

CA

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

IN RE THE PERSONAL RESTRAINT  
PETITION OF:

RODNEY COOLEY,

Petitioner.

NO. 36209-1

STATE'S RESPONSE TO PERSONAL  
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Should this court dismiss this petition when petitioner has failed to show either prejudicial constitutional error or a fundamental defect resulting in a complete miscarriage of justice?

2(a). Has petitioner waived his opportunity to claim that the search warrant was invalid by failing to bring a motion to suppress during the proceedings below?

(b). If not waived, has petitioner failed to show that he has standing to bring a motion to suppress?

(c). If not waived and petitioner has standing, has petitioner failed to show that the trial court should have suppressed evidence recovered after execution of a search warrant when probable cause supported issuance of the warrant?

1           3.       Has petitioner failed to meet the heavy burden of establishing that the  
2           second degree assault statute is unconstitutionally vague?

3           4.       Should petitioner's claim that there was insufficient evidence to prove  
4           second degree assault (torture) be dismissed when this same claim was raised and  
5           rejected on direct appeal and petitioner makes no showing why the interests of  
6           justice require re-examination?

7           5.       Has petitioner failed to show that Blakely compromised the well-settled  
8           rule that a criminal defendant is not placed in double jeopardy by a sentence  
9           enhancement imposed for being armed with a deadly weapon where use of the  
10          deadly weapon is also an element of underlying offense?

11          6.       Has petitioner failed to demonstrate ineffective assistance of counsel as his  
12          evidence does not show both deficient performance and resulting prejudice  
13          necessary to succeed on this claim?

14          7.       Has petitioner failed to show that the State violated its obligation to  
15          disclose Brady material when the material at issue was not in the State's  
16          possession or control?

17  
18       B.       STATUS OF PETITIONER:

19           Petitioner, RODNEY K. COOLEY, is presently restrained pursuant to a judgment  
20           and sentence entered in Pierce County Cause No. 03-1-04835-8. Judgment and Sentence,  
21           Appendix A.

22           Petitioner was charged by amended information with one count of assault in the  
23           first degree (count I), one count of assault in the second degree with a deadly weapon  
24           (count II), one count of assault in the second degree by torture (count III), rape in the  
25           second degree (count IV) and felony harassment (count V). Petr.'s Br. at App. A. The

1 court granted petitioner's motion to dismiss counts IV and V for insufficient evidence.  
2 Order of Dismissal, Appendix C; RP 517.

3 The case proceeded to trial before the Honorable Bryan Chushcoff on December  
4 3, 2003. RP 1. The jury convicted the defendant as charged. App. A. The court  
5 sentenced the defendant to concurrent sentences of 138 months on count I, 22 months  
6 with an additional 12 months for the deadly weapon enhancement on count II, and 22  
7 months on count III. App. A; RP 667-725.

8 Petitioner filed a direct appeal challenging the sufficiency of evidence on all  
9 counts and the trial court's admission of certain evidence. See COA No. 31354-5.  
10 Specifically, petitioner claimed that the trial court erred in admitting the victim, Janice  
11 Novotney's, prior inconsistent statements for impeachment purposes and Novotney's  
12 statements to Deputy Kern as substantive evidence. This court set the matter for  
13 consideration as a motion on the merits and affirmed petitioner's convictions. Ruling  
14 Affirming Judgment, Appendix D. The mandate issued from the direct appeal on April  
15 21, 2006. Mandate, Appendix E.

16 This is petitioner's first personal restraint petition and it is timely.

17 C. GENERAL PRP LAW

18 Personal restraint procedure came from the State's habeas corpus remedy, which is  
19 guaranteed by article 4, § 4 of the state constitution. In re Hagler, 97 Wn.2d 818, 823,  
20 650 P.2d 1103 (1982). Fundamental to the nature of habeas corpus relief is the principle  
21 that the writ will not serve as a substitute for appeal. A personal restraint petition, like a  
22 petition for a writ of habeas corpus, is not a substitute for an appeal. Id. at 824.  
23 "Collateral relief undermines the principles of finality of litigation, degrades the  
24 prominence of the trial, and sometimes costs society the right to punish admitted  
25 offenders." Id. (citing Engle v. Issac, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783

1 (1982)). These costs are significant and require that collateral relief be limited in state as  
2 well as federal courts. Id.

3 In order to prevail in a personal restraint petition, a petitioner must meet an  
4 especially high standard. A petitioner asserting a constitutional violation must show  
5 actual and substantial prejudice. In re Haverty, 101 Wn.2d 498, 681 P.2d 835 (1984).  
6 The rule that constitutional errors must be shown to be harmless beyond a reasonable  
7 doubt has no application in the context of personal restraint petitions. In re Mercer, 108  
8 Wn.2d 714, 718-721, 741 P.2d 559 (1987); In re Hagler, 97 Wn.2d at 825. Mere  
9 assertions are insufficient in a collateral action to demonstrate actual prejudice.  
10 Inferences, if any, must be drawn in favor of the validity of the judgment and sentence  
11 and not against it. In re Hagler, 97 Wn.2d at 825-26. A petitioner relying on non-  
12 constitutional arguments must demonstrate a fundamental defect, which inherently results  
13 in a complete miscarriage of justice. In re Cook, 114 Wn.2d 802, 810-11, 792 P.2d 506  
14 (1990).

15  
16 Reviewing courts have three options in evaluating personal restraint petitions:

- 17 1. If a petitioner failed to meet the threshold burden of showing actual  
18 prejudice arising from constitutional error, the petition must be  
19 dismissed;
- 20 2. If a petitioner makes at least a prima facie showing of actual  
21 prejudice, but the merits of the contentions cannot be determined  
22 solely on the record, the court should remand the petition for a full  
23 hearing on the merits or for a reference hearing pursuant to RAP  
24 16.11(a) and RAP 16.12;
- 25 3. If the court is convinced a petitioner has proven actual prejudicial  
error, the court should grant the personal restraint petition without  
remanding the cause for further hearing.

1 In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). As set forth below, petitioner claims  
2 that error occurred but fails to meet the threshold burden of showing actual prejudice.  
3 This petition must therefore be dismissed.

4  
5 D. ARGUMENT:

- 6 1. PETITIONER'S CLAIM THAT THE SEARCH WARRANT  
7 WAS INVALID IS WAIVED BECAUSE HE FAILED TO  
8 RAISE THE ISSUE BELOW; IF NOT WAIVED, PETITIONER  
9 DOES NOT HAVE STANDING TO RAISE THE ISSUE; IF  
10 NOT WAIVED AND PETITIONER HAS STANDING,  
11 PETITIONER'S CLAIM LACKS MERIT BECAUSE THE  
12 WARRANT WAS SUPPORTED BY PROBABLE CAUSE.

13 a. Waiver

14 Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not  
15 raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish  
16 facts upon which relief can be granted, or (3) manifest error affecting a constitutional  
17 right. RAP 2.5(a)(3); State v. Kirkpatrick, No. 77719-5, 2007 Wash. LEXIS 477, \*7  
18 (Wash. July 12, 2007). Constitutional errors are treated specially under RAP 2.5(a)(3)  
19 because "they often result in serious injustice to the accused." Id. (citing State v. Scott,  
20 110 Wn.2d 682, 686, 757 P.2d 492 (1988)). But this exception is limited to errors that are  
21 "manifest" and "truly of constitutional magnitude." State v. McFarland, 127 Wn.2d 322,  
22 333, 899 P.2d 1251 (1995)(quoting Scott, 110 Wn.2d at 688). "[T]he constitutional error  
23 exception is not intended to afford criminal defendants a means for obtaining new trials  
24 whenever they can "identify a constitutional issue not litigated below." Kirkpatrick, at \*7  
25 (citing Scott, 110 Wn.2d at 687).

In order to allow a new argument on appeal, the court must first determine whether  
the alleged error is truly constitutional. Lynn, 67 Wn. App. at 345. Second, the court

1 must determine whether the alleged error is “manifest,” i.e., whether the error had  
2 “practical and identifiable consequences in the trial of the case.” State v. Stein, 144  
3 Wn.2d 236, 240, 27 P.3d 184 (2001); Lynn, 67 Wn. App. at 345. The Supreme Court  
4 explained the meaning of “manifest” in State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980  
5 P.2d 1257 (1999):

6           McFarland held an error is manifest if it results in actual prejudice to the  
7 defendant. An equally correct interpretation of manifest error was given  
8 in State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992), where the  
9 court stated, “Essential to this determination is a plausible showing by  
10 the defendant that the asserted error had practical and identifiable  
11 consequences in the trial of the case.” Under Lynn, an alleged error is  
manifest only if it results in a concrete detriment to the claimant’s  
constitutional rights, and the claimed error rests upon a plausible  
argument that is supported by the record.

12 WWJ Corp., 138 Wn.2d at 602-03. A purely formalistic error is insufficient to justify  
13 appellate consideration of a belated claim. Lynn, 67 Wn. App. at 345.

14           While recognizing that the admission of evidence obtained in violation of the State  
15 Constitution is an error of constitutional magnitude, Division One has held that “the trial  
16 court does not err in considering evidence that the defendant has not moved to suppress.”  
17 State v. Mierz, 72 Wn. App. 783, 789, 866 P.2d 65, corrected, 875 P.2d 1228 (1994). The  
18 rationale is that the failure to bring the suppression motion is a waiver of the right to  
19 exclude the evidence, therefore, the trial court did not commit error. Mierz, 72 Wn. App.  
20 at 789; see State v. Tarica, 59 Wn. App. 368, 372-73, 798 P.2d 296 (1990), overruled on  
21 other grounds, McFarland, 127 Wn.2d at 337.

22           Even assuming the error is of constitutional magnitude, to be “manifest” petitioner  
23 must show that the error has “practical and identifiable consequences in the trial of the  
24 case.” WWJ Corp., 138 Wn.2d at 603 (quoting Lynn, 67 Wn. App. at 345). This requires  
25

1 a record sufficient for the appellate court to decide that the trial court probably would  
2 have excluded the evidence if petitioner has raised the issue. See McFarland, 127 Wn.2d  
3 at 333-34.

4 Here, petitioner fails to show a “manifest” error because the record is lacking in  
5 several regards. Petitioner never made a motion to suppress the photographs of  
6 Novotney’s injuries or the medical records that were prepared after Novotney’s  
7 examination at the hospital. As such, the record lacks sufficient facts on which to decide  
8 whether this evidence should have been excluded. For example, the record is unclear  
9 whether Janice Novotney consented to the detective taking photographs and transporting  
10 her to the hospital. See State v. Hastings, 119 Wn.2d 229, 234, 830 P.2d 658 (1992)(a  
11 search conducted pursuant to consent is a well-accepted exception to the warrant  
12 requirement). Detective Kern testified that she explained the seizure warrant to Novotney  
13 and that Novotney said that Kern “didn’t need it, that it was fine” and she would go to the  
14 hospital. RP 465. Novotney denied this on the stand and said she wouldn’t have gone to  
15 the hospital without a court order. RP 182-83. Obviously, if a motion to suppress had  
16 been brought below, this issue could have been litigated and further facts obtained.

17  
18 There is also insufficient information to decide whether petitioner had standing to  
19 raise the issue. See Argument, §1(b) below. These holes in the record preclude a finding  
20 of manifest error.

21  
22 Moreover, the evidence that petitioner claims was improperly admitted was merely  
23 cumulative of other properly admitted evidence. Many witnesses testified regarding their  
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1 observations of Novotney's injuries around October 8<sup>th</sup> to the 14<sup>th</sup>. RP 251-54<sup>1</sup>, RP 326-  
2 33<sup>2</sup>, RP 338-40<sup>3</sup>, RP 344<sup>4</sup>, RP 429-30<sup>5</sup>, RP 482-84<sup>6</sup>. Additional photos of Novotney's  
3 injuries that were taken by a friend at Theresa Gorham's house on October 14<sup>th</sup> (and thus  
4 not a result of the search warrant) were admitted without objection.<sup>7</sup> Ex. 2A-2E; RP 254-  
5 55. And the medical records from Novotney's examination at the hospital were admitted  
6 pursuant to counsel's stipulation. Ex. 5; RP 154, 165, 186-87. Petitioner is hard-pressed  
7 to show that a motion to suppress, if granted, would have changed the outcome of this  
8 case – the photos of Novotney's injuries and the evidence obtained from Novotney's  
9 medical evaluation were merely cumulative of other properly admitted evidence. Any  
10 error in admitting the photographs of Novotney's injuries and/or the medical records  
11 cannot be deemed manifest under the circumstances of this case. This court should thus  
12 decline to reach the merits of petitioner's claim.  
13

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17 <sup>1</sup> Theresa Gorham observed that Novotney had a black eye, bruises on her chin and neck, and slap marks  
18 on both sides of her face.

19 <sup>2</sup> Deputy Jones responded to Novotney's residence October 9<sup>th</sup> after Gorham called 911 and observed that  
20 Novotney had a black, swollen left eye, and bruises on her face and cheek.

21 <sup>3</sup> Kathleen Butcher helped Novotney move out on October 9<sup>th</sup> and observed bruises on Novotney's neck  
22 and a black eye.

23 <sup>4</sup> Kathleen Butcher later gave Novotney a massage on October 20<sup>th</sup> and noticed healed broken ribs, several  
24 bruises on neck, a black eye, and sensitivity near the head and neck and on legs.

25 <sup>5</sup> Detective Kern went to Novotney's house on October 13<sup>th</sup> and observed that Novotney had a large black  
eye and bruising on her face and chin.

<sup>6</sup> Techla Fish checked on Novotney on October 9<sup>th</sup> and observed a black eye, bruises on neck and slap  
marks on face.

<sup>7</sup> Janice Novotney is the one that provided the Detective with the film from these photos. RP 434.

1                   b.       Standing

2                   Ordinarily, standing must first be challenged in the trial court. Tyler Pipe Indus.,  
3 Inc. v. Department of Revenue, 105 Wn.2d 318, 327, 715 P.2d 123 (1986), cert. denied,  
4 486 U.S. 1040 (1988). But the State, as respondent, may contest a defendant's standing  
5 for the first time on review because of the appellate court's duty to affirm the trial court  
6 upon any ground supported by the record. State v. Carter, 74 Wn. App. 320, 324 n.2, 875  
7 P.2d 1 (1994), aff'd on other grounds, 127 Wn.2d 836 (1995); State v. Grundy, 25 Wn.  
8 App. 411, 415-16, 607 P.2d 1235 (1980), review denied, 95 Wn.2d 1008 (1981). See,  
9 State v. Michielli, 132 Wn.2d 229, 242, 937 P.2d 587 (1997).

10                   A person challenging a search on federal Fourth Amendment grounds must have a  
11 legitimate expectation of privacy in the area searched in order to have standing. United  
12 States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980); State v.  
13 Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980). A defendant seeking suppression of  
14 seized evidence has the burden of establishing that he or she had a Fourth Amendment or  
15 Article I, sec. 7 interest in the property. State v. Picard, 90 Wn. App. 890, 897, 954 P.2d  
16 336 (1998). In order to meet this burden, defendant must show that a privacy or  
17 possessory interest was invaded, that government agents participated in the invasion, and  
18 that he has standing to contest the invasion. State v. Jackson, 82 Wn. App. 594, 601-02,  
19 918 P.2d 945 (1996), review denied, 131 Wn.2d 1006 (1997).

20                   Here, officers went to Novotney's home and presented her with a seizure warrant  
21 that allowed them to take photographs of her injuries and transport her to the hospital for  
22 a medical examination. Petitioner had no privacy interest in Novotney's person. If a  
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1 privacy interest was invaded, it was Novotney's and not the petitioner's. Thus, petitioner  
2 would not have had standing to contest the seizure.<sup>8</sup>

3  
4 c. Merits

5 Even if petitioner has not waived this issue and has standing, his claim that the  
6 warrant was invalid lacks merit. Petitioner's entire claim is premised on the erroneous  
7 presumption that a warrant cannot issue for the purpose of taking photographs of a  
8 victim's injuries and/or transporting a victim to the hospital for a medical evaluation.  
9 Petitioner's claim is wholly without merit.

10 CrR 2.3(b) provides that a search warrant may be issued to search for and seize  
11 *any (1) evidence of a crime; or (2) contraband, the fruits of crime, or things otherwise*  
12 *criminally possessed; or (3) weapons or other things by means of which a crime has been*  
13 *committed or reasonably appears about to be committed; or (4) person for whose arrest*  
14 *there is probably cause, or who is unlawfully restrained. CrR 2.3(b)(emphasis added).*  
15 The rule further provides that a search warrant may be issued only if the court determines  
16 that there is probable cause for the issuance of the warrant. CrR 2.3(c). In determining  
17 the sufficiency of an affidavit, the court must determine whether or not the affidavit was  
18 sufficiently comprehensive to provide the issuing magistrate with a factual basis from  
19 which he could independently conclude there was probable cause to believe the items  
20

21  
22 <sup>8</sup> Petitioner also claims that he had a privacy interest in the home and that it was this privacy interest that  
23 was invaded when Detective Kern served the seizure warrant. But many issues would need to be  
24 resolved before this issue could be decided. For example, did petitioner have a privacy interest in the  
25 home at the time of the warrant? Petitioner testified that Novotney was the owner of the trailer and that  
he lived there at her pleasure and that he had moved out 5-6 times over their two-year relationship. RP  
575-77. Also, the officers had probable cause to arrest petitioner for second degree assault, but did not  
have a warrant. Did exigent circumstances exist that allowed a warrantless entry into the home? If so, do  
those exigent circumstances vitiate whatever privacy interest petitioner had in the home? The record is  
simply insufficient to decide this claim and thus, the issue is not a manifest constitutional error.

1 sought were at the location to be searched. Withers, 8 Wn. App. at 125 (citing United  
2 States v. Harris, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971) and State v.  
3 Portrey, 6 Wn. App. 380, 492 P.2d 1050 (1972)). “It must be probable (i) that the  
4 described items are connected with criminal activity, and (ii) that they are to be found in  
5 the place to be searched.” State v. Perrone, 119 Wn.2d 538, 548, 834 P.2d 611  
6 (1992)(citing 2 W. LaFave §4.6(a), at 236)). It is well established that affidavits of  
7 probable cause are tested by much less vigorous standards than those which govern the  
8 admissibility of evidence at trial, and the determination by a magistrate that probable  
9 cause exists should be given great weight by a reviewing court. State v. Withers, 8 Wn.  
10 App. 123, 125, 504 P.2d 1151 (1972)(citing Spinelli v. United States, 393 U.S. 410, 89 S.  
11 Ct. 584, 21 L. Ed. 2d 637 (1969)). Here, petitioner does not claim that the warrant lacked  
12 probable cause to believe that evidence of a crime would be found at the residence<sup>9</sup>, but  
13 rather that there was insufficient evidence to believe that Novotney had committed a  
14 crime. But this latter analysis is irrelevant for the purposes of this warrant. The warrant  
15 in this case was a warrant for *evidence of a crime*. The affiant, a detective specializing in  
16 domestic violence crime, stated that she spoke with several of Novotney’s friends who  
17 either observed physical violence between the petitioner and Novotney or who Novotney  
18 had told about the escalating abuse. Petr.’s Br. at App. B. Novotney told these friends  
19 that the abuse was ongoing and that she was fearful for her life. Id. The detective also  
20 personally observed Novotney’s injuries the day before the search warrant was requested  
21 and determined that six 911 calls had been placed from Novotney’s residence between  
22  
23  
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<sup>9</sup> In fact, petitioner stipulates that there is probable cause to believe that petitioner committed a crime. See Petr.’s Br., at 8.

1 July 27, 2003 and October 9, 2003. Id. This much of the affidavit is enough to  
2 establish probable cause to believe that evidence of domestic violence would be found at  
3 Novotney's home and/or on her person. See Withers, 8 Wn. App. at 125-26. The warrant  
4 was properly issued and the evidence seized properly admitted at trial.

5  
6 2. PETITIONER HAS NOT MET THE HEAVY BURDEN OF  
7 ESTABLISHING THAT THE SECOND DEGREE ASSAULT  
8 STATUTE IS UNCONSTITUTIONALLY VAGUE.

9 Petitioner claims that the second degree assault statute that he was charged under  
10 is unconstitutionally vague because it does not define the term "torture." As set forth  
11 below, petitioner fails to meet his burden of proving the statute unconstitutional beyond a  
12 reasonable doubt.

13 Petitioner was charged and convicted of second degree assault based on torture  
14 under RCW 9A.36.021(1)(f). That statute provides, in pertinent part:

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

17 . . . .  
18 (f) knowingly inflicts bodily harm which by design causes such  
19 pain or agony as to be the equivalent of that produced by torture.

20 RCW 9A.36.021(1)(f). Petitioner claims that subsection (f) is unconstitutionally vague  
21 because it fails to define the term torture.<sup>10</sup>

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22 <sup>10</sup> The Amended Information charged the defendant with repeatedly slapping, punching, hitting, pinning to  
23 the ground and/or urinating on the victim, Janice Novotney, during the period of January 1, 2003 to October  
24 9, 2003. Petr.'s Br. at App. A. The court instructed the jury that they needed to find the following elements  
25 in order to convict the defendant:

(1) That on or about the period between and including the 1st 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 . . .

Jury Instruction No. 28, Appendix B. The court did not separately define the term "torture" for the jury.

1 Under the Fourteenth Amendment to the United States Constitution and article I,  
2 section 3 of the Washington Constitution, a statute is void for vagueness if: (1) the statute  
3 does not define the criminal offense with sufficient definiteness that ordinary people can  
4 understand what conduct is proscribed; or (2) the statute does not provide ascertainable  
5 standards of guilt to protect against arbitrary enforcement. Papachristou v. City of  
6 Jacksonville, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972); City of Bellevue v.  
7 Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000); Spokane v. Douglass, 115 Wn.2d 171,  
8 178, 795 P.2d 693 (1990). This test serves two purposes. First, it ensures that citizens  
9 receive fair warning of what conduct they must avoid, and, second, it protects citizens  
10 from “arbitrary, ad hoc, or discriminatory law enforcement.” State v. Halstein, 122  
11 Wn.2d 109, 117, 857 P.2d 270 (1993). A statute is unconstitutionally vague if either  
12 requirement is not satisfied. Douglass, 115 Wn.2d at 178.

14 Despite its broad sweep, the vagueness doctrine is limited in two important ways.  
15 Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). First, a statute is presumed to be  
16 constitutional unless it appears unconstitutional beyond a reasonable doubt. Haley v.  
17 Medical Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991); Eze, 111 Wn.2d at  
18 26. A party bringing a constitutional challenge to a statute bears the burden of proving its  
19 unconstitutionality. Halstien, 122 Wn.2d at 118. Second, “impossible standards of  
20 specificity” or “mathematical certainty” are not required because some degree of  
21 vagueness is inherent in the use of language. Eze, 111 Wn.2d at 26-27; Haley, 117 Wn.2d  
22 at 740. “Consequently, a statute is not unconstitutionally vague merely because a person  
23 cannot predict with complete certainty the exact point at which his [or her] actions would  
24

1 be classified as prohibited conduct.” Eze, 111 Wn.2d at 27. Rather, a statute will be  
2 deemed void for vagueness only “if it is framed in terms so vague that persons of  
3 common intelligence must necessarily guess at its meaning and differ as to its  
4 applicability.” State v. Williams, 144 Wn.2d 197, 204, 26 P.3d 890 (2001)(citing State v.  
5 Lee, 135 Wn.2d 369, 393, 957 P.2d 741 (1998)). “[I]f men of ordinary intelligence can  
6 understand a penal statute, notwithstanding some possible areas of disagreement, it is not  
7 wanting in certainty.” State v. Brown, 60 Wn. App. 60, 65, 802 P.2d 803 (1990)(citing  
8 State v. Maciolek, 101 Wn.2d 259, 265, 676 P.2d 996 (1984)).

9  
10 Vagueness challenges to statutes which do not involve First Amendment rights are  
11 to be evaluated under the particular facts of each case. Maynard v. Cartwright, 486 U.S.  
12 356, 361, 109 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). The context of the entire statute is  
13 considered by the court to determine a sensible, meaningful, and practical interpretation.  
14 Douglass, 115 Wn.2d at 177. A defendant whose conduct clearly fits within the  
15 proscriptions of a statute does not have standing to challenge the constitutionality of that  
16 statute for vagueness and, thus, may not challenge the statute on the ground that it is  
17 vague as applied to the conduct of others. City of Seattle v. Abercrombie, 85 Wn. App.  
18 393, 400, 945 P.2d 1132, review denied, 133 Wn.2d 1005 (1993); State v. Hegge, 89  
19 Wn.2d 584, 589, 574 P.2d 386 (1978).

20  
21 Petitioner’s specific allegation of vagueness is that the statute does not define the  
22 term “torture.” According to petitioner, the term “torture” has taken on such a broad  
23 definition that jurors can’t be expected to know what it means. But “torture” is a term of  
24 common understanding and an ordinary person who reads the statute would understand  
25

1 that repeatedly slapping, punching, hitting, and urinating on someone over a period of 10  
2 months amounts to “torture.”

3 Courts in other jurisdictions have rejected vagueness challenges to the statutory  
4 use of the word “torture.” See State v. Fahy, 201 Kan. 366, 440 P.2d 566  
5 (1968)(Supreme Court of Kansas held that words like ‘beat’, ‘abuse’, ‘torture’, ‘cruelty’,  
6 and ‘traumatic’ provide “reasonable definite standards which one reading the statute can  
7 understand and contemplate”); People v. Webb, 128 Mich. App. 721, 341 N.W.2d 191  
8 (1983)(term ‘torture’ in child torture statute has a “commonly understood meaning which  
9 gives a person of ordinary intelligence fair notice that his contemplated conduct is  
10 forbidden”); People v. Biegajski, 122 Mich. App. 215, 332 N.W.2d 413 (1982); State v.  
11 Ramseur, 106 N.J. 123, 524 A.2d 188 (1987); Commonwealth v. Nelson, 514 Pa. 262,  
12 279, 523 A.2d 728 (1987)(“Thus we agree with the Commonwealth that the word  
13 “torture”, even with its ductile quality, does not present a vagueness question of  
14 constitutional proportions”); Commonwealth v. Pursell, 508 Pa. 212, 238, 495 A.2d 183  
15 (1985)(the general meaning of torture is a matter of common knowledge); State v. Dicks,  
16 615 S.W.2d 126 (Tenn. 1981).

17  
18 In State v. Cornell, 304 Or. 27, 741 P.2d 501 (1987), the Oregon Supreme Court  
19 construed a statute that elevates murder to aggravated murder if it is committed “in the  
20 course of . . . torture of the victim.” Cornell, 304 Or. at 29 (quoting Or. Rev. Stat.  
21 §163.095(1)(e)). The Cornell court held that the word “torture” may be commonly  
22 understood, and that while they might vary slightly, all definitions of the term contain  
23 sufficient common elements. Thus, the Cornell court determined that a fact-finder would  
24 not have unbridled discretion to apply the term, and that the word “torture” provides  
25

1 notice, with a reasonable degree of certainty, of what conduct is forbidden. Therefore, the  
2 Cornell court held that the term “torture” is not vague. Cornell, 304 Or. at 32.

3 In Chambers v. State, 364 So. 2d 416 (Ala. 1978), the court upheld the child abuse  
4 statute’s use of the terms “torture” and “willfully abuse” against a vagueness challenge.

5 In the Alabama statute, the use of the words “willful abuse” and “torture”  
6 in defining what constitutes child abuse are not so vague and indefinite as  
7 to render the statute void for vagueness. Each term has a commonly  
8 understood meaning which does not leave a person of ordinary  
9 intelligence in doubt as to its purport. The [statute] defines the crime of  
child abuse with appropriate certainty and definiteness and conveys  
sufficiently definite warnings as to the proscribed conduct when  
measured by common understanding and practices.

10 Chambers, 354 So. 2d at 418.

11 “Torture” has a common, ordinary meaning to the extent that the second degree  
12 assault statute furnished adequate notice to petitioner that hitting, slapping, punching,  
13 strangling, and urinating on his girlfriend over a period of 10 months is proscribed  
14 conduct. RP 463-70. Petitioner’s conduct clearly fits within the confines of the statute.  
15 Therefore, the statute is not unconstitutionally vague as reading it does not cause people  
16 of ordinary intelligence to speculate as to its meaning. Defendant has not overcome the  
17 presumption that the statute is constitutional.  
18

19 3. PETITIONER’S CLAIM THAT THERE WAS INSUFFICIENT  
20 EVIDENCE TO PROVE SECOND DEGREE ASSAULT  
21 (TORTURE) SHOULD BE DISMISSED AS THIS CLAIM WAS  
22 RAISED AND REJECTED ON DIRECT APPEAL AND  
PETITIONER MAKES NO SHOWING WHY THE INTERESTS  
OF JUSTICE REQUIRE RE-EXAMINATION.

23 Petitioner may not raise in a personal restraint petition an issue which “was raised  
24 and rejected on direct appeal unless the interests of justice require re-litigation of that  
25 issue.” In re PRP of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). “Simply ‘revising’

1 a previously rejected legal argument ... neither creates a 'new' claim nor constitutes good  
2 cause to reconsider the original claim." In re PRP of Jeffries, 114 Wn.2d 485, 488, 789  
3 P.2d 731 (1990).

4 [I]dential grounds may often be proved by different factual allegations.  
5 So also, identical grounds may be supported by different legal arguments,  
6 ... or be couched in different language, ... or vary in immaterial respects.  
7 Thus, for example, "a claim of involuntary confession predicated on  
8 alleged psychological coercion does not raise a different 'ground' that  
9 does one predicated on physical coercion."

8 Jeffries, 114 Wn.2d at 488 (citations omitted). A petitioner may not create a different  
9 ground for relief merely by alleging different facts, asserting different legal theories, or  
10 couching his argument in different language. Lord, 123 Wn.2d at 329.

11 Petitioner's issue regarding sufficiency of evidence of torture merely reiterates a  
12 claim that was raised and rejected on direct appeal. See App. D. Petitioner must  
13 demonstrate that the interests of justice require re-litigation of these issues. As petitioner  
14 makes no argument regarding the "interest of justice" standard, this claim should be  
15 summarily rejected.  
16

17 4. BLAKELY DOES NOT COMPROMISE THE WELL-SETTLED  
18 RULE THAT A CRIMINAL DEFENDANT IS NOT PLACED  
19 IN DOUBLE JEOPARDY BY A SENTENCE ENHANCEMENT  
20 IMPOSED FOR BEING ARMED WITH A FIREARM EVEN IF  
21 THE USE OF THE FIREARM IS AN ELEMENT OF THE  
22 OFFENSE.

21 Petitioner asks this court to re-examine, in light of Blakely v. Washington, 542  
22 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the well-settled rule that a sentence  
23 enhancement imposed for being armed with a deadly weapon does not violate double  
24 jeopardy where the use of a deadly weapon is also an element of the offense. This claim  
25 has been raised and rejected multiple times in Division One. In State v. Nguyen, 134 Wn.

1 App. 863, 869, 142 P.3d 1117 (2006), review pending, 2007 Wash. LEXIS 102 (Wash.  
2 Jan. 30, 2007), Division One found that “nothing in Blakely gives reason to question prior  
3 Washington cases holding that double jeopardy is not violated by weapon enhancements  
4 even if the use of the weapon is an element of the crime.” The court relied on legislative  
5 intent in reaching its decision:

6 [U]nless the question involves the consequences of a prior trial, double  
7 jeopardy analysis is an inquiry into legislative intent. The intent  
8 underlying the mandatory firearm enhancement is unmistakable: the use  
9 of firearms to commit crimes shall result in longer sentences unless an  
exemption applies.

10 Nguyen, 134 Wn. App. at 868. Because the intent of the Legislature was unambiguous,  
11 double jeopardy was not implicated. Id. The court also rejected a claim similar to the one  
12 that petitioner makes here that the deadly weapon allegation “is akin to an element of the  
13 crime.” See Petr. ’s Br. at 33.

14 Nguyen’s argument is essentially based upon semantics, and he assigns an  
15 unsupportable weight to the Blakely Court’s use of the term “element” to  
16 describe sentencing factors. But the meaning of the Court’s language in  
17 Blakely was made clear in Recuenco, wherein the Court pointed out that  
18 “elements and sentencing factors must be treated the same for Sixth  
Amendment purposes.” Nguyen does not contend his Sixth Amendment  
rights to a unanimous jury and proof beyond a reasonable doubt were  
violated.

19 Nguyen, 134 Wn. App. at 869 (citations omitted). Petitioner provides no persuasive  
20 argument why this court should not follow the Nguyen opinion. Any legislative  
21 redundancy in mandating enhanced sentences for offenses involving the use of a deadly  
22 weapon is intentional and does not violate double jeopardy principles or Blakely.

23 5. PETITIONER FAILS TO SHOW THAT HE WAS PROVIDED  
24 INEFFECTIVE ASSISTANCE OF COUNSEL.

25 In a criminal prosecution, the federal and State constitutions guarantee the right of  
an accused to the assistance of counsel. U.S. CONST. amend VI; WASH. CONST. art. I,

1 § 22. Ineffective assistance violates the right to counsel. Strickland v. Washington, 466  
2 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Pirtle,  
3 136 Wn.3d 467, 487, 965 P.2d 593 (1998). To show ineffective assistance of counsel, the  
4 defendant must show both deficient performance and prejudice. State v. Cox, 109 Wn.  
5 App. 937, 940, 38 P.3d 371 (2002)(citing Strickland v. Washington, 466 U.S. at 687). To  
6 satisfy the “performance” part of the test, defendant must prove that defense counsel’s  
7 representation “fell below an objective standard of reasonableness based on consideration  
8 of all the circumstances.” McFarland, 127 Wn.2d at 334-35. Prejudice exists where  
9 “there is a reasonable probability that, but for counsel’s unprofessional errors, the result  
10 of the proceeding would have been different.” Strickland, 466 U.S. at 694. “A  
11 reasonable probability is a probability sufficient to undermine confidence in the  
12 outcome.” Id.

13  
14 a. Petitioner has not shown that he was provided  
15 ineffective assistance of counsel throughout the  
16 plea bargaining process.

17 Petitioner claims that counsel was deficient in advising him of the consequences  
18 of rejecting the plea offer and going to trial. Specifically, petitioner claims that counsel  
19 failed to inform him of the maximum sentence he faced should he be convicted at trial.  
20 As a result of counsel’s failures, petitioner claims he did not make an informed decision  
21 when he rejected the State’s plea offer.

22 In a plea bargaining context, effective assistance of counsel requires that counsel  
23 actually and substantially assist his client in deciding whether to plead guilty. State v.  
24 Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984)(quoting State v. Cameron, 30 Wn. App.  
25 229, 232, 633 P.2d 901 (1981)). Defense counsel has an ethical obligation to discuss plea  
negotiations with a client. State v. James, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987).

1 This duty includes not only communicating actual offers, but also keeping the defendant  
2 apprised of developments in plea discussions and providing sufficient information to  
3 enable the client to make an informed judgment whether or not to plead guilty. State v.  
4 Holm, 91 Wn. App. 429, 435, 957 P.2d 1278 (1998). While the risk calculation and  
5 reduction process may be viewed as inherently strategic and tactical during the plea  
6 bargaining process, Washington courts have held that “failure to advise [a defendant] of  
7 the available options and possible consequences [during plea bargaining] constitutes  
8 ineffective assistance of counsel.” Cox, 109 Wn. App. at 940 (citing In re PRP of  
9 McCready, 100 Wn. App. 259, 263-3, 996 P.2d 658 (2000)). Proper representation is  
10 presumed, however, and deficient performance “is not shown by matters that go to trial  
11 strategy or tactics.” Cox, 109 Wn. App. at 940 (citing State v. Hendrickson, 129 Wn.2d  
12 61, 77-78, 917 P.2d 563 (1996)).

14 In addition to showing deficient performance, a petitioner must also show that  
15 there is a reasonable probability he would have accepted the offered plea bargain if he  
16 received constitutionally adequate advice from counsel. State v. James, 48 Wn. App. 353,  
17 363, 739 P.2d 1161 (1987).<sup>11</sup> If either prong of the test is not satisfied, the inquiry ends.  
18 State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

19 Here, even if we assume that counsel failed to provide adequate information,  
20 petitioner cannot establish prejudice because there is no reasonable probability that  
21

---

24 <sup>11</sup> “Because of the fear that the self-serving, post-conviction testimony of a defendant regarding his wish to  
25 accept a plea offer might lack sincerity, [many courts] have demanded ‘some objective evidence’ that a  
defendant would have accepted a plea offer.” United States v. Barber, 808 F. Supp. 361, 378 n. 47  
(1992).

1 petitioner would have pleaded guilty had he been provided accurate information.<sup>12</sup>  
2 Instead, the record overwhelmingly suggests that petitioner rejected a plea offer because  
3 he believed he was innocent and would be acquitted at trial.

4 During his allocution, petitioner claimed that the State had offered to reduce the  
5 charges to one count of third degree assault with credit for time served. Petitioner told the  
6 court that he did not accept the offer because he was “not going to plead guilty to  
7 something [he] didn’t do”:

8  
9 Now, during this trial, Mr. Schacht takes my attorney Mr. Cross aside  
10 and offers to drop all the charges if in turn I plead to a third degree  
11 assault – that’s when the guards were taking me back for lunch – **and I**  
12 **told him no.** Basically, it’s time served, I could be walking. I told him  
13 no. Not exactly in those words. My name has been slandered: I’m a  
14 rapist, I’m a woman-beater. Any charge that he could have come up, he  
15 came up with. **But I told him no, I’m not going to plead guilty to**  
16 **something I didn’t do. The truth will come out and I’ll be free with**  
17 **no charges.**

18 RP 709 (emphasis added). Petitioner also claimed that he was “absolutely positively not  
19 guilty of these charges” and that he took it to trial because he “believe[d] in the system ...  
20 and [he] believed justice would have come out of this.” RP 705-06.

21 The petitioner also professed his innocence to the pre-sentence investigator. In the  
22 pre-sentence report, the investigator noted that “Cooley ... professed his innocence and  
23

---

24 <sup>12</sup> It is questionable whether petitioner was really provided misinformation. At petitioner’s sentencing  
25 hearing, both petitioner and counsel were made aware of his sentencing potential (RP 691), yet neither  
mentioned anything about the sentencing potential being a surprise to them. Indeed, counsel was clearly  
aware at the sentencing hearing that defendant faced a *minimum* sentence of 5 years for his first degree  
assault, which seems to contradict his affidavit. RP 696; See Petr.’s Br. at App. F. Furthermore, the  
affidavits submitted by petitioner and counsel contain conflicting facts. Counsel claims that petitioner  
was offered one year in jail, while petitioner claims he was offered 1-3 months. Finally, counsel does not  
admit that he provided misinformation. Instead, his affidavit is phrased in terms of “I thought” and “I  
was thinking” and “I probably told him”, but never says he affirmatively misinformed petitioner. See  
Petr.’s Br. at App. F. Counsel admits informing petitioner that he faced a “considerable number of  
years”, which, under the circumstances was probably sufficient information considering all that could  
happen in terms of acquittals and verdicts at trial.

1 described himself as a victim who's been wrongly accused and convicted." Risk

2 Assessment, Appendix H at 7. The investigator further noted:

3 I found it somewhat interesting that **Mr. Cooley was so confident of his**  
4 **ability to convince or persuade a jury of his innocence that he**  
5 **refused to take advantage of the plea agreement that was originally**  
6 **offered by the Prosecutor's Office.** In retrospect, though his denial of  
7 the charges is unwavering, he regrets the decision to have a jury trial. **He**  
8 **repeatedly said that if he had taken the plea agreement it would be**  
9 **the same as admitting guilt, which is the reason he chose a jury trial.**  
10 Unfortunately he was not prepared for a guilty verdict and is obviously  
11 troubled and disappointed with that finding.

12 App. H, at 7.

13 Finally, in his affidavit attached to this petition, petitioner claims that he rejected  
14 the offer because Cross told him that he (the petitioner) would be acquitted and he  
15 "believed Mr. Cross' estimate of ... risk." Petr.'s Br. at App. F. In his own words,  
16 petitioner admits that he rejected the offer, not because he was misinformed about his  
17 potential maximum sentence, but instead because Cross advised him that he would be  
18 acquitted at trial.<sup>13</sup>

19 It is overwhelmingly clear from the above evidence that petitioner's decision to  
20 reject a plea agreement was not based on misinformation regarding his potential sentence  
21 if convicted at trial. In fact, ignorance of his correct maximum was immaterial to his

---

22 <sup>13</sup> Even if petitioner did allege that he rejected the plea offer because he was provided inaccurate  
23 information, such an allegation is insufficient by itself to establish prejudice in a personal restraint  
24 petition. In In re Alvernaz, 2 Cal. 4<sup>th</sup> 924, 8 Cal. Rptr. 713, 830 P.2d 747 (Cal. 1992), the court  
25 considered a claim of ineffective counsel and prejudice in the same context:

In this context, a defendant's self-serving statement – after trial, conviction and sentence –  
that with competent advice he or she *would* have accepted a proffered plea bargain, is  
insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and  
must be corroborated independently by objective evidence. A contrary holding would  
lead to an unchecked flow of easily fabricated claims.

In re Alvernaz, 2 Cal. 4<sup>th</sup> at 938 (emphasis in original). See also, State v. Cox, 109 Wn. App. 937, 941,  
38 P.3d 371 (2002) ("petitioner's "bare assertion that the outcome would have been different is  
insufficient to establish the necessary prejudice").

1 decision. Instead, petitioner firmly believed he was innocent and that he would be  
2 acquitted at trial. Thus, even assuming *arguendo* that counsel provided inaccurate  
3 information, petitioner's claim of ineffectiveness would fail because he cannot show a  
4 reasonable probability he would have accepted the offered plea bargain had he been  
5 properly counseled as to his potential punishment.

6  
7 b. Petitioner has not shown that counsel was ineffective for  
8 failing to investigate.

9 Petitioner claims that he received ineffective counsel because his attorney declined  
10 to call certain witnesses. "A decision not to call a witness is a matter of trial tactics that  
11 generally will not support a claim of ineffective assistance of counsel." State v. Krause,  
12 82 Wn. App. 688, 697-98, 919 P.2d 123 (1996), review denied, 131 Wn.2d 1007 (1997).  
13 This presumption "can be overcome, however, by showing counsel failed to conduct  
14 appropriate investigations to determine what defenses were available, adequately prepare  
15 for trial, or subpoena necessary witnesses." State v. Maurice, 79 Wn. App. 544, 552, 903  
16 P.2d 514 (1995).

17 Here, the failure to call additional witnesses did not amount to ineffective  
18 assistance of counsel because it was a strategic decision. During pre-trial motions, the  
19 prosecuting attorney asked defense counsel to confirm what witnesses he was calling and  
20 the summary of their testimony.<sup>14</sup> RP 28. Defense counsel had previously provided a  
21 summary of witness testimony to the prosecutor, which indicated that his witnesses would  
22 testify that petitioner had never been violent before he met Janice Novotney and that  
23  
24  
25

---

<sup>14</sup> Defense counsel had previously filed a witness list that set forth 15 witnesses he expected to testify.  
Defense Witness List, Appendix I.

1 Janice had her own issues. RP 28. When presented with this summary, defense counsel  
2 advised the court:

3 I don't intend to go there, because then I open up the prior convictions  
4 and reputation issues. There are several witnesses that may have seen  
5 acts of violence between these parties, and I don't particularly plan to go  
there at this time. I will be very careful.

6 ...

7 ... I may bring in several witnesses, people who have seen Ms. Novotney  
8 being violent in the past. I don't know that I'm going to bring them; I'm  
trying to limit the case. But out of caution – He's listed a considerable  
number of witnesses. Because there's a potentiality this case could get  
exponential, and I'm trying to curtail it.

9 RP 29. It is apparent from this colloquy that defense counsel was aware of the witnesses  
10 and what information they could provide, but was making a strategic decision not to call  
11 them because their testimony would open the door to petitioner's prior violent history and  
12 reputation. See, United States v. Logan, 717 F.2d 84 (3d Cir. 1983)(“By introducing  
13 evidence of his good character, the defendant throw[s] open the entire subject of his  
14 character and, consequently, allows the prosecutor to penetrate a previously proscribed  
15 preserve, to produce contradictory evidence, to cross-examine the defendant's character  
16 witnesses, and to probe the extent and source of their opinions”); State v. Fisher, 130 Wn.  
17 App. 1, 108 P.3d 1262 (2000)(defendant's character witnesses may be cross-examined  
18 about specific instances of defendant's misconduct, including defendant's prior criminal  
19 convictions that would be barred by ER 609). This was a sound strategic decision.  
20  
21 Petitioner cannot show ineffectiveness for failing to call these witnesses.

22 Counsel was also not ineffective for failing to investigate and discover the mental  
23 disability of the victim. See, Petr.'s Br. at 40-42. Counsel would have been unsuccessful  
24 in obtaining any of these documents without the permission of Janice Novotney. See,  
25 RCW 70.02.020 (Except as authorized by RCW 70.02.050, a health care provider may not

1 disclose health care information about a patient to any other person without the patient's  
2 written authorization). In addition, Novotney agrees that she did not tell *anyone*,  
3 including defense counsel, about her disability until long after petitioner was convicted.  
4 See, Petr.'s Br. at App. N. Counsel can hardly be faulted for failing to discover medical  
5 records that the victim did not disclose and for which he could not have obtained without  
6 the victim's permission. Petitioner's claim of ineffective assistance thus fails.

7  
8 c. Petitioner has not shown that counsel was ineffective for  
9 not moving to suppress the photos of Janice Novotney's  
10 injuries because the motion would not have been granted.

11 Failure to bring a plausible motion to suppress is deemed ineffective if it appears  
12 that a motion would likely have been successful if brought. State v. Rainey, 107 Wn.  
13 App. 129, 136, 28 P.3d 10 (2001); State v. Meckelson, 133 Wn. App. 431, 135 P.3d 991  
14 (2006), review denied, 159 Wn.2d 1013 (2007). As argued above, a motion to suppress  
15 the photos of Novotney's injuries would not have been successful. See, Argument, §1(c).  
16 As such, counsel was not ineffective for failing to bring the motion. See, State v. Piche,  
17 71 Wn.2d 583, 590, 430 P.2d 522 (1967)("Counsel is not, at the risk of being charged  
18 with incompetence, obliged to raise every conceivable point, however frivolous,  
19 damaging or inconsequential it may appear at the time, or to argue every point to the court  
20 . . . which in retrospect may seem important to the defendant.").

21 Petitioner also fails to show prejudice from counsel's failure to bring the motion  
22 because admission of the photographs was harmless. An error is harmless if it is trivial,  
23 or formal, or merely academic, was not prejudicial to the substantial rights of the party  
24 assigning it, and in no way affected the final outcome of the case. State v. Nist, 77 Wn.2d  
25 227, 234, 461 P.2d 322 (1969). As argued above, several witnesses testified regarding

1 their observations of Novotney's injuries. RP 251-54<sup>15</sup>, RP 326-33<sup>16</sup>, RP 338-40<sup>17</sup>, RP  
2 344<sup>18</sup>, RP 429-30<sup>19</sup>, RP 482-84<sup>20</sup>. Additional photos of the victim's injuries that were not  
3 obtained as a result of the search warrant were also admitted without objection. Ex. 2A-  
4 2E; RP 254-55. Therefore the photographs of Novotney's injuries were merely  
5 cumulative evidence that did not prejudice petitioner.

6  
7 6. THE STATE DID NOT VIOLATE ITS OBLIGATION TO  
8 DISCLOSE BRADY MATERIAL BECAUSE THE MATERIAL  
9 AT ISSUE WAS NOT IN THE STATE'S POSSESSION OR  
10 CONTROL.

11 Petitioner claims that the State violated its obligation under Brady v. Maryland,  
12 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by withholding DSHS records  
13 concerning Janice Novotney's mental health benefits. See, Petr.'s Br. at 42-45; Apps. L-  
14 N. Even assuming that the material was relevant, petitioner's claim lacks merit because  
15 the material was never in the possession or control of the State.

16 The prosecuting attorney is under a duty to disclose and to preserve evidence that  
17 is material to guilt or punishment and favorable to the defendant, and a failure to do so

---

18 <sup>15</sup> Theresa Gorham observed that Novotney had a black eye, bruises on her chin and neck and slap marks on  
19 both sides of her face.

20 <sup>16</sup> Deputy Jones responded to Novotney's residence October 9<sup>th</sup> after Gorham called 911 and observed that  
Novotney had a black, swollen left eye and bruises on her face and cheek.

21 <sup>17</sup> Kathleen Butcher helped Novotney move out on October 9<sup>th</sup> and observed bruises on Novotney's neck  
and a black eye.

22 <sup>18</sup> Kathleen Butcher later gave Novotney a massage on October 20<sup>th</sup> and noticed healed broken ribs, several  
23 bruises on neck, a black eye and sensitivity near the head and neck and on legs.

24 <sup>19</sup> Detective Kern went to Novotney's house on October 13<sup>th</sup> and observed that Novotney had a large black  
eye and bruising on her face and chin.

25 <sup>20</sup> Techla Fish checked on Novotney on October 9<sup>th</sup> and observed a black eye, bruises on neck and slap  
marks on face.

1 generally will be held to violate the accused’s constitutional right to a fair trial. Brady v.  
2 Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); State v. Coe, 101 Wn.2d  
3 772, 783, 684 P.2d 668 (1984); State v. Renfro, 28 Wn. App. 248, 251, 622 P.2d 1295  
4 (1981), aff’d, 96Wn.2d 902, cert. denied, 459 U.S. 842 (1982); see also, CrR 4.7. This  
5 duty is limited, however, “to material and information within the knowledge, possession  
6 or control of members of the prosecuting attorney’s staff.” In re PRP of Hegney, 138 Wn.  
7 App. 511, 536, 158 P.3d 1193 (2007)(citing CrR 4.7(a)).

8  
9 Here, Janice Novotney admitted in her affidavit that she “did not tell either Rod  
10 Cooley or his lawyer about [her] total mental health disability and DSHS payments” until  
11 after petitioner had been convicted. See, Petr.’s Br. at App. N. There is absolutely no  
12 evidence in the record that the prosecutor requested, possessed, or even knew of the  
13 DSHS records. Moreover, contrary to petitioner’s contentions, there is no obligation on  
14 the State to search out records from other state agencies. See, State v. Frederick, 32 Wn.  
15 App. 624, 627, 648 P.2d 925 (1982), rev’d on other grounds, 100 Wn.2d 550 (1983)(“To  
16 require a prosecutor to search court files without some reason to believe that particular  
17 records will be found therein would impose an unreasonable burden upon the State”).  
18 The prosecutor in this case had no duty to disclose records that were not in his possession  
19 or control. Petitioner’s claim that the State violated it’s obligations under Brady lacks  
20 merit.  
21  
22  
23  
24  
25

1 E. CONCLUSION:

2 For the foregoing reasons, the State respectfully requests this court dismiss this  
3 personal restraint petition.

4 DATED: September 5, 2007

5 GERALD A. HORNE  
6 Pierce County  
7 Prosecuting Attorney

8 

9 ALICIA BURTON  
10 Deputy Prosecuting Attorney  
11 WSB #29285

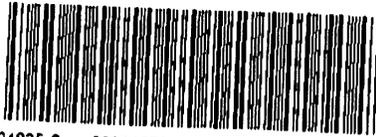
12 Certificate of Service:

13 The undersigned certifies that on this day she delivered by U.S. mail  
14 to petitioner true and correct copies of the document to which this certificate  
15 is attached. This statement is certified to be true and correct under  
16 penalty of perjury of the laws of the State of Washington.  
17 Signed at Tacoma, Washington, on the date below.

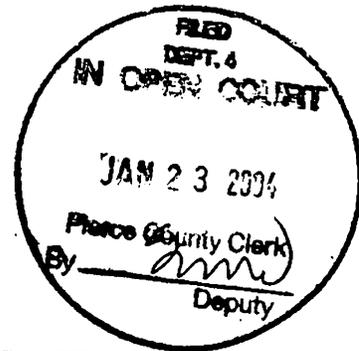
18 9/5/07 Alicia Burton  
19 Date Signature

# **APPENDIX “A”**

*Judgment and Sentence*



03-1-04835-8 20371873 JDSWCD 01-28-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 03-1-04835-8

vs.

RODNEY KENNETH COOLEY,

Defendant.

WARRANT OF COMMITMENT

- 1)  County Jail
- 2)  Dept. of Corrections
- 3)  Other Custody

JAN 26 2004

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

- [ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).
- [x] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

03-1-04835-8

[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: January 23, 2004

By direction of the Honorable  
Kevin Stock  
JUDGE  
KEVIN STOCK

By: Chris Hutton  
CLERK  
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date JAN 26 2004 By Chris Hutton Deputy

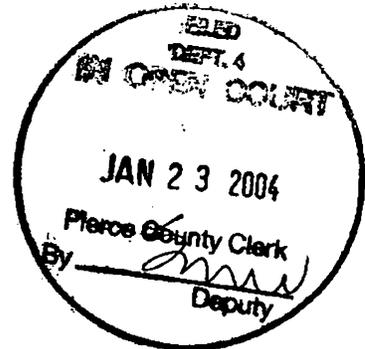
STATE OF WASHINGTON

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office. IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this \_\_\_\_\_ day of \_\_\_\_\_.

KEVIN STOCK, Clerk  
By: \_\_\_\_\_ Deputy

DDH





SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-04835-8

vs

JUDGMENT AND SENTENCE (JS)

RODNEY KENNETH COOLEY

Defendant.

- Prison
- Jail One Year or Less
- First-Time Offender
- SOSA
- DOSA
- Breaking The Cycle (BTC)

JAN 26 2004

SID: 762994XB1  
 DOB: 03/13/1966

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on \_\_\_\_\_ by [ X ] plea [ ] jury-verdict [ ] bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME	INCIDENT NO.
I	ASSAULT IN THE FIRST DEGREE (E23-DV)	9A.36.011(1)(a) 10.99.020	10/8/03 – 10/14/03	032820555
II	ASSAULT IN THE SECOND DEGREE (E28-DV/DW)	9.94A.125 9.94A.602 9.94A.310 9.94A.510 9.94A.370 9.94A.530 10.99.020 9A.36.021(1)(c)	9/10/03 – 9/20/03	032820555
III	ASSAULT IN THE SECOND DEGREE (E31A-DV)	9A.36.021(1)(f) 10.99.020	1/1/03 – 10/9/03	032820555

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as charged in the Amended Information

- The crime charged in Count(s) I, II, & III involve(s) domestic violence.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

**2.2 CRIMINAL HISTORY (RCW 9.94A.525):**

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	MMM3	6/26/79	Juvenile Court	5/15/79	J	M
2	ASSAULT 3	10/8/86	Pierce Co Sup Ct, WA	4/17/86	A	F
3	ASLT 3 HARASSMENT	1/22/01 Unknown	Pierce Co Sup Ct, WA	11/8/00 11/8/00	A	F
4	THEFT 3	Unknown	Pierce Dist Ct, WA	4/25/90	A	M
5	NEGLIGENT DRIVING	Unknown	South Dist Ct, WA	8/6/94	A	M
6	THEFT 3	Unknown	Pierce Dist Ct, WA	6/15/95	A	M
7	DUI	Unknown	Pierce Dist Ct, WA	7/3/96	A	M
8	DWLS	Unknown	Pierce Dist Ct, WA	12/24/96	A	M
9	DUI/DWLS	Unknown	Pierce Dist Ct, WA	3/26/98	A	M
10	DWLS	Unknown	Northeast Dist, KCDC	5/4/99	A	M
11	DWLS 1	Unknown	Mason Co Dist Ct, WA	7/15/01	A	M
12	DWLS 1	Unknown	Pierce Dist Ct, WA	5/5/02	A	M

- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

**2.3 SENTENCING DATA:**

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	7	XII	178-236 mos.		178-236 mos.	LIFE
II	7	IV	43-57 mos. + 12 mos.		43-57 mos. + 12 mos.	10 yrs./ \$20,000
III	7	IV	43-57 mos.		43-57 mos.	10 yrs./ \$20,000

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present.

**2.4 EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence  above  below the standard range for Count(s) \_\_\_\_\_. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney  did  did not recommend a similar sentence.

**2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

- The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

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2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows: N/A

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [ ] The court DISMISSES Counts \_\_\_\_\_ [ ] The defendant is found NOT GUILTY of Counts \_\_\_\_\_

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN \$ - 0 - Restitution to: \_\_\_\_\_

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_  
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV \$ 500.00 Victim assessment RCW 7.68.035

BLD \$ 100.00 Biological Sample Fee ~~RCW 7.68.035~~

CRC \$ \_\_\_\_\_ Court costs, including RCW 9.94A.030, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee \$ 110.00 FRC

Witness costs \$ \_\_\_\_\_ WFR

Sheriff service fees \$ \_\_\_\_\_ SFR/SFS/SFW/WRF

Jury demand fee \$ \_\_\_\_\_ JFR

Other \_\_\_\_\_ \$ \_\_\_\_\_

PUB \$ \_\_\_\_\_ Fees for court appointed Attorney RCW 9.94A.030

\$ \_\_\_\_\_ Other costs for : \_\_\_\_\_  
\$ 710. TOTAL RCW 9.94A.760

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[ ] shall be set by the prosecutor.

[ ] is scheduled for \_\_\_\_\_

[ ] RESTITUTION. Order Attached

[X] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010.

[X] All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than

\$ \_\_\_\_\_ per month commencing \_\_\_\_\_ . RCW 9.94A.760.

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[ ] In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.760

[ ] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 [ ] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

[X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.3 The defendant shall not have contact with Janice Novotney (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for life years (not to exceed the maximum statutory sentence).

*06/04/1966*

[ ] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.4 OTHER:


4.4(a) BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

138 months on Court One months on Court  
22 months on Court Two plus 12 months deadly weapon enhancement  
22 months on Court Three months on Court

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections/Pierce County Jail:

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12 months on Court No two months on Court No \_\_\_\_\_  
 \_\_\_\_\_ months on Court No \_\_\_\_\_ months on Court No \_\_\_\_\_  
 \_\_\_\_\_ months on Court No \_\_\_\_\_ months on Court No \_\_\_\_\_

Sentence enhancements in Courts \_\_\_\_\_ shall run  
 concurrent  consecutive to each other.  
 Sentence enhancements in Courts two shall be served  
 flat time  subject to earned good time credit

Actual number of months of total confinement ordered is: 150

(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other courts, see Section 2.3, Sentencing Data, above).

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: None

The sentence herein shall run consecutively to all felony sentences in other cause numbers prior to the commission of the crime(s) being sentenced.

Confinement shall commence immediately unless otherwise set forth here:

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

4.6  COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count I for \_\_\_\_\_ months;  
 Count \_\_\_\_\_ for \_\_\_\_\_ months;  
 Count \_\_\_\_\_ for \_\_\_\_\_ months;

COMMUNITY CUSTODY is ordered as follows:

Count I for a range from: 24 to 48 Months;  
 Count II for a range from: 18 to 36 Months;  
 Count III for a range from: 18 to 36 Months;

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or for the period of earned release awarded pursuant to RCW 9.94A.726(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.

[x] Defendant shall have no contact with: Jamice Novotney

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit:

[ ] The defendant shall participate in the following crime-related treatment or counseling services: \_\_\_\_\_

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse

[ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: \_\_\_\_\_

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: \_\_\_\_\_

4.7 [ ] WORK ETHIC CAMP. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: \_\_\_\_\_

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus

Office of Prosecuting Attorney  
946 County-City Building  
Tacoma, Washington 98402-2171  
Telephone: (253) 798-7400

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petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7602.

5.4 RESTITUTION HEARING.

[ ] Defendant waives any right to be present at any restitution hearing (defendants initials): \_\_\_\_\_

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634.

5.6 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. N/A

5.8 OTHER: \_\_\_\_\_

DONE in Open Court and in the presence of the defendant this date: 1/23/04

JUDGE Bryan Chushcoff  
Print name: BRYAN CHUSHCOFF

James Schacht  
Deputy Prosecuting Attorney

Print name: James Schacht

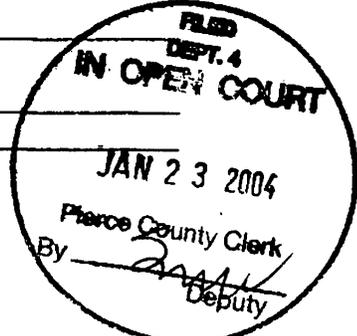
WSB # 12298

Joe Cooley  
Defendant

Print name: \_\_\_\_\_

Attorney for Defendant  
Print name: Ch

WSB # 2089



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**CERTIFICATE OF CLERK**

CAUSE NUMBER of this case: 03-1-04835-8

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_

Clerk of said County and State, by: \_\_\_\_\_, Deputy Clerk

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APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52 committed after July 1, 1988 is also sentenced to one (1) year term of community placement on these conditions:

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

(I) The offender shall remain within, or outside of, a specified geographical boundary: \_\_\_\_\_

(II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: by separate order

(III) The offender shall participate in crime-related treatment or counseling services;

(IV) The offender shall not consume alcohol; \_\_\_\_\_

(V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections, or

(VI) The offender shall comply with any crime-related prohibitions.

(VII) Other: \_\_\_\_\_

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IDENTIFICATION OF DEFENDANT

SID No. 762994XB1 Date of Birth 03/13/1966  
(If no SID take fingerprint card for State Patrol)

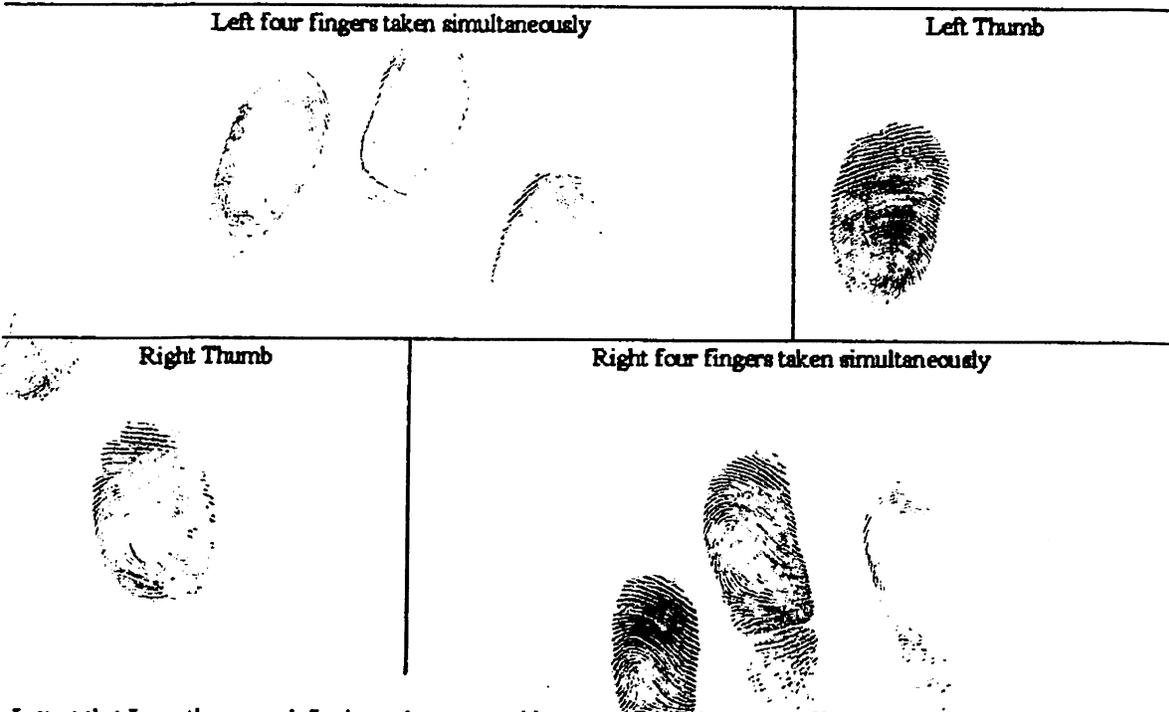
FBI No. 762994XB1 Local ID No. UNKNOWN

PCN No. UNKNOWN Other

Alias name, SSN, DOB:

Race: [ ] Asian/Pacific Islander [ ] Black/African-American [X] Caucasian [ ] Hispanic [X] Male  
[ ] Native American [ ] Other: [X] Non-Hispanic [ ] Female

FINGERPRINTS



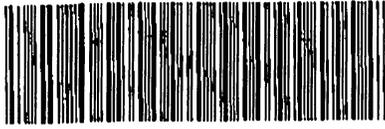
I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk [Signature] Dated: JAN 23 2004

DEFENDANT'S SIGNATURE: [Signature]

DEFENDANT'S ADDRESS: \_\_\_\_\_

# **APPENDIX “B”**

*Jury Instructions*



03-1-04835-8 20177078 CTINJY 12-17-03



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,  
Plaintiff,  
vs.  
RODNEY KENNETH COOLEY,  
Defendant.

CAUSE NO. 03-1-04835-8

*COURT'S INSTRUCTIONS TO THE JURY*

DATED this 15 day of December, 2003.

[Signature]  
JUDGE

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into

account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff, and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

Evidence has been introduced in this case on the subject of prior statements of Janice Novotney. The statements she made on October 14, 2003, at her residence to Deputy Lynelle Kern and Dr. Timothy Dahlgren at Good Samaritan Hospital may be considered by you for any purpose. Ms. Novotney's other prior statements have been introduced for the limited purpose of determining her credibility. You must not consider these prior statements for any other purpose.

INSTRUCTION NO. 6

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 7

A person commits the crime of Assault In The First Degree as charged in Count One when, with intent to inflict great bodily harm, he or she assaults another by any force or means likely to produce great bodily harm or death.

INSTRUCTION NO. 8

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.

INSTRUCTION NO. 10

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 11

To convict the defendant of the crime of Assault In The First Degree as charged in Count One, 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 8<sup>th</sup> and 14<sup>th</sup> days of October, 2003, the defendant assaulted Janice Novotney;

(2) That the assault was committed by a force or means likely to produce great bodily harm or death;

(3) That the defendant acted with intent to inflict great bodily harm; and

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 12

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of Assault In The First Degree as charged in Count One , the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Assault In The First Degree necessarily includes the lesser crimes of Assault In The Second Degree and Assault In The Fourth Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 13

Regarding the lesser degree crime of Assault In The Second Degree for Count One, a person commits the crime of Assault In The Second Degree when under circumstances not amounting to Assault In The First Degree he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

INSTRUCTION NO. 14

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.

INSTRUCTION NO. 15

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

INSTRUCTION NO. 16

Regarding the lesser degree crime of Assault In The Second Degree for Count One, to convict the defendant of the crime of Assault In The Second Degree, 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 8<sup>th</sup> and 14<sup>th</sup> days of October, 2003, the defendant intentionally assaulted Janice Novotney and thereby recklessly inflicted substantial bodily harm; and

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

If you find from the evidence each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

A person commits the crime of assault in the fourth degree when he or she commits an assault not amounting to Assault In The First or Second Degree.

INSTRUCTION NO. 18

Regarding the lesser degree crime of Assault In The Fourth Degree for Count One, to convict the defendant of the crime of Assault In The Fourth Degree, 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 8<sup>th</sup> and 14<sup>th</sup> days of October, 2003, the defendant assaulted Janice Novotney; and

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

A person commits the crime of Assault In The Second Degree as charged in Count Two when he or she assaults another with a deadly weapon.

INSTRUCTION NO. 20

The term deadly weapon means any weapon, device, instrument, substance or article which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury.

INSTRUCTION NO. 21

To convict the defendant of the crime of Assault In The Second Degree as charged in Count Two, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the period of time between and including the 10th day of September, 2003, and the 20<sup>th</sup> day of September, 2003, the defendant assaulted Janice Novotney with a deadly weapon; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 22

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of Assault In The Second Degree as charged in Count Two, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Assault In The Second Degree necessarily includes the lesser crime of Assault In The Fourth Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 23

Regarding the lesser degree crime of Assault in the Fourth Degree for Count Two, to convict the defendant of the crime of Assault In The Fourth Degree, 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 10<sup>th</sup> and 20<sup>th</sup> days of September, 2003, the defendant assaulted Janice Novotney; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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 or agony as to be the equivalent of that produced by torture.

INSTRUCTION NO. 25

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result, which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 26

Bodily injury, physical injury or bodily harm means physical pain or injury, illness or an impairment of physical condition.

INSTRUCTION NO. 27

As to Count III, there are allegations that the defendant committed acts of assault on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt. Further, in considering whether the defendant committed the offense alleged in Count III, you cannot consider any act allegedly constituting assault charged in Counts I and II.

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.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 29

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of Assault In The Second Degree as charged in Count Three, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Assault In The Second Degree necessarily includes the lesser crime of Assault In The Fourth Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 30

Regarding the lesser degree crime of Assault in the Fourth Degree for Count Three, to convict the defendant of the crime of Assault In The Fourth Degree, 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 assaulted Janice Novotney; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 31

It is a defense to a charge of assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 32

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

INSTRUCTION NO. 33

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that or she is being attacked to stand his or her ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

INSTRUCTION NO. 34

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 35

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and verdict forms, for each count and each lesser degree crime.

When completing the verdict forms, you will first consider the crimes charged. If you unanimously agree on a verdict for any of the crimes charged, you must fill in the blank provided in the appropriate verdict form for that count the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict for one or the other of the crimes charged, do not fill in the blank provided in the verdict form for that particular count.

If you find the defendant guilty of the crimes charged in each count (Assault In The First Degree for Count One, Assault In The Second Degree for Count Two, and Assault In The Second Degree for Count Three) do not use the verdict forms for the lesser degree crimes for those counts. If you find the defendant not guilty of the crime of the crimes charged in Counts One, Two and/or Three, or if after full and careful consideration of the evidence you cannot agree the crimes charged in those counts, you will consider the lesser degree crimes. If you unanimously agree on a verdict for one or the other of the lesser degree crimes for those counts, you must fill in the blank provided in the appropriate verdict form the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in

the blank provided in the verdict form or forms for the lesser degree crimes for Counts One, Two and/or Three.

If you find the defendant guilty of the crime of Assault but have a reasonable doubt as to which of two or more degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on the verdict form for the crime as charged and to find the defendant guilty on the verdict form for the lesser degree crime for that count, *according to the decision you reach.*  
TSEC

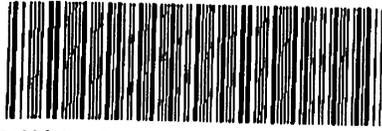
Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror will sign it and notify the judicial assistant, who will conduct you into court to declare your verdict.

INSTRUCTION NO. 36

You will also be furnished with a special verdict form regarding a deadly weapon for Count Two. If you find the defendant not guilty of Assault In The Second Degree for Count Two, do not use the special verdict form. If you find the defendant guilty of Assault In The Second Degree, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

## **APPENDIX “C”**

*Order of Dismissal of Counts Four and Five*



03-1-04835-8 20381572 ORDSM 01-27-04



**SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY**

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-04835-8

vs.

JAN 26 2004

RODNEY KENNETH COOLEY,

**ORDER FOR DISMISSAL OF COUNTS  
FOUR AND FIVE ONLY WITH  
PREJUDICE**

Defendant.

DOB: 03/13/66  
SID #: WA21428786

**ORDER**

**THIS CASE** came before the court for trial on counts one through five of the original Information. At the close of the state's case the defendant moved for dismissal of counts four and five for lack of sufficient evidence. The court considered the testimony presented by the state, the authorities cited by both parties, and the comments and arguments of the parties at the hearing on this motion. Now, therefor

03-1-04835-8

It is hereby ORDERED that counts four and five are hereby dismissed with prejudice.

All other counts are not affected by this order.

DATED the 26 day of January, 2004.

*Angela Chewhats*  
\_\_\_\_\_  
JUDGE

Presented by:

*James S. Schacht*  
\_\_\_\_\_  
James S. Schacht  
Deputy Prosecuting Attorney  
WSB # 17298

FILED  
DEPT. 4  
IN OPEN COURT  
JAN 26 2004  
Pierce County Clerk  
By *mmw*  
Deputy

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## **APPENDIX “D”**

*Ruling Affirming Judgment (COA No. 31354-5)*



# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

03-1-04835-8

FILED  
COURT OF APPEALS  
DIVISION II  
05 MAR - 8 AM 11:18  
STATE OF WASHINGTON  
BY DEPUTY

STATE OF WASHINGTON,

No. 31354-5-II

Respondent,

RULING AFFIRMING  
JUDGMENT AND SENTENCE

v.

RODNEY KENNETH COOLEY,

FILED  
IN COUNTY CLERK'S OFFICE  
A.M. MAR - 8 2005 P.M.  
PIERCE COUNTY, WASHINGTON  
BY KEVIN STOCK, County Clerk  
DEPUTY

Appellant.

A jury convicted Rodney Cooley of one count of assault in the first degree, one count of assault in the second degree with a deadly weapon and one count of assault in the second degree by torture. He appeals, arguing that the State failed to present sufficient evidence as to any of these crimes. He also argues that the trial court erred in admitting hearsay evidence. On its own motion, this court considered Cooley's appeal as a motion on the merits under RAP 18.14. This court concludes Cooley's appeal is clearly without merit and affirms his judgment and sentence.

In September 2003, Theresa Gorham went to the residence of Cooley and Janice Novotney for dinner. Just as Cooley finished preparing dinner, Gorham and Novotney went to a store and purchased beer, over Cooley's objections. When they returned, Gorham noted that Cooley was angry and accused them of

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having used drugs while they were out. Gorham said nothing but Novotney denied, falsely, that they had used drugs while they were out. Cooley brought them dinner but Novotney objected to the taste of mushrooms that he had prepared and then announced she was not hungry. According to Gorham, Cooley took a beer bottle from the counter, held it in front of Novotney's face and then broke the beer bottle across Novotney's knee. Gorham accompanied Novotney to her bedroom, where she changed pants. Her leg had not been cut by the beer bottle. At Gorham's suggestion, Novotney left with her and stayed at her residence for two days.

Early in the morning of September 14, 2003, Gorham received a message from Novotney via the internet. Novotney had left Gorham's residence to get a change of clothes but had not returned. Gorham called Novotney later that morning. Novotney told Gorham that Cooley had slapped her during dinner the night before. Gorham called a friend, Techla Fish, to check on Novotney. When Fish arrived, she saw that Novotney had a black eye, bruises on her neck and slap marks on her face. When Gorham arrived, she saw that Novotney was shaken, had a black eye, had bruises on her chin and neck, and had slap marks on her face. Later than evening, a mutual friend took pictures of Novotney's face and neck. According to Gorham, Novotney told her of instances when Cooley had held her down and slapped her, of one instance when Cooley had urinated on her, of instances when Cooley had poked her in the chest, of an incident when Cooley had thrown Ajax in her face, and of one incident when Cooley broke a broom across her back.

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On October 9, 2003, Gorham, Fish and Kathleen Butcher helped Novotney to move. Butcher and Fish noticed that Novotney had a black eye and bruises on her neck. According to Butcher and Fish, Novotney said that Cooley had lifted her off the ground by her neck. Novotney also told Butcher and Fish of the instances that Gorham had described. Deputy James Jones responded to a 911 call reporting domestic violence assault. Deputy Jones saw that Novotney had a blackened left eye. She told Deputy Jones that she had been assaulted.

On October 13, 2003, Deputy Lynelle Kern went to Novotney's residence to follow-up on Deputy Jones's domestic violence report. She noticed that Novotney's eye, face and neck were bruised. Novotney told Deputy Kern that she did not want to talk to her. Novotney also denied that Cooley was there. The next day, Deputy Kern returned with a warrant for Novotney, so that her injuries could be documented. Deputy Kern and other deputies found Cooley in the residence. Deputy Kern ordered Cooley to come out with his hands up. When Cooley did not comply, Deputy Kern drew her weapon, ordered Cooley to the ground, handcuffed him and placed him under arrest. As the deputies took Cooley out of the residence, he began yelling at Novotney and asking her what she had done. According to Deputy Kern, Novotney began rocking back and forth and repeating: "Oh my God, I'm dead. Oh my God." Report of Proceedings (Dec. 11, 2003) at 461. Also according to Deputy Kern, Novotney told her that on October 8, Cooley had slapped her, kicked her, punched her, put his hands around her throat, squeezed and lifted her off the ground, such that she could not breathe.

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The State charged Cooley with one count of assault in the first degree, one count of assault in the second degree with a deadly weapon and one count of assault in the second degree by torture.<sup>1</sup> Novotney testified that during most of the time at issue, she was drunk or high on methamphetamine. She testified that during the dinner with Gorham, she was drunk and high. She denied that Cooley struck her with a beer bottle. She testified that on October 8, she threw her keys at Cooley and struck him. She did not recall whether Cooley struck her but she denied that Cooley grabbed her around the neck or lifted her from the floor. She denied that Cooley slapped her face or hit her in the stomach. She testified that she could not recall whether she made the statements that Gorham and Deputy Kern reported. She denied that the instances she described to Gorham, Butcher and Fish had occurred. She testified that the only times Cooley had struck her were in self-defense from her assaults of him. She testified that the bruises in her photographs taken on October 9 were the result of Cooley defending himself, from her falling onto a countertop while cleaning her cupboards and from training her horse. She also testified that she planned to marry Cooley.

Novotney could not recall her visit to the hospital emergency department on October 14 or her statements to the physician. The State and Cooley stipulated to the admission of her emergency department medical record, which contained a history that Novotney gave to the physician. That history reads

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<sup>1</sup> The State also charged Cooley with rape in the second degree and with felony harassment, but the trial court dismissed those charges at the end of the State's case.

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[Novotney] states that over the last six months to one year she has been physically abused by the male with whom she lives. She states it escalated in the last six months and even at a higher level of frequency in the last two weeks such that the physical abuse has been daily over the last two weeks. She states that yesterday he picked her up by the throat but she states she did not ever stop breathing or pass out from that.

Clerk's Papers (CP) at 144.

Gorham, Fish, Butcher, Deputy Jones and Deputy Kern testified as described above. John Howard, M.D., a forensic pathologist, testified that squeezing a person's neck until the person cannot breathe will result in some brain injury within 3 to 15 seconds and will result in permanent brain damage within 1 to 2 minutes. Dr. Howard also testified that Novotney's bruises, as shown in the photographs taken on October 9 and October 14, were consistent with squeezing a person's neck to the point that the person cannot breathe. April Gerlock, Ph.D., a domestic violence counselor, testified that some victims of domestic violence recant their statements reporting the violence.

Cooley testified, denying that he had an argument with or struck Novotney with a beer bottle during their dinner with Gorham. He admitted to slapping Novotney on October 8 and struggling with her, but only in self-defense after she threw her keys at him and then tried to stab him with a knife. He denied committing any of the acts that Novotney reportedly described to Gorham, Butcher and Fish. The jury convicted Cooley as charged. He appeals.

First, Cooley argues that the State failed to present sufficient evidence to prove beyond a reasonable doubt that he assaulted Novotney with a deadly weapon. He contends that because the beer bottle did not cut Novotney's leg or

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otherwise impair her ability to walk, the State did not prove that the beer bottle was a deadly weapon.

The State's evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201 (1992); *State v. Green*, 94 Wn.2d 216, 221 (1980); *State v. Delmarter*, 94 Wn.2d 634, 637 (1980). Credibility determinations are for the trier of fact and not subject to review by this court. *State v. Camarillo*, 115 Wn.2d 60, 71 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, *review denied*, 119 Wn.2d 1011 (1992).

A deadly weapon, for purposes of a charge of assault in the second degree, is an item "which, under the circumstances in which it is used . . . is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). "Substantial bodily harm" is an injury "which involves a temporary or substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). The inherent capacity of the item and circumstances in which it is used determine whether the item is a deadly weapon. *State v. Skenandore*, 99 Wn. App. 494, 499 (2000) (citing *State v. Shilling*, 77 Wn. App. 166, 171, *review denied*, 127 Wn.2d 1006 (1995)). Those circumstances include "the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries

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inflicted." *Schilling*, 77 Wn. App. at 171 (quoting *State v. Sorenson*, 6 Wn. App. 269, 273 (1972)).

Cooley relies on *Skenandore*, in which the court found that a homemade spear, made of paper and a pencil, was not a deadly weapon because it struck the victim in the torso, not near the eye, and because it did not tear the victim's shirt or break his skin. 99 Wn. App. at 500-501. But Cooley's assault was more like that in *Schilling*, in which the court held that a bar glass, used to strike the victim in the head, was a deadly weapon. 77 Wn. App. at 172. While Cooley's assault did not result in lacerations, as occurred in *Schilling*, a rational trier of fact could find that a full beer bottle, swung hard enough to break the bottle, was readily capable of causing substantial bodily harm. Assault with a deadly weapon does not require that substantial bodily harm occur. It only requires that the weapon used was capable of substantial bodily harm. A full beer bottle, swung hard enough to break the bottle, could easily result in fractures, especially to bones smaller than the femur or patella. The State presented sufficient evidence for the jury to find that when Cooley assaulted Novotney by breaking the beer bottle over her knee, he assaulted her with a deadly weapon, and so was guilty of assault in the second degree.

Second, Cooley argues that the State failed to present sufficient evidence to prove beyond a reasonable doubt that he committed an assault in the first degree. He contends that the State presented no evidence that his alleged squeezing of her neck resulted in any permanent injury and so that act could not constituted assault in the first degree.

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Under RCW 9A.36.011(1)(c), a person commits assault in the first degree if he inflicts great bodily harm and intended to do so. "Great bodily harm" is an injury "which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). Taken in the light most favorable to the State, the evidence indicates that Cooley grabbed Novotney by the neck, lifted her off the ground, interrupted her ability to breathe and left bruises on her neck consistent with her jugular vein having been collapsed. Dr. Howard testified that such collapse of the jugular vein can result in permanent brain injury. This evidence is sufficient for a rational trier of fact to find beyond a reasonable doubt that Cooley committed assault in the first degree when he grabbed Novotney around the neck.

Third, Cooley argues that the trial court erred in admitting testimony from Gorham, Fish and Butcher as to Novotney's statements regarding other acts of assault by Cooley. He contends that testimony was hearsay and that her statements to those witnesses are not prior statements under ER 801(d)(1)(i) because those statements were not made under oath. But the statements were not offered as substantive evidence under ER 801(d)(1)(i). They were offered and allowed as impeachment evidence of prior statements under ER 613. When a witness testifies about an event but states she cannot recall some aspect of the event, prior statements by that witness regarding that aspect of the event may be used for impeachment purposes. *State v. Newbern*, 95 Wn. App. 277, 292-93, review denied, 138 Wn.2d 1018 (1999). Novotney testified that she did not recall

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making statements to Gorham, Fish or Butcher, although she denied the incidents occurred. The trial court did not err in allowing the State to present the testimony of Gorham, Fish and Butcher to impeach Novotney's testimony.

Finally, Cooley suggests that the only evidence supporting his conviction for assault in the second degree by torture is this impeachment evidence from Gorham, Fish and Butcher. He contends that Deputy Kern's testimony regarding the statements Novotney made when Cooley was arrested were improperly admitted as excited utterances.

A hearsay statement is admissible under ER 803(a)(2) as an excited utterance if: (1) a startling event or condition has occurred; (2) the declarant made the statement while under the stress of excitement caused by that event or condition; and (3) the statement relates to the event or condition. *State v. Chapin*, 118 Wn.2d 681, 686 (1992). Novotney's statements to Deputy Kern meet all three elements of an excited utterance. The startling event was Cooley's arrest at gunpoint and his yelling at her. She was under the stress of that event when she made the statements a few minutes after Cooley's arrest. The statements related to Cooley's prior assaults of her, which led to Cooley's arrest. Thus, her statements to Deputy Kern were admitted properly as excited utterances under ER 803(a)(2).

Further, Cooley's conviction for assault in the second degree by torture is supported by the history that Novotney gave when she was taken to the hospital emergency department. She told the physician that she was "sometimes punched, sometimes slapped, sometimes bitten" by Cooley. CP at 144.

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Novotney's statements to the physician were admitted properly under ER 803(a)(4) as statements made for the purposes of medical diagnosis or treatment. The State presented sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that Cooley committed assault in the second degree by torture in his repeated assaults of Novotney.

Cooley's arguments are clearly without merit. RAP 18.14(e)(1). Accordingly, it is hereby

ORDERED that Cooley's judgment and sentence are affirmed. Cooley is hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36 (1985).

DATED this 5th day of March, 2005.

*Eric B. Schmidt*

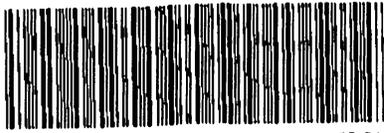
Eric B. Schmidt  
Court Commissioner

cc: Leslie O. Stomsvik  
Kathleen Proctor  
Hon. Bryan Chushcoff  
✓ Pierce County Superior Court  
Cause number: 03-1-04835-8  
Indeterminate Sentence Review Board  
Rodney K. Cooley

## **APPENDIX “E”**

*Mandate (COA No. 31354-5)*

CERTIFIED COPY



03-1-04835-8 25519257 MND 05-24-06

FILED  
IN COUNTY CLERK'S OFFICE

A.M. MAY 23 2006 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,  
Respondent,

v.

RODNEY K. COOLEY,  
Appellant.

No. 31354-5-II

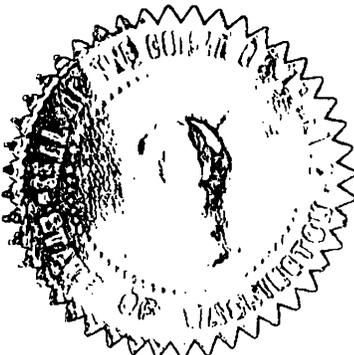
MANDATE

Pierce County Cause No.  
03-1-04835-8

The State of Washington to: The Superior Court of the State of Washington  
in and for Pierce County

This is to certify that the Court of Appeals of the State of Washington, Division II, entered a Ruling Affirming Judgment and Sentence in the above entitled case on March 8, 2005. This ruling became the final decision terminating review of this court on April 4, 2006. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the determination of that court. Costs have been awarded in the following amount:

Judgment Creditor: Appellate Indigent Defense Fund \$2,772.95  
Judgment Debtor: Appellant Rodney K. Cooley \$2,772.95



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 21<sup>st</sup> day of April, 2006.

  
Clerk of the Court of Appeals,  
State of Washington, Div. II

Page 2 – Mandate  
State v. Cooley, Case #31354-5-II

Kathleen Proctor  
Pierce County Prosecuting Atty Ofc  
930 Tacoma Ave S Rm 946  
Tacoma, WA 98402-2171

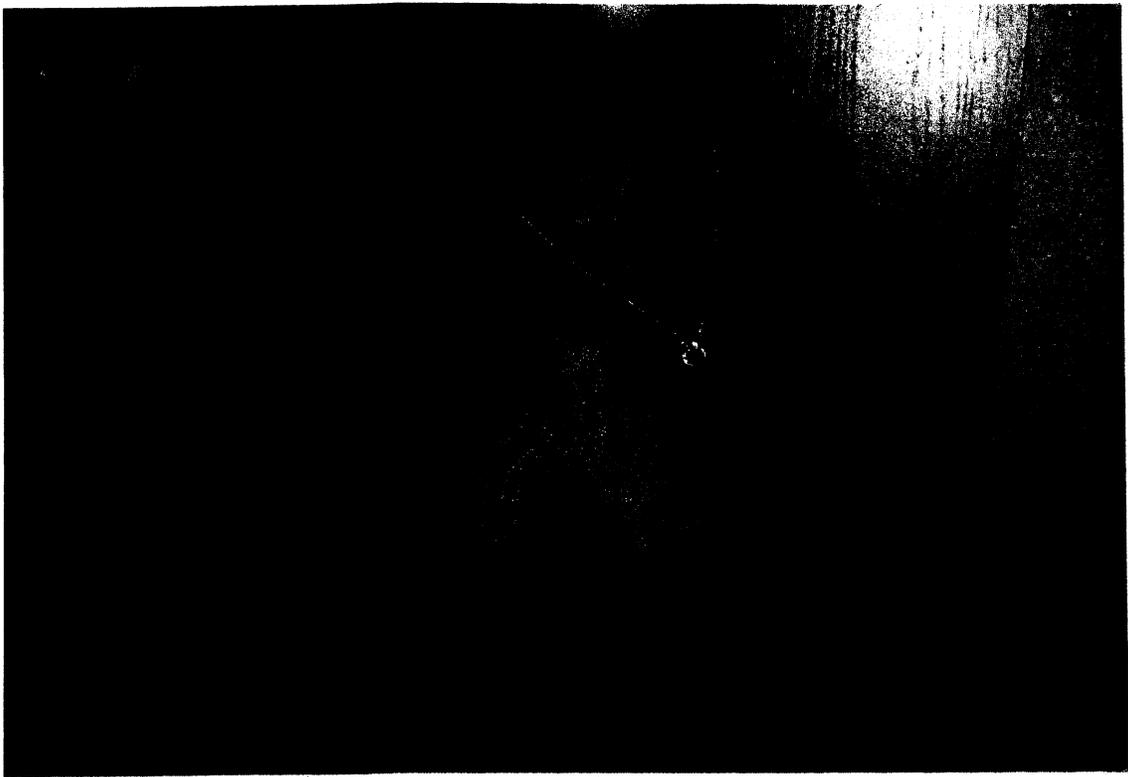
Leslie Orville Stomsvik  
Attorney at Law  
133 S 51st St  
Tacoma, WA 98408-7608

Honorable Bryan E. Cushcoff  
Pierce County Superior Court  
930 Tacoma Ave So  
Tacoma, WA 98402

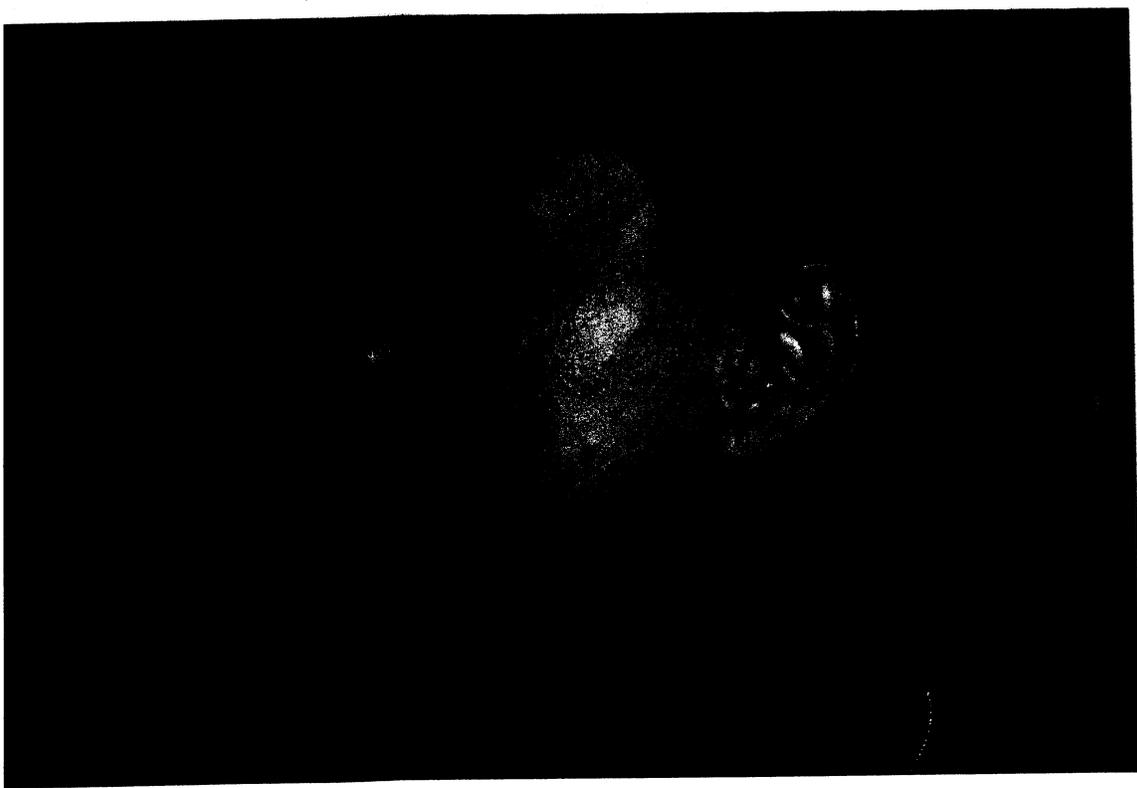
Indeterminate Sentence Review Board

## **APPENDIX “F”**

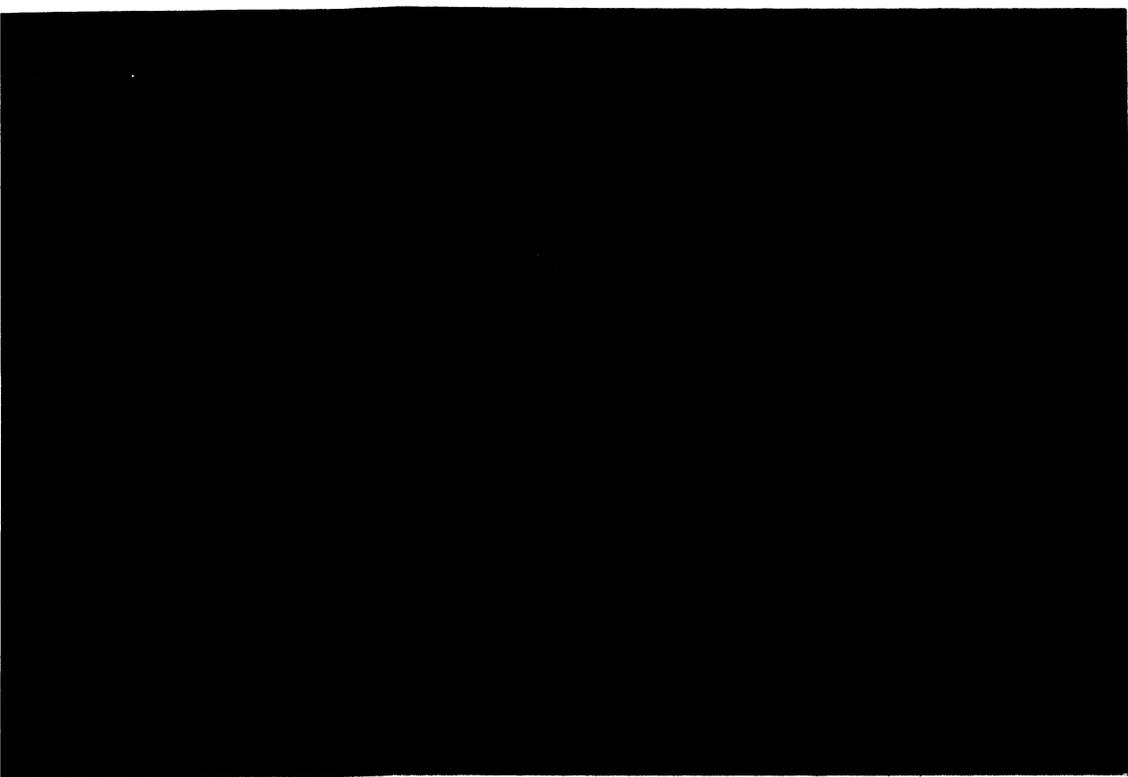
*Exhibits 2A-2E (photographs of victim’s injuries)*



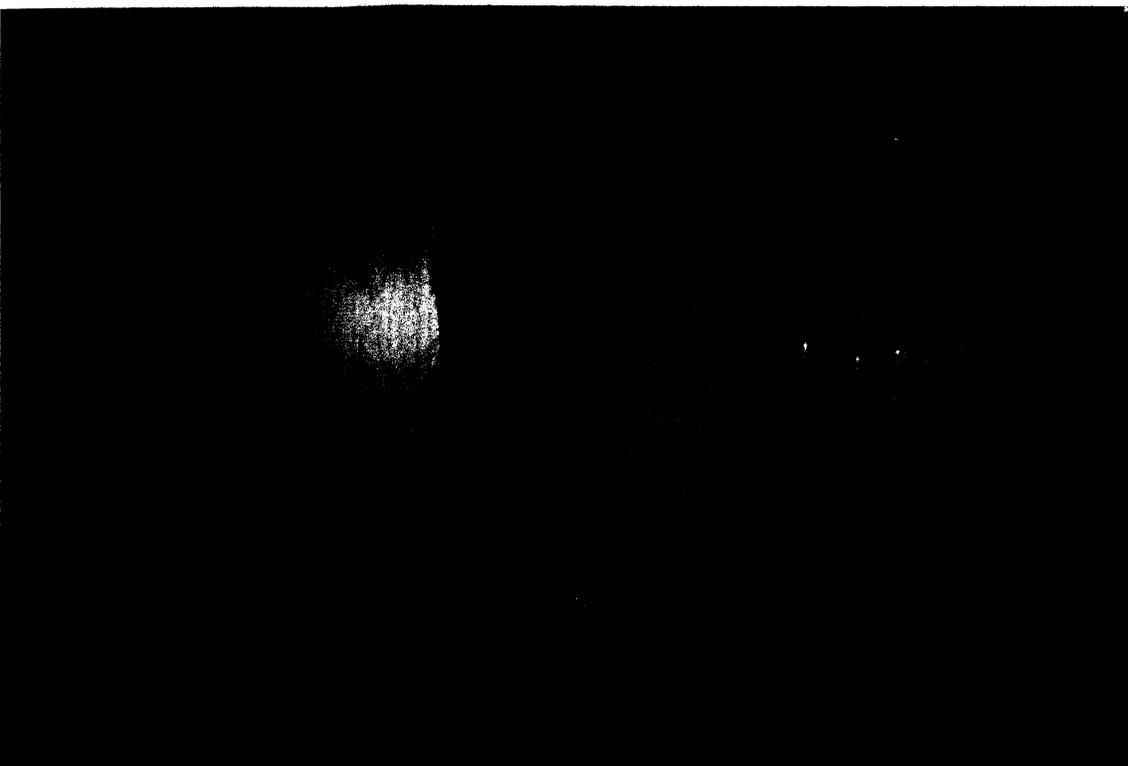
2A



2B



20



20



2E

## **APPENDIX “G”**

*Exhibit 5 (stipulation regarding medical records)*

DEFENDANT'S EXHIBIT 5

SUPERIOR COURT OF WASHINGTON FOR PIERCE

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-00000

vs.

RODNEY KENNETH COOLEY,

STIPULATION

Defendant.

THE PARTIES in this case hereby enter into the following stipulation regarding certain evidence to be admitted in this trial:

1. Dr. Timothy J. Dahlgren M.D. is an emergency room physician at Good Samaritan Hospital and a witness in this case. In place of calling him to the stand to testify in court, the parties hereby stipulate that his report dated October 14, 2003, should be admitted as an exhibit in place of his testimony. A true and correct copy of the report is attached.

2. Dr. Wayne Kim, M.D. is a family practice physician from Spanaway and a witness in this case. In place of calling him to the stand to testify in court, the parties hereby stipulate that records from his office chart regarding Janice Novotney should be admitted as an exhibit in place of his testimony. A true and correct copy of the records is attached.

Dated this 4th day of December, 2003.

James S. Schacht

Geoffrey C. Cross

Rodney Kenneth Cooley

DATE OF EMERGENCY ROOM VISIT: 10/14/03

**HISTORY OF PRESENT ILLNESS:** This is a 37-year-old female who states that over the last six months to one year she has been physically abused by the male with whom she lives. She states it escalated in the last six months and even at a higher level of frequency over the last two weeks such that the physical abuse has been daily over the last two weeks. She states that yesterday he picked her up by her throat but she states she did not ever stop breathing or pass out from that. She states that she sometimes punched, sometimes slapped, sometimes bitten. She cannot recall any time when she has been hit by any objects. She states that it is possible for her to tell which injuries occurred which days other than knowing that it was yesterday that she was \_\_\_\_\_right arm. She never had loss of consciousness. She has no difficulty swallowing. She did have quite a bit of left posterior chest pain although she states that feels better right now. That pain has been worse with movement although she states that feels better right now. That pain has been worse with movement but no dyspnea, no hemoptysis, no abdominal pain. She is currently on her menses. She has had no dysuria, no vaginal bleeding, discharge, or itching. She has no other medical problems. She has been on Ativan in the past for anxiety. She has a history of endometriosis but she is not on any medications for that.

**CURRENT MEDICATIONS:** She takes no current medications.

**ALLERGIES:** She is allergic to codeine.

She is brought in here by police who have arrested the male with whom she lives so she has a safe place to go from here and there will be someone staying with her as well. She presents here with a temperature of 97.4 F, pulse of 100, respiratory rate of 16, blood pressure 156/87. Pulse oximeter is 98% saturation on room air indicating adequate oxygenation. Cranium is without tenderness or deformity. Conjunctivae and sclerae are clear. Fundi are benign. Tympanic membranes are normal. Oropharynx is without lesions. She has ecchymosis under each eye; the left infraorbital area more than the right infraorbital area but there is no bony deformity. She has ecchymosis over the right mid mandible but no bony deformity, no trismus. There is a faint area of ecchymosis over the chin itself but there is no bony deformity. There is no tenderness or deformity or crepitus or ecchymosis over the neck although she does have two small 1 x 2 cm areas of ecchymosis over the mid anterior upper sternal area where there is no associated tenderness. There is no tenderness or deformity over any of her ribs. Her lungs are with full and equal breath sounds. She has a regular rate and rhythm, S1-S2. Abdomen is flat, soft, normal bowel sounds, and nontender. She has two opposing half-circle areas of ecchymosis over the right arm and two 1 centimeter linear abrasions over the left forearm. She is alert, oriented, and appropriate.

**DIAGNOSES:**

1. Multiple contusions.
2. Abrasions to left forearm.

She is to apply ice and/or heat to the areas of discomfort. She is given a prescription for 15 Ativans. She is to return if symptoms change or if there are any other problems; especially abdominal pain or hemoptysis or dyspnea. She is given a family practice referral for follow-up in three to ten days.

TJD/In  
d:  
t: 10/20/2003 11:37:24

Dictated by:  
Timothy J. Dahlgren, M.D.



Good Samaritan

Patient Name: NOVOTNEY, JANICE E  
Visit/Acct. No. V010639150  
Birth Date: 06/04/1966  
M.R. Number: M197238  
Job Number: 5134  
Admit Date: 10/14/2003

Emergency Room Report 54

Chart Copy

Name Novotney, Jan Last First MI

DOB 6/4/66 Account No. \_\_\_\_\_ Page No. \_\_\_\_\_  
M O Y

Date 2/19/02 Cont.

A: Bronchitis.  
P: Zithromax Z-Pak use as directed x 10d. Tussionex 1 tsp. q12h prn cough. Push fluids.  
F/U as scheduled. Return to work on 2/25/02 w/o restrictions.  
W. Kim, D.O./sc

DATE 2/19/02 WT 124 TEMP 97.2 B/P 124/78

C/O

At here for a cough. PT exposed to whooping cough again and same sx are back. @ ST.

NOVOTNEY, JAN DOB: 06/04/66 04/29/02

S: C/O cough intermittently. Has been exposed to whooping cough. She is very concerned. She cont to smoke. No fevers, chills. No orthopnea. No syncopal episodes. No vision problems.  
O: Gen; NAD, A&O x 3. WDWN. Nontoxic-appearing. Skin; dry w/o rash. Conj; clear, noninjected. Throat; clear, no exudate or FB. Nose; patent. Neck; supple w/o adenopathy or meningeal signs. No JVD or thyromegaly. Chest; clear to A&P. Heart; RRR w/o MGR. Abd; soft, NBS x 4. No guarding, rebound. No HSM. Ext; no ECC.  
A: Exposure to whooping cough. Possible bronchitis, possibly smoking related. Zithromax Z-Pak 2 stat and then 1 qd x 14d. Discussed she needs to get whooping cough culture nasal wash done so we can document it. She will get that prior to starting on Zithromax. F/U in 2-3m.

W. Kim, D.O./sc

DATE 2/19/02 WT \_\_\_\_\_ TEMP \_\_\_\_\_ B/P \_\_\_\_\_

C/O

CPE/Pap. @ 45' 14 HT. At wants hyst. and possible liposuction. @ Breast tenderness etc ASD. pain. Endometriosis

NOVOTNEY, JAN DOB: 06/04/66 08/02/02

S: Comes in for CPE. Doing fairly well. Cont abd, pelvic pain. She has endometriosis. She wants to have liposuction and consider hyst because of pain. She does not want any more children. No fevers, chills. No orthopnea. No syncopal episodes. No palpitations. No vision problems. She has been unable to work the last wk or so. She is very moody. No melanic stools. No polyuria, polydipsia. SH/FH: Reviewed, no change from 06/01. ROS: See above Hx.  
A: CPE, Pap. Endometriosis.  
P: See Dr. Larry Larson for eval. Serum estrogen, LH, FSH, CBC, CMP, TSH. F/U in 6m.  
W. Kim, D.O./sc

Name Novotney, Jan Last First MI

DATE 11/22/02 Refused WT 97.1 TEMP 112/72 B/P 112/72 P 80 D.O.B. 6/4/66 M O Y Account No. \_\_\_\_\_ Page No. \_\_\_\_\_

C/O:	URI <del>1</del> 2-3 wks GHF productive cough - yellow green. ↓ hearing @ nose throat @ distal ear.
	⊖ NIV ⊖ Add. pink ⊖ rash. ⊖ urticaria
	⊖ Temp

NOVOTNEY, JAN DOB: 06/04/66 11/22/02

S: C/O cold Sx last 2-3 wks. Not getting better. Productive cough. No arthralgia, myalgia. No syncopal episodes. No stiff neck.  
 O: Gen; NAD, A&O x 3. WDN. Nontoxic-appearing. Skin; dry w/o rash. Conj; clear, noninjected. Sclerae not icteric. Throat; clear, no exudate or FB. Nose; patent. Sinuses nontender with percussion. Neck; supple w/o adenopathy or meningeal signs. No JVD or thyromegaly. Chest; diffuse rhonchi. Heart; RRR w/o M/G/R. Abd; soft, NBS x 4. No guarding, rebound. No HSM. Ext; no ECC. Lymphatics; no lymphadenopathy ing/axill.  
 A: Bronchitis.  
 P: Zithromax 500 mg qd x 3d. Tussionex 1 tsp. q12h prn. Push fluids. RTC prn.  
 W. Kim, D.O./sc

11/10/02	WT	TEMP	98.6	B/P	122/80	P	80	Leup 12/10/02
C/O:	pt. CP chest pain. J.M.M. pt. got an EKG done last Thursday. Pt. state it was normal. J.M.M. cp. while watching TV & palp / pressure road to Stam last night. took previous shelf ↓ sleeping ↑ stress c partner							

NOVOTNEY, JAN DOB: 06/04/66 01/10/03

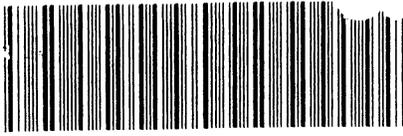
S: C/O anxiety Sx. Has CP. Having a lot of stress factors at home.  
 O: Gen; NAD, A&O x 3. WDN. Nontoxic-appearing. Skin; dry w/o rash. Conj; clear, noninjected. Sclerae not icteric. Throat; clear, no exudate or FB. Nose; patent. Sinuses nontender with percussion. Neck; supple w/o adenopathy or meningeal signs. No JVD or thyromegaly. Chest; clear to A&P. Heart; RRR w/o M/G/R. Abd; soft, NBS x 4. No guarding, rebound. No HSM. Ext; no ECC. CN II-XII grossly intact. Motor 5/5. Lymphatics; no lymphadenopathy ing/axill.  
 A: CP, more anxiety related.  
 P: BuSpar 7.5 bid x 1 wk and then increase to 15 mg bid. Ativan 0.5 mg 1-2 q6h prn to help sleep. Recommended relaxation technique. F/U in 4 wks.  
 W. Kim, D.O./sc

3/21/03	Note written for pt. to be excused from work 3/27/03 - 3/28/03 due to endometriosis. Bal							
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# **APPENDIX “H”**

*Risk Assessment Report*



03-1-04835-8 20373534 RPTDOC 01-26-04

STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

## RISK ASSESSMENT REPORT

**REPORT TO:** The Honorable Bryan E. Chushoff  
County Superior Court

**OFFENDER NAME:** Cooley, Rodney Kenneth  
**AKA:** N A

**CRIME:** Assault in the First Degree Ct. I  
Assault in the Second Degree Ct.  
II & Assault in the Second Degree  
Ct. III

**DATE OF OFFENSES:** Ct. I 10/08/2003  
Ct. II 09/10/2003 - 09/20/2003  
Ct. III 01/01/2003 - 10/09/2003

**CURRENT LOCATION:** Pierce County Jail

**HOME ADDRESS:** 34615 25th Ave. CT. E.  
Roy, WA. 98580

**TELEPHONE NUMBER:** 253-843-3322

**SENTENCE DATE:** 01/23/2004

**DATE OF REPORT:** 01/12/2004  
**DOC NUMBER:** 922445

**CAUSE NUMBERS:** 03-1-04835-8

**COUNTY:** Pierce

**DOSA ELIGIBLE:**  YES  NO

**OAA:**  YES  NO

**ATTORNEY:** Jeff Cross

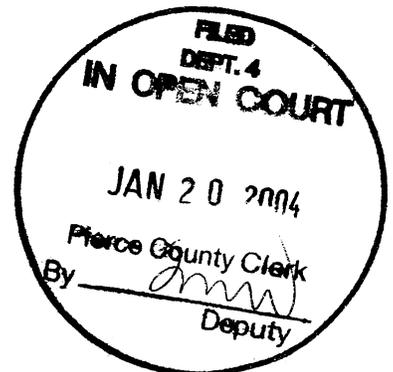
**FAX NUMBER:** Unknown

*I certify or declare under penalty of perjury of the laws of the state of Washington that the foregoing statements are true and correct to the best of my knowledge and belief based on the information available to me as of the date this report is submitted.*

Submitted By:

*P. Shinn* /14/03  
DATE

Peggy Shinn  
Community Corrections Officer III  
Pierce County PSI-Intake Unit  
1016 South 28<sup>th</sup> Street  
Tacoma, WA. 98409  
253-680-2600



The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information and will be redacted in the event of such a request. This form is governed by Executive Order 00-03, RCW 42.17, and RCW 40.14.

Distribution: **ORIGINAL** – Court, **COPY** - Prosecuting Attorney, Defense Attorney, File

Offender Information				
RM Level	DMIO	Level 3	41+ Violent Conviction	RMA Other
RM-A	N/A	N/A	N/A	Serious Violent

Sentence Information			
Prefix	County	Cause Number	Crime Description
	Pierce	03-1-04835-8	Assault in the First Degree Count I Assault in the Second Degree Count I Assault in the Second Degree Count II

#### Offender Risk/Need Summary

##### Criminal History

Our records suggest that Mr. Cooley has a prior felony conviction for: 11/08/00 Assault, Third Count I and Harassment Count II. He was subsequently sentenced to 36 months community supervision for Count I and 12 months community supervision for Count II concurrent with Count I. He has multiple misdemeanor traffic convictions that include: 07/15/01 Driving While License Suspended, First; 05/04/99 Driving While License Suspended, Second; 12/24/96 Driving While License Suspended, Third; 07/03/96 Driving While Under the Influence; 06/15/95 Theft, Third; 08/06/94 Negligent Driving; and 04/25/90 Theft, Third.

##### Official Version of the Current Offense:

According to the Declaration for Determination of Probable Cause between the period of January 1, 2003 and October 8, 2003 the offender committed the crimes of: Assault in the First Degree, Assault in the Second Degree – Deadly Weapon, Assault in the Second Degree, Rape in the Second Degree, and Felony Harassment – Domestic Violence.

On December 16, 2003 Rodney Cooley was found guilty by jury trial of Assault in the First Degree, Assault in the Second Degree, Count I and Assault in the Second Degree, Count II. He remains confined in the Pierce County Jail where he awaits sentencing on January 23, 2004.

Pierce County Sheriff's deputies who were part of the Domestic Violence Unit investigated the case for a several month period and determined that Cooley had been beating, raping, threatening and intimidating the victim, Janice Novotny for an extended time period. Prior calls from the victim for help were not successful and she was in fear and danger. A friend of the victim, Theresa Gorham had also reported the abuse on three separate occasions to 911 emergency operators. The Sheriff's previous efforts to contact the victim at her residence had not been successful because the victim refused to come outside or answer the door. Deputies later learned at the time of the incident the offender was inside the residence.

Gorham recounted that she's known the victim for several months and had observed numerous injuries. Gorham saw Cooley attempt to strike the victim in the head with a beer bottle and though the victim was able to avoid getting hit in the head, Novotny was hit in the knee with such force, the bottle shattered. Novotny confided that Cooley beats her every two to three days, strangles her neck, picks her up from the ground by the neck, pulls out her hair, holds her down and urinates on her, slaps her face, handcuffs her and forces her to have sexual intercourse, punches and kicks her, has thrown Ajax in her face and forced her to eat Ajax. Gorham said that Cooley refers to the bedroom as the "torture chamber" and that he knows where to hit Novotny without leaving any bruises.

Gorham further suggested that she and Novotny developed a prearranged signal: if Gorham calls and Novotny does not call back within 30 minutes, Gorham should call the police. As a result, Gorham has contacted the police on three occasions: July 30, 2003, August 18, 2003, and September 14, 2003. On two of those occasions, Cooley and the victim left the house prior to the police arriving. On the other occasion, no one answered the door.

On October 14, 2003 Judge Arend signed a court order for Pierce County Deputy Kern to transport the victim to a hospital for examination and document her injuries. At the residence, Cooley was arrested and detained but continued to communicate and make eye contact with the victim in an attempt to intimidate her.

The doctor at Good Samaritan Hospital found extensive bruising on Novotny's face, chin, arms, chest, and knees. She also had two bite marks on her arms (one old and one recent), petechiae around her neck, thumb size bruises under her jaw, and pulled muscles in her rib cage. Although the victim was reluctant to provide information regarding her abuse, she revealed that Cooley frequently hits her with a broom handle and has broken three brooms on her. He has also taken her to a cemetery, talked about her death, and has left her in the cemetery at 2:00 a.m. Novotny furthermore described incidents when Cooley has pinned her to the ground and urinated on her, strangled her to near unconsciousness, picked her up from the ground by her neck, handcuffed her and repeatedly threatened to kill her. In addition, Cooley has threatened to have Novotny committed to a psychiatric hospital and has punched her in the ribs.

Novotny has previously called 911 and hung up. When police called back, they've spoken with Cooley who's reported that everything is okay. On an occasion when the police requested to speak with Novotny, she agreed that everything was okay however it was later revealed that Cooley was holding her hair as she spoke. Novotny reported that she's afraid to call 911 because Cooley has threatened to beat her.

Records indicate that in November 2002, Novotny contacted the police and reported that she wanted the offender to move out of her house. Cooley reportedly became angry and strangled and punched the victim with such force, she nearly lost consciousness. Cooley then threatened to kill her or burn her house down if she called the police again. Cooley was subsequently charged with Assault in the Fourth Degree and Harassment however, Novotny failed to appear on the trial date and the case was dismissed with prejudice.

After his recent arrest and while en route to the jail, Cooley continued to make threatening remarks against Theresa Gorham accusing her of being the instigator who called 911. Officers also heard Cooley say that Gorham would "get hers".

#### Education/Employment Narrative

At the time of his arrest, Cooley was contracted to install fire and sprinkler systems. He described this as his primary vocation and reportedly earned \$8000.00 a month in this position. Over the past 10 years, Cooley has worked intermittently for Anchor Plumbing and Fire in Marysville, WA. In this capacity he installed fire protection systems in new construction.

Cooley is a 1984 graduate of Franklin Pierce High School. While in school, he was suspended on one occasion after setting a bon fire on the football field. After graduation he was awarded an athletic scholarship to Olympic College in Bremerton where he completed one year but quit after he was given a job offer.

Mr. Cooley has not been in the Military Service.

#### Financial Narrative

Cooley indicated that prior to his arrest, he was doing well financially and was "getting back on my feet following my divorce". He was current on child support payments, and was meeting all of his monthly debts and expenses. Though he claimed to have no outstanding debts, further probing revealed a school loan for massage therapy that may have been turned over to collections for debt resolution and settlement. He has not filed bankruptcy and has not had any wage garnishments.

Cooley is in the process of selling his home that he hopes will generate enough income to pay his attorney and legal fees.

#### Family/Marital Narrative

Mr. Cooley was divorced three years ago after 17 years of marriage. Two children, ages 7 and 9, who currently reside with their mother, were issued from the union. He was unable to provide specific reasons for the divorce but felt that they gradually "grew apart" and had nothing (other than the children) in common. Cooley denies a history of domestic violence or other forms of abuse in the relationship. The relationship with his former wife was described as amicable.

Cooleys' parents were divorced approximately 18 years ago. His mother now resides in Portland, Oregon and his dad lives in the Pierce County Spanaway area. Neither of his parents was engaged in any known criminal behavior and have never been arrested or confined. He believes that he was raised in a traditional family where normal values were taught, demonstrated, and adhered to. He did not observe or experience any domestic violence in the home or subjected to patterns of substance or alcohol abuse. Cooley described a close and loving relationship with his mother but a somewhat distant and estranged relationship with his dad who has remarried and travels extensively. The offender

feels that he grew apart from his dad following the divorce but added that his dad has financially contributed toward his defense and has expressed support.

Cooley has two siblings, an older and a younger brother. One of his brothers resides in Kelso, WA., the other resides in Puyallup, WA. They generally talk by telephone on a weekly basis. Neither of them has prior convictions and are considered law abiding.

Cooley reported that he's known the victim for approximately 30 years. They attended the same grade school, were neighbors and friends for many years. They have reportedly been in an intimate relationship for roughly two and a half years but have no children from their association. The offender described a very different picture of their relationship and categorically disputes much of what is reported in the official version. He denies that he's physically battered or sexually abused Novotny and claims that her psychiatric disorder contributes to her unpredictable behavior, particularly since her mental illness is not being medically treated. In addition, Cooley indicated that Novotny is addicted to crank which is used to self-medicate and manage the symptoms of her mental health disorder. He further claims that the victim experiences delusions and auditory hallucinations.

Cooley denies sexually assaulting the victim or engaging in other sexually offensive behaviors.

Cooley suggested that his relationship with Novotny was initially satisfying until her behavior became so erratic and her mood swings became more extreme. According to the offender, Novotny was terminated from her employment at Tacoma General Hospital as a Licensed Practical Nurse because of her inability to control her substance and alcohol abuse.

Cooley admits that on one occasion he hit Novotny in the face with an open hand, when she "came at me with a knife, but I was protecting myself. That's the only time that I've ever touched her. All of those things in that report are lies. You can call and ask her and she'll tell you the same thing that I'm saying. Her friend, the one who said that I was abusing Janice is a drug dealer."

#### Accommodation Narrative

As previously noted, Cooley is in the process of selling his home in Roy, WA. The property sits on a couple of acres and is valued at \$150,000. He's lived there for about two years and described the location as somewhat rural but nice, quiet, and safe. He was not aware of any crime in the area and expressed many regrets over the loss of his home.

#### Leisure/Recreation Narrative

During his leisure, Cooley enjoys playing slow pitch softball, camping and having family bar-b-ques. He said that he especially appreciates any amount of time that he can spend with his daughters, conversing and engaged in activities with them.

Cooley is not a member of any organizations or groups that provide socialization. He has been a member of Bethany Open Bible Church but does not attend on a regular basis.

## Companions Narrative

Cooley characterized his friends and companions as productive and honorable. They are family men who are employed and exhibit pro-social values and principles. Cooley believes that they may occasionally consume a beer or smoke marijuana but generally lead lifestyles that do not involve law enforcement agents. According to Cooley, his friends and companions provide positive modeling and influence.

## Alcohol/Drugs Narrative

Alcohol use began at the age of 17 for Mr. Cooley. Although he denies that alcohol has been a problem, he admits that he's been cited on two previous occasions for driving while under the influence of alcohol. His use of alcohol has never interfered with his motivation or impacted his ability to follow through with tasks and responsibilities. Prior to his arrest, he consumed beer once or twice a week, but has not consumed alcohol in about nine months.

Marijuana use began at the age of 16 or 17 however Cooley denies experimentation with other illegal substances and has not used drugs for a significant time period.

Cooley acknowledged that alcohol use was a part of a prior assault on the victim.

## Emotional/Personal Narrative

Cooley has no history of mental illness nor is there a familial history. He denies the existence of suicide ideation or gestures or circumstances in his life that have compelled him to seek professional help for an emotional disturbance.

He successfully completed a two year outpatient transition program for alcohol treatment after he was cited for driving while under the influence of alcohol.

At the age of 19 he participate in grief counseling after the unexpected death of a friend.

## Attitudes/Orientation Narrative

As previously noted, there is a great disparity in what is reported in the official documents and information provided by the offender. Throughout my interview with Cooley he professed his innocence and described himself as a victim who's been wrongly accused and convicted. I found it somewhat interesting that Mr. Cooley was so confident of his ability to convince or persuade a jury of his innocence that he refused to take advantage of the plea agreement that was originally offered by the Prosecutors Office. In retrospect, though his denial of the charges is unwavering, he regrets the decision to have a jury trial. He repeatedly said that if he had taken the plea agreement it would be the same as admitting guilt, which is the reason he chose a jury trial. Unfortunately he was not prepared for a guilty verdict and is obviously troubled and disappointed with that finding.

Cooley also denied that he's a batterer and unquestionably believes that the victim is troubled and has fabricated the assaults based on her delusions and untreated psychiatric disorder. Though he admits striking Novotny on one occasion, it was in self-defense. If what Cooley presents is accurate, I can only question why he remained in dysfunctional relationship with a woman who was so extremely disturbed particularly since they were not married and the relationship lacked long term commitment.

Cooley demonstrated no remorse for the victim of the offense, which is understandable given his belief that he has done nothing wrong. In fact, he projects himself as the victim, is defensive and blames Novotny and her friend Gorham, for his current circumstance.

Victim Statement/Issues and Community Concerns

I have attempted to contact the victim, Janice Novotny on several occasions and have left messages on her voice mail asking that she return my calls. Unfortunately to date, Ms. Novotny has failed to respond to my requests.

**Risk Analysis Narrative**

Risk Analysis Narrative Summary

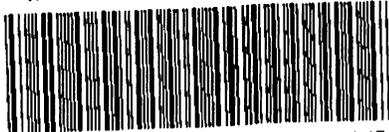
It's going to be imperative that Cooley thoroughly evaluate and assess the women that he chooses to become emotionally and intimately involved with. He should not align himself with women who are emotionally unstable and dependent. Cooley obviously presents a significant risk to the victim of this offense and there is a strong likelihood that he will continue to maintain contact with her despite the no contact order that is in effect. Although he is not verbalizing a threat to the victim, in my opinion his past behavior is clearly threatening. As long as Cooley is convinced that he is not the aggressor and does not have issues related to power and control, there is a high likelihood of a re-offense and imminent risk to the victim. Any violation of the no contact order should be taken seriously and immediately addressed.

The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information and will be redacted in the event of such a request. This form is governed by Executive Order 00-03, RCW 42.17, and RCW 40.14.

OAP 080801 SR

# **APPENDIX “I”**

*Defense Witness List*



03-1-04835-8 19999283 DFLW 11-17-03

IN COUNTY CLERK'S OFFICE

FILED  
A.M. NOV 14 2003 P.M.

PIERCE COUNTY, WASHINGTON  
BY KEVIN STOOK, County Clerk  
DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, )

Plaintiff, )

vs. )

RODNEY K. COOLEY, )

Defendant. )

NO. 03-1-04835-8

DEFENDANT'S WITNESS LIST

COMES NOW Geoffrey Cross, attorney for defendant, and provides the following list of witnesses:

- 1. Bill & Yvonne Bailey  
Phone: 846-6351
- 2. Marty Guy  
Phone: 606-5092 or 841-7399
- 3. Lana Cooley  
Phone: 232-7323
- 4. Dan & Pam Cooley  
Phone: 847-2404
- 5. Ross Atkins  
Phone: 360-458-3006
- 6. Elmer Roy

1 - Defendant's Witness List

ORIGINAL

LAW OFFICES OF  
GEOFFREY C. CROSS, P.S., INC.  
252 BROADWAY  
TACOMA, WASHINGTON 98402  
(253) 272-8998

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Phone: 847-1299

7. Tony Fox  
Phone: 536-0461

8. Marty & Kim Plumb  
Phone: 988-0059

9. Dan Kelly  
Phone: 531-6585

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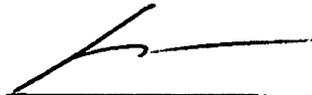
13. Dave Reeser

14. Mick Praden

15. Dr. Wayne Kim  
Spanaway Family Medical Clinic  
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16. Janice Novotney

DATED this 13<sup>th</sup> day of November, 2003.



Geoffrey Cross, WSB #3089  
Attorney for Defendant

2 - Defendant's Witness List