

No. 49491-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint of

STEVEN DANIEL KRAVETZ,

Petitioner.

ON APPEAL FROM LEWIS COUNTY SUPERIOR COURT
Honorable Richard L. Brosey

APPELLANT'S [CORRECTED] REPLY BRIEF

James E. Lobsenz WSBA #8787
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
Attorneys for Petitioner

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
I. ARGUMENT IN REPLY	1
A. The failure to make a motion to suppress violated the right to effective assistance of counsel.	1
1. The Search Warrant was Overbroad.....	1
(a) <i>Hayden</i> does not support the State’s position. There was no warrant in <i>Hayden</i> , the search was a consent search, and there was an obvious nexus between the items seized (clothes) and the crime.....	1
(b) The failure to bring a viable suppression motion is virtually always deficient conduct.....	2
(c) The State misrepresents the record. The prosecutor was the first to discuss the illegally seized evidence in closing argument.....	3
(d) This case is similar to <i>Nordlund</i> where the search warrant was found to be overbroad, and the improper seizure of a single document found on the defendant’s computer was held to be prejudicial because the State used the document to undermine the defense presented.....	6
2. The document seizure exceeded the scope of the warrant.	11

Page

(a)	Neither the courtroom sketch nor the photos of Deputy Libby are items that show dominion and control of the residence being searched.	11
(a)	The “plain view” doctrine does not apply for two reasons. First, the discovery of the documents was not inadvertent. Second, it was not immediately apparent that the documents were evidence of the crimes under investigation.	11
3.	The <i>Cook</i> prejudice rule is inapplicable to IAC claims. To win relief on an IAC claim a PRP Petitioner does <i>not</i> have to prove actual prejudice by a preponderance of the evidence. He need only satisfy the <i>Strickland</i> prejudice requirement.	14
4.	The <i>Guloy</i> harmless error doctrine does not apply to an ineffective assistance of counsel claim. And even if it did, the State’s case on the contested issue of <i>mens rea</i> obviously was not overwhelming.	16
B.	SAME COURSE OF CONDUCT	17
1.	The State misrepresents Petitioner’s argument. Petitioner does not argue that the Assault 1 furthered the Disarming offense. He argues that the Disarming offense furthered the Assault 1 with a firearm offense.	17

2. *Wilson* is not on point. In that case two different assaultive acts were charged. But here, the State seeks to rely on an assault that was never charged, never argued, and thus never found to have been committed. Moreover, the two assaultive acts in *Wilson* were not committed at the same time and were instead separated by a “period of reflection.” No such period of reflection separated the uncharged assault and the charged assault in this case.19

C. THE EXCEPTIONAL SENTENCE VIOLATES THE RULE AGAINST DOUBLE COUNTING. *FISHER* IS DIRECTLY ON POINT.21

D. RESENTENCING IS REQUIRED TO CONSIDER THE MENTAL ILLNESS MITIGATING FACTOR.23

E. A SENTENCING JUDGE CANNOT AVOID THE HOLDING OF *BARNES* SIMPLY BY ORALLY USING FUTURE DANGEROUSNESS AS THE BASIS FOR AN EXCEPTIONAL SENTENCE, AND REFRAINING FROM PUTTING THAT JUSTIFICATION IN WRITING.24

II. CONCLUSION.25

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Washington Cases	
<i>In re Cook</i> 114 Wn.2d 802, 792 P.2d 506 (1990).....	14, 15
<i>In re Crace</i> 174 Wn.2d 835, 280 P.3d 1102 (2012).....	15, 16
<i>In re Khan</i> 184 Wn.2d 679, 363 P.3d 577 (2015).....	16
<i>State v. Barnes</i> 117 Wn.2d 701, 818 P.2d 1088 (1991).....	24
<i>State v. Barron</i> 139 Wn. App. 266, 160 P.3d 1077 (2007).....	3
<i>State v. Daugherty</i> 94 Wn.2d 263, 271, 616 P.2d 649 (1980), <i>rev'd on other grounds in State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1990)	12, 14
<i>State v. Fisher</i> 108 Wn.2d 419, 739 P.2d 683 (1987).....	21, 22
<i>State v. Garcia</i> 140 Wn. App. 609, 166 P.3d 848 (2007).....	11, 13
<i>State v. Guloy</i> 104 Wn.2d 412, 705 P.2d 1182 (1985).....	16
<i>State v. Hayden,</i> 122 Wn. App. 365, 95 P.3d 760 (2004).....	23
<i>State v. Higgs</i> 177 Wn.App. 414, 311 P.3d 1266 (2013).....	2, 3
<i>State v. Keefe</i> 13 Wn. App. 829, 537 P.2d 795 (1975).....	14

	<u>Page(s)</u>
<i>State v. Lair</i> 95 Wn.2d 706, 630 P.2d 427 (1981).....	11
<i>State v. Lewis</i> 115 Wn.2d 294, 797 P.2d 1141 (1990).....	21
<i>State v. Macon</i> 128 Wn.2d 784, 911 P.2d 1004 (1996).....	23
<i>State v. Miller</i> 92 Wn. App. 693, 964 P.2d 1196 (1998).....	17
<i>State v. Nordlund</i> 113 Wn. App. 171, 53 P.3d 520 (2002).....	3, 6-10
<i>State v. Nordby</i> 106 Wn.2d 514, 723 P.2d 1117 (1986).....	23
<i>State v. Ortiz</i> 196 Wn. App. 301, 383 P.3d 586 (2016).....	3
<i>State v. Rainey</i> 197 Wn. App. 129, 28 P.3d 10 (2001).....	3
<i>State v. Thein</i> 138 Wn.2d 133, 977 P.2d 582 (1999).....	8
<i>State v. Wilson</i> 136 Wn. App. 596, 150 P.3d 144 (2007).....	19, 20

Federal Cases

<i>Buck v. Davis</i> ___ U.S. ___ (Feb. 22, 2017)	25
<i>Coolidge v. New Hampshire</i> 403 U.S. 443 (1971)	13
<i>Warden v. Hayden</i> 387 U.S. 294 (1967)	1, 2

	<u>Page(s)</u>
<i>Zurcher v. Stanford Daily</i> 436 U.S. 547 (1978)	8
Constitutional Provisions, Statutes and Court Rules	
RCW 9A.46.020	20
RCW 9A.52.020(1)(b)	20
RCW 9.41.010	18
RCW 9.94A.535(1)(e)	23

I. ARGUMENT IN REPLY

A. The failure to make a motion to suppress violated the right to effective assistance of counsel.

1. The Search Warrant was Overbroad.

(a) *Hayden* does not support the State’s position. There was no warrant in *Hayden*, the search was a consent search, and there was an obvious nexus between the items seized (clothes) and the crime.

The search warrant authorized a search for “items showing dominion/control of [the] residence.” Appendix F, *Decl. Lobsenz*. Citing to *Warden v. Hayden*, 387 U.S. 294, 307 (1967), the State claims this part of the warrant was not overbroad because “[a] warrant may authorize the seizure of evidence establishing a nexus between the suspect and the crime.” *Brief of Respondent*, at 8. But *Hayden* provides no support for the contention that the warrant in this case was not overbroad.

In *Hayden* the defendant’s wife consented to a *warrantless* search.¹ Since there was no warrant, the issue of warrant overbreadth could not possibly arise, so the Court had no occasion to address it. Instead, the issue in *Hayden* was whether searching officers are limited to seizing the instrumentalities and fruits of a crime, such as weapons and stolen property, or whether they may also seize “mere evidentiary” items. One of the searching officers found clothes in a washing machine that matched

¹ In *Hayden* an armed robber entered the business premises of a cab company, took money, and fled on foot. 387 U.S. at 297. Cab drivers followed him, watched him enter a specific residence, and notified the police. *Id.* When police officers arrived at the house, they told the woman who answered the door “they believed that a robber had entered the house, and asked to search the house. She offered no objection.” *Id.*

the description given of the clothes worn by the robber. *Id.* at 298. The clothes seized were neither fruits nor instrumentalities of the crime of robbery. The Court held that their seizure was permissible if there was probable cause to believe that there was a nexus between the clothes *and the crime* committed:

There must, of course, be a nexus – automatically provided in the case of fruits, instrumentalities or contraband – ***between the item to be seized and criminal behavior.***

387 U.S. at 307 (emphasis added). The Court went on to hold that obviously there was such a nexus:

The clothes found in the Washington machine matched the description of those worn by the robber and the police therefore could reasonably believe that the items would aid in the identification of the culprit.

387 U.S. at 307 (emphasis added).

Hayden is of no help to the State in this case. There was no reason to believe that there was a connection between papers showing dominion and control of a house in Olympia and two assaults committed in a courthouse in Montesano. Since probable cause for such a nexus is clearly lacking, the search warrant was overbroad to the extent that it authorized the seizure of such papers.

(b) The failure to bring a viable suppression motion is virtually always deficient conduct.

Petitioner cited several cases involving overbroad search warrants in his opening brief, which the State has not even attempted to distinguish. Petitioner cited *State v. Higgs*, 177 Wn.App. 414, 311 P.3d 1266 (2013)

and *State v. Nordlund*, 113 Wn. App. 171, 53 P.3d 520 (2002). In *Higgs*, as in this case, the issue regarding the validity of the search warrant was raised in the context of a claim of ineffective assistance because the trial attorney failed to make a motion to suppress. This Court held that the failure to make a suppression motion was deficient conduct. *Id.* at 425. Several other cases hold that the failure to bring a plausible or viable suppression motion is always deficient conduct simply because it is not possible to conceive of a tactical reason why a defendant would not bring a suppression motion that had an appreciable chance of succeeding.²

(c) The State misrepresents the record. The prosecutor was the first to discuss the illegally seized evidence in closing argument.

The State attempts to persuade this Court that the trial prosecutor only “obliquely referenced” the exhibit that contained the photos and addresses of Deputy Libby in his closing argument. *State’s Response*, at 12. But the State is forced to admit that the prosecutor told the jury that Kravetz “had a long standing hatred, dislike for the Grays Harbor County Sheriff’s Office, not really just Grays Harbor County, the Sheriff’s Office, but most law enforcement. He didn’t like the Mason County Sheriff’s Office. He didn’t like Centralia Police Department. He didn’t like Grays Harbor County Sheriff’s Department . . .” RP 610-611.

² See, e.g., *State v. Barron*, 139 Wn. App. 266, 276, 160 P.3d 1077 (2007) (conduct deficient if counsel fails to bring a viable motion to suppress); *State v. Rainey*, 197 Wn. App. 129, 135, 28 P.3d 10 (2001) (“We can conceive of no reason why such a motion would not have been made.”); *State v. Ortiz*, 196 Wn. App. 301, 313, 383 P.3d 586 (2016) (“counsel was deficient for not moving to suppress the evidence”).

The prosecutor characterized the documents found inside the folders (which were inside cardboard boxes) in the garage as Kravetz's "research," and used them to support his argument that Kravetz hated the Grays Harbor Sheriff's Department:

In 2009 and 2012, as he's doing research, he's researching the people involved in the case. ***You will find some of that research in the evidence.*** You will also find the warrants to indicate the officer that was involved, Officer Libby, and you will find ***in that research*** a lot of history that the defendant has dug up on Libby, so he's very aware of what he's doing.

RP 612 (emphasis added). Moments later, the prosecutor was arguing that Kravetz intended to kill Deputy Davin. RP 613 ("[H]e decides he's going to kill her"); RP 616 ("[W]hat he did is only consistent with someone who intends to try to kill. It is only consistent with someone, who's trying to inflict great bodily harm."); RP 617 ("there was only one thing left for him to do: He had to kill the deputy.").

The prosecutor's logic was clear:

1. Kravetz hates Grays Harbor Deputy Sheriffs. (That's why he has a folder with information on deputies such as Deputy Libby.)
2. Like Libby, Deputy Davin is a Grays Harbor Deputy Sheriff. RP 62.
3. Ergo, Kravetz hated Deputy Davin and intended to kill her.

On appeal the State asserts that Kravetz's long-standing hatred of Grays Harbor deputy sheriffs "was not contested at trial." *State's Response*, at 12. But this assertion is simply not true. The allegation of a long-standing hatred *was explicitly contested*. Defense counsel argued to

the jury that although he believed he had been sexually assaulted by Mark Reed hospital employees seven years earlier,

everything he did for those next seven years *was not* in an effort *as the State said in their closing a long-standing hatred of law enforcement.*

In fact, you heard Detective Pittman describe the defendant as he wasn't angry at all. He was just telling us this story he was fixated on. *It wasn't hatred.* What there was was a long standing obsession from his untreated – Dr. Ronnei and others – psychotic – all the other experts bring.

RP 624 (emphasis added).

The State also asserts that the trial prosecutor “did not reference the courthouse sketch at all in his closing.” *State's Response* at 13, citing to RP 593-618. But this is also incorrect. The State has either overlooked, or else simply ignores, the trial prosecutor's explicit reference to Kravetz's “hand drawn floor plan”:

He had scouted the courthouse, before back in February of 2012. He had gone there and spent a number of hours taking notes, watching people, seeing who came, who went to various offices, *and he even prepared a hand drawn floor plan.* He'd pick [sic] up the little flyer that's at the front of the courthouse, and *on the back he had drawn a fairly good floor plan, the first floor and part of the second floor, and he has notes on it* about when people came, when people went. He's got notes at locations, benches, stairways, doorways, whether a door is locked. He's got one noted as locked.

RP 602 (emphasis added). Contrary to the State's assertion in its brief that “the prosecutor did not mention the courthouse sketch at all in his closing,” this rather lengthy discussion of the defendant's hand drawn

floor plan *was* a part of the prosecutor's closing argument. It is found on page 602 of the trial transcript. The prosecutor's closing argument remarks do not end until the bottom of page 618.

In sum, the State's contention that "[t]he [trial] prosecutor did not rely on either of these exhibits in any meaningful way," is complete nonsense. The contention that it was defense counsel who first discussed these exhibits is simply false.

(d) This case is similar to *Nordlund* where the search warrant was found to be overbroad, and the improper seizure of a single document found on the defendant's computer was held to be prejudicial because the State used the document to undermine the defense presented.

The outcome of an IAC claim based on failure to bring a suppression motion usually turns on the assessment of whether the defendant can show prejudice. *Nordlund* is a good example of a case where the failure to move to suppress was prejudicial. *Nordlund* raised an IAC claim for the first time on appeal. 113 Wn. App. at 179. To prevail he needed to show that a motion to suppress would likely have been granted. *Id.* This Court held that he made the requisite showing.

In *Nordlund* police obtained two search warrants, a King County warrant that authorized the search of the defendant's residence and the seizure of any computer equipment, and a Pierce County warrant that authorized the search of a computer that police seized pursuant to the King County warrant. *Id.* Police were investigating the attempted rape of a 13-year old girl by a man wearing a ski mask. At trial, the contested issue

was whether Nordlund was the man who attacked the girl. There was no showing of any nexus between the crime and his personal computer.

The affidavits supporting the King County warrant contain no factual support for the conclusory statement that the computer contained data that would establish Nordlund's "location at critical times relevant to the alleged crimes." CP 364. Although an examination of the computer could show the times that Nordlund was using his computer and, thus, support an inference that he was at home those times, there is no factual nexus between this information and any alleged criminal activity. . . .

Id. at 183.

Because a computer stores documents, the *Nordlund* Court recognized that a stricter than usual scrutiny of the probable cause and particularity requirements was called for:

The trial court aptly described a personal computer as "the modern day repository of a man's records, reflections, and conversations." CP at 200. Thus, the search of that computer "has first amendment implications that may collided with fourth amendment concerns. When this occurs [courts] ***closely scrutinize*** compliance with particularity and probable cause requirements." *Id.* at 181-82, citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); [*State v.*] *Perrone*, 119 Wn.2d [538,] at 547, 834 P.2d 611 [(1992)] ("Where a search warrant authorizing a search for materials protected by the First Amendment is concerned, ***the degree of particularity demanded is greater***[.]"); *See also State v. Stenson*, 132 Wn.2d [668,] at 692, 940 P.2d 1239 [(1979)] (search warrants for documents are generally ***given closer scrutiny*** because of potential for intrusion into personal privacy).

(Emphasis added).

Applying this stricter standard, the Court held that the warrants authorizing the search and seizure of the computer were overbroad:

Under this “scrupulous” scrutiny, the King and Pierce County affidavits do not demonstrate probable cause for the seizure and search of Nordlund’s personal computer. . . .

Although the affidavits establish the presence of a computer in Nordlund’s home and his noncriminal use of that computer, they do not contain particularized information demonstrating the required nexus between the computer and the possible evidence of the crimes under investigation. *United States v. Kow*, 58 F.3d 423, 427-28 (9th Cir. 1995) (rejecting search warrant on particularity and overbreadth grounds as warrant failed, in part, to specify alleged crime to which the seized documents related). “[P]robable cause requires a nexus between criminal activity and the item to be seized[.]”

Id. at 182-83, quoting *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Since there was no probable cause to believe that evidence of the attempted rape was in the computer, “the trial court erred in admitting evidence derived from the search of Nordlund’s computer. . . .” *Id.* at 184.

The *Nordlund* Court then proceeded to analyze the question of whether Nordlund had been prejudiced by his trial attorney’s failure to make a suppression motion. The Court recognized that when the State got a search warrant for Nordlund’s computer, “it appears that the State was fishing for some incriminating document, which is precisely what the first and fourth amendments prohibit.” *Id.* at 183, citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978). But the State’s fishing expedition was successful because it turned out that the computer contained a document that Nordlund had written entitled “Statement of Day.” *Id.* at 179. In that document Nordlund described his whereabouts on July 2, from noon until his arrest sometime after 9:30 p.m.” *Id.* The “Statement of the Day” was

the *only* document from the computer which was admitted into evidence. *Id.* at 184. This Court considered whether the admission of that document was prejudicial and concluded that it was:

The State used it to impeach the credibility of Nordlund and his alibi witnesses by highlighting inconsistencies between the times set forth in the document and the times testified to by defense [alibi] witnesses. The State sought to portray Nordlund as carefully crafting his alibi as he learned more about the attacks under investigation.

Id. at 184-85. While the evidence of Nordlund's guilt as to some other counts was overwhelming, the evidence of guilt on the counts dealing with his attack on the young girl was not, and so this Court found that Nordlund was prejudiced by his attorney's failure to move for suppression:

We cannot conclude beyond a reasonable doubt that the State's use of the "Statement of Day" document to impeach Nordlund, his alibi defense, and his alibi witnesses did not contribute to the verdicts on counts III and IV involving D.T. . . .

Id. at 186. Recognizing that "the credibility of Nordlund and his witnesses was a key issue" in the case, this Court reversed Nordlund's convictions on those two counts. *Id.* at 186.

A similar analysis leads to a similar conclusion in this case. First, as in *Nordlund*, the State's "fishing expedition" paid off. The State stumbled across some documents which helped it to impeach Kravetz, just as the document in *Nordlund* helped the State to impeach Nordlund. While Nordlund used a computer to store documents, Kravetz stored documents the old-fashioned way. He put them inside file folders, and then he put the folders inside boxes. The State used an invalid overbroad

warrant as a justification for searching inside the boxes, and as authority for searching inside the folders which were inside the boxes. It then used what it found to impeach Kravetz, whose credibility was a key issue in this case. Kravetz told the interrogating detective that he did not intend to kill either Deputy Davin or the judge, he simply wanted to hurt them enough so that he could escape. At trial, his expert witness testified that Kravetz's delusional disorder significantly impaired his ability to form the intent to kill. RP 471. But the prosecutor used his "courthouse sketch" and his file containing documents about Grays Harbor Deputy Sheriff Libby to impeach Kravetz and to undermine his diminished capacity defense, arguing that these documents showed that he planned his attack on the deputy because he "had a long-standing hatred, dislike for the Grays Harbor County Sheriff's Office." RP 610. He reminded the jury that Kravetz had done research on Officer Libby, and that "he even prepared a hand drawn floor plan" for his trip to the courthouse. RP 612, 601. The prosecutor claimed that "just looking at this map you would say this man wasn't mentally ill at all." RP 653. In sum, just as the prosecution used the one document found in *Nordlund's* computer to undermine his alibi defense, the prosecution used the documents found in the file folders in the cardboard box in Kravetz's garage to undermine his diminished capacity defense. Here, as in *Nordlund*, the defendant was prejudiced by the admission of illegally seized evidence which his trial attorney should have moved to suppress.

2. The document seizure exceeded the scope of the warrant.

- (a) Neither the courtroom sketch nor the photos of Deputy Libby are items that show dominion and control of the residence being searched.**

In addition to illegal search warrant overbreadth, the seizure of the documents found inside the boxes also violated the Fourth Amendment because the warrant only authorized the seizure of documents that showed dominion and control over the residence. Since the seized documents did not show that, their seizure exceeded the scope of the warrant.

The prosecution *admits* that the documents seized were not within the scope of the warrant but attempts to justify their warrantless seizure under the plain view doctrine:

The Petitioner asserts that trial counsel was ineffective for failing to seek suppression of items found in the Petitioner's garage because "they did not show dominion or control of the Kravetz residence." *However, the documents were found in plain view and were clearly pertinent to the crimes under investigation.*

State's Response, at 9 (emphasis added).

- (a) The "plain view" doctrine does not apply for two reasons. First, the discovery of the documents was not inadvertent. Second, it was not immediately apparent that the documents were evidence of the crimes under investigation.**

"The plain view doctrine has three main elements: (1) prior justification for police intrusion; (2) inadvertent discovery; and (3) immediate knowledge by police that the material in plain view is evidence of a crime." *State v. Garcia*, 140 Wn. App. 609, 624, 166 P.3d 848 (2007); *State v. Lair*, 95 Wn.2d 706, 714, 630 P.2d 427 (1981). These

requirements were not met in this case because the discovery of the documents was *not* inadvertent, and when the documents were viewed it was *not* immediately obvious that they constituted evidence of a crime.³

This was clearly not a case of “inadvertent” discovery. As the trial prosecutor told the trial judge, the searching officer “went through boxes and papers . . . that were found in the garage.” RP 252. The prosecutor explained that going through everything found in those boxes was an exhausting process and he invited the trial judge to look at the exhibits: “You can see what’s in them, and there are reams and reams of pieces of paper and little scraps of paper.” RP 252-53. The officer did not accidentally happen across these “reams and reams” of documents and he did not accidentally read through all of them. Thus, the discovery of what these documents contained was not inadvertent.

In *State v. Daugherty*, 94 Wn.2d 263, 271, 616 P.2d 649 (1980), *rev’d on other grounds in State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1990), police “conduct[ed] an exploratory search of” an area inside the defendant’s garage “in the hope that they would discover evidence” of a burglary they were investigating. The Court held: “Discovery of any

³ The document seizure also does not satisfy the first requirement of a prior justification for the police intrusion. The State asserts that the police were justified in opening up the boxes, and in opening up the folders that were inside the boxes, because the warrant authorized a search for documents showing dominion and control. But as noted in the preceding section of this brief, that portion of the search warrant was overbroad because there was no showing of a probable cause nexus between such documents and the assaults committed in the neighboring county. Since the search warrant was invalid as to dominion and control documents, the police did not have a valid “prior justification” for opening those boxes and folders.

evidence in the course of such a search is not ‘inadvertent’ as is required for the plain view doctrine to apply.” *Id.* at 272. Similarly, the discovery of the documents in this case, during an exploratory search through the boxes in Kravetz’s garage, was not an “inadvertent” discovery either.

The plain view doctrine also does not apply because it was not “immediately apparent” that the documents constituted incriminating evidence. “[T]he ‘plain view’ doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.” *Coolidge v. New Hampshire*, 403 U.S. 443, 446 (1971). “Immediate knowledge is required under the plain view exception in order to prevent police from engaging in a generalized search for incriminating material.” *Garcia*, 140 Wn. App. at 625.

In this case, it is clear from the record that the police were unsure whether the photos of Deputy Libby and the courtroom sketch were of any evidentiary significance. Detective Rhoades sought a second search warrant in which he described what police had found in the boxes as documents that “appeared” to be of interest and which “suggested” that Kravetz’s attacks at the courthouse were “possibly premeditated”:

“We’ve recovered some documents uh *that appear to be of interest* and specifically uh one file in particular which is marked with the writing on it saying master plan, when that file was opened its discovered to contain items inside showing or *at least suggesting that the attacks at the courthouse were possibly premeditated* . . . We located some personal information at least the name and address of Deputy Libby, Dave Libby is currently a Grays Harbor um deputy. Um *it appears that it’s possible that uh mister Kravetz had been planning an attack of some sort* uh particular on uh Grays Harbor deputies and **possibly** even mister

Libby. . . .

Petition Appendix J (emphasis added). This is not the language of “*immediate knowledge*” that they were looking at incriminating evidence. This is the language of admitted uncertainty. Here, as in *State v. Keefe*, 13 Wn. App. 829, 833, 537 P.2d 795 (1975), “the most that can be said for the officer’s view of the [item seized], as [the defendant’s] counsel stated in oral argument, is that an item of possible evidentiary value came within the officer’s ‘plain view.’” The fact that police thought it was “possible” that the documents was evidence of an incriminating state of mind is itself conclusive proof that the police did *not* think it was “immediately apparent” that the documents *did* constitute incriminating evidence. Here, as in *Keefe*, the seizing officer “did not have immediate knowledge that he had evidence before him.” *Id.*

In sum, here, as in *Daugherty* and *Keefe*, the plain view doctrine does not apply, the evidence seized must be suppressed, and the defendant’s convictions must be suppressed because the illegally seized evidence played a key role in securing his convictions.

3. The *Cook* prejudice rule is inapplicable to IAC claims. To win relief on an IAC claim a PRP Petitioner does *not* have to prove actual prejudice by a preponderance of the evidence. He need only satisfy the *Strickland* prejudice requirement.

Citing *In re Cook*, 114 Wn.2d 802, 792 P.2d 506 (1990), the State asserts that because Kravetz is attacking his conviction in a collateral attack proceeding, Kravetz “bears the burden of showing prejudicial error by a preponderance of the evidence.” But as the Court recognized in *In re*

Crace, 174 Wn.2d 835, 280 P.3d 1102 (2012), the *Cook* prejudice standard does *not* apply when the claim being raised is a claim of ineffective assistance of counsel. In *Crace* the prosecution argued that a Petitioner raising a claim of ineffective assistance of counsel had to meet the *Cook* prejudice standard:

The State insists that the “actual and substantial prejudice” showing generally required to prevail in a personal restraint petition must be superimposed on the *Strickland* showing, to require proof that the outcome of the trial “*more likely than not*” would have been different.

Crace, 174 Wn.2d at 840.

But the Washington Supreme Court explicitly *rejected* this argument because it “overlooks the foundation of *Strickland*.” *Id.* at 841.

[T]he *Strickland* court rejected any requirement that the defendant show counsel’s deficient conduct ‘more likely than not altered the outcome [of] the case. . . . Thus, *Strickland* arrived at a measure of prejudice that requires the defendant to show a ‘reasonable probability’ that but for counsel’s deficient representation, the outcome of the proceeding would have been different. . . .

Crace, 174 Wn.2d at 841-42.

The *Crace* Court also rejected the contention that the *Cook* preponderance of the evidence prejudice standard applied to IAC claims, because “that would run counter to *Strickland*, as it would require adopting the outcome-determinative standard that *Strickland* expressly rejected.” *Id.* at 844. The Court held that a PRP petitioner raising an IAC

claim only had to satisfy the lower *Strickland* prejudice standard.⁴

4. The *Guloy* harmless error doctrine does not apply to an ineffective assistance of counsel claim. And even if it did, the State’s case on the contested issue of *mens rea* obviously was not overwhelming.

The State argues at length that even if trial counsel was ineffective for failure to move to suppress, that Petitioner’s convictions should not be vacated because the admission of the illegally seized documents was harmless error. *State’s Response*, at 11. The State seeks to rely on the overwhelming untainted evidence test of *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). *Id.* at 11.

But the harmless error rule of *Guloy* does not apply to claims of ineffective assistance of counsel. Like the *Cook* actual prejudice rule for PRPs, the *Crace* Court also explicitly rejected the contention that harmless error analysis adds a second layer of prejudice analysis to consideration of an IAC claim: “A successful showing of ineffective assistance of counsel establishes actual prejudice – *i.e., that error was not harmless.*” *Crace*, 174 Wn.2d at 843 n.2 (emphasis added).

The only standard of prejudice that Petitioner must meet is the *Strickland* prejudice standard. The State’s assertion that there was “overwhelming” evidence of guilt skips over the inconvenient fact that the

⁴ “[F]or a petitioner on collateral attack claiming ineffective assistance of counsel, no ‘double prejudice’ showing above and beyond the prejudice showing required under *Strickland* should be imposed. In meeting his *Strickland* burden, a petitioner has necessarily met the burden of proving ‘actual and substantial prejudice.’” *Crace*, 174 Wn.2d at 845. *Accord In re Khan*, 184 Wn.2d 679, 688, 363 P.3d 577 (2015).

jury in this case *acquitted* Petitioner of the attempted murder of Deputy Davin, and only found him guilty of the alternative charge of Assault 1. Thus, the jury found the State had *not* proved that Kravetz had *an intent* to kill Davin. Similarly, with respect to the charge involving the assault on the judge, the jury acquitted Petitioner of the Assault 1 charge, finding that the State had *not* proved the Petitioner acted with *the intent* to inflict great bodily harm. Instead, the jury only found him guilty of Assault 2, and thus found that the State had only proved that he *recklessly* inflicted substantial bodily harm. These verdicts show that the diminished capacity defense had some considerable success. If the jurors had not been given the illegally seized documentary evidence, there is a reasonable probability that they would not have convicted Petitioner of Assault 1 for the Assault on Deputy Davin, and would have rejected that charge just as they rejected the Assault 1 charge for the assault on the judge.

B. SAME COURSE OF CONDUCT

- 1. The State misrepresents Petitioner's argument. Petitioner does not argue that the Assault 1 furthered the Disarming offense. He argues that the Disarming offense furthered the Assault 1 with a firearm offense.**

The State purports to distinguish *State v. Miller*, 92 Wn. App. 693, 964 P.2d 1196 (1998). In *Miller* the defendant assaulted the officer in order to attempt to gain possession of the officer's gun. The Court held that his Assault 3 crime furthered the crime of Attempted Theft of a Firearm and thus both crimes had the same objective intent.

The State pretends that Petitioner has argued, as *Miller* did, that his

Assault crime furthered the Disarming crime. The State asserts: “Petitioner did not necessarily have to commit Assault in the First Degree in order to effectuate his Disarming of a Law Enforcement Officer.” *State’s Response*, at 18. But the State has the argument backwards. Kravetz is not arguing that he had to commit the assault first so that he could then commit the disarming offense. He is arguing that in this case he necessarily had to commit the crime of Disarming a Police Officer first in order to commit the crime of Assault 1 with a firearm because the firearm used was the officer’s firearm.

In Count III the information alleged:

That the said defendant, Steven Daniel Kravetz, in Grays Harbor County, Washington, on or about March 9, 2012, with intent to interfere with the performance of a law enforcement officer's duties, did knowingly remove a firearm from the person of Polly Davin, a law enforcement officer,

Appendix A, Second Declaration of James Lobsenz.

In Count II the State alleged, and it was undisputed that Kravetz then fired *that* gun at Davin:

That the said defendant, Steven Daniel Kravetz, in Grays Harbor County, Washington, on or about March 9, 2012, with intent to inflict great bodily harm did assault another person, to wit: Polly Davin, ***with a firearm*** or other deadly weapon or by any force or means likely to produce great bodily harm or death;

. . . . and furthermore at the time of the commission of this crime the defendant ***was armed with a firearm*** as defined by RCW 9.41.010

Id.

He had to *get* the gun first before he could use it to commit the

charged assault. Without a successful disarming he could never have committed an assault with a firearm on Deputy Davin. In Special Verdict Form (Count III) the jury explicitly found that the assault flowed from the disarming:

We the jury, return a special verdict by answering as follows:
Was the firearm discharged by the defendant after he removed the firearm from the law enforcement officer?

ANSWER: Yes

(“yes” or “no”)

Appendix N to Declaration of James E. Lobsenz. Accordingly, it is indisputable that that the Disarming furthered the Assault 1 with a firearm.

2. *Wilson* is not on point. In that case two different assaultive acts were charged. But here, the State seeks to rely on an assault that was never charged, never argued, and thus never found to have been committed. Moreover, the two assaultive acts in *Wilson* were not committed at the same time and were instead separated by a “period of reflection.” No such period of reflection separated the uncharged assault and the charged assault in this case.

In an attempt to liken this case to *State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007), the State argues that before Petitioner grabbed her gun Petitioner had already begun to assault her trying to stab her. *State’s Response*, at 23. The State argues that here, as in *Wilson*, there were *two* assaults, and that the second did not further the first.

In *Wilson* two assaults were charged and the defendant was

*convicted of both.*⁵ This Court said that the two assaults were “two acts giving rise to two criminal charges [which] were separated in time, providing opportunity for completion of the assault ending Wilson’s assaultive intent, followed by a period of reflection and formation of a new objective intent upon reentering the house to threaten and to harass her.” *Wilson*, at 615.

This case is not analogous to *Wilson* for two independent reasons. First, the assault allegedly committed by supposedly trying to stab Davin and the assault committed by shooting her with her own gun were *not* “separated in time,” and there was no “period of reflection” following the first act which allowed for the formation of a new objective intent to commit a new crime. Second, and even more significantly, the supposed first assault was never charged, and thus Kravetz was never convicted of it. The State simply hypothesizes that such an earlier assault occurred. *If the State had charged* a separate, initial stabbing assault, as well as a subsequent assault with a firearm, and if a jury had convicted Kravetz of both, then the issue might have arisen as to whether the first assault and second assaults were part of the same criminal conduct. *If that had*

⁵ First, *Wilson* was charged with Burglary 1 for unlawfully entering a building and while inside the building “assault[ing] any person.” *Wilson*, at 606, quoting RCW 9A.52.020(1)(b). He was convicted of Burglary 1 because “he broke down the door, went immediately to the bedroom, pulled Sanders out of bed by her hair, and kicked her in the stomach . . .” *Id.* at 614. He then left the house, reentered the house, “lifted a stick of wood from the broken door and threatened to kill Sanders.” *Id.* at 615. For this conduct *Wilson* was charged with felony harassment, a crime which required proof of a second assault – of a threat to cause bodily injury to another. RCW 9A.46.020. *Wilson* was also convicted of this second assault crime.

occurred, the sentencing judge would have been faced with the issue of whether the two assaults occurred at the “same time” as part of one continuous criminal episode. Petitioner submits that had this issue arisen, the only tenable conclusion would have been that they did occur at the same time, and thus these two assaults would *still* have been part of the same criminal conduct. But there is simply no occasion to address that issue since the alleged stabbing assault was never charged.⁶

C. THE EXCEPTIONAL SENTENCE VIOLATES THE RULE AGAINST DOUBLE COUNTING. FISHER IS DIRECTLY ON POINT.

In *State v. Fisher*, 108 Wn.2d 419, 739 P.2d 683 (1987), the Court recognized that “[p]ursuant to the SRA’s provisions on sentencing for multiple current convictions,” when there is more than one current offense, each fact necessary for conviction on any count necessarily is also taken into account when computing the standard range for every other

⁶ The State hypothesizes that maybe Kravetz had a different *subjective* intent for the Assault 1 and Disarming crimes. The State asserts, “Arguably, the Petitioner’s intent when disarming Deputy Davin was to prevent her from shooting him,” whereas Assault 1 requires proof of an intent to inflict great bodily harm. *State’s Response*, at 24. But as the State itself acknowledges, “the Court must look at the *objective* intent of the Petitioner and whether one crime furthered the other.” *Response* at 16, citing *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990).

The State concedes that “[o]bjective intent may be determined by examining whether one crime furthered the other or whether both crimes were part of a recognizable scheme or plan.” *Response*, at 16. In this case, Petitioner indisputably satisfies both of these alternative tests for ascertaining objective intent because his disarming did further his assault with a firearm, and also because both crimes were part of a recognizable plan or scheme – a plan to avoid being arrested by Deputy Davin. The State itself quotes the evidence of Kravetz’s subjective intent to escape by referring to his taped police statement where he said: “I just wanted something so that these people would not be able to you know if somebody is stunned in some sort of a way by something like that *then I can get out of there*, they won’t be able to hurt me.” *State’s Response*, at 25, quoting Appendix D-2 at 26 (First) Decl. of Lobsenz (emphasis added).

count. Because it is already taken into account once, *Fisher* held that it cannot be used to justify an exceptional sentence. *Id.* at 426.

In this case, Disarming and Assault 1 were both charged. Knowledge that the victim is a police officer is an element of the crime of Disarming. Therefore this fact was necessarily taken into account when the standard range for Disarming was set. Because the Disarming conviction counted as one point in Kravetz’s criminal history when the standard range for Assault 1 was calculated, knowledge that the victim was a police officer was already accounted for when the standard range for Assault 1 was calculated. The sentencing judge counted this fact again when it used it as the basis for an exceptional sentence on Count I. This is double counting. This is exactly what *Fisher* prohibits.

The State argues, without elaborating, that Petitioner is attempting to “bootstrap” the rationale of *Fisher* to support his contention that the sentencing judge erred when he counted knowledge of the fact the victim was a police officer twice – once when setting the standard range for Assault 1 and again when imposing a sentence for Assault 1.

The State asserts that “[n]one of the cases cited by Petitioner indicate this conclusion.” *State’s Response*, at 28.⁷ The State seems to be saying that the holding of *Fisher* is limited to cases where “the fact” which is counted twice is the fact that the victim was assaulted twice, and that the

⁷ The State attempts to brush *Fisher* aside with the observation that in *Fisher* “multiple incidents were addressed by multiple charged counts.” *Id.* But similarly in the present case *knowledge that the victim was a police officer* “was addressed by multiple charged counts.”

holding of *State v. Nordby*, 106 Wn.2d 514, 723 P.2d 1117 (1986) is “the fact” that the victim suffered “serious bodily injuries” cannot be counted twice. But the principle animating *Fisher* and *Nordby* is that *no fact – no matter what it is* – can be counted twice. *Fisher* is directly on point, and it requires vacation of Petitioner’s exceptional sentence.

D. RESENTENCING IS REQUIRED TO CONSIDER THE MENTAL ILLNESS MITIGATING FACTOR.

The State misrepresents Petitioner’s position. He does not claim he is entitled to an exceptional sentence below the standard range. He does contend that the judge made a negative finding that the statutory mitigating factor recognized by RCW 9.94A.535(1)(e) was not present in this case,⁸ and that this finding is not supported by substantial evidence as it must be. *State v. Macon*, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). (The State has not argued that there is substantial evidence to support it). Petitioner *agrees* that just because a statutory mitigating factor exists, that does not mean the sentencing judge must base a sentence below the standard range upon it. But he does maintain that given the evidence in this case, no sentencing judge could rationally find that this statutory mitigator did not apply. Therefore, this Court should remand with directions to enter a finding that this mitigating factor does exist in this

⁸ The sentencing judge failed to make any written finding as to whether or not Petitioner’s “capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law, was significantly impaired.” RCW 9.94A.535(1)(e). Petitioner submits that “the absence of a finding of fact in favor of the party with the burden of proof” – here Kravetz – “is the equivalent of a finding against that party on that issue.” *State v. Haydel*, 122 Wn. App. 365, 373, 95 P.3d 760 (2004).

case, and directing a new sentencing judge to consider that factor when deciding whether a different sentence should be imposed.

E. A SENTENCING JUDGE CANNOT AVOID THE HOLDING OF *BARNES* SIMPLY BY ORALLY USING FUTURE DANGEROUSNESS AS THE BASIS FOR AN EXCEPTIONAL SENTENCE, AND REFRAINING FROM PUTTING THAT JUSTIFICATION IN WRITING.

On the record, the sentencing judge said that Petitioner had “all kinds of mental issues.” RP 5/17/13 at 40-41. He proceeded to list them, stating that Petitioner was “delusional,” “obsessive,” and that “[u]nfortunately, Mr. Kravetz, you are also very dangerous, because there is no doubt in my mind that were you not in handcuffs and in a situation where law enforcement is here to keep you from acting out, that you would easily act out again.” RP 5/17/13 at 40-41.

In very similar words, the sentencing judge in *State v. Barnes*, 117 Wn.2d 701, 704, 818 P.2d 1088 (1991) said that one of his reasons for imposing an exceptional sentence above the standard range was the defendant’s “general obsessive personality that make him extremely dangerous to any family members alive upon his release from DOC.” *Barnes* holds that except in sex offense cases, future dangerousness is not a legally permissible justification for an exceptional sentence.

Without even mentioning *Barnes* or its holding, the State simply argues that because the sentencing judge’s oral statements were never put in writing in the judge’s Findings of Fact and Conclusions of Law, that this Court can simply ignore these statements. Thus, the State argues that

as long as the judge doesn't put it down on paper, it doesn't matter how indefensible the judge's verbally expressed reasons might be for imposing an exceptional sentence. One wonders, if a sentencing judge said, "Mr. Defendant, you are very dangerous because you are an African-American, so therefore I am going to give you an exceptional sentence," would the State be arguing that the appellate court could just ignore that remark because that reason was never stated in writing?⁹

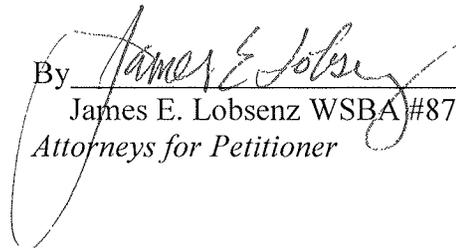
II. CONCLUSION

Petitioner asks this Court to vacate his convictions and remand for a new trial because his trial counsel provided IAC when he failed to make a suppression motion. Alternatively, Petitioner asks this Court to vacate his exceptional sentence, and to remand for resentencing before a new judge. The new sentencing judge should be directed to consider the possibility of imposing an exceptional sentence *below* the standard range due to Petitioner's undisputed severe mental illness which substantially impaired his ability to conform his conduct to law, and which caused the jury to acquit him of attempted murder.

⁹ The very recent decision in *Buck v. Davis*, ___ U.S. ___ (Feb. 22, 2017) makes it clear that that the State could never successfully advance that argument. In *Buck* the jury heard testimony that being African-American tends to make a person more dangerous. Although there was no written verdict that showed that the jury accepted this argument and based its death sentence on it, the Supreme Court vacated the death sentence.

Respectfully submitted this 6th day of April, 2017.

CARNEY BADLEY SPELLMAN, P.S.

By  _____
James E. Lobsenz WSBA #8787
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

- Email and first-class United States mail, postage prepaid, to the following:

Attorneys for Respondent

Katherine Lee Svoboda
GRAYS HARBOR COUNTY PROSECUTOR'S OFFICE
102 W Broadway Ave Rm 102
Montesano WA 98563-3621
ksvoboda@co.grays-harbor.wa.us

Petitioner

Mr. Steven Kravetz
DOC No. 320316
Monroe Correctional Center – SOU – E231
P.O. Box 514
Monroe, WA 98272

DATED this 6th day of April, 2017.


Deborah A. Groth, Legal Assistant

CARNEY BADLEY SPELLMAN

April 06, 2017 - 9:41 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49491-4
Appellate Court Case Title: Personal Restraint Petition of Steven Daniel Kravetz
Superior Court Case Number: 13-1-00175-1

The following documents have been uploaded:

- 2-494914_20170406093552D2866169_1714_Briefs.PDF
This File Contains:
Briefs - Appellants Reply - Modifier: Amended
The Original File Name was Appellants Corrected Reply Brief.PDF

A copy of the uploaded files will be sent to:

- ksvoboda@co.grays-harbor.wa.us
- lobsenz@carneylaw.com

Comments:

Sender Name: Deborah Groth - Email: groth@carneylaw.com

Filing on Behalf of: James Elliot Lobsenz - Email: lobsenz@carneylaw.com (Alternate Email:)

Address:

701 5th Ave, Suite 3600
Seattle, WA, 98104
Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20170406093552D2866169

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint of
STEVEN DANIEL KRAVETZ,
Petitioner,

NO. 49491-4-II

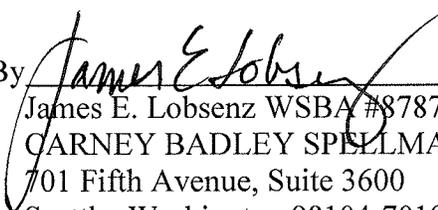
SECOND DECLARATION
OF JAMES E. LOBSENZ IN
SUPPORT OF REPLY
BRIEF

I, JAMES E. LOBSENZ, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

1. I am counsel for the petitioner Steven Kravetz.
2. I have personal knowledge of the facts set forth here.
3. Attached to this declaration as Appendix A is a true and correct copy of the INFORMATION filed in Grays Harbor County Superior Court No. 12-1-140-8.

DATED this 6th day of March, 2017.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz WSBA #8787
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
Attorneys for Petitioner

SECOND DECLARATION OF JAMES E. LOBSENZ IN SUPPORT OF REPLY
BRIEF – 1

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

First-class United States mail, postage prepaid, to the following:

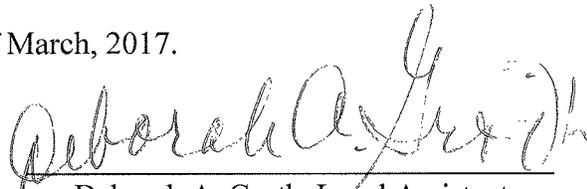
Attorney for Respondent

Katherine L. Svoboda
Grays Harbor County Prosecuting Attorney
102 W. Broadway #102
Montesano WA 98563

Petitioner

Mr. Steven Kravetz
DOC No. 320316
Monroe Correctional Center – SOU – E231
P.O. Box 514
Monroe, WA 98272

DATED this 9th day of March, 2017.



Deborah A. Groth, Legal Assistant

APPENDIX A

2012 APR -4 AM 8:17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

STEVEN DANIEL KRAVETZ,
DOB: 11-16-1977

Defendant.

No.: 12-1-140-8

INFORMATION

P.A. No.: CR 12-0146
P.R. No.: MCSO 12-03019

I, H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Information do accuse the defendant of the crime(s) of ATTEMPTED MURDER IN THE SECOND DEGREE, ASSAULT IN THE FIRST DEGREE (TWO COUNTS), and DISARMING A LAW ENFORCEMENT OFFICER, committed as follows:

COUNT 1.

That the said defendant, Steven Daniel Kravetz, in Grays Harbor County, Washington, on or about March 9, 2012, with intent to commit the crime of Murder in the Second Degree, did an act which was a substantial step toward the commission of the crime of Murder in the Second Degree, to wit: did attempt to intentionally cause the death of another person, to wit: Polly Davin;

CONTRARY TO RCW 9A.28.020 and RCW 9A.32.050(1)(a); and furthermore at the time of the commission of the crime, the defendant was armed with a firearm as defined in RCW 9.41.010; contrary to RCW 9.94A.533(3) and against the peace and dignity of the State of Washington..

The State further alleges that the offense charged in Count 1 was committed against a law enforcement officer who was performing her official duties at the time of the offense, that the defendant knew that the victim was a law enforcement officer and the victim's status as a law enforcement officer is not an element of the offense charged in Count 1, Contrary to RCW 9.94A.535(2)(v).

8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

COUNT 2.

And I, H. Steward Menefee, Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of Assault in the First Degree, a crime based on a series of acts connected together with Count 1, committed as follows:

That the said defendant, Steven Daniel Kravetz, in Grays Harbor County, Washington, on or about March 9, 2012, with intent to inflict great bodily harm did assault another person, to wit: Polly Davin, with a firearm or other deadly weapon or by any force or means likely to produce great bodily harm or death;

CONTRARY TO RCW 9A.36.011(1)(a); and furthermore at the time of the commission of this crime, the defendant was armed with a firearm as defined by RCW 9.41.010; Contrary to RCW 9.94A.533(3) and against the peace and dignity of the State of Washington.

The State further alleges that the offense charged in Count 2 of this Information was committed against a law enforcement officer who was performing her official duties at the time of the offense, the defendant knew that the victim was a law enforcement officer and the victim's status of a law enforcement officer is not an element of the offense charged in Count 2 above. RCW 9.94A.535(2)(v).

COUNT 3.

And I, H. Steward Menefee, Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of Disarming a Law Enforcement Officer, a crime based on a series of acts connected together with Counts 1 and 2, committed as follows:

That the said defendant, Steven Daniel Kravetz, in Grays Harbor County, Washington, on or about March 9, 2012, with intent to interfere with the performance of a law enforcement officer's duties, did knowingly remove a firearm from the person of Polly Davin, a law enforcement officer, when that officer was acting within the scope of the officer's duties, did not consent to the removal and defendant had reasonable cause to know and/or knew that the individual was a law enforcement officer;

CONTRARY TO RCW 9A.76.023(1); and furthermore it is alleged that the firearm involved in the commission of this crime was discharged when the defendant removed the firearm. Contrary to RCW 9A.76.023(2)(b) and against the peace and dignity of the State of Washington.

COUNT 4.

And I, H. Steward Menefee, Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of Assault in the First Degree, a crime based on a series of acts connected together with Counts 1, 2, and 3, committed as follows:

9

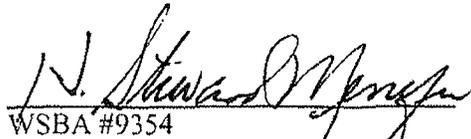
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

That the said defendant, Steven Daniel Kravetz, in Grays Harbor County, Washington, on or about March 9, 2012, with intent to inflict great bodily harm, did assault another person, to wit: David L. Edwards, with a deadly weapon, or by force or by means likely to produce great bodily harm or death;

CONTRARY TO RCW 9A.36.011(1)(a) and furthermore it is alleged that at the time of the commission of the crime charged in Count 4 was armed with a deadly weapon other than a firearm; Contrary to RCW 9.94A.533(4) and against the peace and dignity of the State of Washington.

DATED this 3rd day of April, 2012.

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County


WSBA #9354

HSM/lh

10

CARNEY BADLEY SPELLMAN
March 09, 2017 - 3:22 PM
Transmittal Letter

Document Uploaded: 2-494914-Second Declaration of James E Lobsenz in Support of Reply Brief.PDF

Case Name: In re Personal Restraint of Steven Daniel Kravetz

Court of Appeals Case Number: 49491-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: Second Declaration of James E Lobsenz in Support of Reply Brief

Comments:

No Comments were entered.

Sender Name: Melia Cossette - Email: groth@carneylaw.com

A copy of this document has been emailed to the following addresses:

ksovoda@co.grays-harbor.wa.us

lobsenz@carneylaw.com