

62682-5

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IN WASHINGTON STATE COURT OF APPEALS, DIV. I

IN RE PERSONAL RESTRAINT PETITION  
of REYNALDO DELGADO,

Petitioner

vs.

State of Washington,

Respondent

No. 62682-5-1

REPLY TO STATES RESPONSE  
IN PART

FILED  
COURT OF APPEALS, DIV. #1  
STATE OF WASHINGTON  
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ISSUES PRESENTED FOR REVIEW

1. Did the State prosecutor knowingly present and thus obtain a FALSE conviction, using false evidence while concealing irrefutable exculpatory evidence impeaching State's primary witness?
2. Did the State prosecutor fail to investigate and learn the facts proving his primary witness to be incompetent or fabricating provably false facts? If not, when did he know there were no police reports corroborating his witness' claims of police actions? Why didn't he disclose his findings to the defendant per CrR 4.7(a)?
3. Did the State present inadmissible hearsay evidence from unqualified "expert" witnesses to prop up weak claims by the State's primary witness through attempts to boost trustworthiness of her at trial?
4. Did defense counsel fail to investigate, prepare a defense, and present exculpatory and impeachment material evidence from witnesses and police, failing to secure evidence from the prosecution and police, depriving the Petitioner his 6th Amendment right to effective counsel?

GROUNDS: prosecutorial misconduct; Knowingly presented false evidence

DESCRIPTION: State prosecutor became aware of the claim of its key witness in an interview with the state's agent, Ashley Wilske, presented in DVD, that ZD testified in that interview she was assaulted in Yakima, WA, and in Billings, MT, where her four year-old sister called the police departments and summoned the police, where the police arrested the defendant and took him to jail on a sexual assault charge.

This statement is blatantly false as proven by police records showing no such report, contact, arrest, etc. (Ref. Exhibit A, police report)

Where the prosecutor had this statement in the interview with A. Wilske, and would corroborate this claim to substantiate the involvement of other police departments as additional testimony to confirm the state's witness, ZD's allegations, which would clearly present irrefutable evidence of a reported assault and offer extremely relevant material evidence, it is clear that the state prosecutor and his agents would obtain such police records from those jurisdictions in Yakima, WA, and Billings, MT, as their Constitutionally obligated duty to CrR 4.7 Discovery under Brady and Kyles law.

AGUEMENT: The prosecutor had readily available evidence at its disposal in its communications with police records that it had to investigate under due process obligation to disclose evidence to the defendant and to establish probable cause where the testimony of their key witness and charging victim required establishing competence to testify under Allen standards. When the competency of a child witness is questioned as it was in this case, the burden of proving the child's competency rests on the party calling the child; >RCWA 5.60.020, >5.60.050; STATE v. S.J.W., 206 P.3d 355 (WA.Appl.Div 1, 2009) "Burden of proving that child victim was competent to testify at an adjudicatory hearing...was on the state, not [defendant], where the victim was the state's witness."

The State knew that it had to establish the competency of ZD as a witness, proven by Ashley Wilske's failed attempts to do so in the out-set of the interview, where ZD failed to answer correctly numerous times and Ashley Wilske pretended ZD answered correctly. This in itself demonstrated incompetency of ZD but was ignored by state agents and prosecutor which initiated knowing reliance upon and presentation of false evidence to secure false charges under knowingly false claims for purposes of probable cause and contrived false conviction by presenting known false evi-

dence.

Prosecutor has a Constitutional Duty to correct evidence he knows is FALSE; Hayes v. Woodford, 301 F.3d 1054 (9 Cir. 2002)

Denial of Due Process occurs where State allows false evidence to go uncorrected; Hall v. Directory of Corrections, 343 F.3d 976 (9 Cir. 2003)

Prosecutor may not obtain conviction by FALSE EVIDENCE; Thompson v. Calderon, 109 F.3d 1358 (9 Cir. 1996)

Prosecutor may not use or solicit FALSE evidence or allow it to go uncorrected; United States v. Goodson, 165 F.3d 610 (8 Cir. 1999)

Deliberate deception of a court and jurors in a criminal case by the presentation of known false evidence is incompatible with the rudimentary demands of justice; Giglio v. United States, 405 US 150, 31 LEd.2d 104, 92 S.Ct. 763.

A conviction secured by the use of false evidence must fall under the due process clause where the State allows false evidence to go uncorrected when it appears; Giglio v. U.S., supra.

The prosecution and its agents failed to investigate key witness, ZD, claims that her four year-old sister, Gennevie, called the Billings, MT, PD to report that the defendant had assaulted ZD and where testimony by ZD claimed there was very significant evidence of blood, a bathtub at the home of vary credible witnesses, all adults present at the Montana home, where ZD testified that the Billings Police responded to the scene of the alleged crime. Such a claim is highly suspect just from the standpoint of a four year-old hispanic girl, in a strange home, not familiar with where the telephone was located in that large home, nor how to operate it likely, nor how to communicate in English such that the police intake officer could understand the small Spanish speaking child, who didn't even know where she was in terms of an address to report the location, nor the fact that such activity would have raised all of the house occupants to witness the phone activity, the commotion ZD would have raised as someone (a child!) being raped where blood and such were the result. No contact with the Billings PD to gather all these extremely significant details that are most relevant and material to the crime. Prosecution failed to even investigate inquire about charges or evidence gathered by the Billings PD officers, which would be critical evidence of conviction. And, if there was such a crime scene and Billings PD arrested the defendant (petitioner), why did they not prosecute the defendant in Montana? How is it possible for the PD to release this suspect the next day? Any

competent investigating agent in a police department would leave no stone unturned in such an evidence rich case, and likewise any ensuing investigation in another jurisdiction (King Co.) where there was no substantive evidence in its case, but a "truck load" in two other police investigations (Yakima, WA PD, and Billings, MT PD) reported by ZD.

Because police investigators routinely seek out ALL available evidence in criminal cases, both in support of their case theory and pursuant to Constitutional Law obligating them to disclose all exculpatory and impeachment evidence contained in their collected evidence under rules of discovery and prosecutor's ABA Professional Conduct Code duty of care, it is presumed that such attention to detail in seeking and discovering a potential virtual "jackpot" of state favorable evidence was thoroughly investigated. Since NO details of this "iron-clad" evidence from ANY such police records has ever been presented by the State (nor defense counsel) it must be for the reason that such evidence does not exist, and therefore, the prosecutor presented the claims of his key witness that these events actually took place, backed up by the "fact" (factoid fabricated by ZD and her adult handlers who had motive to remove the defendant from society by a false conviction because he could prove they were operating prostitution rings, drug dealing, thievery ring, and identity theft, known to the defendant and other reliable adult witnesses he can provide) that as presented, the authority and recognition of actual police involvement in response to the state's key witness's claim of rape, actually occurred as she falsely stated and testified with the full knowledge of the investigators and prosecution. This creates manifest injustice in the form of either deliberate indifference to the truth, or deliberate deception of a court and jurors by presentation of known false testimony, violation of Giglio v. United States, supra, requiring vacation of a contrived conviction. Additionally, affidavit from Billings Police showing that no such event(s) took place at Donna Sitton's home as claimed by ZD, and the affidavits of Norma and Donna Sitton, daughter and home owner of the Billings, Montana home, prove these falsehoods presented by the prosecutor's witnesses. Had these events taken place, the state would have investigated the home owners and occupants of the home at this family gathering, available to the state investigators by police records readily available to them through phone, mails, and computer systems, and would have called these witnesses as irrefutable evidence substantiating the probable cause and charges, wrongfully brought under false evidence.

Actual awareness, or lack thereof, of exculpatory evidence in the government's hands, **IS NOT** determinative of the prosecution's disclosure obligations; rather, the prosecution has a **DUTY TO LEARN** of **ANY** exculpatory evidence known to others acting on the government's behalf; *United States v. Price*, May 21, 2009, 9th Cir. Court of Appeals, Nos. 05-30323, 06-30157.

Here, the prosecutor clearly failed to learn of any favorable evidence held by the government (Police) in ZD's claim of report and response to her sister's phone call for help in Billings, MT, and Yakima, WA, that which was readily available to him through law enforcement channels and his office/agents. Regardless of his personal knowledge, the prosecutor utterly failed in his "**DUTY TO LEARN** of any favorable evidence known to the others acting on the government's behalf...including the police;" >*Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (19-95)

There are three components of a Brady violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." >*Strickler v. Green*, 527 US 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

There is no dispute that the first component of a Brady violation exists in this case: Impeachment evidence, Police reports proving no such events were reported to them as claimed by state's primary witness, ZD, thereby irrefutably impeaching this witness as an incompetent or fabricator of claims, equally dispositive of her testimony and cause complaint, indisputably favorable to the accused.

See >*Giglio v. US*, 405 US 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); see also, e.g., >*United States v. Blanco*, 392 F.3d 382, 387 (9th Cir. 2004)("Brady/Giglio information includes 'material...that bears on the credibility of a significant witness in the case.'" (omission in original)(quoting >*United States v. Brumel-Alvarez*, 991 F.2d 1452 (1993)).

For a Brady violation to have occurred, the evidence at issue "must have been suppressed by the State." >*Strickler*, 527 US at 281; also >*Edwards v. Ayers*, 542 F.3d 759 (9 Cir.2008)("Suppression by the prosecution, whether willful or inadvertent, of evidence favorable to the accused and material to either guilt or punishment, violates the Constitution."). The term "suppression" does not describe merely overt or purposeful acts on the part of the prosecutor; sins of omission are equally within Brady's scope.

See >*Benn v. Lambert*, 283 F.3d 1040 (9 Cir.2002)("The

terms 'suppression,' 'withholding,' and 'failure to disclose' have the same meaning for Brady purposes."). We perform this step of the inquiry "irrespective of the good faith or bad faith of the prosecution" in failing to disclose favorable evidence. >Brady, 373 US at 87.

Evidence of the police reports denying ZD's claims of assault and police action taken against the Petitioner, were exculpatory impeachment and either suppressed by neglect of duty of care and professional ethical conduct by the prosecutor in failing to obtain readily available material facts going to the ultimate fact before the triers of fact as to whether the crime took place or it did NOT, per police logs and responses, such evidence was in possession of the government (police) and failed to disclose by failure to investigate and discover the true facts of this case, or by deliberate indifference to the facts, where the prosecutor DID perform his duty to "learn" all of the evidence, by investigation, in compliance with his Constitutional obligation under Kyles v. Whitley, supra, and then deliberately suppress that those police records proved his primary witness to be incompetent, or worse, a deceiver by design and motivation of adult handlers manipulating this witness by fabricating facts in Maria and Adrienne's best interest who have a vested interest in removing the Petitioner from society to protect their criminal operations. (Ref. defense uncalled, uninvestigated witnesses' affidavits: Exhibits:

Where he suppressed or concealed those police reports under deliberate indifference to the truth, he committed malfeasance to defraud justice in violation of Brady and then presented the fraudulent testimony of ZD as false evidence in violation of Giglio, Mooney v. Holohan, 294 US 103, 55 S.Ct 340 (1935), and Napue v. Illinois, 360 US 264, 79 S.Ct. 1173 (1959), where a conviction is secured by the use of false evidence, it must fall under due process, >Giglio, and obtain vacation of such contrived conviction.

Additional false evidence stated by ZD is refuted by readily available testimony from Petitioner's witnesses that were never interviewed or called by either State or defense counsel. Had they not failed to investigate the reliable testimony of Norma and Donna Sitton, as well as the other house guests at the home during the alleged actus reus, owners and her house guests where ZD claims the assault took place by her "dad", there would have been ample proof that no such assault or any extraordinary events took place during that Easter holiday in Billings. And, as stated in affidavits, witnesses for the defense would have provided testimony that ZD commonly called the male head of household where she was living at any given time, "dad", and the lady of the house, "mom", as Norma Sitton was

referred to by ZD while she lived with Norma (Ref. Norma's Affidavit, item #4). Furthermore, Norma's sworn statement confirms that 1) Petitioner and his two daughters visited Norma's parents' home in Billings, MT, for Easter holidays in year 2003, and that the children stayed in a bedroom adjacent to the adult's room, Norma and Petitioner, which attached to the bathroom, claimed to be the crime scene by ZD, where she states in her interview, IRP at 15, ln 10, using the term "mom" to refer to Norma, the family friend she and her sister, Gennie, stayed for a while in Seattle before moving to live with Maria C., her aunt. ZD incompetently considers the few days of Easter visiting in Billings to be the status of "living at Montana" and line 13, declares she was "put...up...on the bath tub," presumably on the tub elevated SIDE since that is the part that is "up", to facilitate height differential for her attacker, 2) noting that there is NO bathtub in the bathroom, as may be testified by Donna Sitton, home owner and her daughter, Norma's affidavit, where 3) at "NO TIME" did ZD report any "assault" to people staying in the home, no blood or other sign of struggle or evidence in the bathroom that would have been readily visible to all using the bathroom in a shared home, and 4) at "NO TIME" did anyone staying in the home, call the Billings PD nor did it respond to the home, nor was the Petitioner approached or questioned by any Police detective, 5) nor did any other family members (six adults) ever observe or report any events remotely related to ZD's statements, demonstrated in affidavits of witnesses available for substantive testimony. These witnesses provide particularized guarantees of trustworthiness to qualify their statements, unlike the lack of particularized guarantees of trustworthiness in the interviews with ZD, in IRP or statements made to pediatricians who have a preconceived belief of what the child SHOULD be disclosing and asking leading questions to prompt answers, irreparably damaging reliability.

Admission of inculpatory hearsay testimony violated the [defendant's] federal constitutional right to confrontation, because...it was based on an interview that lacked procedural safeguards...and error was not harmless. The state failed to show...statements possessed sufficient particularized guarantees of trustworthiness where viewing the totality of the circumstances surrounding the younger [witness'] responses to the pediatrician's questions, there was no special reason statements were particularly trustworthy, and to be admissible...must be reliable by virtue of its inherent trustworthiness, not by reference to corroborating evidence at trial. IDAHO v. WRIGHT, 497 US 805, 110 S.Ct. 3139 (1990).

Since Brady material was readily available and concealed or suppressed by the prosecution, the first two components of a Brady violation are present here, with the third component of prejudice being necessary also, it is a simple matter of weighing the preponderance of false evidence that is presented to the triers of fact. Because the false evidence was related to the ultimate fact in question, and it is largely this prime state's witness's statements that the triers of fact would find credible or not, depending on the particularized guarantees of trustworthiness and the totality of the circumstances that render the declarant particularly worthy of belief, by the prosecution's presentation of false claims as factual or indicative of real, nonfabricated events, is extremely prejudicial without highly preponderant refuting evidence from eye-witnesses on location at the time and the scene to counter with rational factual provable facts, especially the weight of actual police department records proving that no such claimed events took place under their investigative and responding authority. Had Petitioner been able to present these police reports of no claimed action, and the witness's testimony proving no such activity of a noisy, bloody, disturbing assault took place, the preponderance of that evidence would have been extremely effective in terms of reasonable doubt, or actual innocence. Therefore, prejudicial injury is most certain here, and the elements of a Brady claim are met in full.

The admission of video record of ZD's falsified claims of events contrary to police records and eye-witnesses, does not provide virtue of inherent trustworthiness, and cannot be salvaged by attempts at corroborating evidence at trial by admitting inculpatory hearsay testimony from a pediatrician who has NO firsthand knowledge of allegations in this case, especially in light of the findings of CPS case worker, Naomi, who was granted interviews with ZD and found no evidence of assault for her record. Furthermore, hearsay evidence offered by a pediatrician, Dr. Susan O'Brien of Highline hospital, examination of Aug. 28, 2004, violates the general rule prohibiting the admission of hearsay statements--child to a pediatrician--under the presumption of inadmissibility accorded accusatory hearsay statements, the state has failed to show these statements possess sufficient particularized guarantees of trustworthiness, for 6th Amend. confrontation clause purposes, viewing the totality of circumstances surrounding the child's responses to promptings by the doctor, there is no special reason for supposing the incriminating statements to be trustworthy, given that out-of-court statements are presumptively unreliable and the pediatrician interviewed the child in a suggestive manner, without the

indicia of reliability by inherent trustworthiness, not by propping it up by claims of corroboration at trial by attempting to bootstrap the notion or appearance of trustworthiness through admission of other evidence at trial. >IDAHO v. WRIGHT, 497 US 805, 110 S.Ct. 3139.

Under procedural requirements of overcoming inadmissibility of accusatory hearsay, the pediatrician must (1) record the interview of the child on video, (2) avoid asking the child leading questions, and (3) not use preconceived ideas of what the child should be disclosing to support reliability of out-of-court statements of children, in accordance with considerations for significant personality disorders based in trauma of several origins possible that the American Psychological Association's (APA) and other such scientific method analysis can determine are contributing to the spontaneity and accuracy, trustworthiness, of an evaluation interview. Responses must be analyzed in the context of personality profiles as indicative of typical and atypical pathology. The etiology of behavioral traits are relevant to factor into assessments of risk for tainted results without the benefit of knowing attachment style, repetitive interpersonal behavior, reactance, and coping styles that significantly influence interactions with the evaluator and subject matters. Where there is actual history of abuse being explored, the evaluator should be a certified specialist in preserving mental recall and detecting constructs of personality disorders that can skew data and conclusions of untrained and incompetent analysis of the responses that vector the direction of the probe of events and facts, to distinguish between fabrications or embellishment for purpose of revenge or retaliation toward the accused, often for totally unrelated matters such as the feelings of neglect, abandonment or deprivation of material wealth, or odds over discipline and rules of behavior.

There is no indication of consideration of mental state of mind of the alleged victim, ZD, in the investigations or information gathered under duty of care by state "experts", that should have been a significant factor in the process of determining ZD's competency to testify, aside from the obvious challenge to the validity and veracity of claims, and therefore, together with insufficient procedural requirements, the lack of procedural safeguards disqualify trust in the results in this case.

**GROUND:** Prosecutorial Misconduct; failure to qualify key witness

**DESCRIPTION:** In pretrial, a great deal of consternation took place over the competence of the State's key witness, ZD. It is moot in light of debunked statements clearly fabricated by lack of police record of events she alleged. But, defense counsel failed to challenge her veracity on this

glaring omission of discovery from the prosecutor that if there had been police reports confirming ZD's accounting of events at the two locations she names, and having all of the signature of a very evidence rich crime scene, defense attorney, Mr. Savage, would have reasonably illuminated the fact that the State had failed to present the defense ANY discovery evidence from the police records that would have been a substantial, if not insurmountable, in its duty to disclose inculpatory evidence for the defense to prepare to refute or mitigate in the guilt phase of trial.

Instead, the adversarial advocacy failed to use critical thinking skills to ask the most obvious questions, such as why didn't the police departments responding to four year old Genevie's phone calls for help make an investigation into the alleged rapes as the law requires and an arrest of Petitioner Delgado where such clear blood evidence, injury to ZD for a sexual assault evaluation would have been absolutely part of the investigation, and all the witnesses who would have been deeply disturbed by the screaming and bloody scene that they would have been party to during and after the assaults in a crowded home with other adults and children? Here, presumption of guilt drives both the State prosecutor and defense counsel to overlook the most obvious glaring issues of incompetency for this witness, or credibility. It is impossible for the defendant to receive a fair or honest trial under such egregious malpractice that is apparently pervasive throughout the law enforcement and justice system today, relying upon broad generalizations and stereotypic prejudices held in all cases of this allegation type, just as in overlooking the extremely obvious fact that ZD has signatures of abuse that the school inquires about that are very temporary in sight at the time ZD is living with a crowd of people at Adrianna's apartment while the defendant has been a thousand miles away for months; couldn't possibly be involved. Yet the focus is on the defendant simply because, contrary to rational thinking, under the re-

quirements of scrutiny for admission of hearsay statements, where particularized guarantees of trustworthiness must be shown from the TOTALITY of the circumstances, that is analysis of ALL the factors at play rather than blind acceptance of statements as presumably reliable, the focus goes to the defendant when the alleged victim points at any one individual by label, disregarding the need to qualify the reliability of the source as a very insecure child with a traumatic past that has influencing personality disorders and, in this case, adult handlers that are highly motivated to use the State witness as their weapon of choice to remove the defendant as a perceived threat to their criminal enterprises, where investigation reveals that the defendant had warned ZD's aunts, Maria and Adrianna, that he would report them to the authorities for identity theft, training the children to shoplift for them, fraud, prostitution, etc. if they didn't cease and leave his children alone, the reason he moved away from them with Erica, his new wife.

The question is why did the investigators, both State and defense, fail to qualify the allegations against the totality of circumstances and probe the people surrounding ZD's life when she showed signs of abuse, when Mr. Delgado had been removed from her life for months, working in AK? When evaluating ZD's competence to testify, even though the wild fabrication of stories or fantasy about the police involvement is rapidly and easily debunked, why didn't the "competent" counselors go to the standards of the Allen Test before the judge, and present the analysis of a certified child psychologist specially trained and working in assessing behavior disorders with deep seated resentment in the child for the target of her wrath and allegations, likely related to ZD's feelings of abandonment and perceived neglect of material welfare. Because the State called child witness, ZD, it was upon them to apply the Allen Test, >STATE v. ALLEN, 424 P.2d 1021, 70 Wn.2d 690 (1967); RCWA 5.60.020, 5.60.050. Ashley Wilske's incompetent qualification of ZD, resulted false positives, ind-

ications of a correct response as instructed by Ashley Wilske, but were only slightly acknowledged by this "expert" at first sign, and then completely denied as false responses when it was clear that the child was unable to follow instructions and provide correct responses to the screening test. Ashley Wilske's interview protocol failed to resemble that which the APA (American Psychological Association) has provided in guidelines for interviewing children where sexual abuse is suspected. Such guidelines indicate substantial overlap with both clinical consensus and a large body of laboratory findings on child development and behavior.

The methodology demonstrated in the Ashley Wilske interview demonstrates a lack of objectivity and skews the process toward subjectivity to form a result most favorable to the State, ignoring and abandoning reliable protocol and procedure. This interviewer fails to clarify the objectives for all parties and agencies involved. The objectives dictate many of the methodological choices the interviewer must select. Interviewers must be knowledgeable of legal and ethical issues, and avoid dual relationships to avoid conflicts of interest. They should be careful to employ methods sufficient to substantiate their conclusions. Psychological tests cannot prove abuse occurred.

When events developed that led to allegations by police (CPS), it was notice from the counselor at ZD's school pertaining to behavior and marks on ZD's neck, in March of 2004 (RP 8, page 100, lines 10-13 and 23) that initiated the claims of abuse. (It should be noted that who ever was causing the marks (hickies) on ZD's skin was in contact with her WHERE SHE LIVED at the time, NOT her biological father who was hundreds of miles away in Alaska, a FACT completely lost on incompetent investigators and prosecutor.) Behavior was said to be indication of abuse suspected by the school counselor, behavior that had developed in recent days, when the defendant was not and had not been around ZD for months at a time as here also. According to the Psychologist Desk Reference, Second Ed., page 424, section 87 on Interviewing Children when Sexual Abuse is Suspected, children are often referred for an interview because of behavioral changes. "Although many reactions to trauma can accompany the onset of maltreatment (e.g., nightmares, personality change, fearfulness, anxiety) these occur MORE frequently in a population of **nonabused** children who are distressed for other reasons. No single constellation of behaviors or symptoms is pathognomonic to child abuse, and many genuinely abused children, even those with STDs, may show no measurable behavioral problems. Behavior changes indicate the **further evaluation and investigation**

are necessary (Lamb, 1994)." Refer to Friedrich et. al., 2001 in following:

One indicator that is unique to a history of sexual abuse is age-inconsistent sexual behavior and knowledge. "However, there is no definitive way to know when a child's age-inconsistent knowledge is a function of victimization or of exposure to pornography, CROWDED LIVING CONDITIONS, and so forth." ZD had been living in "crowded living conditions" much of her short life and certainly so when this report from the school was made. Witnesses for the defendant can corroborate this fact, but were never even investigated when defendant provided a list to defense and state counsels. Competent and ethical attorneys would be most interested in probative value of such exculpatory evidence under ABA Professional Code of Conduct and their oath to uphold the laws, including Brady rule to disclose favorable evidence the state finds in a competent, unbiased investigation to seek the truth under the law. Yet the prosecutor fails to have the slightest interest in investigating the people actually living with the key witness, ZD, especially since the defendant was NOT living or been living with or around their alleged victim, ZD, for months. Had the prosecutor bothered to investigate the family and persons coming and going all hours of the day and night at Maria and Adrianna's dens of crime, the state would have found that the "head of household" where ZD lived, Julio, Adrianna's husband and crime leader, was parading nude in the apartment in front of the children and was taking the victims of this claim into the shower with him routinely, and prostituted his wife out and God knows what else. The state would have found that Julio skipped the country (literally) when this red flag was raised by CPS, who deliberately ignored all the obvious clues and focused on the defendant who was not even present when the clues and signs showed up!! (Ref. Affidavit Exhibits in support of this:

The question for competent CPS interviewers is can they obtain reliable information from small children without manipulation by an interview? "Such interviewing is difficult..." and is best conducted "by well trained and experienced interviewers" (Lamb, 1994, P. 1024). "The most reliable information is obtained in response to ~~open-ended~~ questions that elicit free narratives." Ashley Wilske's performance in the record of the interview demonstrates manipulation and lack of open-ended questions: Ref. "Interview of Zuley" conducted September 28, 2004 by Ashley Wilske, page 2 lines 17-20; interviewer begins by unprofessional attempts to win favor with the subject of evaluation by extending false accolades to a child who has a history/record of manipulation and bullying of her peers.

If this interviewer conducted herself as a true professional, she would have done a workup file on the child's school record of discipline, social harmony with ZD's family and peers at school, and would already know that offering false praise to this type of personality disorder opens the door for the child to feel confident she can fabricate untruth and win approval from the evaluator for lying, NOT the goal of an unbiased or professional and qualified expert modality. Rather the behavior one would expect from a daycare attendant, untrained in how to carefully inspire trust in the subject while helping the subject understand the objective of truth seeking, not "Barney" games of fantasy and imagination. By rewarding a child's behavior by propping up a manipulative personality, and setting up an environment of fantasy and imagination ("You're a little cheerleader. I love that." Line 19) encouraging this mind-set, demonstrates insensitivity to professional goals and methodology that elicits a somber truth where lives are being devastated by inaccurate results. It is unprofessional if not egregious malpractice to attempt to win favor with the subject of evaluation where it is well established that children are generally interested in "pleasing" adult authorities to allow them to be more successful in deception. Ashley Wilske demonstrates she is not interested in the objective truth in the conduct of this interview, but seeks to get the child to state what the interviewer has already predetermined in her own mind to be the truth. This process is just a "formality" for the record. This fact is evident by the leading questions that she uses to seek answers she is expecting, tell-tale of a rehearsed and prejudiced process, contrary to an objective open-ended procedure that is recognized by the professional experts in this field of psychology. Where it is reasonable to converse with a client to "break the ice" and establish a rapport by talking about school or friends or family or entertainment shows, a professional must not try to curry favor lest it taint the results of objective evaluation and testimony. Had this expert for the state been objective in her duty to seek the truth, she would have investigated the family history of ZD and known that she had a traumatic early childhood, one in which her biological mother physically abused her and tormented her, including an attempted drowning in a 200 liter barrel in Mexico when she was three years old, where her father, the defendant RESCUED her, saving her life and removing her from future abuse by leaving the abusive spouse to protect the children. This information places the witness's behavior and personality disorder into some perspective necessary to configure an interview to the client.

ARGUMENT: The prosecution relies upon the "expertise" of the State interviewer to obtain evidence that must be factual and obtained by some qualifying scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue an expert may bring in testimonial evidence. The adjective "scientific" implies a grounding in the methods and procedures of science, where unbiased objectivity and pragmatism must prevail. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." Webster's Third New International Dictionary 1252 (1986). Indeed, scientists do not assert that they know what is immutably 'true' --they are committed to SEARCHING for new, temporary, theories to explain, as best they can, phenomena; Brief for American Association for the Advancement of Science et. al. as Amici Curiae 7-8 ("Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a PROCESS for proposing and refining theoretical explanation about the world that are subject to further testing and refinement"). But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. The use of "experts" in obtaining and presenting true facts in testimonial evidence must be supported by appropriate validation--i.e., "good grounds," based on what is known, in a community of scientific knowledge establishing a standard of evidentiary reliability. The value of "experts" in evidence admission demands that it assist the trier of fact to understand the evidence or to determine a fact in issue. Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology is what distinguishes science from other fields of human inquiry." Green 645. See also C. Hempel, Philosophy of Natural Science 49 (1966) ("The statements constituting a scientific explanation must be capable of empirical test"). "The criterion of the scientific status of a theory is its falsifiability, or refutability, or testability," K. Popper, Conjectures and Refutations.

Additionally, in the case of a particular scientific technique, such as must be relied upon to arrive at objective truth probing in a witness, the court ordinarily should consider the known or potential rate of error, see e.g., >United States v. Williams, 583 F.2d 1194, (CA2 1978)(noting professional organization's standard governing spectrographic analysis),

cert. denied, 439 US 1117, 99 S.Ct. 1025, 59 LEd2d 77 (1979).

Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *United State v. Downing*, 753 F2d at 1238. See also 3 Weinstein & Berger, ¶702[03], pp. 702-41 to 702-42. Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique which has been able to attract only minimal support within the community," *Downing*, 753 F2d at 1238, may properly be viewed with skepticism. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 113 S.Ct. 2786 (1993).

The State in instant case, relies upon its experts in the field of CPS and medical evaluations to entice reliable evidence from its key witness, ZD, ignoring all other corroboration elements for the moment. However, no mention or attempt is made to establish the expert credentials of its experts under the requirements standard known as the Daubert Standard, meant to help qualify a witness or evaluator used to extract evidence from a witness of questionable competency. Here, Ashley Wilske's unscientific methodology used to elicit evidence from a witness of unknown competence, fails to exhibit the expected pragmatic approach to open-ended questions and objectivity to produce trustworthy testimony from ZD. Rather, it demonstrates that ZD is leading the interviewer to "tell all" about her "dad" in eager anticipation of dishing out vengeance on someone she obviously hates, for an undetermined reason (failure to investigate). It appears there is a potential for this witness (ref. interview of ZD by A. Wilske), to be anxious to achieve what she has been "prepared" for in a prior discussion with adults, before she loses track of the details she rehearsed. Combined with the refuting facts of no police intervention as she has reported happened, discrediting her claims, makes this construct even more plausible. A. Wilske's unscientific procedures do not provide reliability to the qualification of ZD as a competent witness, a process that produced false information that was taken for granted by both sides, instead of validation and verification procedures to investigate her fabrication of facts. The result was a miscarriage of justice by relying upon uninvestigated claims of a small child with a history of emotional trauma influencing her statements and probable influences of the adults she had been controlled by when she lived under their domination at the time these allegations appear, when the defendant is not part of the scene.

GROUNDS: Ineffective Assistance of Counsel; FAILURE TO INVESTIGATE and PREPARE

DESCRIPTION: Defense counsel, Mr. Savage, failed to investigate and prepare a defense where numerous defense witnesses were readily available to provide corroborative exculpatory and impeachment testimony. Counsel utterly failed to interview them for probative value in the defense preparation and presentation of strong impeaching and exculpatory material evidence, otherwise referred to as Brady evidence, thus denying the Petitioner his constitutional right to effective assistance of counsel.

Petitioner, Delgado, provided a list of witnesses to his attorney, Savage, for contact and investigative interviews, sources of credible testimony that refute the State's key witness, ZD's, account of events that she purports to have happened where other adults and police departments would offer dispositive refuting evidence impeaching ZD. Defense counsel never questioned or investigated why the State did not disclose the result of its expected investigation of the police departments ZD claimed were responsive to her assault in Yakima, WA, and Billings, MT. Counsel fails to raise the issue of discovery disclosure from the state prosecutor in omnibus hearings, where the State had a Constitutional obligation to disclose ALL exculpatory and inculpatory evidence counsel must prepare a defense against. This demonstrated subpar performance in duty of care, a violation of Petitioner's 6th Amendment Constitutional right to effective representation, under *Strickland v. Washington*, 466 US 668, 104 S.Ct. 2052, 80 LEd2d 674 (1984). Defense counsel's failure to call defense witnesses that have direct knowledge of the living conditions and character/behavior of State's key witness, ZD, deprived the defendant his right to impeach the state's key witness, constituting ineffective counsel, and the lack of such refute prejudiced the defense. Exhibits B.

ARGUMENT: An attorney cannot make a trial strategy decision not to call on a witness having first-hand knowledge testimony of events in the ultimate fact decision before the triers of fact, where he has never investigated the preponderance of the evidence he does not know and is Constitutionally obligated to learn from defense witnesses under due process. Failure to investigate and prepare for trial constitutes ineffective assistance. Defense counsel must conduct reasonable investigation into facts of defendant's case, or make reasonable determination that such investigation is unnecessary; inadequate investigation precludes attorney's making informed decision to call or not call a list of witnesses that can corroborate the defendant's version of events misrepresented by ZD.

Furthermore, defense counsel failed to investigate fundamentally basic

questions of State's disclosure obligations for Brady material and evidence it planned to use against the defendant. CrR 4.7(a) requires the prosecutor to disclose ALL he knows/learns of as evidence favorable to the defense, such as police reports or records that demonstrate the absence of record of law enforcement involvement in response to alleged assault the defendant must refute and in the event that such police records corroborate the claims of the alleged victim, prosecution must provide such inculcating evidence for the defendant to prepare a defense against. Defense counsel failed to inquire and motion to compel the State to disclose all such evidence and failed to perform even the minimum professional duty of care expected of counsel in protecting a defendant's right to due process. Counsel's neglect of his fundamental professional ABA ethics and oath of office to uphold the Constitution deprived the defendant of a substantial defense. See >Wiggins v. Smith, 539 US 510, 123 S. Ct. 2527, 156 LEd2d 471 (2003); >Roe v. Flores-Ortega, 528 US 470, 120 S. Ct. 1029, 145 LEd2d 985 (2000), "a strategic decision by counsel must be reasonable.

As indicated in the affidavits provided in this reply by witnesses for the defendant, their testimony was material and powerful rebuttal to allegations made by ZD and would impeach that testimony and present facts not admitted to the triers of facts, depriving due process. Omission of this testimony was very damaging, prejudicing the defendant, especially where the defendant was not testifying in his own behalf to present facts.

Defense counsel failed to investigate the circumstances surrounding ZD's living quarters and persons she was living with while the defendant was working in Alaska. The fact that the school brought attention to marks on ZD's body that are of the nature that only show for a few hours, while the defendant is hundreds of mile away and cannot possibly have been involved in the making of those marks, thus being caused by someone else that is acting abusively toward her, NOT the defendant, shows a deficiency of performance in the defense counsel. Investigation reveals that the persons ZD was living with routinely paraded nude around the apartment in front of the children there and indeed, took them into the shower with him and made a hasty disappearance when the school inquired about ZD's marks and behavior. Counsel is obligated to present a defense of facts that demonstrate that other people were actively involved in ZD's life at the time of these alerts and that their behavior was highly suspect, while the defendant was not in the picture at all. The deprivation of this exculpatting evidence was highly prejudicial to the defendant, where reasonable

doubt was well established by testimony of witnesses more aware of ZD's living conditions by the nature of the families Petitioner's children were living with than he was while he was working out of the vicinity for long periods of time. These witnesses were available to provide alternative suspects for the police to investigate, and demonstrate that Petitioner was learning of abuses of his children by remote and late in the subsequent series of events after returning to the vicinity from remote work.

Defense counsel also failed to investigate and call witnesses that are able to corroborate that ZD was abused by her biological mother in Mexico, leading to a development of personality disorders that conflict with her parent-child relationship with the defendant, and are contributory to hostilities ZD expresses toward the Petitioner, behavior she also inflicts on her sister and other children, that is motive for her to accuse the defendant of hurting her, retaliation for perceived injustices of leaving her with other people to live with while he worked long periods far away. Counsel had a duty to investigate this and other causes for any behaviors ZD was expressing and bring expert witnesses to bear in refutation of the allegations against his client, exposing the psychology of the alleged victim as significant in the assignment of blame for her suffering. Deprivation of this expert witness was prejudicial to defendant, where he allowed damaging testimony from ZD and State's expert witnesses to go unrefuted. Well-established federal law requires that defense counsel conduct a reasonable investigation into the facts of a defendant's case, or to make a reasonable determination that such investigation is unnecessary. See >Wiggins, 539 US at 522-23, 123 S.Ct. 2527; >Strickland, 466 US at 691 104 S.Ct. 2052; >Stewart, 468 F.3d at 356.

American Bar Association standards also mandate counsel's duty to investigate ALL LEADS relevant to the merits of the case," >Blackburn v. Foltz, 828 F.2d 1177 (6th Cir.1987); see also >Rompilla v. Beard, 545 US 374, 125 S.Ct. 2456, 162 LEd2d 360 (2005)(noting that the ABA standards provide guidance for determining the reasonableness of counsel's conduct). The duty to investigate "includes the obligation to investigate all witnesses who may have information concerning his client's guilt or innocence, >Towns v. Smith, 395 F.3d 251 (6th Cir.2005) at 258. "A purportedly strategic decision is not objectively reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." >Id. (quoting >Horton v. Zant, 941 F.2d 1449, 1462 (11 Cir.1991)). Inattention or negligence, as opposed to reasoned strategic judgment, is excusable. See >Wiggins, 539 US at 526, 123 S.Ct. 2527. Counsel cannot

competently accept and rely upon the prosecution's version of events and live up to his Constitutional duty to vigorously advocate for his client, in the adversarial relationship of court. When an attorney fails to present evidence, the question becomes, "might [it] well have influenced the jury's appraisal of [Petitioner's] culpability" and whether "the likelihood of a different result if the evidence had gone in, is sufficient to unnerve confidence in the outcome actually reached..." >Rompilla, 545 US at 393, 125 S.Ct. 2456. Because trial counsel failed to call Petitioner's witnesses, the jury never had the opportunity to evaluate all of the relevant testimony and make a fully-informed decision as to Petitioner's guilt or innocence. Deprivation of witnesses and police reports readily available to counsel, deprived Petitioner of an actual innocence claim opportunity and undermines confidence in the outcome. Affidavits from Maria Gomez and Jose Cervantes in Yakima demonstrates that ZD was never assaulted or showed any indications of "marks" while she lived with them and with Petitioner traveling to and from work, leaving the children with these people while he was away. ZD's claim of assault while living in Yakima, WA, would be refuted directly and soundly had their testimony, as well as their family members available to testify, been presented at trial. If the defendant was causing this abuse, it would be a long history and pattern of behavior that they would have seen signs of. And, if the Petitioner was the abusive predator in the State's theory of case, he wouldn't want to leave his victim for long periods and in the hands of people who would easily recognize symptoms and behavior related, just as the school in Federal way believed they did. The life of the Petitioner has been not one of obsessive compulsion or overly controlling with his children, as he would necessarily be in the "predator" mode the State has portrayed. Deprived testimony would have dispelled this sort of notion about him, and offered the character they know as a kind, hardworking, honest, principled man, certainly something the jury had a right to know in their deliberation, but were denied by lack of investigation, preparation of a valid defense, and effective presentation of the facts in evidence. To perform effectively...counsel must conduct sufficient investigation and engage in sufficient preparation to be able to present...all the available...evidence. An uninformed strategy is not a reasoned strategy, for purposes of a claim of ineffective assistance of counsel; it is in fact, no strategy at all. >Correll v. Ryan, 465 F.3d 1006 (9 Cir.2006). The ABA standards for Criminal Justice: "It is the duty of the lawyer to conduct a prompt investigation...and explore ALL avenues leading to facts...include efforts to secure information in the possession of prosecution and law enforcement."

State and its witness, ZD, made the statement that Petitioner/Defendant assaulted the alleged victim in Yakima, WA, and Billings, MT, and that the police responded, arresting the defendant, etc. The presence or absence of this evidence was critical to the guilt or innocence of Petitioner and his counsel had the duty to obtain that evidence from the police departments or the prosecutor who would have that information as an essential element of their evidence, if it were inculcating, which the prosecutor would have to disclose to the defendant in either case. Where the defense counsel failed to investigate or obtain what the prosecutor/police had evidence of in this regard, either showing a great deal of seemingly empirical evidence that would be very difficult to overcome, OR show NO CONTACT with the police, proving ZD's testimony was fabricated for reasons that deserve further investigation, but proves the Petitioner did not assault ZD as she testified, where such preponderance indicates actual innocence, especially when coupled with the fact that the school reported signs of assault from someone near her, i.e. home, when Petitioner was and had been in Alaska for weeks, impossible to have been involved in ZD's life during the time in March of 2004 when the school reported their findings. Where counsel's failure to investigate evidence, which demonstrated his client's factual innocence, undermines the confidence in the verdict and constitutes ineffective assistance of counsel, violation of the 6th Amendment. >Lord v Wood 184 F.3d 1083 (9 Cir.1999).

Defense counsel's failure to investigate and present evidence corroborating [defense] witness' testimony that she accompanied defendant and his children to their ranch...constituted ineffective assistance where evidence could have precluded conviction; >Hart v Gomez 174 F.3d 1067 (9 Cir.1999)

Trial counsel's failure to investigate and prepare for trial amounted to ineffective assistance; >Harris v Wood, 64 F.3d 1432 (9 Cir.1995)

#### CONCLUSION

In cases cited above, courts have reversed convictions for due process violations in disclosure to the defendant, and ineffective counsel failing to investigate critical evidence and present a vigorous advocacy for his client. Petitioner was deprived his Constitutional right of a fair and honest trial where he was deprived critical facts and due process in presenting those truths to the triers of fact. He asks this Court to reverse and remand for further proceedings, including an independent review of the state court record, discovery and expansion of the record. To facilitate, Petitioner asks that an evidentiary hearing be granted after new evidence is gathered for review, and asks that this Court first conduct review of specific record of concealed and suppressed evidence favorable to the defendant. If it does so, it should find good cause for vacating this verdict and consider remand for issuance of an unconditional writ of habeas corpus.

RESPECTFULLY SUBMITTED this 21 day of September, 2009.

# EXHIBIT

# A



CITY OF BILLINGS  
POLICE DEPARTMENT

P.O. Box 1554 • Billings, MT 59103  
220 N. 27th St. • Billings, MT 59101  
(406) 657-8460 • Fax (406) 657-8417 • E-mail bpd@ci.billings.mt.us



DATE: 7/16/09

TO WHOM IT MAY CONCERN:

A search of the records of the Billings Police Department shows no traffic or criminal arrest record against Reynaldo Delgado  
date of birth none provided

Signed by:

Carolyn Meek, Police Clerk  
(Signature)



**AFFIDAVIT**

STATE OF MONTANA                    )  
  ) ss: \_\_\_\_\_  
COUNTY OF YELLOWSTONE        )

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I, DONNA SITTON \_\_\_\_\_, being first duly sworn upon oath deposes and says:

1. I am a citizen of the United States, over the age of 18 years, and competent to be a witness here. I am (always been) available as a witness for Reynaldo Delgado.

2. I am the home owner and host at the home my daughter, Norma Sitton, her friend, Reynaldo Delgado and his two children, Zuley and Genevie, came to visit for Easter holiday in April, 2003.

3. My home is located in Billings, Montana, where my daughter and Reynaldo were guests occupying one bedroom with a full sized bed and adjoining small bathroom having a sink, stool, and shower stall, no tub.

4. The Delgado children stayed as guests in my home and occupied an adjacent bedroom to the one their father, Reynaldo, occupied, and had use of the bed in that bedroom to themselves. I have no recollection of any stressful or unusual events regarding my daughter and her guests during their visit, nor were the city police ever summoned to my home in response to any complaint made by my guests.

5. I hosted other family members as guests during this Easter holiday who were also unaware of any extraordinary events such as an assault on Mr. Delgado's child, Zuley. My late husband was also present and as head of the household, would have engaged law enforcement had their been such a need. As there was no need for police at my home during this family gathering, we did not call for any assistance nor did any police presence develop.

Signed before me, Heather E. Marquez on 7/6/2009  
by Donna Sitton.

Heather E. Marquez

HEATHER E. MARQUEZ  
NOTARY PUBLIC for the State of Montana  
Residing In Yellowstone County  
My Commission Expires April 30, 2011



I, Donna Sitton declare under penalty of perjury, pursuant to the Laws of the State of Montana, that the foregoing statements, contained within this Affidavit, are true and correct to the best of my knowledge and belief to wit.

FURTHER THIS AFFIANT SAYETH NAUGHT.

Signed this 6 day of July, 2009 at Yellowstone  
County, Montana.

Donna M. Sitton  
Signature

DONNA M. SITTON  
Printed Name



9. Upon returning from the Easter vacation at Montana, Reynaldo Delgado enrolled Zuley in Burien public school for attendance in May, 2003, where she attended school while living at my home, without incident, without any complaints at school or home from Zuley regarding any assault, etc.

10. Reynaldo moved his children, Zuley and Genevie, from Selah, WA, to Burien, to stay with me, around April 5th, before traveling to Montana for Easter, 2003.

11. On May 31, 2003, Reynaldo moved his children from my home to the dwelling of Maria and Jesus Delgado, an apartment in Federal Way. Just prior to moving, Reynaldo invited the Federal Way relatives to a barbecue at my home where I met the adults from the home Reynaldo was moving to and others that lived in the neighborhood there. I became concerned for Rey and his children, advising him that they looked like trouble and recommended he remain with me in Burien instead of moving to Federal Way.

12. Prior to this trial, I let Reynaldo know that I would be willing to testify to these events that I have first hand knowledge of, but was never called to testify by his attorney, Mr. Savage, even though I am a very reliable and key witness to Reynaldo's defense, with substantive exculpatory evidence to refute the State's key witness who has testified untruthfully, depriving Reynaldo of a fair and honest trial of the facts.

13. I believe Zuley's problems began soon after moving to live with Maria and Jesus (and Julio hanging around) in Federal Way. Reynaldo had left Federal Way to work in Alaska and was unaware of the problems developing in his absence. Zuley has confused the time of her assault with the trip.

I, Norma Sitton declare under penalty of perjury, pursuant to the Laws of the State of Washington, that the foregoing statements, contained within this Affidavit, are true and correct to the best of my knowledge and belief to wit.

FURTHER THIS AFFIANT SAYETH NAUGHT.

Signed this 27<sup>th</sup> day of June, 2009, at Seattle, WA

County, Washington.

  
Signature

Norma Sitton  
Printed Name

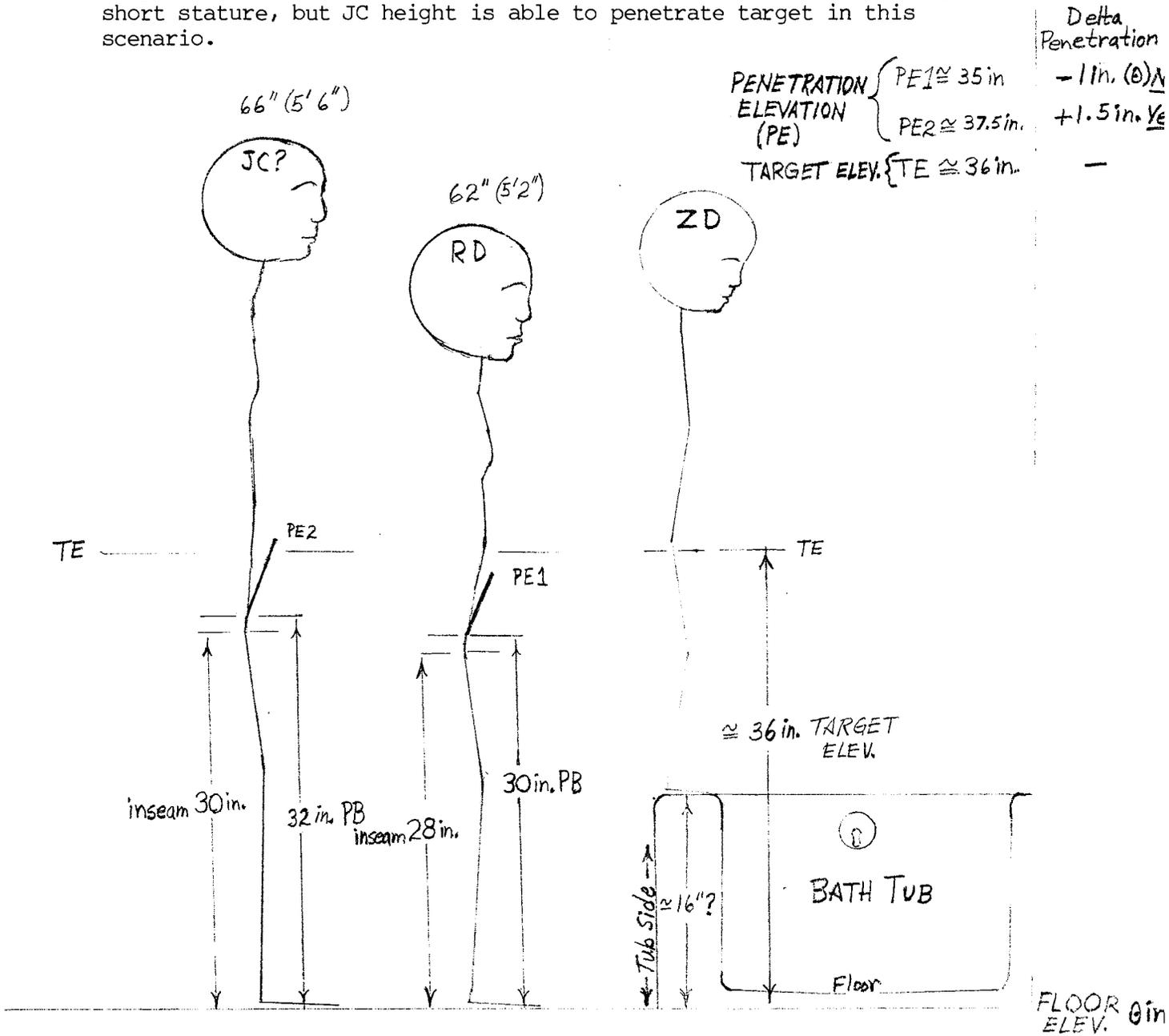
AFFIDAVIT EXHIBIT

WITNESS DESCRIBED SCENARIO HEIGHT COMPARISON DIAGRAM

SCENARIO: ZD interview statement indicated "up" on the bathtub; therefore the only "UP" is the elevated side. This diagram shows anticipated positioning for claimed event; ZD standing on top of tub side, raised approx. 18 inches above the floor (avg. tub height)

Defendant, RD, is shown compared to suspect JC, who was called "dad" by ZD while ZD lived with Maria DC, and Adrianna DC, in Federal Way.

Height difference demonstrates RD is unable to reach target by short stature, but JC height is able to penetrate target in this scenario.



INTERVIEW REF. NO. 04-1-13920-8 KNT

EXCULPATING EVIDENCE

WITNESS TO SUSPECT DIMENSIONAL FACTS

Reference: Photograph Exhibit "A" and related scale; photo dated 4-25-04

This document exhibits various measurements relative to the witness, Zuley Delgado, alleged victim in cause No. 62682<sup>5</sup>-I in Washington State Court of Appeals, Div. I, and establishes evidence in favor of defendant's innocence in his PRP collateral attack, this document in support of the Affidavit declaring facts withheld from trial.

WITNESS Zuley States on page 15 Ln 13: ..."and he put me **UP**, were at [here on] the bathtub"...

NOTE: witness misuses "at" typically in place of "on" in statements and seems to be indicating being placed UP ON the tub side, raised above the floor by 14 to 16 inches, typically the height of the side of household bathtubs in modern apartments and homes. Ref. pg 17 Ln 7: Interviewer clarifies: ..."how is your body ON the bathtub?"

WITNESS Zuley States on page 17 Ln 6 to the question of ..."were you standing..." Ln 6 Zuley: "At [ON] the bathtub"

This indicates she was STANDING ON the edge of the raised tub side, about 14 inches or more above the floor elevation, making the elevation of her vaginal area about 35 inches above floor level as indicated by scale of the picture of her with Julio, Jesus to the left, on April 25, 2004, 8-10 months after Zuley was placed in Adriana and Julio's apartment where she most likely was assaulted, given the facts of the events of the Montana visit with the defendant and friends where there were no unusual events and no police reports of any assault as testified happened there by Zuley in her interview of 9-28-04 and at trial on 11-17-05.

Julio stands approx. 66 in. tall and has a penis base elevation of 30.5 inches (estimated by picture scale) above floor height, with erection height estimated at 35.5 in. or more, placing this  $\frac{1}{2}$  inch above the necessary height to penetrate Zuley's hymen. This illustrates that a male of approximately 5 ft. 6 in. or more would have had to be involved to reach the vaginal region for the arrangement testified to by this witness, Zuley, involving the normal height of bathtub sides she stated she stood on during an alleged assault. (Note: no "tub" in Montana bathroom; see witness affidavit statements)

Given the defendant's unusual SHORT stature of 5 foot high, his penis elevation reach would be approximately 32.6 inches, well SHORT of the required 35 inches of Zuley's vagina (21 in. + 14 in. tub side height or greater if the tub side was 15-16 inches high). This indicates he is not able to penetrate in the manner described by the witness. Additionally, his brother, Jesus Delgado, also about 5 ft. tall was too short to be a suspect, like Reynaldo Delgado.

Scale (ft.)



5' Scale  
< Julio Height 5'6"  
< Regilio Height 5'1"  
4'  
< ZD Height 3'7" (43")  
37.6" Julio  
(24") - 3 (36") Scale  
35 Jesus < Julio PE (305")  
Jesus P.E.  
< 1'9" (21")  
Z.D. (target elevation)  
2'00 Ground Reference

A F F I D A V I T

STATE OF WASHINGTON )  
 ) ss:  
COUNTY OF \_\_\_\_\_ )

I, Maria Gomez, being first duly sworn upon oath deposes and says:

1. I'm an immigrant to the United States, over the age of 18 years, and competent to be a witness herein.

2. I have known Reynaldo Delgado since before June, 2001, and I provided long-term child care for his two daughters from June 2001, to Sept. 2002.

3. During that time period, while his children were with me at my home, here in Sunnyside, WA, Mr. Reynaldo Delgado had no contact with his children except for a one to two hour layover at a Bar-B-Q on Sept. 9 or 10, 2001, after he returned from Alaska work, stopping by shortly for dinner and check on his kids as he was driving south to Texas, traveling with his work associate, Carmelo Morado, just before the "9-11" terrorist attack at New York.

4. During that Bar-B-Q dinner, Reynaldo was not alone with any one at the dinner but was always around the people at the Bar-B-Q and so were his daughters, Zuley and Genevieve.

5. During the time his children were in my care, I did not hear them ever say they were assaulted by anyone or abused by Mr. Delgado. I don't think he was ever abusive to them and only tried to be a good father and provide for them while he was working long times in Alaska, which is why he had to leave them with me then. I believe Mr. Delgado was very responsible for his children, tried to protect them, and loved them.

6. Reynaldo Delgado assigned me as custodial parent to take his children to medical or school or any emergency services when they were with me.

7. I came to Jose Cervantes' home in Yakima, WA, to pick up Reynaldo's children in June of 2001 and take them back to Sunnyside to stay with me while Mr. Delgado went to work in Alaska.

8. While his children stayed with my family in Sunnyside, I noticed some behavior problems with Zuley, the older girl. She could be hostile to other children and her sister, and not always be truthful, telling stories.

I, Maria Gomez, declare under penalty of perjury, pursuant to the Laws of the State of Washington, that the foregoing statements, contained within this Affidavit, are true and correct to the best of my knowledge and belief to wit. FURTHER THIS AFFIANT SAYETH NAUGHT.

Signed this 24<sup>th</sup> day of August, 2009, at county of Sunnyside Wash.

Maria Gomez  
Signature

Maria Gomez  
Printed Name

## AFFIDAVIT

STATE OF WASHINGTON            )  
  ) ss: \_\_\_\_\_  
COUNTY OF YAKIMA            )

---

1. JOSE CERVANTES, being first duly sworn upon oath deposes and says:

1. I am a citizen of the United States, over the age of 18 years, and competent to be a witness here.

2. I attest that I know of NO events as described or claimed by Zuley Delgado in statements in or out of Court of the nature of abuse having taken place while she and her sister, Genevie, and their father, Reynaldo Delgado, resided at my home with my family in Yakima, WA, between September 15, 2002, and January 10, 2003.

3. On or about September 12, 2002, Reynaldo drove his car from Burien, WA, to Yakima, WA, to visit me and my family at my home, where he stayed two to three days before driving to Sunnyside, WA, to pick up his daughters from the child care woman there before bringing the kids back to stay with my family and attend grade school in Yakima before Reynaldo, me, and my wife prepared to go back to work in Alaska.

4. Reynaldo registered his daughter Zuley in grade school in September, 2002.

5. While staying with me and my family in Yakima, Reynaldo and his daughters were in a car accident that caused trauma to all of them. They went to the hospital for like 2-3 days and Reynaldo needed to get Chiropractic doctor care after he came home. He got the care from Gina and James who live in Sela and Gina said she would give Reynaldo a babysitter while he went back to work in Alaska with me in December, 2002. She and James took care of Reynaldo's kids from about December 28, 2002, to April 5, 2003 while we worked in Alaska, about three months.

Around December 28 or 29, Gina came from Sela to pick up Rey's two daughters from my home in Yakima, for them to stay with her and her husband, James, in Sela until Reynaldo and us came back home from Alaska work on about April 2, 2003. Reynaldo went to pick up his kids at Gina's house to take them to Norma's home in Burien, WA.

6. We never heard of any kind of trouble like Zuley has said in court or to the police in Federal Way, when they stayed in Yakima or Sela with us. If that happened, I would call the police myself, but nothing like that happened around me and my family and no police came

to my home when Reynaldo and his kids lived with us.

7. I have worked with Reynaldo Delgado for a long time and I do not believe he can ever do something like Zuley has said happened in Yakima. Reynaldo is an honest man and hard worker and tries to take care of his kids by working hard in far away places sometimes, but he has to leave them with other people when he goes to work for long times.

I, Jose Cervantes declare under penalty of perjury, pursuant to the Laws of the State of Washington, that the foregoing statements, contained within this Affidavit, are true and correct to the best of my knowledge and belief to wit.

FURTHER THIS AFFIANT SAYETH NAUGHT.

Signed this 7<sup>th</sup> day of July, 2009, at Yakima

County, Washington.

Jose Cervantes  
Signature

Jose Cervantes  
Printed Name

## AFFIDAVIT

STATE OF WASHINGTON )

) ss: \_\_\_\_\_

COUNTY OF KING )

---

I, Zoila Mejia, being first duly sworn upon oath deposes and says:

1. I am a guest in the United States, over the age of 18 years, and competent to be a witness

here. I have been and still am available to witness for Reynaldo Delgado.

2. I have known Mr. Reynaldo Delgado for many years and have provided child care for his daughters, Zuley and Genevie

3. I have operated my own child care business for years and I'm familiar with child behavior complications and causes in general. I provided day care for Mr. Delgado's children while he was working long periods in Alaska and his children lived in Seattle with a custodial guardian whom I also know as a good friend and as a witness of great integrity, a witness also to this matter.

4. As care providers to these children shortly before they moved to reside with Maria and Adrianna in Federal Way, I can attest that the children did not demonstrate any such assault issues as has been claimed by Zuley, which only happened after the children had lived at Maria Coronilla's and Adrianna's.

5. I have observed behavior of Zuley Delgado around children and adults. It is my opinion that she has significant difficulty with personal relationships, being manipulative and cruel to other children, lying, biting, hitting, and other anti-social behavior that would make it difficult to believe her statements as she is likely to tell stories to gain sympathy and attention.

6. I know that Zuley used the terms "dad" and "mom" to refer to adults that she lived with while Reynaldo was away on work assignments, so it is very likely that at the time she said her "dad" did something, she could have meant a man other than Reynaldo Delgado and likely did since he was not living with the girls much then, working in Alaska most of the time.

7. I know that Maria Coronilla and Adrianna Camarena, along with their husbands Jesus Coronilla and Julio Camarena, were involved in drug dealing and prostitution at the time Zuley and Genevie were living with them, and that the children were exposed to Julio as he took them into the shower with him and exposed himself to the children around the house, making him a suspect in this case and should be investigated.

8. I know of a witness who can testify as to being propositioned by Maria in Federal Way, for prostitution, while he was attending an early birthday party Reynaldo held for Zuley at Maria's apartment, on June 4, 2003.

9. I am also aware that Maria and Adrianna run a thievery ring and that

they had trained Mr. Delgado's children to shoplift and assist them in crimes.

10. I am aware that Maria and Adrianna, those who had reason to incriminate Mr. Delgado to remove him from exposing their criminal enterprise, have stolen the identity of Reynaldo's ex-wife, Kenia N. Delgado, by taking Mr. Delgado's papers while he was at work, using the identity to create false ID they used to commit welfare fraud and to deposit Mr. Delgado's childcare payments into hidden accounts to conceal it from DSHS for welfare fraud. I know this having seen a false drivers license with Kenia's name and information but having Maria's photo ID. I saw this in May, 2004. I also know they stole unemployment checks and income tax refunds from Reynaldo, using stolen ID to cash them. When Reynaldo discovered the extent of their criminal activity and suspecting other criminal activity, he let them know that he would expose them if they didn't stop; and he decided to move into his own home.

11. I believe Maria and Adrianna set up Reynaldo to extort money from him and blackmail him, but when he stopped paying them, they used Zuley, whom they had turned against him while she lived with them, as part of their criminal operation, to get rid of Reynaldo by using the rape allegations, because he had told them that they would be caught for their crimes. He tried to protect his family by moving into his own apartment and having his wife Erica and her friend take care of his children while he went away for long work jobs. But, the police did not investigate this because they wanted to believe everything Zuley told them, which was many lies such as when she said her sister called the police in Billings Montana and Yakima to have the police arrest Reynaldo for assaulting them. That never happened and the police records prove she was lying. Mr. Delgado's attorney never asked me or even called the police stations to see if it was true so he could show Zuley was lying, or if he did, he didn't help Reynaldo the way he was supposed to as an attorney and didn't do his job so the truth would be told. And the police and prosecutor never even called those other police to find out if what Zuley said was true but if they did, then they used lies to frame Mr. Delgado when they knew the real truth. And, they never investigated Maria and Adrianna for crimes or Julio for being naked in the house around the children and taking them into the bathroom and shower with him and ask Zuley if Julio did this to her. Why? And they never wanted to talk to any of Mr. Delgado's witnesses that could prove things Zuley said were false. Why? Mr. Delgado was in Alaska when the school said Zuley had marks on her. She was living with Julio and Adrianna then but police didn't investigate them.

I, Zoila Mejia declare under penalty of perjury, pursuant to the Laws of the

State of Washington, that the foregoing statements, contained within this Affidavit, are true and correct to the best of my knowledge and belief to wit.

FURTHER THIS AFFIANT SAYETH NAUGHT.

Signed this 18<sup>th</sup> day of September, 2009, at KING, Seattle wa.

County, Washington.

Zoila Mejia  
Signature

Zoila Mejia  
Printed Name

**B**  
**EXHIBIT**

FOR THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN FOR KING COUNTY

STATE OF WASHINGTON )  
Plaintiff ) Cause No. 04-1-13920-8  
Vs ) Statement of a witness,  
Reynaldo Delgado ) Stela Delgado (Through  
Defendant ) interpreter) See attach.  
Affidavit

Comes now, the defendant Mr. Reynaldo Delgado in support of my defense, and with intentions to exercise the VI U S Const. Amend. Due Process, by presenting witness testimony.

At this time is presented with attached originals (Spanish) and interpreted by not certified interpreter, due to INDINGENCY STATUS of Mr. Reynaldo Delgado.

DECLARANT'S OATH

I, Stela Delgado Gutierrez, in this letter, state all the truth and nothing else but the truth, In support and clarify all the related in my brothre's case, Mr. Reynaldo Delgado.

I am a witness of the false accusations made against my brother, Also, I stated that Mrs. Maria de Jesus Coronilla delgado and Mrs. Erika Alvarado, made false accusations against my brother, They boths of them coerced the two little girls, Zuley Delgado and Genevie Delgado to falsely accuse and tell lies about the crimes that my brother is accused and charged.

I, Stela Delgado knows all the truth, this women accused my brother of a shame crimes, (made up). I am able to testify at any time that is necessary, to probe the lies. In the dates that those argue crime were committed, my brother was in Alaska and not in Washington State. The defendant's Attorney have not performed any investigation neither call for witnesses that a list previously given by the defendant, and clarify (support) Alaska's allegations times In June, 2001 and 2002 Mrs. Maria Gomez take care of Zuley and Genevie, and all this time my brother have not seen his doughters Why the Magistrate accused without evidences? how they know when those crimes were committed if my brother was working in Alaska? No body knows when were committed, Why everybody contradicted their statements? Neither Zuley the victim knows, when it happened. Look for the person that committed the crime, also ask to Mrs. Adriana's husband, Mr. Julio Aldama Camarena, He used to shower the two little girls when Mrs. Adriana was not present. Also he use drugs all kind infront of the girls. The girls under

his care, suffer physical and psychology pain. Zuley toldme, that both Mr. Julio and Adriana beatten the two little girls when their father was not with them (Mr. Reynaldo Delgado) on a trip to Mexico.

Mrs. Erika is hidden because she, wish not to testify in the Court, however she were interviewed by the social worker, the specialist in this type of cases, And She testified that, Mr. Reynaldo Delgado has never committed any crime included other witnesses.

In August 28, 2004 Mr. Delgado spoke by phone with his two daugthers and Mrs. Erika that, He will be back to Washington and the same day Mrs. Adriana, Maria and Erika planned all and took the two girls to the Hospital, to accuse my brother of a crime that has been committed.

Affidavit pursuant to 28 U S C & 1746 And DIKINSON V WAINWRITE, 626 F 2d 1184 (1980) Sworn as true and correct under penalty of perjury has full force of and does not to be verified by NOTARY PUBLIC.

I am Stela Delgado Gutierrez, I am over the age of majority and competent to testify and herein attest under penalty of perjury that all the statement contained herein is true and absolute truth.

Respectfully submitted on this 28th day of February, 2009.

in and for the court of appeals, div. i  
of the state of washington Cause No. 62682-5-I  
STATE OF WASHINGTON )  
 ) ss.  
County of KING ) PRP of REYNALDO DELGADO

## AFFIDAVIT

Pursuant to 28 U.S.C. § 1746 No Notary Required

~~Yo Estela DELgado Gutierrez en esta carta declaro toda la verdad y nada más que la verdad para ayudar a aclarar todo lo relacionado sobre el caso de mi hermano Reynaldo Delgado, soy testigo por todas las falsas acusaciones que se declararon en su contra, también declaro que las señoras María de Jesus Coronilla Delgado y Erika Alvarado cometieron falsas acusaciones culpandolo a él, ellas aconsejaron a las niñas Zuley Delgado y Genevie Delgado para que dijeran mentiras y culparlo a él de los delitos que lo acusan. yo Estela Delgado Gutierrez se muy bien toda la verdad, estas mujeres acusaron a mi hermano de esos delitos tan vergonzosos, estoy dispuesta a declarar en la corte en el momento que sea necesario para descubrir sus mentiras. En las fechas que se cometieron estos delitos mi hermano se encontraba en Alaska y no en Washington donde se cometieron. el abogado no hizo ninguna investigación y no se llamo a ninguno de sus testigos de los cuales él dio una lista pudiendo aclarar con esto su estancia en Alaska. En junio del 2001 y 2002 la señora María Gomez cuidó a Zuley y Genevie, durante este tiempo mi hermano no vio a sus hijas, ¿por qué el fiscal lo acusa sin tener pruebas? ¿Cómo saben cuando se cometieron los delitos si mi hermano estaba en Alaska trabajando? nadie sabe cuando se cometieron, por que todos se contradicen, ni Zuley sabe~~

~~cuando paso todo, busquen al verdadero culpable, investiguen a todos, el esposo de Adriana (julio Aldama Camarena) bañaba a las niñas no estando ella presente, el consumia drogas de todo tipo delante de todos, las niñas bajo su cuidado sufrieron maltrato físico y psicológico, Zuley me dijo que le pegaban y maltrataban no estando su padre presente, cuando vinieron a México. La señora Erika se esconde para no declarar y ella dijo que mi hermano Reynaldo nunca cometio estos delitos delante de la trabajadora social que se dedica a estos casos y de otros testigos. El 28 de agosto del 2004 mi hermano hablo con sus hijas y Erika para decirles que regresaba de Alaska. Este mismo día Adriana, María y Erika planearon todo para llevar a las niñas al hospital y acusarlo de un delito que ya habia sido cometido.~~

I, am Estela Delgado Gutierrez, am over the age of majority and competent to testify and herein attest under penalty of perjury that all statements contained herein is the absolute truth.

Affidavit pursuant to 28 U.S.C. § 1746 and DICKINSON V. WAINWRIGHT, 626 F. 2d 1184 (1980) sworn as true and correct under penalty of perjury has full force of and does not have to be verified by notary public.

Respectfully submitted on this 28,th day of February, of 2009.

 30-Marzo-2009.

Signature

Estela Delgado Gutierrez

Print or Type Name

Reynaldo Delgado #889357 wa

Institution

CCA/ prairie corr, Facility

Address pob 500 EB110

Appleton Minnesota 56208

City State Zip



for my brother, Reynaldo. I am and have been available as a witness  
for RD.  
Norma and his mother was always prepared to testify in this  
but ~~is~~ attorney never called a witness. My two brothers were  
at the trial but were never asked to testify.

\_\_\_\_\_  
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I, Rogelio Delgado Gutierrez, am over the age of majority and competent to  
testify and herein attest under penalty of perjury that all statements contained herein is the  
absolute truth.

**Affidavit pursuant to 28 U.S.C. § 1746 and DICKINSON V. WAINWRIGHT, 626 F.  
2d 1184 (1980) sworn as true and correct under penalty of perjury has full force of  
and does not have to be verified by notary public.**

Respectfully submitted on this 30th day of March, of 2009.

11/05/09   
Signature  
Rogelio Delgado Gutierrez  
Print or Type Name  
16612 first Ave South  
Address  
~~#####~~ Burien wa 98148  
Address  
\_\_\_\_\_  
City State Zip



Telephone number - (206) 499-1128

I am and have been available as a witness at any time for my-  
brother, Reynaldo Delgado. but his attorney never call any witness  
my brother geves the list for all witness but never call any onen.

I, Martin Delgado Gutierrez, am over the age of majority and competent to testify and herein attest under penalty of perjury that all statements contained herein is the absolute truth.

Affidavit pursuant to 28 U.S.C. § 1746 and DICKINSON V. WAINWRIGHT, 626 F. 2d 1184 (1980) sworn as true and correct under penalty of perjury has full force of and does not have to be verified by notary public.

Respectfully submitted on this 28, Th day of February, of , 2009.

  
Signature

MARTIN DELGADO GUTIERREZ  
Print or Type Name

16612, first st south, BURien wa  
Institution 98148  
Reynaldo Delgado, #889357  
Address

Box, 500 EB110A Appleton Minnesota 56208  
City State Zip



of days worked and many witnesses. His attorney never called any witnesses,  
for my brother, Reynaldo, Delgado  
I was and am available as a witness at any time for my brother-RD

I, Adriana Delgado Gutierrez, am over the age of majority and competent to testify and herein attest under penalty of perjury that all statements contained herein is the absolute truth.

**Affidavit pursuant to 28 U.S.C. § 1746 and DICKINSON V. WAINWRIGHT, 626 F. 2d 1184 (1980) sworn as true and correct under penalty of perjury has full force of and does not have to be verified by notary public.**

Respectfully submitted on this 30th day of March, of 2009.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

2009 OCT -1 AM 10:51

1105109 

Signature

Adriana Delgado Gutierrez

Print or Type Name

~~Institution~~ Address

16612 first Ave, south.

Address

Burien, WA. 98148

City

State

Zip

Westlaw

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C

Court of Appeals of Washington,  
 Division 2.  
 STATE of Washington, Appellant,  
 v.  
 Gregory WILSON, Jr., Respondent.  
 No. 34277-4-II.

Jan. 9, 2007.

**Background:** Defendant was convicted by jury of first degree burglary, assault in violation of protection order, and felony harassment. The Superior Court, Clallam County, George Lamont Wood, J., dismissed burglary conviction, determined that assault and harassment were same criminal conduct for offender score, and sentenced defendant accordingly. State appealed.

**Holdings:** The Court of Appeals, Hunt, J., held that:  
 (1) as issue of first impression, defendant's entering house he cohabited with girlfriend was not unlawful, notwithstanding no-contact order, and  
 (2) assault and harassment were not same criminal conduct.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] **Burglary 67** 

67 Burglary  
 67I Offenses and Responsibility Therefor  
 67k1 Nature and Elements of Offenses  
 67k7 k. Ownership or Possession of Building. Most Cited Cases  
 Defendant who entered house he cohabited with girlfriend to assault and harass girlfriend, thereby violating no-contact order, did not enter house unlawfully so as to constitute burglary; no-contact order did not exclude defendant from girlfriend's residence, he and girlfriend co-signed lease for house,

defendant's clothing remained in house, defendant had keys to house, and girlfriend characterized house as "our house." West's RCWA 9A.52.010(3), 9A.52.020.

[2] **Criminal Law 110** 1144.13(3)

110 Criminal Law  
 110XXIV Review  
 110XXIV(M) Presumptions  
 110k1144 Facts or Proceedings Not Shown by Record  
 110k1144.13 Sufficiency of Evidence  
 110k1144.13(2) Construction of Evidence  
 110k1144.13(3) k. Construction in Favor of Government, State, or Prosecution.  
 Most Cited Cases

**Criminal Law 110** 1159.2(7)

110 Criminal Law  
 110XXIV Review  
 110XXIV(P) Verdicts  
 110k1159 Conclusiveness of Verdict  
 110k1159.2 Weight of Evidence in General  
 110k1159.2(7) k. Reasonable Doubt. Most Cited Cases  
 Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.

[3] **Criminal Law 110** 1144.13(4)

110 Criminal Law  
 110XXIV Review  
 110XXIV(M) Presumptions  
 110k1144 Facts or Proceedings Not Shown by Record  
 110k1144.13 Sufficiency of Evidence  
 110k1144.13(4) k. Evidence Accepted as True. Most Cited Cases

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**Criminal Law 110**  **1144.13(5)**

110 Criminal Law  
 110XXIV Review  
 110XXIV(M) Presumptions  
 110k1144 Facts or Proceedings Not Shown by Record  
 110k1144.13 Sufficiency of Evidence  
 110k1144.13(5) k. Inferences or Deductions from Evidence. Most Cited Cases  
 A claim of insufficiency of evidence to support a conviction admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.

**[4] Criminal Law 110**  **552(4)**

110 Criminal Law  
 110XVII Evidence  
 110XVII(V) Weight and Sufficiency  
 110k552 Circumstantial Evidence  
 110k552(4) k. Relative Strength of Circumstantial and Direct Evidence. Most Cited Cases  
 On a claim of insufficiency of evidence to support a conviction, circumstantial evidence and direct evidence are equally reliable.

**[5] Criminal Law 110**  **1159.4(2)**

110 Criminal Law  
 110XXIV Review  
 110XXIV(P) Verdicts  
 110k1159 Conclusiveness of Verdict  
 110k1159.4 Credibility of Witnesses  
 110k1159.4(2) k. Province of Jury or Trial Court. Most Cited Cases  
 Credibility determinations are for the trier of fact and are not subject to appellate review.

**[6] Criminal Law 110**  **1159.2(9)**

110 Criminal Law  
 110XXIV Review  
 110XXIV(P) Verdicts  
 110k1159 Conclusiveness of Verdict  
 110k1159.2 Weight of Evidence in

## General

110k1159.2(9) k. Weighing Evidence. Most Cited Cases

**Criminal Law 110**  **1159.3(2)**

110 Criminal Law  
 110XXIV Review  
 110XXIV(P) Verdicts  
 110k1159 Conclusiveness of Verdict  
 110k1159.3 Conflicting Evidence  
 110k1159.3(2) k. Province of Jury or Trial Court. Most Cited Cases

**Criminal Law 110**  **1159.4(2)**

110 Criminal Law  
 110XXIV Review  
 110XXIV(P) Verdicts  
 110k1159 Conclusiveness of Verdict  
 110k1159.4 Credibility of Witnesses  
 110k1159.4(2) k. Province of Jury or Trial Court. Most Cited Cases  
 On a claim of insufficiency of evidence to support a conviction, the reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

**[7] Burglary 67**  **7**

67 Burglary  
 67I Offenses and Responsibility Therefor  
 67k1 Nature and Elements of Offenses  
 67k7 k. Ownership or Possession of Building. Most Cited Cases  
 In determining whether an alleged burglar's presence is unlawful, courts must turn to whether the perpetrator maintained a licensed or privileged occupancy of the premises. West's RCWA 9A.52.010(3).

**[8] Burglary 67**  **15**

67 Burglary  
 67I Offenses and Responsibility Therefor  
 67k13 Defenses

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67k15 k. Consent of Owner or Occupant of Building. Most Cited Cases

It is the consent, or lack of consent, of the residence possessor, not the State's or court's consent or lack of consent, that drives the burglary statute's definition of a person who "is not then licensed, invited, or otherwise privileged to so enter or remain" in a building. West's RCWA 9A.52.010(3).

#### [9] Sentencing and Punishment 350H ⚡774

350H Sentencing and Punishment  
 350HIV Sentencing Guidelines  
 350HIV(D) Multiple Offenses or Counts  
 350Hk774 k. Acts or Conduct Connected by Common Objective or Plan. Most Cited Cases  
 Defendant's convictions for assault in violation of protection order and felony harassment committed against his girlfriend had separate criminal intents and thus did not constitute "same criminal conduct" for determining offender score; defendant first entered house with intent to physically assault girlfriend, and subsequently reentered house with intent to harass girlfriend by threatening to kill her. West's RCWA 9.94A.589(1)(a), 9A.46.020, 26.50.110(4).

#### [10] Sentencing and Punishment 350H ⚡773

350H Sentencing and Punishment  
 350HIV Sentencing Guidelines  
 350HIV(D) Multiple Offenses or Counts  
 350Hk773 k. Single Act or Transaction.  
 Most Cited Cases

#### Sentencing and Punishment 350H ⚡774

350H Sentencing and Punishment  
 350HIV Sentencing Guidelines  
 350HIV(D) Multiple Offenses or Counts  
 350Hk774 k. Acts or Conduct Connected by Common Objective or Plan. Most Cited Cases  
 For multiple offenses to be same criminal conduct under sentencing statute, three factors must be shown: two or more crimes that require the same criminal intent, are committed at the same time and

place, and involve the same victim; if any one element is missing, offenses do not encompass same criminal conduct and must be counted separately in calculating offender score. West's RCWA 9.94A.589(1)(a).

#### [11] Sentencing and Punishment 350H ⚡773

350H Sentencing and Punishment  
 350HIV Sentencing Guidelines  
 350HIV(D) Multiple Offenses or Counts  
 350Hk773 k. Single Act or Transaction.  
 Most Cited Cases  
 Courts construe sentencing statute defining "same criminal conduct" narrowly to disallow most assertions of same criminal conduct. West's RCWA 9.94A.589(1)(a).

#### [12] Criminal Law 110 ⚡1134.75

110 Criminal Law  
 110XXIV Review  
 110XXIV(L) Scope of Review in General  
 110XXIV(L)8 Sentencing  
 110k1134.75 k. In General. Most Cited Cases  
 (Formerly 110k1134(3))

#### Criminal Law 110 ⚡1156.2

110 Criminal Law  
 110XXIV Review  
 110XXIV(N) Discretion of Lower Court  
 110k1156.1 Sentencing  
 110k1156.2 k. In General. Most Cited Cases  
 (Formerly 110k1147)

Reviewing court will reverse a sentencing court's determination of "same criminal conduct" only when there is a clear abuse of discretion or misapplication of the law. West's RCWA 9.94A.589(1)(a).

#### [13] Sentencing and Punishment 350H ⚡774

350H Sentencing and Punishment  
 350HIV Sentencing Guidelines

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## 350HIV(D) Multiple Offenses or Counts

350Hk774 k. Acts or Conduct Connected by Common Objective or Plan. Most Cited Cases

To decide whether two crimes involve the same criminal intent for purposes of determining "same criminal conduct" under sentencing statute, the court must examine and compare each statute underlying each crime to determine whether the required intents are the same or different for each crime. West's RCWA 9.94A.589(1)(a).

**[14] Sentencing and Punishment 350H  774**

## 350H Sentencing and Punishment

## 350HIV Sentencing Guidelines

## 350HIV(D) Multiple Offenses or Counts

350Hk774 k. Acts or Conduct Connected by Common Objective or Plan. Most Cited Cases

Two crimes do not contain the same criminal intent, and are not "same criminal conduct" under sentencing statute, when the defendant's intent objectively changes from one crime to the other. West's RCWA 9.94A.589(1)(a).

**\*\*146** Carol L. Case, Clallam County Prosecutor's Office, Port Angeles, WA, for Appellant.

Manek R. Mistry, Jodi R. Backlund, Backlund & Mistry, Olympia, WA, for Respondent.

HUNT, J.

**\*600** ¶ 1 The State appeals the trial court's dismissal of Gregory Wilson's first degree burglary jury conviction and its same criminal-conduct finding in calculating Wilson's offender score for his assault in violation of a protection order and felony harassment convictions. We affirm the trial court's dismissal of the burglary conviction, reverse the trial court's finding that the assault and the harassment constituted the same criminal conduct for offender score purposes, and remand for resentencing.

## FACTS

## I. CRIMES

¶ 2 On April 16, 2005, the Clallam County District Court issued a no-contact order prohibiting Gregory Wilson from contacting Charlene Sanders, his girlfriend of six years, in person, by telephone, or through any intermediary except an attorney, a police officer, or an officer of the court. The no-contact order listed Sanders' address as 1123 East Park Avenue in Port Angeles, but it did not prohibit Wilson's presence at that address, where he and Sanders had been living together.

¶ 3 Shortly thereafter, Sanders and Wilson co-signed a lease for the 1123 East Park residence and resumed living together. Their automobiles and all Wilson's clothing remained at this residence. Wilson had keys to the residence, to which Sanders referred as "[o]ur house."

**\*601** ¶ 4 On August 22, 2005, Wilson and Sanders argued, and Wilson left the house angry around 11:00 P.M. Sanders "knew he'd be back." Wilson returned home around 2:30 A.M. Unable to open the door without his key, which he had left behind, Wilson angrily forced open the kitchen door, splintering some of the wood, went to the bedroom, grabbed Sanders by her hair, and pulled her out of bed. Sanders asked Wilson to go into the kitchen with her so they would not wake her sleeping grandson.

¶ 5 At some point, Wilson kicked Sanders once, left the house to speak with friends outside, immediately returned and re-entered the house, picked up a piece of the splintered wood from the kitchen door, and used it to threaten to kill Sanders.

¶ 6 Using her cellular phone to call 911, Sanders told the police that Wilson was living at the home, but "he wasn't supposed to be there." Wilson left the home and traveled by car to a friend's house. When the police arrived at the residence, Sanders refused medical attention because she "hadn't been hurt in any way."

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¶ 7 Later that evening, the police arrested Wilson at his friend's house and took him to the police station to be interviewed. Wilson \*\*147 voluntarily admitted that he was aware of the no-contact order, but said that he had moved in because he was "trying to do the right things [sic] to assist Sanders in taking care of her kids, providing for them and such." Report of Proceedings (RP) (Nov. 1, 2005) at 120.

## II. PROCEDURE

¶ 8 The State charged Wilson with first degree burglary, assault in violation of a protection order, and felony harassment.

### A. TRIAL

¶ 9 At Wilson's jury trial, the State presented the following evidence: (1) photographs of the kitchen door that \*602 Wilson broke when he entered the house; (2) the 911 tape, which included Sanders' panic-stricken plea for the police come to the house because Wilson was assaulting and threatening her; and (3) the testimonies of the arresting officers and Sanders, who testified somewhat reluctantly.<sup>FN1</sup> Wilson presented no defense case.

FN1. Sanders testified that the prosecutor "threatened" her with jail time to obtain her appearance.

¶ 10 After both sides rested, Wilson moved to dismiss the burglary charge. He argued that all the evidence established that he lived in the home with Sanders and, thus, he could not have entered unlawfully. The State countered that the no-contact order made Wilson's presence unlawful regardless of the parties' rental agreement or Sanders' consent to Wilson's presence in the home. Expressing its skepticism of the burglary charge's validity, the trial court denied the motion and allowed it to go the jury with the other two counts. The jury convicted Wilson of all three charges.

¶ 11 After the jury returned its verdict, the trial

court noted that the critical question under the burglary statute is whether the defendant is licensed or privileged to be in the home at the time of the allegedly unlawful entry, and it dismissed the burglary conviction, for the following reasons: (1) the no-contact order did not prohibit Wilson's presence in this house; (2) Sanders had authorized Wilson to be in the home, he had keys to the home, and he had been living there for several months; (3) Sanders had never revoked Wilson's right to be in the house; and (4) Sanders told 911 dispatch that Wilson lived at the residence even at the time of her call for help. The trial court also expressed concern that, if it adopted the State's reasoning, Wilson would have committed a burglary every day for four months before his arrest, each time he entered the residence with intent to have contact with Wilson.

### \*603 B. Sentencing

¶ 12 At sentencing, the State argued that Wilson's offender score should be one because the events underlying the remaining two jury convictions occurred sequentially rather than simultaneously and, thus, there was a different mens rea for each action. Wilson argued that his offender score should be zero because the assault and the harassment comprised the same criminal conduct.

¶ 13 The trial court agreed with Wilson, reasoning that (1) when Wilson came into the house at 2:30 A.M., his intent was to assault and to harass Sanders; (2) these two charges included the same victim and the same intent, and they occurred simultaneously; and (3) therefore, the assault and the harassment should count as the same criminal conduct in calculating Wilson's offender score. Treating the two counts as the same criminal conduct and calculating Wilson's offender score as zero, the trial court sentenced Wilson to 11 months confinement for the assault, with credit for time served, and 90 days for the harassment, to be served concurrently.

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¶ 14 The State appeals.

## ANALYSIS

### I. DISMISSAL OF BURGLARY CONVICTION

[1] ¶ 15 It is undisputed that (1) Wilson entered the residence he shared with Sanders, (2) intending to assault and to harass Sanders inside, and (3) his contact with her violated a no-contact order. The State argues that, because Wilson entered and remained\*\*148 with intent to commit a crime, namely to contact Sanders in violation of the no-contact order, the trial court erroneously dismissed Wilson's burglary conviction. Thus, we address a legal issue of first impression-whether entry or remaining in a jointly shared residence, from which neither party has been lawfully excluded,\*604 is unlawful for purposes of establishing this essential element of the crime of burglary.<sup>FN2</sup>

FN2. RCW 9A.52.020(1)(b).

¶ 16 We agree with the trial court and hold that, although the acts Wilson committed inside the residence were unlawful, his acts of entering and remaining inside were not themselves unlawful because the no-contact order did not exclude him from the residence he shared with Sanders.

#### A. Standard of Review

[2][3][4] ¶ 17 Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wash.2d at 201, 829 P.2d 1068. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980).

[5][6] ¶ 18 Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wash.App. 410, 415-16, 824 P.2d 533, review denied, 119 Wash.2d 1011, 833 P.2d 386 (1992).

#### B. First Degree Burglary

¶ 19 We reiterate the following uncontroverted facts that the trial court found significant: (1) The no-contact order did not prohibit Wilson from entering or remaining at the 1123 East Park residence; (2) the no-contact order left unchecked the adjacent box and blanks in the form that read: "( ) remain \_\_\_\_\_ feet from the above-listed person(s) residence(s), workplace(s) \_\_\_\_\_, school/day-care \_\_\_\_\_"; \*605 and (3) in contrast, there were check marks in four other adjacent boxes prohibiting various forms of personal contact with Sanders. Exhibit 1. Thus, the no-contact order language prohibited Wilson only from being in contact with Sanders; it did not prohibit him from entering or getting near any specific location, including the East Park residence. Moreover, in spite of the State's argument to the contrary, it is also uncontroverted that, at the time of the incident, Wilson was living at the 1123 East Park residence with Sanders' permission. Not only does the record support this fact, but also the State failed to assign error to the trial court's finding of fact that:

Despite the No-Contact order of April 16, 2005, Ms. Sanders and Mr. Wilson had co-habited at the Park Avenue address continually since said order and were so co-habiting on the date of the alleged Burglary. Both she and Mr. Wilson had signed the lease agreement for that residence when they moved in and they had resided there essentially continually since. Mr. Wilson kept all his clothes and personal belongings there and considered it his home. Handwritten note: He

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also had keys to the residence.

Clerk's Papers (CP) at 21, Findings of Fact and Conclusions of Law No. 3. C. Thus, we treat this finding as a verity on appeal. *See Baugh v. Dunstan & Dunstan*, 67 Wash.2d 710, 712, 409 P.2d 658 (1966).

¶ 20 The issue, then, is whether under the circumstances of this case, Wilson could be guilty of burglary within the meaning of RCW 9A.52.020 and RCW 9A.52.010(3).

#### 1. Elements

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, \*\*149 the actor or another participant in the crime ... assaults any person.

\*606 RCW 9A.52.020(1)(b). A person unlawfully enters a building when he is not then licensed, invited, or otherwise privileged to enter or remain. RCW 9A.52.010(3).

¶ 21 For purposes of this opinion, we assume that Wilson entered the residence with intent to commit a crime, namely contacting, assaulting, and harassing Sanders in violation of the no-contact order, a misdemeanor under RCW 26.50.110(1). Accordingly, we focus on whether the record supports a separate burglary element, namely "unlawfully entering or remaining" in a building. We find instructive the common law, a previous decision from our court, and an Ohio case addressing a similar issue.

¶ 22 At common law, courts viewed burglary as an offense against habitation and occupancy. *State v. Klein*, 195 Wash. 338, 342, 80 P.2d 825 (1938). Thus, a court could not convict a defendant of burglary for entering his own home with felonious intent. This rule applied to joint occupants as well as to sole owners of homes. *See Clarke v. Commonwealth*, 66 Va. 908, 916-17 (1874) (the important

factor has been occupancy, rather than ownership, of the home); *People v. Gauze*, 15 Cal.3d 709, 125 Cal.Rptr. 773, 542 P.2d 1365 (1975).

[7] ¶ 23 Similarly, modern burglary statutes remain an offense "against the security of habitation or occupancy, rather than against ownership or property." 3 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 316 (15th edition 1995) (footnote omitted); *see also Klein*, 195 Wash. at 342, 80 P.2d 825 (the test of ownership in Washington is not legal title, but rather occupancy and possession at the time of the offense.). Thus, in determining whether an offender's presence is unlawful, courts must turn to whether the perpetrator maintained a licensed or privileged occupancy of the premises.

#### 2. Domestic violence context

¶ 24 In domestic violence cases, determining possession of a residence presents a murky area of law. Although Washington case law is clear that an offender can burglarize\*607 the residence of his or her spouse or partner despite legal ownership of the property,<sup>FN3</sup> these cases generally apply to situations where the couples are estranged and living separately. *See e.g., State v. Stinton*, 121 Wash.App. 569, 574, 89 P.3d 717 (2004); *State v. Schneider*, 36 Wash.App. 237, 241, 673 P.2d 200 (1983) (holding that wife was an accomplice to burglary when she arranged for two teenagers to enter her estranged husband's residence to commit a crime). We have not found any Washington cases, however, addressing the issue here—whether an offender can burglarize his own residence that he co-possesses and co-habits with his spouse or partner.

FN3. The Model Penal Code warns that the "unlawful remaining" section of many burglary statutes creates a risk that the State will severely punish an offender under a burglary charge for an otherwise minor offense. MODEL PENAL CODE § 221.1, commentary at 71.

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a. Lawfulness of entry and remaining

¶ 25 We must decide here whether the record supports the trial court's finding that Wilson and Sanders remained joint occupants of the residence at 1123 East Park and, if so, whether Wilson's entry itself was lawful, regardless of what he intended to do once inside.

¶ 26 The testimony at trial demonstrated that (1) before Wilson and Sanders co-signed the lease for the residence at 1123 East Park, Sanders allowed Wilson to live there; (2) Wilson had keys to the residence; (3) all of Wilson's clothing as well as his automobiles remained at this residence up to and after the incident at issue here; (4) the State presented no evidence that Wilson had a separate primary residence; and (5) even at trial, Sanders referred to the residence as "[o]ur house." Thus, it is uncontroverted that Sanders gave Wilson permission to reside at 1123 East Park and that he continued to live there with her consent at the time of the assault.

¶ 27 The State argues, however, that the no-contact order made Wilson's presence inside the residence unlawful, regardless of Sanders' consent and Wilson's other claims on this residence. As the State correctly **\*\*150** points out, Sanders could not waive the court's no-contact order.<sup>FN4</sup> The State then argues that, therefore, Sanders could not consent to Wilson's presence in their home.<sup>FN5</sup> That Sanders could not override the no-contact order by allowing Wilson to be in contact with her, whether inside the residence or elsewhere, does not thereby make his entry into the residence unlawful for purposes of the burglary statute.

FN4. *State v. Dejarlais*, 88 Wash.App. 297, 299, 944 P.2d 1110 (1997), *affirmed*, 136 Wash.2d 939, 969 P.2d 90 (1998).

FN5. The State relies primarily on our decision in *State v. Jacobs*, 101 Wash.App. 80, 2 P.3d 974 (2000). We dismissed Jacobs' Fourth Amendment suppression claim

when the police found him at a residence, the owner of which a court had prohibited him from contacting. 101 Wash.App. at 83-84, 2 P.3d 974. We reasoned that Jacobs' presence at the residence was unlawful and, therefore, he had no privacy interest in the residence even though the no-contact order did not explicitly bar him from the residence. 101 Wash.App. at 87-88, 2 P.3d 974.

*Jacobs*, however, is distinguishable from the case here because, unlike Wilson, Jacobs did not live at the residence where he contacted the subject of the no-contact order. Instead, he lived separately with friends or in a park. 101 Wash.App. at 86-88, 2 P.3d 974. Therefore, we reasoned that, in addition to the no-contact order, Jacobs had no expectation of privacy at the residence because he did not live there.

¶ 28 At oral argument, the State acknowledged that Wilson's entry into the residence he shared with Sanders would not have been unlawful within the meaning of the burglary statute (1) if Sanders had not been home at the time, or (2) if she had been at home in a separate room that Wilson did not enter. The State also conceded that if Sanders had been at the residence of a friend who had also invited Wilson, Wilson's act of entry into the friend's house, even with the same purpose to assault Sanders as here, would not transform that entry into a burglary because he would have entered with the friend's consent.

[8] ¶ 29 As we note above, the purpose of a burglary statute is to protect the occupancy and habitation of a residence. Here, with Sanders' assent, Wilson was a co-occupant and co-lessee of the residence, from which the no-contact order had not excluded him. Although the purpose of a no-contact order is to prevent a victim from having to face her batterer, the burglary statute's intent is to allow an occupant to prevent all those who are unwelcome

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from entering the \*609 premises. It is the consent, or lack of consent, of the residence possessor, not the State's or court's consent or lack of consent, that drives the burglary statute's definition of a person who "is not then licensed, invited, or otherwise privileged to so enter or remain" in a building. RCW 9A.52.010(3). See, e.g. *Iowa v. Hagedorn*, 679 N.W.2d 666, 670-71 (2004). Here, Sanders and Wilson, not the State, occupied the 1123 East Park residence.

b. Case law-*Stinton*

¶ 30 In *Stinton*, a no-contact order prevented the defendant from harassing contact with the mother of their children with whom he previously resided. The order expressly barred him from their former joint residence. 121 Wash.App. at 571, 89 P.3d 717. Thus, at the time of the incident, Stinton and the victim were living in separate residences. When Stinton went to the victim's residence, she let him in. But when he began taking some of her personal property, they engaged in a heated exchange and she asked him to leave. Stinton left, but he immediately returned, kicking in the door and resuming arguing with the victim. 121 Wash.App. at 571, 89 P.3d 717. When she called 911, Stinton twice said to her, "Thanks a lot ... this is a felony." Id.

¶ 31 The State charged Stinton with burglary, on the theory that (1) his intended contact and harassment was a crime, in violation of the no-contact order; and (2) the crime he intended to commit when he unlawfully entered the victim's home was in violation of a separate provision of the no-contact order specifically excluding him from their former joint residence. The trial court dismissed the burglary charge because the facts did not establish prima facie proof of all the elements of the crime. The State appealed, and we reversed.

¶ 32 Unlike the situation here, it was undisputed that Stinton "entered or remained unlawfully in [their former] residence." Id. at \*\*151 575, 89 P.3d 717. Moreover, Stinton even conceded that his

entry was unlawful. Id. at 576, 89 P.3d 717. We reasoned that \*610 Stinton committed burglary when he unlawfully entered the residence without permission and with the intent to commit the crime of harassing the victim in violation of the court order expressly excluding him from her residence. FN6 Id. at 575, 89 P.3d 717. We held that "the violation of a provision of a protection order can serve as the predicate crime for residential burglary." Id. at 571, 89 P.3d 717.

FN6. See also *State v. O'Neal*, 103 Ohio App.3d 151, 658 N.E.2d 1102, 1104 (1995), in which the Ohio Court of Appeals noted that in all jurisdictions (including Washington, citing *Schneider*), criminalizing one spouse's burglarizing the other, the common thread was clear evidence that the spouses had taken up separate residences. 658 N.E.2d at 1104. Thus, the Ohio court reasoned that, in the absence of a restraining order preventing a spouse from the residence, the court's primary inquiry must be whether the evidence demonstrates that possessory interest in what had been the parties' common property had passed from both partners to one single occupant. 658 N.E.2d at 1104.

Similarly, courts in other jurisdictions have focused on the parties' separate residences when addressing the propriety of burglary convictions after a court has issued a no-contact order against a spouse or domestic partner who formerly lived in the burglarized home. See *People v. Johnson*, 906 P.2d 122, 125 (Colo.1995) (majority of states "have found that the uninvited entry of an estranged spouse into the residence of the other spouse constitutes an 'unlawful entry'"); *Parham v. State*, 79 Md.App. 152, 556 A.2d 280, 285 (1989) (affirming burglary when victim had thrown defendant out three weeks before the crime and de-

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fendant lived in a separate residence); *Hagedorn*, 679 N.W.2d at 671-72 (upholding burglary conviction where wife had repeatedly told defendant to stay away from their co-owned house, wife was living with another man, and defendant entered house without wife's permission).

¶ 33 In rejecting Stinton's argument that "the State's theory would improperly "elevate all violation of protection orders to burglaries," we noted:

*The court may specifically tailor a protection order to the petitioner's circumstances by including multiple provisions forbidding the respondent from a variety of misconduct toward the petitioner.* RCW 26.50.060; [*Spence v.*] *Kaminski*, 103 Wash.App. 325] 331, [12 P.3d 1030 (2000) ]. Thus, the respondent may violate a protection order by disobeying one or several of multiple provisions. See RCW 26.50.110(1) ("a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location") (emphasis added).

\*611 *Stinton's protection order contained two provisions prohibiting separate and distinct conduct toward McNeill. And the evidence of Stinton's harassing and threatening McNeill was separate and distinct from the evidence supporting his unlawful entry.*

*Stinton*, 121 Wash.App. at 575, 89 P.3d 717 (first and last emphasis added).

¶ 34 Here, in contrast, the court that issued the no-contact order did not specifically tailor the order to exclude Wilson from Sanders' residence or workplace. And, although it could easily have excluded Wilson from the residence simply by checking the box on the form and filling in the prohibited addresses, it did not do so. Thus, the no-contact order

provision prohibiting Wilson's contact with Sanders criminalized only personal contact between them; but it did not thereby criminalize, or transform into a burglary, Wilson's entry into his own home, even though he entered with criminal intent to assault and to harass Sanders.

¶ 35 Our Legislature has promulgated special statutes prohibiting and criminalizing assaultive conduct (see RCW 9A.36.021), violation of a no-contact order (RCW 9A.46.080), and assault in violation of a no-contact order (RCW 26.50.110). But in so doing, the Legislature did not also include in its statutory definition of burglary a person's entry into his own home, from which he had not been lawfully excluded, regardless of what crime he may intend to commit once inside.<sup>FN7</sup>

FN7. Our Legislature has not transformed into a burglary every crime a person commits inside his or her own home, absent proof of some additional element, such as violation of an order excluding the defendant from the home. For example, absent such additional element, neither a domestic violence assault nor a murder inside the defendant's own home would also constitute a burglary. Thus, our Legislature has avoided opening a Pandora's Box of myriad burglary prosecutions it did not contemplate including under RCW 9A.52.020.

\*\*152 ¶ 36 Although, as we said in *Stinton*, "residential burglary can be a crime of domestic violence," 121 Wash.App. at 577, 89 P.3d 717, the crime of domestic violence that Wilson committed here was not burglary. Unlike in *Stinton*, here, the State did \*612 not present evidence of all legislatively required elements of burglary, namely unlawful entry or remaining in the residence. RCW 9A.52.020(1)(b); RCW 9A.52.010(3).

#### c. Revocation of consent

¶ 37 The State further argues that when Sanders

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dialled 911, she implicitly revoked any permission she may have given Wilson to be in the residence. But the cases the State cite involve a home owned, possessed, or controlled by the victim, who, therefore, could unilaterally revoke consent for the abuser to remain present.

¶ 38 But here, as we note above, it is uncontroverted that Sanders did not have exclusive control over the home. On the contrary, it was Wilson's home, too. And although it was clearly criminal for him to assault her anywhere, his act in entering or remaining in his own home was not itself a criminal act. Thus, we reject the State's argument that once Sanders called the police, Wilson remained unlawfully for the purposes of the burglary statute.

¶ 39 Based on the facts on the record before us, we hold as a matter of law that Wilson could not have burglarized the 1123 East Park resident by entering and remaining unlawfully because it was his residence and neither a court order nor Sanders had lawfully excluded him from it. Thus, unlike in *Stinton*, here we affirm the trial court's dismissal of the burglary charge and conviction.

## II. OFFENDER SCORE-SAME CRIMINAL CONDUCT

[9] ¶ 40 The State next argues that the trial court erred in finding that Wilson's assault and harassment of Sanders constituted the same criminal conduct. We agree.

### A. Standard of Review

[10] ¶ 41 RCW 9.94A.589(1)(a) defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, \*613 and involve the same victim." All three factors must be present. *State v. Porter*, 133 Wash.2d 177, 181, 942 P.2d 974 (1997), cited in *State v. Price*, 103 Wash.App. 845, 14 P.3d 841 (2000), *review denied*, 143 Wash.2d 1014, 22 P.3d 803 (2001).

If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score. See Note, *The "Same Criminal Conduct" Exception of the Washington Sentencing Reform Act: Making the Punishment Fit the Crimes-State v. Collicott*, 112 Wash.2d 399, 771 P.2d 1137 (1989), 65 WASH. L.REV. 397, 402-03 (1990).

*State v. Lessley*, 118 Wash.2d 773, 778, 827 P.2d 996 (1992).

[11][12] ¶ 42 We construe RCW 9.94A.589(1)(a) narrowly to disallow most assertions of "same criminal conduct." *State v. Flake*, 76 Wash.App. 174, 180, 883 P.2d 341 (1994). Nonetheless, we will reverse a sentencing court's determination of same criminal conduct only when there is a "clear abuse of discretion or misapplication of the law." *State v. Elliott*, 114 Wash.2d 6, 17, 785 P.2d 440, *cert. denied*, 498 U.S. 838, 111 S.Ct. 110, 112 L.Ed.2d 80 (1990).

[13][14] ¶ 43 To decide whether two crimes involve the same criminal intent for purposes of determining "same criminal conduct," the court must examine and compare each statute underlying each crime to determine whether the required intents are the same or different for each crime. *State v. Hernandez*, 95 Wash.App. 480, 484, 976 P.2d 165 (1999). Two crimes do not contain the same criminal intent when the defendant's intent objectively changes from one crime to the other. *State v. King*, 113 Wash.App. 243, 295, 54 P.3d 1218 (2002), *review denied*, 149 Wash.2d 1015, 69 P.3d 874 (2003). Objective \*\*153 intent may be determined by examining whether one crime furthered the other or whether both crimes were a part of a recognizable scheme or plan. *State v. Lewis*, 115 Wash.2d 294, 302, 797 P.2d 1141 (1990). But where the second crime is "accompanied by a new objective 'intent,' " one crime can be said to have been completed before commencement of the second; therefore, the two crimes involved different criminal intents and they do not constitute the \*614 same criminal con-

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duct. *State v. Grantham*, 84 Wash.App. 854, 859, 932 P.2d 657 (1997).<sup>FN8</sup>

FN8. As we noted in *Grantham*, which involved sequential rapes of the same victim,

Grantham, upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. He chose the latter, forming a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous. The evidence also supports the trial court's conclusion that each act of sexual intercourse was complete in itself; one did not depend upon the other or further the other.

*Grantham*, 84 Wash.App. at 859, 932 P.2d 657.

## B. Criminal Intent

### 1. Trial Court Finding

¶ 44 At sentencing, the trial court evaluated Wilson's assault and harassment of Sanders. It ruled that (1) Wilson's conduct clearly involved the same victim, Sanders, at the same time and place; (2) thus, the only relevant inquiry was whether Wilson's criminal intent changed at any time during the episode such that it was not the "same" for both convictions; (3) Wilson entered the residence at 2:30 A.M. with intent to assault and harass Sanders; (4) Wilson's brief foray into the front yard did not change his original intent to harass and to assault Sanders; and (5) the two crimes also involved the same intent. It is uncontroverted that Wilson's assault and harassment of Sanders occurred at the same place, against the same victim, and within a relatively short, though not exactly the same, time span. We disagree, however, with the trial court's apparent finding of same criminal intent.

### 2. Separate criminal intents

¶ 45 The State argues, and we agree, that the record shows (1) Wilson entered the home with the intent to assault Sanders—he broke down the door, went immediately to the bedroom, pulled Sanders out of bed by her hair, and kicked her in the stomach; (2) when Sanders said that she was going to call the police, Wilson left the house to \*615 warn his friends outside; and (3) Wilson then reentered the house, this time with a newly formed and separate intent to harass Sanders verbally—he lifted a stick of wood from the broken door and threatened to kill Sanders.

¶ 46 The criminal intent for harassment requires that the defendant knowingly threaten (1) to cause bodily injury to another; (2) to cause physical damage to the property of another; (3) to subject another to physical confinement or restraint; or (4) maliciously to perform any act that places the person threatened in fear for her physical or emotional safety. RCW 9A.46.020. Assault in violation of a no-contact order requires that the defendant intentionally assault another (assault not amounting first or second degree) when a court has already issued a protective order restricting contact between the parties. RCW 26.50.110(4).

¶ 47 The record clearly shows that Wilson had separate criminal intents for the two acts—one for the assault (physically assaulted Sanders when he pulled her by the hair from the bed) and one for the harassment (threatened to kill Sanders while waving a stick of wood at her). Not only do these two crimes' respective statutes define different criminal intents, but also the two acts giving rise to the two criminal charges were separated in time, providing opportunity for completion of the assault and ending Wilson's assaultive intent, followed by a period of reflection and formation of a new, objective intent upon reentering the house to threaten Sanders and to harass her. *Grantham*, 84 Wash.App. at 858, 932 P.2d 657. Construing RCW 9.94A.589(1)(a) narrowly, as we must, to disallow most assertions of "same criminal conduct," we vacate the trial

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court's same-criminal-conduct finding. *Flake*, 76 Wash.App. at 180, 883 P.2d 341.

**\*\*154 ¶ 48** Accordingly, we affirm the trial court's dismissal of the burglary conviction, reverse the trial court's finding that the assault and harassment constituted the same **\*616** criminal conduct for offender score purposes, and remand for resentencing.

We concur: HOUGHTON, C.J., and VAN DEREN, J.

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