



**A. STATUS OF PETITIONER**

I, Rodney Cooley, DOC# 922445, Florence Correctional Center, P.O. Box 6900, Florence, Arizona 85232, apply for relief from my conviction and sentence. The Court of Appeals, Division II, affirmed my conviction of one count of assault in the first degree (Count 1) and two counts of assault in the second degree (Counts 2 and 3). The Washington Supreme Court denied review. The mandate issued April 21, 2006. I am currently incarcerated at Florence Correctional Center in Arizona pursuant to that sentence.

1. The court in which I was sentenced is Pierce County Superior Court, No. 03-1-04835-8.

2. I was found guilty and convicted, following a jury trial, of one count of assault in the first degree in violation of RCW 9A.36.011(1)(a), and two counts of assault in the second degree in violation of RCW 9A.36.021(c) and (f).

3. The Judgment was entered on January 23, 2004. Pierce County Superior Court Judge Bryan Chushcoff imposed the sentence. I was sentenced to 138 months on Count 1, 22 months on Count 2 with a 12-month deadly weapons enhancement, and 22 months on Count 3, for a total of 150 months confinement.

4. My lawyer in the Superior Court was Geoffrey C. Cross, No.

3089, 252 Broadway, Tacoma, WA 98402; (253) 272-8998.

5. I did appeal the decision of the trial court. I appealed to Division II, Washington Court of Appeals in Case No. 31354-5-II. My attorney on appeal was Leslie Stomsvik, WSBA No. 3071, 133 S. 51<sup>st</sup> St., Tacoma, WA 98408-7608; (253) 565-1011. The convictions were affirmed on the merits in a Ruling by the Commissioner, filed on March 8, 2005.

6. I filed a timely pro se Petition for Review with the Washington Supreme Court in Case No. 77400-5. On April 4, 2006, the Petition for Review was denied.

7. The mandate issued April 21, 2006.

8. This is the first time I have filed a personal restraint petition.

#### **B. GROUNDS FOR RELIEF**

I have the following reasons for this Court to grant me relief from the sentence described in Part A.

##### **First Ground**

This whole case was based on injuries observed after Janice Novotney, the alleged "victim," was forcibly removed from her home and examined under compulsion of a warrant. The warrant, however, provided no probable cause to believe that *she* had committed a crime – it was therefore completely illegal.

### **Second Ground**

The undefined crime of “torture” in one assault statute of which I was convicted makes it unconstitutionally vague.

### **Third Ground**

The evidence was insufficient to prove pain equivalent to torture.

### **Fourth Ground**

Following Blakely<sup>1</sup> and Recuenco<sup>2</sup>, the state cannot charge first-degree robbery premised on use of a deadly weapon as well as a firearm enhancement for use of that same weapon; the firearm enhancement should therefore be vacated.

### **Fifth Ground**

Trial counsel was ineffective in failing to advise me about the sentencing consequences of the charges, in failing to investigate, and in failing to file the motion to suppress.

### **Sixth Ground**

The state failed to disclose material, exculpatory, evidence casting doubt on Ms. Novotney’s ability to perceive, recall, and relate – that is, the fact that she was on state disability due to mental illness during the alleged crimes and during her trial testimony.

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<sup>1</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

<sup>2</sup> State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188, rev'd on other grounds, 126 S.Ct. 2456 (2006).

C. OATH OF PETITIONER

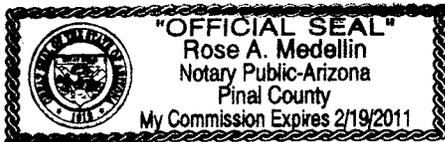
THE STATE OF ARIZONA, )  
 ) ss.  
COUNTY OF Pinal )

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

Dated this 29<sup>th</sup> day of March, 2007.

Rodney Cooley  
Rodney Cooley

SUBSCRIBED AND SWORN TO before me this 29<sup>th</sup> day of March, 2007.



Rose A. Medellin

Print Name: Rose A. Medellin

NOTARY PUBLIC in and for the State of Arizona, residing at:

Florence Correctional Center

My commission expires: 2/19/11

CERTIFICATE OF SERVICE

I certify that on the 10<sup>th</sup> day of April, 2007, a true and correct copy of the foregoing Personal Restraint Petition was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Pierce County Prosecutor  
Appellate Unit  
930 Tacoma Avenue South  
Tacoma WA 98402-2171

Rodney Cooley  
DOC# 922445, 6C #106  
Florence Correctional Center  
PO Box 6900  
Florence, AZ 85232

BY [Signature]  
STATE OF WASHINGTON  
CLERK OF SUPERIOR COURT  
COUNTY OF PIERCE  
STARTED IN PM 1:45  
COMPLETED

[Signature]  
Sheryl Gordon McCloud

ORIGINAL

NO. 36209-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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IN RE THE PERSONAL RESTRAINT OF

Rodney Cooley,

Petitioner.

---

DECLARATION OF YVONNE HAWKEY-BAILEY IN SUPPORT OF  
PERSONAL RESTRAINT PETITION

---

Sheryl Gordon McCloud  
710 Cherry St.  
Seattle, WA 98104-1925  
(206) 224-8777  
Attorney for Petitioner,  
Rodney Cooley

## DECLARATION OF YVONNE HAWKEY-BAILEY

I, Yvonne Hawkey-Bailey, do state:

1. I have known Janice Novotney since she was 13 years old. I also know her family.

2. I have known Rod Cooley for about the same amount of time; he is friends with my brother.

3. I know that Janice had a hard life, an abusive first marriage, and that she developed a drug addict. I know that she lost her job because of her drug habit.

4. I know that Janice was going through an especially hard time with drugs in 2003 -- she was binging on drugs during most of that year. Janice acted crazy during that time.

5. I have never seen Rod act violently, in any way, towards Janice.

6. I have, however, seen Janice act violently towards Rod. I have seen Janice fly into a rage, perhaps from lack of drugs. I have seen bite marks and cut marks on Rod, that I was told were from Janice.

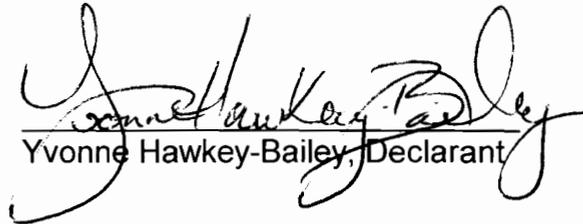
7. I recall speaking to Rod Cooley's trial lawyer just once, on the telephone, before the trial. I answered his questions,

but he did not ask me anything about the abuse I had seen in their relationship, that is, Janice's abuse of Rod.

8. I was available and willing to testify at the time of the trial, but I was never contacted for anyone.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

4/11/07  
Date/Place

  
Yvonne Hawkey-Bailey, Declarant

COLEMAN  
STANLEY  
STATE OF WASHINGTON  
BY: [Signature]

ORIGINAL

NO. 36209-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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IN RE THE PERSONAL RESTRAINT OF  
Rodney Cooley,  
Petitioner.

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DECLARATION OF RODNEY COOLEY IN SUPPORT OF  
PERSONAL RESTRAINT PETITION

---

Sheryl Gordon McCloud  
710 Cherry St.  
Seattle, WA 98104-1925  
(206) 224-8777  
Attorney for Petitioner,  
Rodney Cooley

## DECLARATION OF RODNEY COOLEY

I, Rodney Cooley, do state:

1. During my trial, after Janice Novotney and Theresa Gorham testified, the state did offer me a plea agreement. They offered to reduce all the charges to one count of third-degree assault, and to recommend a sentence of credit for time served. Since I was told that the sentencing range for that crime was 1-3 months, and I had been in jail for two months, I believed that if I accepted the deal, I would be out almost immediately.

2. My lawyer, Geoffrey Cross, never told me that I was facing 14 years if I lost at trial, even if I won on a few counts and lost on the others (as I ended up doing). He never told me that I could end up serving even 12 ½ years, the sentence I received.

3. Instead, before trial, Mr. Cross advised me all of the charges would be totally rejected – either dismissed by the court, or with acquittals by the jury. He told me I would serve no sentence at all.

4. Because I believed Mr. Cross' estimate of my risk, I rejected the plea offer.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

4/20/07  
Date/Place

  
Rodney Cooley, Declarant

04/11/17  
07:00 PM  
STATE OF  
BY \_\_\_\_\_  
RECEIVED

NO. 36209-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

IN RE THE PERSONAL RESTRAINT OF  
  
Rodney Cooley,  
  
Petitioner.

---

SECOND DECLARATION  
OF RODNEY COOLEY IN SUPPORT OF  
PERSONAL RESTRAINT PETITION

---

Sheryl Gordon McCloud  
710 Cherry St.  
Seattle, WA 98104-1925  
(206) 224-8777  
Attorney for Petitioner,  
Rodney Cooley

ORIGINAL

## DECLARATION OF RODNEY COOLEY

I, Rodney Cooley, do state:

1. I rejected a plea agreement offered by the state during the trial in my case. As my original declaration states, that offer was for the state to dismiss most of the charges, in exchange for my plea of guilty to one count of third-degree assault; in addition, that plea offer contained the provision that the state would recommend a sentence of credit for time served. I was also advised that the sentencing range for that third-degree assault crime was 1-3 months, so I believed that if I accepted the deal, I would be out almost immediately.

2. I rejected the deal because I thought I could not do much worse after trial. As my first Declaration states, my defense lawyer never advised me that I faced 14 years, or 12 ½ years, or anything like that. He advised me that the maximum sentence I could receive would not be much more than the time that I had spent in jail pre-trial.

3. I believe that I am innocent of all the crimes charged. However, I also make rational decisions. If my lawyer had told me the truth about my sentencing exposure – if he had told me that I faced up to 14 years in prison if convicted on all charges and could

easily get such a sentence as a standard range sentence – then I certainly would have taken the plea offer. Under the plea offer, I would walk out of jail immediately. If I had been given proper advice about the true sentencing maximum and sentencing guidelines exposure, such a deal would have seemed much more appealing.

4. If I had known about the real sentencing exposure I faced; if I had known that I could plead guilty under Alford without admitting guilty; then I would have taken the deal. As I said in the original declaration, “Because I believed Mr. Cross’ estimate of my risk, I rejected the plea offer.” If I had understood what my real risk was, I would not have rejected that plea offer.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Oct of 2007  
Date/Place  
SAYRE OKLA HBK

  
\_\_\_\_\_  
Rodney Cooley, Declarant

**CERTIFICATE OF SERVICE**

I certify that on the 11<sup>th</sup> day of October, 2007, true and correct copy of the Second Declaration of Rodney Cooley in Support of Personal Restraint Petition were served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Alicia Burton, Deputy Prosecutor  
Pierce County Prosecutor's Office  
Appellate Unit  
930 Tacoma Avenue South  
Tacoma WA 98402-2171

Rodney Cooley  
DOC# 922445  
N.F.C.F.  
1605 E. Main  
Sayre, OK 73662

  
\_\_\_\_\_  
Sheryl Gordon McCloud

STATE OF WASHINGTON  
BY   
10/11/07  
Sheryl Gordon McCloud



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## **ASSIGNMENTS OF ERROR**

1. The trial court erred in failing to suppress all evidence derived directly and indirectly from the unlawful entry into Mr. Cooley's home and seizure of Ms. Novotney.

2. The state erred in charging, and the trial court erred in entering Judgment on, the assault-causing-pain-equivalent-to-torture statute, RCW 9A.36.021(f).

3. The state erred in charging, and the trial court erred in entering Judgment on, the deadly weapon enhancement.

4. Trial counsel erred in failing to investigate and present critical evidence, in failing to advise Mr. Cooley of the sentencing consequences of the charges, and in failing to move to suppress.

5. The state erred in failing to disclose material, exculpatory evidence.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Whether seizing Ms. Novotney based on a warrant that established probable cause to believe someone else committed a crime – but not her – violated U.S. Const. amend. IV, Wash. Const. art. I, § 7, state statute, and CrR 4.10(a), and necessitated suppression of all evidence directly and indirectly derived from that seizure?

2(a). Whether the assault statute under which Mr. Cooley was convicted, RCW 9A.36.021(f), requiring proof of pain equivalent to “torture,” is unconstitutionally vague in violation of U.S. Const. amends. VII, XIV and Wash. Const. art. I, §§ 3, 14, 22?

2(b). Whether the evidence was insufficient to prove “pain equivalent to that produced by torture,” RCW 9A.36.021(f), rather than bruises, threats or even indignities, under accepted definitions of torture, in violation of U.S. Const. amend. XIV, Wash. Const. art. I, §§ 3, 14, 22?

3. Following Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188, rev'd on other grounds, 126 S.Ct. 2456 (2006) – which held that any fact increasing the statutory maximum penalty is akin to an element of the crime – does the state violate double jeopardy protections by charging first-degree robbery based on a deadly weapon, plus a firearm enhancement for use of that same weapon?

4. Whether trial counsel was ineffective for failing to advise Mr. Cooley of the sentencing consequences of his charges; for failing to investigate critical witnesses and other evidence; and for failing to move to suppress evidence gained as a result of the

unlawful entry into his home and seizure of Ms. Novotney?

5. Whether the state violates its Brady<sup>1</sup> obligations by failing to disclose that its key witness – alleged victim Janice Novotney – was on state disability for mental illness at the time of her testimony, thus casting doubt on her ability to perceive, recall, and testify accurately?

### **STATEMENT OF THE CASE**

Mr. Cooley was charged with five felony crimes of violence against Janice Novotney. See Amended Information (Appendix A). He was ultimately convicted, after a jury trial, of first-degree assault on one date in 2003, second-degree assault on a different occasion in 2003 while armed with a deadly weapon (based on alleged use of a beer bottle), and second-degree assault (based on a lengthy alleged period of abuse in 2003).

The state's complaining witness – Janice Novotney – and the defendant – Rod Cooley – both denied that any crimes occurred. 12/8/03 VRP:86-197 (Novotney testimony denying all charges); 12/11/03 VRP:519-577 (Rod Cooley testimony denying all charges). Instead, the state used a series of witnesses to impeach Ms. Novotney, and presented photographs and testimony

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<sup>1</sup> Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

about bruises on her body. The key witness was a methamphetamine addict who had been under the influence at the time of the alleged acts. E.g., 12/9/03 VRP:226-309 (Theresa Gorham).

With respect to Count 1, first-degree assault, the state presented photographs and testimony regarding bruising on Janice's neck. 12/8/03 VRP:186 (reports of Dr. Kim and Dr. Dahlgren); 12/10/03 VRP:407-34 (testimony of officers who seized Janice against her will). The photographs and observations came about as a result of law enforcement officers seizing Janice, and forcibly subjecting her to medical observations, in response to a warrant showing no probable cause to believe that she had done anything wrong – only probable cause to believe that someone else had. See 12/4/03 VRP (of 3.5 hearing).

Then, Dr. Howard, a pathologist employed by the Pierce County Medical Examiner, testified about the significance of those bruises. He testified that the amount of force necessary to restrict blood flow in the arteries leading to the brain and the amount of force necessary to collapse the airway of a person being manually strangled. 12/8/03 VRP 134-139. He explained that five to fifteen seconds of compression of blood flow could cause loss of

consciousness, and that one to three minutes of disturbance could cause permanent brain damage. 12/8/03 VRP 141-46. Dr. Howard testified that he was unable to point to any injury to the arteries or to Ms. Novotney's larynx from examining photographs of her neck taken at the time of the incident. Id., VRP 165-68. He opined only that the images in the photograph were consistent with the sort of injuries which *might* occur if an individual *were* strangled. Id., VRP 170.

Janice Novotney herself said that she did not recall any statements that she might have made to the emergency room doctor. 12/8/03 VRP 189. She said that she had been drinking and had consumed about six beers over three hours on the day of the incident (12/8/03 VRP 178) and that she used methamphetamines on a daily basis. 12/8/03 VRP 180. She also indicated that one of the other principal witnesses for the state, Theresa Gorham, was her main supplier of illegal drugs. Id., VRP 215.

A police officer (Deputy Lynelle Kern) was allowed to testify about statements made by Ms. Novotney at the time Mr. Cooley was arrested, some of which were relevant to this Count 1. This deputy indicated that Janice said that Rod Cooley had slapped her, kicked her and had put his hands around her throat and picked up

her. 12/11/03 VRP 463. The deputy also testified that Janice had said that she had not lost consciousness but that she could not breathe while was being choked. 12/11/03 VRP 464.

The second-degree assault conviction involving the deadly weapon (Count 2) was based on an allegation that Rod Cooley hit Janice's leg with a beer bottle. The only testimony that this event occurred came from Theresa Gorham. She said that Mr. Cooley broke a beer bottle across Novotney's knee. 12/9/03 VRP 240. Gorham then indicated that Ms. Novotney did not have any cut or injury to her leg nor did she have any difficulty in walking after the beer bottle was broken across her leg. Id., VRP 243. Both Ms. Novotney and Mr. Cooley denied that the beer bottle incident occurred. 12/11/03 VRP 542.

The other second-degree assault conviction (Count 3) was based on a charge of continuing abuse, producing "pain equivalent to that produced by torture" from January 1, 2003 to October of 2003. This was based primarily on testimony from Janice's methamphetamine supplier and cohort. E.g., 12/11/03 VRP:479-491 (testimony of Techla Fisch about statements Janice allegedly made); 12/9/03 VRP:226-277 (testimony of Theresa Gorham to same effect).

Purported expert witness April Gerlock then testified that she was a nurse practitioner and that she was familiar with domestic violence in general. Gerlock indicated that frequently, abusers will make the same claim that Rod Cooley made here, that is, that the victim is an alcoholic or a drug user – to provide some justification for violence. 12/10/03 VRP 376. Gerlock also indicated that abuse victims sometimes recant. Id., VRP 384. Gerlock admitted that she had never met Ms. Novotney and that she was not a licensed physician. Id., VRP 396.

The court dismissed the rape and harassment charges due to lack of evidence. 12/11/03 VRP:515-16. The jury convicted on the remaining assault counts.

### ARGUMENT

I. THIS WHOLE CASE WAS BASED ON INJURIES OBSERVED AFTER JANICE NOVOTNEY, THE ALLEGED “VICTIM,” WAS FORCIBLY REMOVED FROM HER HOME AND EXAMINED UNDER COMPULSION OF A WARRANT. THE WARRANT, HOWEVER, PROVIDED NO PROBABLE CAUSE TO BELIEVE THAT *SHE* HAD COMMITTED A CRIME – IT WAS THEREFORE COMPLETELY ILLEGAL.

A. The Affidavit in Support of the Warrant to “Seize” Janice Novotney Shows That There Was No Probable Cause to Suspect Her of Any Wrongdoing – They Suspected Someone Else, But Issued a Warrant to Seize Her.

This whole case started when the deputies obtained a

warrant to “seize” Janice Novotney. The affidavit in support of that warrant is attached as Appendix B, and the warrant itself is attached as Appendix C.

It is clear that there was no “probable cause” to believe that Janice Novotney herself committed any crime. In fact, when the officers went into the Novotney-Cooley home, they assured Ms. Novotney that *she* was not in trouble. E.g., 12/10/03 VRP:407-11.

Instead, the affidavit in support of the application for the search warrant, and the search warrant itself, identify Janice as the victim of repeated assaults. The only probable cause is probable cause to believe that someone else committed the crime, yet the warrant issued to seize Janice.

**B. This is Unconstitutional. An Affidavit Must Provide Probable Cause to Believe the Person to Be “Seized” Committed a Crime, Not Probable Cause to Believe that Someone Else Did.**

This is illegal under the Fourth Amendment to the U.S. Constitution, and under Art. 1, § 7 of the Washington Constitution.

A *search* warrant can issue, on probable cause, to seize *objects and things*. U.S. Const. amend IV; Zurcher v. Stanford Daily, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).

A *seizure* warrant can issue, on probable cause, to seize a

*person* – if there is probable cause to believe that the person, himself or herself, committed a crime. Not probable cause to believe someone else has committed a crime. In re Armed Robbery, Albertson's On August 31, 1981, 99 Wn.2d 106, 659 P.2d 1092 (1983) (individual may not be seized in any manner – not even forced to participate in a lineup – unless there is probable cause to believe that he or she himself or herself has committed the offense under investigation; based on Fourth Amendment and art. 1, § 7); State v. Klinker, 85 Wn.2d 509, 521, 537 P.2d 268 (1975) (probable cause boils down to “a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed the crime”). See also State v. Fisher, 145 Wn.2d 209, 35 P.3d 366 (2001) (probable cause means a determination of there is reason to believe that the person to be seized has himself committed the crime).

Thus, evidence or things can be seized if there is probable cause to believe that it relates to a crime, but a person is not a “thing” – hence a person cannot be seized under the standard for things. Zurcher v. Stanford Daily, 436 U.S. 547, 554-55 (distinguishing prerequisites for warrants to search for “things” and to seize “persons”: “In situations where the state does not seek to

seize 'persons' but only those 'things' which there is probable cause to believe are located on the place to be searched, there is no apparent basis in the language of the [Fourth] Amendment for also imposing the requirements for a valid arrest – probable cause to believe that the third party is implicated in the crime.”); *id.* (“Search warrants are not directed at persons; they authorize the search of ‘place[s]’ and the seizure of ‘things,’ and as a constitutional matter they need not even name the person from whom the things will be seized.”) (citing *United States v. Kahn*, 415 U.S. 143, 155 n.15, 94 S.Ct. 977, 984, 39 L.Ed.2d 225 (1974)).

There is no provision in state or federal law, or in the state or federal constitutions, allowing a *search* warrant to issue to seize a person, rather than a thing. And there is no provision in state or federal law, or in the state or federal constitutions, allowing a seizure or arrest warrant to issue except upon probable cause to believe that the very person to whom it is directed has committed the offense under investigation.

**C. This Also Violates State Statute and Court Rule. The Only Possible Statutory Authority for Issuing a Warrant to Seize an Uncooperative Person is the Material Witness Warrant Statute, and That Does Not Apply Here.**

There is no statutory authority to issue a warrant to seize a

person for whom there is no probable cause, either.

It is true that there is a provision in state law allowing issuance of a “material witness warrant.” That is a warrant to arrest a person who is not suspected of having committed a crime, but who needs to be brought in to court to give testimony about someone else’s suspected crime.

There are very specific prerequisites to issuance of such a material witness warrant, however. Under CrR 4.10(a), a material witness warrant can issue only for witness “testimony.”<sup>2</sup> In addition, a witness’s refusal to obey a lawfully issued subpoena or other court order, or the likelihood that that will occur, is a necessary prerequisite to issuance of a material witness warrant. *Id.*

Neither prerequisite is satisfied here. The warrant issued for Janice Novotney did not seek testimony. Nor had she ever disobeyed any lawfully issued process of the court to testify anywhere. And there was never any showing that she would disobey such a lawfully issued subpoena. Those prerequisites were simply not addressed anywhere in the warrant affidavit or warrant that was actually issued in this case.

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<sup>2</sup> The testimony must also be material. *State v. Hartley*, 51 Wn. App. 442, 446, 754 P.2d 131 (1988); *City of Bellevue v. Vigil*, 66 Wn. App. 891, 895-96, 833 P.2d 445 (1992).

There is no other procedure in state statute or court rules loosening the probable cause requirements for the seizure of a person. And even if there were, our state Supreme Court has conclusively rejected the notion that such a state statute or court rule, which loosens up probable cause requirements to *seize* a person, could withstand constitutional scrutiny. In re Armed Robbery, Albertson's On August 31, 1981, 99 Wn.2d 106, 111 (rejecting approach adopted in certain other jurisdictions that rules "which authorize the seizure of an individual (on less than probable cause) to obtain physical evidence, such as an eyewitness identification," are constitutional, and noting that Washington has not adopted such rules anyway).

**D. All Fruits of the Unlawful Seizure Should Have Been Suppressed.**

Since the warrant was improperly issued, all evidence gained as a result of that warrant, and all of the secondarily-seized evidence derived from that primary evidence, should have been suppressed.

The first set of evidence that should have been suppressed under this analysis were the initial statements from Ms. Novotney – identifying defendant Rod Cooley as the person who inflicted

bruises on her – following her seizure.<sup>3</sup> They were the product of the functional equivalent of an arrest without probable cause, so those statements were inadmissible. Subsequent statements obtained from Ms. Novotney – and the views and photographs of Ms. Novotney's neck bruises which occurred at the compelled medical examination occurring during her seizure<sup>4</sup> – should have been suppressed as well, whether they are considered the primary or secondary fruits of this illegal seizure.<sup>5</sup>

The Novotney statements, testimony about her bruises, and the photographs of those bruises, formed the basis for the most serious charge against her, that is, Count I, charging first-degree

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<sup>3</sup> E.g., 12/11/03 VRP: 449-72 (testimony of Deputy Kern regarding accusatory statements made by Janice Novotney when they forcibly seized her to photograph her bruises).

<sup>4</sup> Copies of much of that evidence – the notes from the medical examination, the photographs from that examination – are attached as Appendix D. The doctors' reports were admitted by stipulation at 12/8/03 VRP:186.

<sup>5</sup> Brown v. Illinois, 422 U.S. 590, 603, 95 S. Ct. 2254, 45 L.Ed.2d 416 (1975) (confession "obtained by exploitation of an illegal arrest" must be suppressed); Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); United States v. Shaw, 464 F.3d 615, 631 (6<sup>th</sup> Cir. 2006), (defendant detained and questioned without probable cause in child sex abuse case; confessions made during detention must therefore be suppressed, since they were "not sufficiently voluntary to eliminate the taint of the illegality of his arrest"); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); State v. Avila-Avina, 99 Wn. App. 9, 13-14, 991 P.2d 720 (2000) ("When police obtain physical evidence or a defendant's confession as the direct result of an unlawful seizure, the evidence is 'tainted' by the illegality and must be excluded").

assault which resulted in the sentence of 138 months. They were therefore critical and outcome-determinative evidence.

Since this is an error of constitutional magnitude, the state cannot prove that it is harmless unless it shows that the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. See State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

The state cannot make such a showing in this case. The statements made by Ms. Novotney to the arresting deputies, and then to the doctor, were the most incriminating evidence in the case. The photographs of the bruises resulted from that seizure. The observations of those bruises resulted from that seizure. The observations of Mr. Cooley's supposed manner of acting in a threatening way towards Ms. Novotney resulted from that seizure. And, finally, Mr. Cooley's statements to Janice Novotney, at the time that the deputies entered your home, resulted from that seizure. Those were the most incriminating pieces of evidence introduced at trial on the most serious count, that is, Count I.<sup>6</sup>

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<sup>6</sup> We note that there was no claim of imminent, impending injury or exigent circumstances – just a warrant issued to seize Janice Novotney for evidentiary purposes. Cf. Brigham City, Utah v. Stewart, \_\_\_ U.S. \_\_\_, 126 S.Ct. 1943, 1947, 164 L.Ed.2d 650 (2006).

E. **Mr. Cooley Can Raise This Claim, Because the Warrant Violated His Right to Privacy in His Own Home.**

The only possible question that might arise is whether Mr. Cooley can raise this issue, since he was not the one who was improperly seized – Janice Novotney was.

The general rule is that Fourth Amendment rights are personal rights, and they can only be asserted by the person whose rights were invaded – not by someone else. State v. Goucher, 124 Wn.2d 778, 787, 881 P.2d 210 (1994). As the state Supreme Court has explained, “[a] defendant may challenge a search or seizure only if he ... has a personal Fourth Amendment *privacy interest in the area searched or the property seized*”; “Presence alone is not sufficient.” State v. Boot, 81 Wn. App. 546, 551, 915 P.2d 592 (1996) (citation omitted) (emphasis added).

But when the deputies were serving the warrant to seize Ms. Novotney, they had to enter the home that she shared with Rod Cooley. Since they entered the home that they shared – without permission from either of them and only on the strength of that

warrant – Mr. Cooley’s own “Fourth Amendment privacy interest in the area searched or the property seized” was invaded.<sup>7</sup>

It is likely that Mr. Cooley could raise this challenge even under an *analogy* to Washington’s “automatic standing” rule.

In Washington, a defendant has “automatic standing” to challenge the legality of a seizure ‘even though he or she could not technically have a privacy interest in such property.’ State v. Simpson, 95 Wn.2d 170, 175, 622 P.2d 1199 (1980) (affirming automatic standing under Washington Constitution article 1, section 7, notwithstanding the United States Supreme Court’s decision to abolish the automatic standing rule under the Fourth Amendment .... Evans meets both parts of the test for automatic standing: (1) possession was an “essential’ element of the offense,” and (2) he “was in possession of the contraband at the time of the contested search or seizure.” State v. Simpson, 95 Wn.2d at 181 (describing two part test).

State v. Evans, 159 Wn.2d 402, 406-07, 150 P.3d 105 (2007)

(supporting citations omitted).

That rule has never, to our knowledge, been applied to one person’s challenge to the seizure of another *person* as if they were

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<sup>7</sup> It is clear that the owner of a home has a privacy interest in that home. In fact, without exigent circumstances or consent law enforcement officers cannot even search for the subject of an arrest warrant (like the one for Janice Novotney) in the home of a third party, without search warrant for that home. Steagald v. United States, 451 U.S. 204, 216, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981). And a co-owner can effectively bar entry into the home even if (contrary to the present case) the other owner consents. Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). Thus, Mr. Cooley clearly had a privacy interest of his own that was invaded by this police conduct. In fact, he himself was arrested – without a warrant – in his own home, as a result of this illegal police entry and seizure. It is hard to imagine a more drastic invasion of privacy than that.

a piece of property. But that is probably best explained by the fact that this never happens – the state does not usually treat people as if they were “things.”

But the state did so in this case. If the state is to assert that Ms. Novotney can be treated as property, then the analogy should extend to the doctrine of automatic standing; and under that analogy, both prerequisites to automatic standing doctrine should be considered satisfied: “possession” or having Ms. Novotney within his clutches was an essential element of the charged offenses, and Mr. Cooley was accused of having Ms. Novotney in his clutches and subject to his abuse at the time of her seizure.

**II. THE UNDEFINED CRIME OF “TORTURE” IN ONE ASSAULT STATUTE OF WHICH MR. COOLEY WAS CONVICTED MAKES IT UNCONSTITUTIONALLY VAGUE.**

**A. The Instruction Based on “Torture.”**

Count 2 charged Mr. Cooley with assault by torture. That statute provides in relevant part:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

\* \* \*

(f) *Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.*

RCW 9A.36.021(f) (emphasis added).

The Information charged that this crime occurred from January 1, 2003 to October 9, 2003, as follows:

... under circumstances not amount to assault in the first degree, knowingly inflict bodily harm upon Janice Novotny, which by design causes such pain or agony as to be the equivalent of that produced by torture, to wit: repeatedly slap and/or punch and/or hit with a broom handle and/or pin to the ground and urinate on, contrary to RCW 9A.36.021(1)(f), a domestic violence act as defined in RCW 10.99.020, and against the peace and dignity of the State of Washington.

Amended Information (12/11/03), Appendix A.

Instruction No. 24 covered the torture count, and it defined the crime of assault in the second degree by torture as follows:

#### INSTRUCTION NO. 24

A person commits the crime of Assault in The Second Degree as charged in Count Three when he or she knowingly inflicts bodily harm which by design causes such pain and agony as to be the equivalent of that produced by torture.

The "to convict" instruction concerning this assault charge then states:

#### INSTRUCTION NO. 28

To convict the defendant of the crime of Assault in The Second Degree as charged in Count

Three, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period between and including the 1<sup>st</sup> day of January, 2003, and the 9<sup>th</sup> day of October, 2003, the defendant knowingly inflicted bodily harm upon Janice Novotney;

(2) That the bodily harm, by design, caused such pain or agony as to be the equivalent of that produced by torture; and

(3) That the acts occurred in the State of Washington. ...

**B. Definitions of Pain Equivalent to that Produced by Torture Vary Widely.**

There is no jury instruction, however, defining the word “torture” that is used in these definitional and elements instructions.

But it is not obvious what “torture” means without such an instruction.

This has been made most clear over the last few years, with the debate over the meaning of “torture” at Abhu Graib Prison and Guantanamo Bay.

For example, the U.S. government apparently defines torture extremely narrowly, as a review of the Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations 6 March 2003 (hereinafter “Report”), the “secret” torture memo produced at

the Pentagon, leaked by THE WALL STREET JOURNAL on June 8, 2004, and available at [www.isthatlegal.org/mil\\_torture.pdf](http://www.isthatlegal.org/mil_torture.pdf), shows.

That Report has a detailed discussion of the United States' narrow interpretation of the word "torture" – a discussion that shows how difficult it is to define that word, and showing that it does not include even many continuing assaults. Under that definition, the allegations and evidence concerning Count 2 would certainly not count as torture, or pain equivalent to torture.

The dictionary definitions do not help clarify the definition of torture that might apply here, either. The dictionary carries one definition of torture as "severe pain." WEBSTER'S NEW WORLD DICTIONARY (2<sup>nd</sup> College Ed. 1978), p. 1502. But dictionaries also define torture as "any severe physical *or mental pain*," in the alternative, thus indicating that torture might exist even if there were no physical pain at all. *Id.* (emphasis added). See also Garner, BLACK'S LAW DICTIONARY (7<sup>th</sup> ed. 1999) (torture defined as "infliction of intense pain to the body *or mind* ...") (emphasis added).

The Code of Federal Regulations also define torture as including mental pain without physical pain. E.g., 8 CFR § 208.18(a)(1). Those regulations recognize that much pain may be caused by things that are awful, cause degradation and punishment

and harm, but do not amount to torture: "Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." 8 CFR § 208.18(a)(2).

The courts have widely varying definitions of the amount of pain that is equivalent to that produced by torture, also. The Supreme Court recognized this in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), in which concurring Justice Marshall went into the reasons that the words used to define the aggravating factors in that case were vague. He honed in on the word "torture," and explained: "The Georgia court has given an extraordinarily broad meaning to the word "torture." "Under that court's view, 'torture' may be present *whenever the victim suffered pain or anticipated the prospect of death*. See Campbell v. State, 240 S.E.2d 828 (Ga. 1977), cert. denied, 439 U.S. 882 (1978); Blake v. State, 236 S.E.2d 637 (Ga.), cert. denied, 434 U.S. 960 (1977); Banks v. State, 227 S.E.2d 380 (Ga. 1976), cert. denied, 430 U.S. 975 (1977)." Godfrey v. Georgia, 446 U.S. 420, 441 & n.12 (emphasis added). See also Romano v. Gibson, 239 F.3d 1156, 1176 (10th Cir.), cert. denied, 534 U.S. 1046 (2001) (collecting cases watering down the meaning of "torture"); Fluke v.

State, 14 P.3d 565, 568 & n. 9 (Okla. Crim. App. 2000) (evidence that victim was aware of attack is sufficient to show torture, citing cases).

These various dictionary definitions and court decisions, then, construe the pain that is produced by torture in very different ways. They range from extremely severe physical pain, to *any* pain if death occurs or is contemplated (see Godfrey v. Georgia, 446 U.S. 420, 441), to no physical pain at all but mental anguish (see BLACK'S LAW DICTIONARY, supra), to rape of a relative without additional acts of cruelty to the victim (see Zubeda v. Ashcroft, 333 F.3d at 472-73 (3<sup>rd</sup> Cir. 2003)). Even the CFR's recognize that harmful actions can be severely hurtful, degrading, and punitive, without fitting within the definition of torture.<sup>8</sup>

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<sup>8</sup> Amnesty International (AI) – a leading non-governmental organization with recognized expertise concerning torture prevention – recognizes that substandard and overcrowded prison conditions that are damaging to one's physical or mental well-being constitute torture – even if they do not inflict agonizing pain. An AI press release explains:

However torture does not only occur in custody: around the world, *great numbers of prisoners are held in conditions which are damaging to their physical and mental well-being and can constitute threats to health and life.* Conditions, such as overcrowding, poor sanitation, lack of food and medicines and denial of contact with families and friends, fall short of UN standards for the treatment of detainees and prisoners. *Singly or in combination, the worst conditions can constitute ill treatment or even torture.* Between 1997 and 2000 Amnesty International received reports of cruel, inhuman or degrading conditions of detention in 90 countries; such conditions were widespread in

Thus, it cannot be said that the amount of pain equivalent to that produced by torture is self-evident. Apparently, it differs from one context to the next.

**C. Courts Therefore Uphold Use of the Word "Torture" When It is Defined.**

The amount of pain meant by the word "torture" is, therefore, vague, ambiguous, and dependent upon context.

Hence, it is not surprising that courts construing criminal statutes using the word "torture" hold that "torture" must be sufficiently defined by trial court instructions, or else the word can be unconstitutionally vague. Thus, in Pursell v. Horn, 187 F. Supp. 2d 260 (W.D. Pa. 2002), the court granted a writ of habeas corpus and reversed the death sentence because the only aggravating factor in that case – "torture" – was not defined by state statute, and not adequately defined by jury instructions.

In fact, decisions upholding use of the word "torture" in instructions to the jury have done so because "torture" was restrictively defined, either for the jury or by controlling state law, so

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over 50 countries. People confined in institutions for the mentally disabled and institutions for people with other forms of illness or disability are also at risk of torture or ill treatment.

<http://www.amnestyusa.org/news/2003/world06262003.html>; News Release, June 26, 2003 (emphasis added).

that its meaning was made clear. In Godfrey v. Georgia, 446 U.S. 420, for example, the plurality ruled that the aggravating factor elevating the penalty for that murder to death – a factor depending on the word “torture” – was unconstitutionally vague. The Supreme Court explained that in earlier decisions interpreting the aggravating factor, the Georgia Supreme Court had held that the aggravating factor was limited in part by construction of the word “torture” “*in pari materia* with ‘aggravated battery’ so as to require evidence of serious physical abuse of the victim before death.” Id., 446 U.S. 420, 431. The Supreme Court concluded that since the application of the aggravating factor in the case before it had not been so limited, the aggravating factor was vague.

Similarly, in the only constitutional challenge to the assault-causing-pain-equivalent-to-torture statute that we have located in this state, the appellate court concluded that the use of the word “torture” in that case was not unconstitutionally vague – *because the trial court had defined the word torture for the jury*. State v. Brown, 60 Wn. App. 60, 65, 802 P.2d 803 (1990), review denied, 116 Wn.2d 1025 (1991), overruled on other grounds, State v. Chadderton, 119 Wn.2d 390 (1992) (“the court’s instructions defined the term as ‘the infliction of severe or intense pain as punishment or coercion, or for

sheer cruelty.’ Instruction 9. The jury was not left to speculate as to the meaning of this term ...”).

It is true that the appellate court in the 1990 State v. Brown decision went on to state that the word “torture” had a generally accepted meaning and hence was not unconstitutionally vague for that reason.

But that was not the holding. The only holding of that case is that the word “torture” was adequately defined.

Further, that decision was issued before authoritative U.S. government documents had endorsed such variable definitions of torture – some stating that even infliction of severe pain does not rise to the level of torture. For example, the Bybee memo – a formal legal opinion of the Office of Legal Counsel interpreting the Convention Against Torture – “defines torture so narrowly that only activities resulting in ‘death, organ failure or the permanent impairment of a significant body function’ qualify.” John W. Dean, The Torture Memo by Judge Jay S. Bybee That Haunted Alberto Gonzales’s Confirmation Hearings (Jan. 14, 2005), <http://writ.news.findlaw.com/dean/20050114.html>.

Other courts have ruled that, where the jury must find “torture,” the failure to provide a definition of this word *does* render

the statute unconstitutionally vague. For example, in Houston v. Dutton, 50 F.3d 381 (6th Cir.), cert. denied, 515 U.S. 905 (1995), the court found that the definitions of “heinous,” “atrocious,” and “cruel” in death penalty aggravating factors submitted to the jury were unconstitutionally vague, because the way that they were defined – as involving “torture or depravity of mind” – did not cure their problem of vagueness. Indeed, the state conceded that this instruction defining one vague phrase (“heinous, atrocious, or cruel”) with another including the word “torture” was still unconstitutionally vague. Id., 50 F.3d at 382-87.

This leads to the conclusion that the word “torture” is not unconstitutionally vague *in cases where it is defined* for the jury. At least the same must be said of the element of pain equivalent to that inflicted by torture, the element at issue here – since it requires a single accepted meaning of not just torture, but its physical pain.

**D. Neither “Torture” Nor the Pain That is Equivalent to Torture Was Defined in Mr. Cooley’s Case.**

In this case, however, neither “torture” nor the amount of pain that is “equivalent” to that produced by torture was defined for the jury. Nevertheless, this was a critical element of the “to convict” instruction.

In this situation, where the trial court failed to provide the definitional instruction upon which the court in State v. Brown hung its hat, the word – and the to convict instruction – must be considered unconstitutionally vague in violation of the right to a fair trial and due process of law, U.S. Const. amend. XIV; Wash. Const. art. I, §§ 3, 14 and 22. City of Sumner v. Walsh, 148 Wn.2d 490, 496, 61 P.3d 1111 (2003) (defendant’s standing to challenge element of offense on vagueness grounds); id., 148 Wn.2d 490 at 499 (listing prerequisites to challenge to criminal statute on void-for-vagueness grounds). See Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

**E. The Error Mattered – Because there Was Evidence Showing that Mr. Cooley Beat Up Ms. Novotney and Caused Her Indignities, But Not That He Produced Agonizing Pain Worse Than Other Assaults.**

The error mattered – because there was evidence presented in this case which might have caused the jury to believe that Mr. Cooley beat up Ms. Novotney and/or caused her great indignities, but not that he produced agony or pain worse than what other assaults produce. In fact, the assault charge itself listed assaultive conduct – “slap and/or punch and/or hit with a broom handle and/or pin to the ground and urinate on.” But some of those alternative allegations,

while certainly humiliating, do not necessarily inflict pain (e.g., “slap” and “urinate on”). The others are painful, but not necessarily as painful as “torture.” Does such evidence show that the actual “pain” caused was equivalent to that produced by “torture”? That depends on the definition of torture used, as the sources above show – and no definition of torture was used here.

### **III. THE EVIDENCE WAS INSUFFICIENT TO PROVE PAIN EQUIVALENT TO TORTURE.**

When evaluating a sufficiency of evidence claim, the issue is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” State v. Joy, 121 Wn.2d 333, 339, 851 P.2d 654 (1993) (citation omitted).

Applying this standard, the evidence in this case certainly might have caused the jury to believe that Mr. Cooley caused Ms.

Novotney pain. They might also have concluded that she suffered bruises and indignities.

But none of that proves the “torture” element of the crime defined by RCW 9A.36.021(f) – because the critical element is not simply “torture,” but “pain” or agony as to be equivalent of that produced by “torture.” Thus, indignities equivalent to that produced by torture are insufficient. Assaults that are in duration equivalent to that produced by torture are insufficient. Threats that are equivalent to those occurring during torture are insufficient. Only “pain” equivalent to that produced by torture satisfies this element of RCW 9A.36.021(f), and the proof of that – as opposed to torturous indignities – is lacking.

**IV. FOLLOWING *BLAKELY*<sup>9</sup> AND *RECUENCO*, THE STATE CANNOT CHARGE FIRST DEGREE ROBBERY PREMISED ON USE OF A DEADLY WEAPON AS WELL AS A FIREARM ENHANCEMENT FOR USE OF THAT SAME WEAPON; THE FIREARM ENHANCEMENT SHOULD THEREFORE BE VACATED.**

In the past, the Washington courts have rejected double jeopardy challenges to the charging of both a substantive crime

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<sup>9</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

having use of a deadly weapon as an element, as well as a deadly weapon enhancement.<sup>10</sup>

Those challenges, however, have always been rejected on the ground that the underlying, substantive, statute was considered a crime containing the element of unlawful use of a weapon, *but the deadly weapon enhancement statute was considered only a matter in enhancement of penalty – not a crime and not an element.* See, e.g., State v. Claborn, 95 Wn.2d 629, 628 P.2d 467 (1981) (first-degree assault); State v. Husted, 118 Wn. App. 92, 95, 74 P.3d 672 (2003), review denied, 151 Wn.2d 1014 (2004) (same); State v. Woods, 34 Wn. App. 750, 755 (“RCW 9.95.040 does not offend the constitutional protection against double jeopardy by imposing multiple punishments based on a single deadly weapon finding even when applied to a defendant convicted of an offense where

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<sup>10</sup> E.g., State v. Caldwell, 47 Wn. App. 317, 320, 734 P.2d 542, review denied, 108 Wn.2d 1018 (1987) (robbery); State v. Pentland, 43 Wn. App. 808, 811, 719 P.2d 605, review denied, 106 Wn.2d 1016 (1986) (rape); State v. Woods, 34 Wn. App. 750, 665 P.2d 895, review denied, 100 Wn.2d 1010 (1983) (analyzing RCW 9.95.040, predecessor deadly weapon enhancement statute). See also State v. Warriner, 30 Wn. App. 482, 635 P.2d 755 (1981), rev'd on other grounds, 100 Wn.2d 459 (1983) (“Warriner first contends that because possession of a weapon was a necessary element of second degree assault, enhancement of the penalty under the firearm and deadly weapon statutes was improper ..., and violated the double jeopardy clause of the United States and Washington State Constitutions. This argument was considered and rejected in State v. Foster, 91 Wn.2d 466, 589 P.2d 789 (1979), which Warriner urges us to disregard. We have no authority to ignore controlling precedent, and decline to do so. We are bound by the Supreme Court’s holding in Foster and affirm the findings and sentence enhancement under both the firearm and deadly weapon statutes.”).

the use of a firearm or deadly weapon is an element of the underlying offense. ... RCW 9.95.040 does not create a separate criminal offense, and thus a separate punishment, but merely limits the discretion of the trial court and the Board of Prison Terms and Paroles in the setting of minimum sentences.”).

That logic does not survive Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), Blakely v. Washington, and State v. Recuenco, which adopted the logic and holdings of Apprendi and Blakely. In those three controlling cases, the courts made clear that any fact that increases the maximum penalty that may be imposed upon a criminal defendant is akin to an element of the crime, in that it must be proven to the jury beyond a reasonable doubt. In other words, the aggravating factor now acts as the *functional equivalent of an element* that must be charged in the Information.<sup>11</sup>

Even the more recent Booker<sup>12</sup> decision proves this. Its discussion about why engrafting a jury trial component onto the federal Sentencing Guidelines would directly contradict the intent of Congress shows that the majority assumed that such sentence-

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<sup>11</sup> See State v. Goodman, 150 Wn.2d 774, 785-786, 83 P.3d 410 (2004).

<sup>12</sup> United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

enhancing conduct would have to have been charged – as an *element* – for it to have been considered by a jury:

The Court’s constitutional jury trial requirement, however, if patched onto the present Sentencing Act, would move the system backwards in respect both to tried and to plea-bargained cases. *In respect to tried cases, it would effectively deprive the judge of the ability to use post-verdict-acquired real-conduct information; it would prohibit the judge from basing a sentence upon any conduct other than the conduct the prosecutor chose to charge; and it would put a defendant to a set of difficult strategic choices as to which prosecutorial claims he would contest. The sentence that would emerge in a case tried under such a system would likely reflect real conduct less completely, less accurately, and less often than did a pre-guidelines, as well as a Guidelines, trial.*

\* \* \*

*Such a system would have particularly troubling consequences with respect to prosecutorial power. Until now, sentencing factors have come before the judge in the pre-sentence report. But in a sentencing system with the Court’s constitutional requirement engrafted onto it, any negotiation would be placed beyond the reach of the judge entirely. Prosecutors would thus exercise a power the Sentencing Act vested in judges: the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment.*

Booker, 125 S.Ct. 738, 762-63 (Breyer, J.) (emphasis added).

And while the dissent disagreed on certain points, it did not disagree on this point – in fact, it made exactly the same

assumption, that is, that the enhancing factor must now be considered akin to an element of the crime that must be charged and proven. E.g., Booker, 125 S.Ct. 738, 774 (Stevens, J., dissenting) (“In many cases, prosecutors could avoid an Apprendi ... problem simply by alleging in the indictment the facts necessary to reach the chosen Guidelines sentence.”); id., 125 S.Ct. 738, 775 (Stevens, J., dissenting) (“The Government has already directed its prosecutors to allege facts such as the possession of a dangerous weapon or ‘that the defendant was an organizer or leader of criminal activity ...’”).

The deadly weapon enhancement statute certainly increases the maximum sentence that might be imposed over and above the Blakely statutory maximum – i.e., the standard Guidelines range – for the crime. Hence, following Blakely, Apprendi, and Recuenco, the firearm enhancement statute is the functional equivalent of an element of the crime.

Since it is essentially an “element,” rather than just a matter in aggravation of penalty, the prior decisions holding that there is no double jeopardy problem because there is no duplication of elements between the underlying statute and the weapon enhancement statute must now be reconsidered.

We acknowledge that this challenge to the deadly weapon enhancement was recently rejected by Division I in State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), review pending, 2007 Wash. LEXIS 102 (Jan. 20, 2007). But that does not bind this Division and this issue remains open in the state Supreme Court.

If this Court agrees, this affects only the deadly weapon enhancement on Count 2, assault with a deadly weapon. The total sentence on that count was 34 months (22 months for the underlying crime plus 12 months for the deadly weapon enhancement), far less than the total sentence of 138 months on Count 1.

**V. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ADVISE MR. COOLEY ABOUT THE SENTENCING CONSEQUENCES OF THE CHARGES, IN FAILING TO INVESTIGATE, AND IN FAILING TO FILE THE MOTION TO SUPPRESS.**

**A. The Right to Effective Assistance of Counsel at Trial and Sentencing.**

A criminal defendant has a state and federal constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Tinkham, 74 Wn. App. 102, 109, 871 P.2d 1127 (1994).

This right to effective assistance of counsel applies to sentencing. State v. Tinkham, 74 Wn. App. 102, 109. See In re Morris, 34 Wn. App. 23, 658 P.2d 1279 (1983).

“A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney’s conduct.” State v. Benn, 120 Wn.2d 631, 662, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993) (citations omitted). Thus, to prevail on a claim of ineffective assistance of trial counsel, a movant must show both deficient performance and prejudice.<sup>13</sup> To show prejudice, the movant need not prove that the outcome *would* have been different. He must show only a “reasonable probability” – by less than a more likely than not standard – that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.<sup>14</sup>

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<sup>13</sup>Strickland v. Washington, 466 U.S. 668, 687; State v. Rawson, 94 Wn. App. 293, 971 P.2d 578 (1984).

<sup>14</sup>Strickland v. Washington, 466 U.S. 668, 694; State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996); Bonin v. Calderon, 59 F.3d 815, 833 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996) (defendant suffers prejudice if “there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different”).

**B. The Right to Effective Assistance of Counsel With Respect to Sentencing Consequences – and How it was Violated Here.**

The right to effective assistance of counsel with regard to sentencing means that the lawyer must know how any applicable sentencing guidelines apply to the case. Otherwise, trial counsel cannot counsel the defendant properly and cannot notice, correct, or raise objections to errors made at the sentencing hearing.<sup>15</sup>

For that reason, the courts are uniform in holding that a lawyer must accurately counsel the client about his maximum exposure under the guidelines, in jurisdiction with a sentencing guidelines system, to provide effective assistance. United States v. Grammas, 376 F.3d 433, 436-37 (5<sup>th</sup> Cir. 2004) (counsel's erroneous advice that defendant, who received 70 month sentence, faced only potential 6 to 12 month sentence constituted deficient performance, for purpose of determining whether defendant was deprived of effective assistance; error stemmed from counsel's lack of

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<sup>15</sup>For example, "[t]he failure of counsel to object to an improper application of the sentencing guidelines may amount to ineffective assistance of counsel." United States v. Breckenridge, 93 F.3d 132, 35 (4th Cir. 1996) (numerous citations omitted). United States v. Headley, 923 F.2d 1079 (3d Cir. 1991) (failure of trial counsel to object to guideline adjustment at sentencing constitutes ineffective assistance); United States v. Cocivera, 104 F.3d 566, 571 (3d Cir. 1996), cert. denied, 520 U.S. 1248 (citing with approval Headley's holding that failure to object to a sentencing adjustment due to role in the offense constituted ineffective assistance of counsel).

investigation and lack of understanding of Sentencing Guidelines) (citations omitted). “By grossly underestimating [the defendant's] sentencing exposure ..., [counsel] breache[s] his duty as a defense lawyer in a criminal case to advise his client fully on whether a particular plea to a charge appears desirable.” Id. (citations omitted).

But that is exactly what occurred here. Rod Cooley's trial counsel recalls that Mr. Cooley likely faced 5-6 years in prison as a result of the charges against him, if he went to trial. That trial lawyer further remembers advising Mr. Cooley that the absolute most he would get was about eight years. See Declaration of Geoffrey Cross (trial counsel), Appendix E. Mr. Cooley recalls that his lawyer gave him an even rosier picture of his sentencing exposure – Mr. Cooley recalls that Mr. Cross advised him that he had no exposure at all, and would not serve any more time at all. See Declaration of Rodney Cooley, Appendix F.

This was important, because Mr. Cooley was offered a deal, mid-trial, for a plea to an offense that would have produced a 1-3 month standard range, and a 3 month sentence at the most. Mr. Cooley rejected that plea offer, and continued to trial, believing that the likely sentence he faced was no more than that anyway. See

Appendices E and F.

Unfortunately, Mr. Cooley found out that this was not correct when he was convicted – and he was not even convicted of all of the offenses with which he was charged. His sentencing range turned out to be 138 to 184 months. Sentencing VRP:715. The judge imposed a sentence of 138 months, the low end of the Guidelines range on Count 1. VRP:721. The court determined that the range on Count 2 was 22-29 months plus 12 for the deadly weapon enhancement, or 24-41 months; the court imposed a sentence of 36 months on that count, to run concurrently. VRP:721-22. On Count 3, with a range of 22-29, the court imposed 29 months, concurrent. VRP:722.

Mr. Cooley was either advised that the absolute maximum sentence he could receive after trial was three months, as he remembered, or 5 or 8 years, as his lawyer claims. Instead, it was 15 years. The sentence he received was 11 ½ years. The difference between what he was told, and the truth, was significant – significant enough that it caused him to summarily reject the state's deal. Declaration of Rodney Cooley, Appendix F, ¶ 4.

A lawyer must accurately counsel the client about his maximum exposure under the guidelines, in jurisdictions with a

sentencing guidelines system, to provide effective assistance. Mr. Cooley's lawyer failed to do that, and it caused him to reject an otherwise extremely attractive plea offer. The ineffective assistance likely affected the outcome; the PRP should be granted.

**C. The Right to Effective Assistance of Counsel With Respect to Investigating Witnesses – And How it Was Violated Here.**

Effective assistance of counsel also includes reasonable investigation, including witness interviews. Lord v. Wood, 184 F.3d 1083 (9<sup>th</sup> Cir 1999), cert. denied, 506 U.S. 856 (2000); Sanders v. Ratelle, 21 F.3d at 1456. Failure to investigate exculpatory witnesses constitutes ineffective assistance. Hendricks v. Calderon, 70 F.3d 1032, 1042 (9th Cir. 1995), cert. denied, 116 S.Ct. 1335 (1996).<sup>16</sup> This is clear from Brown v. Meyers, 137 F.3d 1154 (9th Cir. 1998), in which the court ruled that defense counsel's failure to investigate, locate, and produce alibi witnesses constituted ineffective assistance.

Some of the missing evidence here was of the same sort. We have attached as Appendices G-K the declarations of numerous

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<sup>16</sup>“[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable, professional judgments support the limitations on investigation.” Strickland v. Washington, 466 U.S. 688, 690. Accord Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993) (“tactical decision to pursue one defense does not excuse failure to present another defense that ‘would bolster rather than detract from [primary defense]’”).

witnesses who knew Janice Novotney and Rod Cooley during the critical 2003 period of these charges. All of them verify that Rod Cooley never acted violently towards Janice; all of them verify that Janice, instead, was the one who flipped out and acted violently, in words as well as deeds, against Rod Cooley.<sup>17</sup> Mr. Cooley has therefore alleged a Strickland violation. Brown v. Myers, 137 F.3d 1154; Jones v. Wood, 114 F.3d 1002 (9th Cir. 1997) (failure to investigate witnesses called to attention of trial counsel constitutes ineffective assistance); Harris v. Reed, 894 F.2d 871, 878 (7<sup>th</sup> Cir. 1990).

**D. The Right to Effective Assistance of Counsel With Respect to Investigating the Key State Witness, Janice Novotney, and Her Mental Disability at the Time of Trial – And How it Was Violated Here.**

The other category of evidence that trial counsel failed to locate was evidence about the state's witness, Janice Novotney. As it turns out, DSHS had awarded state's witness Janice Novotney disability payments for her mental problems – and had backdated her entitlement to DSHS compensation for that disability to August 31, 2003. Appendix L. That predated all of the crimes in this case except for Count 3; with respect to that crime, which spanned a

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<sup>17</sup> Due to time limits, we have not been able to provide original signed versions of all these documents with this brief. We will replace the unsigned version with signed ones upon receipt.

period of several months, the DSHS award fell within the charging period.

The DSHS award was based on diagnoses of “schizophrenia paranoid type r/o schizoaffective disorder and amphetamine dependence in remission.” See Appendix M. Medical records show such critical problems with Janice Novotney’s ability to accurately perceive, recall, and relate, as the fact that she is subject to repeated hallucinations. Appendix M.<sup>18</sup>

This is critical to credibility. United States v. Smith, 77 F.3d 511, 512 (D.C. Cir. 1996) (reversing denial of motion to vacate due to government’s failure to disclose psychiatric history of its witness, Mr. M); United States v. Pryce, 938 F.2d 1343, 1345 (D.C. Cir. 1991), cert. denied, 503 U.S. 941 (1992) (violation of confrontation clause to prohibit inquiry about witness’s hallucinations 3 months before charged event; they “are obviously relevant to a witness’s ability to discern reality” later).

Yet no one told the defense about this, before, during, or in the critical weeks and months after the trial. See Declaration of Janice

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<sup>18</sup> This Appendix is drastically redacted for privacy reasons. We are in possession of a complete and unedited copy, and can provide it upon request. It is a multi-page assessment. We provide here only page 1.

Novotney, Appendix N. Trial counsel's failure to obtain this information therefore fell below the required standard.

**E. The Right to Effective Assistance of Counsel With Respect to Moving to Suppress.**

Finally, trial counsel failed to raise the suppression issue that we have briefed here (as Argument § I).

If trial counsel failed to move to suppress, and if that failure fell below the required standard and caused prejudice, then trial counsel's failure to move to suppress constituted ineffective assistance of counsel. See generally State v. Brockob, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). For the reasons discussed in Argument § I, trial counsel's failure to raise this meritorious motion, based on controlling state and federal law, fell below the required standard and caused prejudice.

**VI. THE STATE FAILED TO DISCLOSE MATERIAL, EXCULPATORY, EVIDENCE CASTING DOUBT ON MS. NOVOTNEY'S ABILITY TO PERCEIVE, RECALL, AND RELATE – THAT IS, THE FACT THAT SHE WAS ON STATE DISABILITY DUE TO MENTAL ILLNESS DURING THE ALLEGED CRIMES AND DURING HER TRIAL TESTIMONY.**

If the failure to obtain the DSHS records on Janice Novotney is not considered trial counsel's fault, then the fault must be placed with the government. Neither the state nor the state's witness

provided this information to the defense before or during the trial, or even in the brief aftermath of the trial when they must have realized its existence and importance. It was not discovered until Ms. Novotney came forward and presented it, well after trial and sentencing were over.

But the government must disclose all evidence “favorable to the accused upon request.” Brady v. Maryland, 373 U.S. 83, 87. And impeachment evidence – like the DSHS material – falls within the disclosure mandate of Brady. United States v. Bagley, 473 U.S. 667, 676 (1985).

The fact that the records were maintained by a different agency is irrelevant. The government has a duty to search not just its own prosecutorial offices, but also other agencies for such impeachment material. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (writ granted where state failed to disclose statements by witnesses even though only police, and not prosecutor, knew about the statements); Carriger v. Lewis, 132 F.3d 463, 479 (9th Cir. 1997) (*en banc*), cert. denied, 523 U.S. 1133 (1998).

DSHS is just such an other agency. As discussed above, DSHS had awarded state’s witness Janice Novotney disability

payments for her mental problems – and had backdated her entitlement to DSHS compensation for that disability to August 31, 2003. Appendix L. That predated or coincided with the dates of all of the counts of conviction in this case. Further, the DSHS award was based on diagnoses of “schizophrenia paranoid type r/o schizoaffective disorder and amphetamine dependence in remission.” Medical records show such critical problems with Janice Novotney’s ability to accurately perceive, recall, and relate, as the fact that she is subject to hallucinations. Appendix M.

As noted above, this is critical, exculpatory, information, because it bears so strongly on credibility. Hence, the state’s failure to reveal such information about a witness’s mental state – particularly about hallucinations occurring near in time to the alleged crime and the trial – requires reversal. United States v. Smith, 77 F.3d 511, 512 (reversing denial of motion to vacate due to government’s failure to disclose psychiatric history of its witness, Mr. M); United States v. Pryce, 938 F.2d 1343, 1345 (violation of confrontation clause to prohibit inquiry about witness’s hallucinations 3 months before charged event; they “are obviously relevant to a witness’s ability to discern reality” later). In fact, all evidence about the deteriorated mental state of a key witness is critical and

exculpatory impeachment. United States v. Mohawk, 20 F.3d 1480, 1486 (9th Cir. 1994) (cross-examination as to “mental instability” provided “significant[] impeach[ment]”).<sup>19</sup>

## VII. CONCLUSION

For all of the foregoing reasons, this personal restraint petition should be granted.

DATED THIS 11<sup>th</sup> day of April, 2007.

Respectfully submitted,



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Sheryl Gordon McCloud  
WSBA #16709  
Attorney for Petitioner,  
Rodney Cooley

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<sup>19</sup> See United States v. Pryce, 938 F.2d 1343, 1345; United States v. Johnson, 820 F.2d 1065 (9th Cir. 1987) (referring to cross-examination of bank tellers about “agitated mental state” to discredit identifications); Colley v. Sumner 784 F.2d 984, 990 (9th Cir.), cert. denied, 479 U.S. 839 (1986) (referring to defense cross-examination that appropriately elicited “damaging testimony regarding her drug use and past emotional problems”); United States v. Brown, 770 F.2d 768, 770 (9th Cir. 1985), cert. denied, 474 U.S. 1036 (1986) (witnesses appropriately and extensively cross-examined about mental problems, and jury properly instructed to consider mental problems in evaluating credibility); United States v. Heath, 528 F.2d 191, 193 (9th Cir. 1975) (“fact of insanity or mental abnormality ... may be provable, on cross-examination or by extrinsic evidence, as bearing on credibility”).

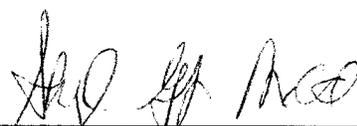
**CERTIFICATE OF SERVICE**

I certify that on the 10<sup>th</sup> day of April, 2007, a true and correct copy of the foregoing Opening Brief in Support of Personal Restraint Petition was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Pierce County Prosecutor  
Appellate Unit  
930 Tacoma Avenue South  
Tacoma WA 98402-2171

Rodney Cooley  
DOC# 922445, 6C #106  
Florence Correctional Center  
PO Box 6900  
Florence, AZ 85232

COURT REPORTERS  
1111  
BY STATE OF WASHINGTON  
CLERK TO  
BY 1-1-10  
ACTIVITY

  
\_\_\_\_\_  
Sheryl Gordon McCloud