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

IN RE PERSONAL RESTRAINT PETITION  
OF:  
ROBERT E. JAMES,

No.: 49767-1-II  
**RESPONSE TO PERSONAL  
RESTRAINT PETITION**

**1. IDENTITY OF RESPONDING PARTY.**

The State of Washington responds by and through Katherine L. Svoboda, Grays Harbor County Prosecuting Attorney’s Office and seeks relief as designated in Part 2 of this response.

**2. RELIEF REQUESTED.**

The State of Washington requests dismissal of the Personal Restraint Petition filed herein.

**3. AUTHORITY FOR RESTRAINT OF PETITIONER.**

The Petitioner was charged by Amended Information in Grays Harbor Superior Court, on February 19, 2013 with Rape in the First Degree, RCW 9A.44.040(1). Attachment A. A jury trial was held in this matter beginning on March 26, 2013 and ending on March 28, 2013. Attachment B. On March 28, 2013, the jury returned a verdict of guilty to the lesser included offense of Rape in the Second Degree. Attachment C. On May 20, 2013, the Petitioner came before the court for sentencing and was sentenced to a standard range sentence of 102 months to life. Attachment D.

1 The Petitioner timely appealed his conviction under cause no. 44906-4-II; however, the Court  
2 affirmed the trial court and issued a Mandate on October 23, 2015. Attachment E.

3 **4. GROUNDS FOR RELIEF AND ARGUMENT.**

4 Relief through a personal restraint petition is extraordinary. *In re Pers. Restraint of Coats*, 173  
5 Wn.2d 123, 132, 267 P.3d 324 (2011). It is not a substitute for an appeal. *In re Pers. Restraint of*  
6 *Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). Collateral relief is limited because it “undermines  
7 the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs  
8 society the right to punish admitted offenders.” *Id.*

9 An appellate court will reach the merits of a personal restraint petition only after the petitioner  
10 makes a threshold showing of (1) constitutional error from which he has suffered actual and  
11 substantial prejudice, or (2) non-constitutional error constituting a fundamental defect that inherently  
12 resulted in a complete miscarriage of justice. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671-72,  
13 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)).  
14 A petitioner’s compliance with this “threshold burden” is mandatory, and the appellate court will  
15 refuse to address the merits of the petition in the absence of such compliance. *Cook*, 114 Wn.2d at  
16 814 (citing *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988)).

17 The petitioner bears the burden of showing prejudicial error by a preponderance of the  
18 evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004) (citing *Cook*, 114  
19 Wn.2d at 813-14)). Bare assertions unsupported by references to the record, citation to authority, or  
20 persuasive reasoning cannot sustain the petitioner’s burden of proof. *State v. Brune*, 45 Wn. App.  
21 354, 363, 725 P.2d 454 (1986). “Where the record does not provide any facts or evidence on which to  
22 decide the issue and the petition instead relies on conclusory allegations, a court should decline to  
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1 determine the validity of a personal restraint petition.” *Cook*, 114 Wn.2d at 814 (citing Williams, 111  
2 Wn.2d at 365).

3 This Court should refuse to reach the merits of this petition because the Petitioner has failed  
4 to meet the required threshold burden of establishing both error and prejudice.

5 **A. Alleged Failure to Provide a Record of Sufficient Completeness**

6 Much of what the Petitioner complains of hinges on an assertion that there is not a complete  
7 record of the trial in this case. However, he provides no competent evidence to demonstrate such a  
8 thing.  
9

10 “A criminal defendant is constitutionally entitled to a ‘record of sufficient completeness’ to  
11 permit effective appellate review of his or her claims.” *State v. Thomas*, 70 Wash.App. 296, 298, 852  
12 P.2d 1130 (1993) (quoting *Coppedge v. United States*, 369 U.S. 438, 446, 82 S.Ct. 917, 8 L.Ed.2d 21  
13 (1962)). However, a record of sufficient completeness does not necessarily mean a complete verbatim  
14 transcript. *Id.* at 299, 852 P.2d 1130. See *State v. Burton*, 165 Wash. App. 866, 883, 269 P.3d 337,  
15 345 (2012).  
16

17 In *Burton*, the judgment and sentence was entered on February 3, 2006. A trial transcript was  
18 requested and it was to be produced by the court reporter at the trial, Loni Smith, by the end of May.  
19 Ms. Smith resigned her position with the superior court in early May 2006 and moved to Utah. Ms.  
20 Smith failed to produce the transcript and eventually an alternate court reporter was appointed.  
21

22 The appointee was unable to produce a transcript from the provided materials due to  
23 incompatible compact discs containing the stenographic record and missing or inoperable audio  
24 records. After attempting unsuccessfully to prepare a transcript, the alternate court reporter notified  
25 the court that only Ms. Smith would be able to produce an accurate transcription of the proceedings.  
26  
27

1 Ms. Smith was reappointed as the official court reporter on June 26, 2007; however, it took  
2 being eventually arrested on a civil contempt bench warrant for her to produce the transcript. The  
3 transcript was finally produced by Ms. Smith on April 21, 2009—three years from the date it was  
4 originally due.

5 The transcript as provided contains hundreds of typographical and stenographical errors, some  
6 of which render portions of the transcript difficult to decipher. For example, the prosecutor's closing  
7 remarks on “abiding belief” appear in the transcript as follows:  
8

9 So think about a situation where you're a year from now at cocktail party a guest  
10 this time ooth Chris matter something like that and TV story comes up something  
11 comes up, and the topic of juror service comes as sometimes does the oirj speri  
12 speakings with said waling var been on a jury and respond smashing I was, what  
13 was of the case about.

14 the case was about a woman who hated her bos and wanted to diel kill him and  
15 thiewt they was hag a hit man and paid 5 fine to aundercover and the whole thing  
16 was on videotape.

17 In a nut sheal ladies and gentlemen if that is how you believe you will describe  
18 this case a year from now, then Ms. Burton is guilty of the crime of sew list tation  
19 of mered in first-degree that's abelief abiding in the future,  
20

21 In response to Ms. Burton's motion objecting to the transcript, the trial court entered an order  
22 in November 2009 directing trial counsel to settle the record. Burton identified passages in the  
23 transcript requiring clarification or correction and the court directed both trial counsel, from that  
24 identification, to determine to the best of their recollection, trial materials and notes, what the record  
25 should reflect. Eventually the trial judge determined that the procedure for supplementation of the  
26 record laid out in RAP 9.4 and 9.5 had been followed and that “[t]he record satisfactorily recounts the  
27 events material to the issues on appeal.” *State v. Burton*, 165 Wash. App. 873–76.

28 Burton argued on appeal that her case more closely resembled *State v. Larson*, 62 Wash.2d  
29 64, 66, 381 P.2d 120 (1963) and *Tilton*, 149 Wash.2d at 783, 72 P.3d 735, two cases in which our

1 Supreme Court concluded that the record was insufficient for review. The appeals court disagreed. In  
2 *Larson*, the entire verbatim report of proceedings was lost and the court concluded that appellate  
3 counsel, who had not acted as trial counsel, had no means by which to assess the sufficiency of the  
4 narrative summary provided by the trial court. *State v. Larson*, 62 Wash.2d at 67, 381 P.2d 120. In  
5 *Tilton*, 36 minutes of the defendant's testimony were not preserved. *State v. Tilton*, 149 Wash.2d at  
6 779, 72 P.3d 735. The court ordered a new trial because the missing testimony was essential. *Id.* at  
7 785, 72 P.3d 735.

9 The Court held that in *Burton*, however, no part of the record was lost. The State's clarifying  
10 affidavit supplements the transcript; it is not offered as a substitute. Indeed, this case appears unique  
11 in that no part of the report of proceedings is missing. Instead, the transcript contains a number of  
12 garbled passages, mostly during closing argument, that require varying degrees of effort to decipher.  
13 *State v. Burton*, 165 Wash. App. 866, 884–85, 269 P.3d 337, 346 (2012). The trial court was  
14 affirmed.

16 In this case, a Verbatim Report of Proceedings was produced for each of the three days of  
17 trial. These were prepared by three separate court reporters as follows:

- 19 • March 26, 2013 VRP by Janice L. Tegarden, filed on August 12, 2013;
- 20 • March 27, 2013 VRP by Pamela J. Dalthorp, filed on August 27, 2013;
- 21 • March 28, 2013 VRP by Sue E. Garcia, filed on August 9, 2013;

22 All three of these transcripts were certified by the reporters and filed with the Court of Appeals as  
23 part of the direct appeal in cause no. 44906-4-II.<sup>1</sup> A review of these transcripts shows no irregularities  
24 or sections that were not transcribed. There is certainly no section of the transcript that resembles the  
25  
26

27 <sup>1</sup> As these are already filed with the Court, the State will not re-submit them here.

1 transcript produced in *Burton*. Further, the Petitioner did not raise any claim of error in the transcript  
2 in his direct appeal.

3 In support of his claim, he filed affidavit's from Karen Ketner (dated December 9, 2015),  
4 Jason A. Ketner (dated October 12, 2016), and Attorney Karrie Young (dated April 6, 2016).  
5 Petitioner's Attachments A, B, and C. These were produced 2.5 to 3.5 years after the trial. The  
6 recitations are vague at best. There is no evidence that any of them actually reviewed the transcript,  
7 nor can they specifically show error. The record produced in this case is sufficient and accurate.  
8 Attachment H.

9  
10 **B. Alleged Prosecutorial Misconduct**

11 The Petitioner makes a claim of prosecutorial misconduct, alleging that "...the prosecutor  
12 repeatedly introduced evidence which had been previously ruled inadmissible.." PRP at 9. The  
13 Petitioner claims that "the statement that 'the person who picked up is the one who raped me' was  
14 made by the victim to the emergency room nurse Miriam Thompson, during her examination and  
15 repeated by nurse Thompson in her testimony." PRP at 9. The Petitioner goes on to claim that "the  
16 judge ruled the statement inadmissible" and that the prosecutor later used this precluded statement in  
17 her rebuttal argument. PRP at 9. This claim is not supported by the record.  
18

19 Arguments that are not supported by any reference to the record or by any citation of  
20 authority need not be considered. *Foster v. Gilliam*, 165 Wash.App. 33, 268 P.3d 945, review denied  
21 173 Wash.2d 1032, 277 P.3d 668(2011).  
22

23 The Sexual Assault Nurse Examiner (SANE), Miriam Thompson, testified as follows regarding a  
24 statement made to her by the victim during the medical exam:

25 She voluntarily got into a car last evening with a friend of her brother's. They  
26 were drinking alcoholic beverages. This was my words on that. And he drove her  
27 to his hotel room and penetrated her anally with his penis. She stated that she  
struggled to get him off of her –

1 3/27/13 RP at 50. At this time, defense counsel objected and the jury was taken from the courtroom.

2  
3 3/27/13 RP at 50.

4 After hearing additional testimony from Ms. Thompson, outside the jury's presence, and  
5 argument from counsel, the trial court ruled that: "I'll allow that, basically. I mean, she's already  
6 testified to part of it. I will allow her to continue with testimony as to what happened as far as the  
7 struggling and that sort of thing but then not get into subsequently calling for help." 3/27/13 RP at  
8 57. Contrary to the Petitioner's assertion, the court did not exclude testimony about the rape being  
9 perpetrated by the person that picked her up.

10  
11 Additionally, the only mention of Ms. Thompson's testimony in rebuttal was a stated that  
12 "...Miriam Thompson testified that [the victim] had not been given pain medication." 3/27/13 RP at  
13 146.

14 There is nothing in the record to support the Petitioner's claim of prosecutorial misconduct.  
15 The State did not use any inadmissible evidence in its closing argument or rebuttal.

16  
17 C. Alleged Ineffective Assistance of Trial Counsel

18 The Petitioner makes several claims of ineffective assistance of trial counsel. However, again,  
19 these are not supported by the record and should be disregarded.

20 The Washington State Supreme Court has adopted the two prong *Strickland* test for analysis  
21 of the effectiveness of a defense counsel performance. See *State v. Jeffries*, 105 Wn.2d 398, 417, 717  
22 P.2d 722, 733 (1986). Ineffective assistance of counsel is a fact-based determination..." *State v.*  
23 *Carson*, 184 Wn.2d 207, 210, 357 P.3d 1064, 1066 (2015) (citing *State v. Rhoads*, 35 Wash.App.  
24 339, 342, 666 P.2d 400 (1983).) Appellate courts "review the entire record in determining whether a  
25 defendant received effective representation at trial." *Id.*

1            *Strickland* explains that the defendant must first show that his counsel’s performance was  
2 deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).  
3 Counsel’s errors must have been so serious that counsel was not functioning as the “counsel”  
4 guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel’s performance is  
5 guided by a presumption of effectiveness. *Id.* at 689. “Reviewing courts must be highly deferential to  
6 counsel’s performance and ‘should recognize that counsel is strongly presumed to have rendered  
7 adequate assistance and made all significant decisions in the exercise of reasonable professional  
8 judgment.’” *Carson* at 216 (quoting *Strickland* at 690.)

10            Secondly, the defendant must show that the deficient performance prejudiced the defense.  
11 *Strickland* at 687. The defendant must show “that counsel’s errors were so serious as to deprive the  
12 defendant of a fair trial, a trial whose result is reliable.” *Id.* For prejudice to be claimed there must be  
13 a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the  
14 result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a  
15 probability sufficient to undermine confidence in the outcome. *Id.*

17            The defendant bears the “heavy burden” of proof as to both prongs. *Carson* at 210. If both  
18 prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the  
19 adversary process that renders the result unreliable. *Strickland* at 687.

21            a. *Failure to Object to the Prosecutors Use of Inadmissible Evidence in Rebuttal and  
22 Failure to Request a Curative Instruction or Mistrial*

23            The Petitioner alleges that trial counsel was “ineffective for failing to object to the prosecutors  
24 repeated use of inadmissible evidence during closing arguments.” PRP at 16. He also contends that  
25 counsel was “ineffective for failing to request a curative instruction” or a mistrial based on the State’s  
26 Argument. “As discussed above, the State did not reference any excluded evidence during its closing  
27

1 or rebuttal arguments. Therefore, there was nothing for defense counsel to object to or any basis for a  
2 curative instruction or a mistrial.

3           b. *Defense Counsel's Questioning of Petitioner*

4           Petitioner claims that he was "abandoned" on the witness stand by defense counsel. He  
5 contends that, contrary to what the record reflects, "...defense counsel abruptly stated, 'no more  
6 questions,' and returned to sit at the defense table. PRP at 20. He then claims that, absent any  
7 questioning, he then had to try and present his testimony without questioning from counsel. PRP at  
8 20. Specifically, he says this was testimony "...that during his departure from the motel room, the  
9 victim was unharmed and conversing with a transient..." PRP at 20.

10  
11           However, the VRP reflects the following questioning took place on this subject between Mr.  
12 Nagle (Q) and the Petitioner (A):

13           Q · Did she come to the door?

14           A · Yes, sir.

15  
16           Q · Now, when you went outside the door, did you see anyone else in the parking  
17 lot?

18           A · Yes, I did.

19           Q · Tell me about that.

20           A · There were, um, at least two groups of people, and I assumed that some of  
21 them were tenants in the far corner, smoking and talking back and forth. · And one  
22 of the -- I wouldn't call him a gentleman, but one of the guys who I took to be a  
23 transient was trying to sell tennis shoes to the people over there. · And I was  
loading stuff up before I left. · While I was still talking to Sonya, he walked up  
and tried to sell the tennis shoes to me.

24           Q · One pair of tennis shoes?

25           A · Yes, sir.

26           Q · And what was that conversation, how did that go?  
27

1 A· ·I've got some new tennis shoes, they are out of the box, brand-new, still have  
2 tags on them, you know, I'll let you have them for, you know, cheap.·I just  
3 informed him I didn't want -- you know, I didn't need tennis shoes.·I just took  
4 him to be a transient that was trying to get money for beer, is what my thoughts  
5 were.·So...

6 Q· ·So Sonya was somewhere near the door at this point?

7 A· ·Her head was out at the door, holding the door as she was wrapped in the  
8 blanket.

9 Q· ·She had a blanket from the bed wrapped around her?

10 A· ·Yes, sir.

11 Q· ·So you -- did you just say good-bye to her or...

12 A· ·I told her I was going to be leaving, so pretty much, yes.

13 Q· ·From there what did you do?

14 A· ·I went home, went to my father's house.·It was still pretty early in the  
15 morning.·I still was smelling like alcohol and probably a little bit drunk, so I  
16 slept for a while and took a shower before going to visit with my children.

17 3/27/13 VRP at 103-104.

18 The only thing the Petitioner presents in support of this assertion is the declaration of his sister. PRP  
19 Attachment A.

20 It is absurd to think that the court reporter fabricated the above exchange between defense  
21 counsel and the petitioner, or that the trial court would have let a witness just sit on the stand and  
22 present a narrative without questioning. It is also probative that Ms. Young, who was co-counsel,  
23 doesn't relate such an event occurring. PRP Attachment C.

24 *c. Failure to request "reasonable belief" instruction regarding Rape in the Second  
25 Degree*

26 The Petitioner claims that defense counsel was "ineffective for failing to request a reasonable  
27 belief instruction to the lesser charge of Rape in the Second Degree..." pursuant to RCW  
9A.44.030(1). PRP at 28. This statute provides that "it is a defense which the defendant must prove

1 by a preponderance of the evidence that at the time of the offense the defendant reasonably believed  
2 that the victim was not mentally incapacitated and/or physically helpless.” He relies on *State v.*  
3 *Powell* for this assertion.

4 In *Powell*, the Defendant appealed his second degree rape jury conviction, under RCW  
5 9A.44.050(1)(b), for engaging in sexual intercourse with another person when the victim was  
6 incapable of consent by reason of being physically helpless or mentally incapacitated. He argued that  
7 he received ineffective assistance from his trial counsel, who failed to propose a jury instruction on  
8 the “reasonable belief” defense, RCW 9A.44.030(1). *State v. Powell*, 150 Wash. App. 139, 142, 206  
9 P.3d 703, 704 (2009).

11 The Court went on to hold that:

13 Without the “reasonable belief” instruction, the jury had (1) no way to recognize  
14 and to weigh the legal significance of Powell's testimony and portions of defense  
15 counsel's closing argument that it appeared to Powell that PLM had consented;  
16 and (2) no way of acquitting Powell even if it believed he had reasonably believed  
17 PLM was not mentally incapacitated or physically helpless. Instead, it would have  
18 appeared to the jury that it had no option but to convict Powell if it found beyond  
19 a reasonable doubt that PLM had been mentally incapacitated or physically  
20 helpless, regardless of whether it also found that Powell reasonably believed  
21 PLM had consented. The absence of this instruction essentially nullified Powell's  
22 defense.

23 *State v. Powell*, 150 Wash. App. 139, 155–57, 206 P.3d 703, 711 (2009)

24 The Court concluded, “...we cannot say that the trial's outcome would have necessarily been  
25 the same had the jury been provided with a “reasonable belief” instruction.” *Id.*; *See Hubert*, 138  
26 Wash.App. at 930, 158 P.3d 1282 (“A reasonable probability ‘is a probability sufficient to undermine  
27 confidence in the outcome.’ ” (Quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052)).

1 A criminal defendant has a constitutional right to effective assistance of counsel. To  
2 determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective  
3 assistance of counsel, appellate courts review whether: (1) the defendant was entitled to the  
4 instruction; (2) the failure to request the instruction was tactical; and (3) the failure to offer the  
5 instruction prejudiced the defendant. *State v. Powell*, 150 Wn.App. 154–58. Courts are required to  
6 begin their analysis with a strong presumption of competence. *Strickland*, 466 U.S. at 689–90 (A  
7 lawyer's strategic choices made after thorough investigation of the law and the facts rarely constitute  
8 deficient performance. *Id.* at 690; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).  
9 To show prejudice, the defendant must establish a reasonable probability that, but for counsel's  
10 errors, the result of the proceeding would have been different. *State v. Pitchford*, 167 Wash. App.  
11 1015, review granted, cause remanded, 174 Wash. 2d 1012, 281 P.3d 288 (2012).  
12

13  
14 In this instance, the Petitioner must meet the higher burden required by a Personal Restraint  
15 Petition. “In order to prevail on a personal restraint petition, a petitioner must establish that there was  
16 a constitutional error that resulted in actual and substantial prejudice to the petitioner or that there  
17 was a nonconstitutional error that resulted in a fundamental defect which inherently results in a  
18 complete miscarriage of justice.” *In re Pers. Restraint of Woods*, 154 Wash.2d 400, 409, 114 P.3d  
19 607 (2005). “This threshold requirement is necessary to preserve the societal interest in finality,  
20 economy, and integrity of the trial process. It also recognizes that the petitioner has had an  
21 opportunity to obtain judicial review by appeal.” *Woods*, 154 Wash.2d at 409, 114 P.3d 607.  
22

23 Without the benefit of the standard of review applicable on direct appeal, Petitioner must  
24 satisfy the above-described standard of review applicable on collateral review. Petitioner alleges a  
25 constitutional error. Thus, he bears the burden of establishing actual and substantial prejudice by a  
26 preponderance of the evidence. *In re Pers. Restraint of Borrero*, 161 Wash.2d 532, 536, 167 P.3d  
27

1 1106 (2007). However, this burden may be met where the particular error “gives rise to a conclusive  
2 presumption of prejudice.” *In re Pers. Restraint of St. Pierre*, 118 Wash.2d 321, 328, 823 P.2d 492  
3 (1992); *Borrero*, 161 Wash.2d at 536, 167 P.3d 1106. Failure to give this instruction is not  
4 presumptively prejudicial. In *Pitchford*, the court found no error in failing to give the instruction.

5 The Defendant’s defense in this case was not consent, it was that the victim was mistaken as  
6 to the identity of her attacker. Defense counsel argued, “I am not going to stand here and tell you that  
7 something terrible didn’t happen that day. The question before you is, has the State proven Robert  
8 James did this.” 3/27/13 VRP at 132-133. The defense, in essence, hinged on the fact that the victim  
9 was mentally incapacitated at the time of the event and couldn’t correctly identify the perpetrator. “I  
10 don’t believe you should set aside her...repeated statement that it was Louis Pluff that did this...”  
11 3/27/13 VRP at 134.

12  
13  
14 The defense then went on to point out the discrepancies between the physical description of  
15 the attacker given by the victim and Mr. James’s description, again arguing “it’s a question of...not  
16 knowing who did this.” 3/27/13 VRP at 134-5. In his SAG, the Petitioner also contends that “I never  
17 raised a consent defense.” Attachment G, page 2.

18  
19 Assuming Petitioner was entitled to the instruction, he fails to overcome the presumption that  
20 counsel made a legitimate tactical decision. It is a legitimate tactic to focus the jury's attention on the  
21 State's high burden of proof of force by avoiding introduction of a potentially confusing inquiry about  
22 defendant's burden to prove the consent defense. Further, both the State's theory and the defense  
23 rested upon the same evidence, that the victim was highly intoxicated. A jury instruction about this  
24 defense would not have changed the outcome of the proceeding.

1                   d. *Alleged failure to investigate DNA report*

2                   The Petitioner alleges that defense counsel failed to “investigate the results of the DNA  
3 report” which apparently affected his decision whether or not to accept a plea bargain. PRP at 31-32.  
4 However, this was an issue he previously raised in his direct appeal through his Statement of  
5 Additional Grounds. Attachment G, page 17. “A personal restraint petitioner may not raise, in a  
6 subsequent (the second or later) petition, an issue (constitutional or nonconstitutional) which was  
7 previously “heard and determined” absent a showing of good cause.” *Matter of Cook*, 114 Wash. 2d  
8 802, 813, 792 P.2d 506, 512 (1990).

10                   e. *Failure to object to Rape in the 2<sup>nd</sup> Degree elements instruction*

11                   Petitioner claims that counsel was ineffective for not objecting to “the improper jury  
12 instruction on second degree rape.” He alleges that the to-convict instruction omitted the statutory  
13 element of “under circumstances not constituting rape in the first degree.” PRP at 37. However, this  
14 is not an essential element of the crime.  
15

16                   In this case, the court instructed on the elements of Rape in the Second Degree using WPIC  
17 41.02. This instruction read as follows:

18                   To convict the defendant of the crime of rape in the second degree, each of the  
19 following three elements of the crime must be proved beyond a reasonable doubt:

- 20                   (1) That on or about June 30, 2012 to July 2, 2012 , the defendant engaged in  
21 sexual intercourse with S.J.C.;
- 22                   (2) That the sexual intercourse occurred  
23                   (a) by forcible compulsion, or  
24                   (b) when S.J.C. was incapable of consent by reason of being physically helpless  
25                   or mentally incapacitated, and  
26                   (3) That this act occurred in the State of Washington.

27                   If you find from the evidence that elements (1) and (3), and either of the  
alternative elements (2)(a), or (2)(b) have been proved beyond a reasonable doubt,  
then it will be your duty to return a verdict of guilty. To return a verdict of guilty,  
the jury need not be unanimous as to which of alternatives (2)(a) or (2)(b) has

1           been proved beyond a reasonable doubt, as long as each juror finds that at least  
2           one alternative has been proved beyond a reasonable doubt.

3           On the other hand, if, after weighing all the evidence, you have a reasonable  
4           doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a  
5           verdict of not guilty.

6           Attachment F, Instruction no. 9. This instruction is a correct statement of the essential elements.

7           Further, in this case, the Petitioner was originally charged with Rape in the First Degree, so  
8           the jury was instructed that “If you find the defendant not guilty of the crime of Rape in the First  
9           Degree, or if after full and careful consideration you cannot agree on that crime, you will consider the  
10          lesser crime of Rape in the Second Degree...” Attachment F, Instruction no. 15.

11          This clearly instructed the jury that they couldn’t find the Petitioner guilty of Rape in the  
12          Second Degree until they had eliminated the possibility that he was guilty of Rape in the First  
13          Degree.

14                   *f. Failure to request pre-trial competency hearing with victim*

15          The Petitioner alleges that “Defense counsel was ineffective for failing to request a pre trial  
16          competency hearing to determine if the victim was capable of accurately recalling and relating  
17          events.” PRP at 39. However, this was an issue he previously raised in his direct appeal through his  
18          Statement of Additional Grounds. Attachment G, page 13. “A personal restraint petitioner may not  
19          raise, in a subsequent (the second or later) petition, an issue (constitutional or nonconstitutional)  
20          which was *previously “heard and determined”* absent a showing of good cause.” *Matter of Cook*,  
21          114 Wash. 2d 802, 813, 792 P.2d 506, 512 (1990).  
22

23  
24          This Court has previously ruled on this issue and Petitioner makes no showing why the matter  
25          should be reexamined.  
26  
27

1           g. *Failure to object to courts use of facts not proven/admitted for top of standard range*  
2           *sentence*

3           The Petitioner attempts to couch this as an ineffective assistance of counsel claim; however,  
4 he objects to the trial court's imposition of a sentence at the top of the standard range. PRP 41-43.

5           The trial court has discretion to sentence anywhere within standard range without providing  
6 any reasons in support of its decision; therefore, there cannot be abuse of discretion with regard to  
7 sentence within standard range and consequently as matter of law there is no right to appeal amount  
8 of time imposed. *State v. Mail*, 65 Wash.App. 295, 828 P.2d 70, affirmed 121 Wash.2d 707, 854 P.2d  
9 1042 (1992). The Petitioner was given a standard range sentence and he cannot challenge that here.

10  
11           h. *Failure to object to restitution re: victim's injuries*

12           The Petitioner asserts that he was "not convicted of causing" the victim's injuries and  
13 restitution for her medical bills should not have been imposed. PRP at 43. However, the Petitioner  
14 was convicted of Rape in the Second Degree and one of the alternatives was "forcible compulsion."  
15 Further, the victim testified that the injuries she incurred were as a result of the rape committed by the  
16 Petitioner.

17           RCW 9.94A.750(3) provides that "...restitution ordered by a court pursuant to a criminal  
18 conviction shall be based on easily ascertainable damages for injury to or loss of property, actual  
19 expenses incurred for treatment for injury to persons, and lost wages resulting from injury." The trial  
20 court acted within its discretion to impose this restitution.

21  
22           **D. Alleged Errors of the Trial Court**

23           The Petitioner alleges that is was error for the trial court to fail "to correct the prosecutor's use  
24 of inadmissible evidence during closing arguments." PRP at 23. Again, the Petitioner fails to cite any  
25 part of the record to support this, and he fails to present any competent evidence that such argument  
26 occurred. This argument is not supported by the record and should be disregarded.  
27

1 The Petitioner alleges that the court failed to record questions from the jury during  
2 deliberations. However, there is no record of such question in the court file, the transcripts, or the  
3 clerk's minutes. Attachments B and H. The only evidence produced by Petitioner is an equivocal  
4 statement by Ms. Young that "I believe that the jury did submit a question." PRP Attachment C. Even  
5 if this is correct, Ms. Young recalls that the jury was simply instructed that they "had already been  
6 provided the relevant instructions." *Id.* The Petitioner can show no prejudice on this issue and is not  
7 entitled to relief.  
8

9 **E. Ineffective Assistance of Appellate Counsel**

10 Generally, upon collateral review, a petitioner may raise a new error of constitutional  
11 magnitude or a nonconstitutional error which constitutes a fundamental defect that inherently results  
12 in a miscarriage of justice. *In re Pers. Restraint of Lord*, 123 Wash.2d 296, 303, 868 P.2d 835 (1994).  
13 Where constitutional error or fundamental defect is alleged, the petitioner must show that he or she  
14 was actually and substantially prejudiced by the error.  
15

16 If a petitioner raises ineffective assistance of appellate counsel on collateral review, he or she  
17 must first show that the legal issue that appellate counsel failed to raise had merit. *In re Pers.*  
18 *Restraint of Maxfield*, 133 Wash.2d 332, 344, 945 P.2d 196 (1997). Second, the petitioner must show  
19 that he or she was actually prejudiced by appellate counsel's failure to raise the issue. *Id.* See *In re*  
20 *Pers. Restraint Petition of Dalluge*, 152 Wash. 2d 772, 777-78, 100 P.3d 279, 282 (2004).  
21

22 The Petitioner lodges a number of complaints regarding appellate counsel, including an  
23 alleged "failure to communicate" and an alleged failure to adequately investigate." PRP at 43-36.  
24 However, he fails to show what meritorious issue that appellate counsel failed to raise. Considering  
25 the lack of evidence that the record is deficient, it is reasonable that appellate counsel would not  
26  
27

1 challenge the VRP on appeal. Petitioner was able to address these issues in his SAG and failed to do  
2 so.

3 None of the complaints made by the Petitioner regarding appellate counsel would equate to an  
4 “error of constitutional magnitude or a nonconstitutional error which constitutes a fundamental defect  
5 that inherently results in a miscarriage of justice.” Therefore, he is not entitled to relief.

6  
7 **F. Allegation that court personnel conspired to alter court records**

8 The Petitioner makes the outrageous claim that “court personnel conspired to deprive  
9 petitioner of his constitutional right to due process by altering the RP and clerk’s minutes to conceal  
10 errors committed during his trial.” PRP at 47. For this to be true, there would have to be a conspiracy  
11 of, at least, three court reporters and a deputy court clerk. The Petitioner advances no theory why  
12 these court personnel would risk their jobs and the potential criminal and civil liability of such an  
13 action. There is no competent evidence that supports this claim and it should be disregarded by the  
14 Court.

15  
16 **G. Alleged destruction of court records**

17 There has been no destruction of court records in this case. The three court reporters each  
18 filed a certified transcript of the proceeding at issue. Each of these reporters was physically present  
19 during the trial and any additional notes or audio recording might assist them in completing the  
20 transcript, but the transcript is the official court record.

21  
22 **H. Cumulative Error**

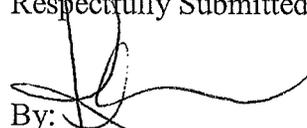
23 As discussed above, the Petitioner’s claims all lack merit. Therefore, there can be no  
24 cumulative error.

1 5. **CONCLUSION.**

2 The Petitioner has not been able to carry his burden and this petition should be denied.

3  
4 DATED this 14 day of March, 2017.

5  
6 Respectfully Submitted,

7  
8 By: 

9 KATHERINE L. SVOBODA  
10 Prosecuting Attorney  
11 for Grays Harbor County  
12 WSBA #34097  
13  
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Attachment -- A

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SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

v

ROBERT E JAMES,  
DOB 06-29-1964

Defendant

No 12-1-338-9

AMENDED INFORMATION

P A No CR 12-0364

P R No APD 12-A13073

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 RAPE IN THE FIRST DEGREE, committed as follows

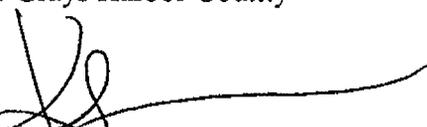
That the said defendant, Robert E James, in Grays Harbor County, Washington, on or about June 30, 2012, to July 1, 2012, did engage in sexual intercourse with S J C by forcible compulsion and did inflict serious physical injury upon S J C ,

CONTRARY TO RCW 9A 44 040(1) and against the peace and dignity of the State of Washington

DATED this 19th day of February 2013

H STEWARD MENEFEE  
Prosecuting Attorney  
for Grays Harbor County

BY

  
KATHERINE L SVOBODA  
Sr Deputy Prosecuting Attorney  
WSBA #34097

39

Attachment -- B

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON

CAUSE NO 12-1-00338-9

Court convenes at 9 01 a m

Plaintiff,

DATE March 26, 2013

VS

HON JUDGE F MARK MCCAULEY

Robert James

COURT REPORTER Jan Tegarden

Defendant,

COUNTY CLERK CHERYL BROWN

DEPUTY CLERK SUSAN O'BRIEN

Voir Dire

---

Cause comes on regularly for trial at 9 01 a m Plaintiff is represented by Katherine Svoboda  
Defendant is appearing in person and is represented by counsel Michael Nagle and Karrie  
Young Defendant is in custody

Prospective jurors and Bailiff Jennifer Hagen present in the courtroom

Prospective jurors are sworn to true answers give and interrogation of prospective jurors by Court  
and counsel begins

Court gives introduction and asks general questions

Jurors excused for hardship #9 14, 69, 79, 104 and 129

9 30 a m Voir dire by Ms Svoboda

Recess 10 01 a m to 10 16 a m

Voir dire by Mr Nagle

10 39 a m Further voir dire by Ms Svoboda None by Mr Nagle

Jury selection 10 45 a m to 10 58 a m

The following jurors are sworn to try this case

1	Michelle Barclay	7	Roney Erickson
2	Elaine Farmer	8	Sylvia Gaub
3	Robert Chambers	9	Steven Puvogel
4	Roger Records	10	Erica Pearson
5	Linda Damgaard	11	Lindsay Bromley
6	Matthew Mackey	12	Renee Fisher
		13	Marlene McAllister

Remaining jurors are thanked and excused at 11 03 a m

Court explains process and expectations, and admonishes the jury not to discuss or investigate this  
case

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

CAUSE NO 12-1-00338-9  
COURT CONVENES AT 11 11 a m  
DATE March 26 2013

STATE OF WASHINGTON

Plaintiff  
VS  
Robert E James

HON JUDGE F MARK MCCAULEY

COURT REPORTER Jan Tegarden

Defendant

COUNTY CLERK CHERYL BROWN

DEPUTY CLERK KT O'Brien

Jury Trial, Day 1

---

Cause comes on regularly for hearing at 11 11 a m Plaintiff is represented by Katherine Svoboda Prosecuting Attorney Defendant is appearing in person is in custody is represented by counsel Michael Nagle and Karrie Young

Jury is present with bailiff Jennifer Hagen  
State's ID #s 1-17 have been previously marked  
Opening statements Ms Svoboda  
Mr Nagle

Jury goes out 11 22 a m

Re admissibility of victim s statements Mr Nagle, Ms Svoboda  
Counsel agree that where both sides have called the same witness, the witness need appear only once  
Recess 11 26 a m to 11 36 a m Defendant and both counsel present, jury present with bailiff  
Notepads distributed to jury Court gives instruction re note-taking

State calls Sonya Comenout, sworn and testified Cross examination by Mr Nagle

State's ID #5, victim statement, identified

Recess for lunch 12 08 p m to 1 32 p m Jury comes in with bailiff

State calls Marvin Gregory, sworn and testified

State's ID #8, Mr. Gregory's statement, identified Cross examination by Mr Nagle

State calls Charlie Kim, sworn and testified

State's ID #17 motel room key, offered and admitted Cross examination by Mr Nagle

State's ID #16, registration form, offered and admitted

State's ID #9, Mr Kim's statement, identified

State calls Helen Biggs, sworn and testified

State's ID #7, Ms Biggs' statement, identified Cross examination by Mr Nagle

Defendant's ID #18, photo line-up, marked, offered Court reserves decision

State calls Wendy Taylor, sworn and testified

State's ID #10, Ms. Taylor's statement, identified Cross examination by Ms Young

State calls Christa Anderson, sworn and testified

State's ID #11, Ms Anderson's statement, identified Cross examination by Ms Young

Jury excused for recess 2 37 p m

Arguments heard re Defense ID #18 Ms Svoboda, Mr Nagle By stipulation, State s copy of the same exhibit is substituted as #18, and admitted

Recess to 2 58 p m Jury comes in with bailiff

State calls Jason Capps, sworn and testified

State's ID #30 and 29, photographs, offered and admitted #29 is published to the jury

---

State's ID #28 and 24 photographs, offered and admitted, published (separately) to the jury  
State's ID #23, photograph, offered and admitted  
State's ID #5, victim statement, identified Ms Svoboda asks to have Officer Capps read Sonya Comenout's statement per rule 803 Mr Nagle objects Court reserves decision  
State's ID #22, photograph, offered and admitted, published to the jury  
State's ID #21, 20, and 19, photographs, offered and admitted #19 and 20 published to the jury  
Jury goes out 3 37 p m Court reviews State s ID #5 Argument Mr Nagle, Ms Svoboda  
Rebuttal by Mr Nagle  
Recess 3 38 p m to 4 01 p m Jury not present Court makes statement, hears from counsel  
Court makes oral findings, allows officer to read #5 to the jury Discussion of scheduling  
4 11 p m Jury comes in with bailiff  
Officer Jason Capps reads State's ID #5 to the jury Cross examination by Mr Nagle  
Officer Capps reads partial statement from States's ID #5 ID #5 admitted by agreement

Out of order, Mr Nagle calls FLAY WHITE, sworn and testified  
Defense ID #31, Mr White s statement, marked  
Cross examination by Ms Svoboda

Out of order, Mr Nagle calls MARY WHITE, sworn and testified  
Cross examination by Ms Svoboda

Court excuses the jury at 4 29 p m , until tomorrow at 8 55 a m

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

CAUSE NO 12-1-00338-9  
COURT CONVENES AT 9 02 a m  
DATE March 27, 2013

STATE OF WASHINGTON

Plaintiff  
VS  
Robert E James

HON JUDGE F MARK MCCAULEY

COURT REPORTER Pam Dalthorp

Defendant

COUNTY CLERK CHERYL BROWN

DEPUTY CLERK KT O'Brien

Jury Trial, Day 2

---

Cause comes on regularly for hearing at 9 02 a m Plaintiff is represented by Katherine Svoboda  
Prosecuting Attorney Defendant is appearing in person is in custody is represented by counsel  
Michael Nagle and Karrie Young

State's ID #32 through 45 marked

Jury is present with bailiff Jennifer Hagen

State calls John Andrew ("Andy") Snodgrass, sworn and testified

State's ID #18, photo montage, published to the jury

State's ID #46, photo montage instructions, offered and admitted, read to the jury

State's ID #47, photo montage instructions, offered and admitted.

State's ID #38, 39, 42, 43, 44, 45, 41, and 40, photographs, offered and admitted

State's ID #6, victim's statement, identified, offered Mr Nagle objects

Jury is taken out 9 37 a m

Court reviews ID #6 Arguments heard Court makes oral findings, sustains objection

Jury returns 9 48 a m

Testimony of Andy Snodgrass continues, with direct examination by Ms Svoboda

State's ID #15, transit mall DVD, identified

State's ID #32 through 37, photographs, identified

State's ID #13, DNA sample, identified.

State's ID #14, Sexual Assault kit, identified.

Cross examination by Mr Nagle

State calls: Tammy Drago, sworn and testified

State's ID #15 identified.

State's ID #32, 33, 34, 35, 36, and 37, photographs, offered and admitted

No cross examination

State calls Miriam Thompson, RN, sworn and testified Mr Nagle objects to her reading from notes

Jury is taken out 10 19 a m

Arguments heard on objection Mr Nagle

Ms Svoboda makes offer of proof further direct examination of Miriam Thompson, and she reads from her notes Court inquires of Mr Nagle as to specific objections Oral order witness may continue her testimony except the portion about victim calling for help

Recess 10 32 a m to 10 47 a m Jury comes in with bailiff

Testimony of Miriam Thompson continues, with direct examination by Ms Svoboda

State's ID #14, Sexual Assault kit, identified, and contents described by the witness

Cross examination by Mr Nagle Sidebar

Jury taken out 11 06 a m

Statement Mr Nagle He submits 1 page (not marked) to the Court Ms Svoboda makes objection

Mr Nagle inquires of the witness, Miriam Thompson

Oral order Court will allow testimony re victim's psychological condition and history

Jury returns 11 12 a m

Further cross examination of Miriam Thompson by Mr Nagle

State calls Marion M. Clark (from Crime Lab), sworn and testified

State's ID #49 and 50, each containing underwear and biological evidence, marked

State's ID #13, DNA sample, offered and admitted

State's ID #14, Sexual Assault kit, offered and admitted

State's ID #50 and 49 identified

Cross examination by Mr Nagle Re-direct examination by Ms Svoboda

State re-calls Det. Andy Snodgrass, still under oath

State's IDs #50 and 49 identified; offered and admitted

Re-direct examination by Mr Nagle

Defense ID #51, photograph, offered and admitted

Jury excused for lunch 11 49 a m , to return at 1 15 p m

Recess to 1 21 p m Jury present with bailiff

State rests

Defense calls Robert James, sworn and testified

Cross examination by Ms Svoboda

State's exhibit #36, 37, and 32 identified

Sidebar Cross examination continues

Re-direct examination by Mr Nagle

Defense rests

Jury taken out 2 10 p m

Statements/arguments heard re jury instructions

Recess to 2 30 p m Statements heard re jury instructions

Court explains sidebar Recess to 2 45 p m Jury comes in with bailiff

Court instructs the jury

Closing arguments heard Ms Svoboda, Mr Nagle

Rebuttal by Ms Svoboda

Court names Roney Erickson, Juror #7, as the alternate he is admonished not to talk about the case until released by a call from the bailiff Court adds a few oral instructions re deliberations

Jury retires to deliberate at 3 47 p m

Jury leaves for the day at approximately 4 40 p m , and will return tomorrow morning

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

CAUSE NO 12-1-00338-9  
COURT CONVENES AT 1 48 p m  
DATE March 28, 2013

STATE OF WASHINGTON

Plaintiff  
VS  
Robert E James

HON JUDGE F MARK MCCAULEY

COURT REPORTER Sue Garcia

Defendant

COUNTY CLERK CHERYL BROWN

DEPUTY CLERK KT O'Brien

Jury Trial, Day 3

---

Cause comes on regularly for hearing at 9 02 a m Plaintiff is represented by Katherine Svoboda  
Prosecuting Attorney Defendant is appearing in person is in custody is represented by counsel  
Michael Nagle

Jury comes in with bailiff Jennifer Hagen

The following verdict is read in open Court We, the jury, find the defendant Robert E James, guilty of  
the crime of Rape in the Second Degree Michelle Barclay, Presiding Juror

Jury is thanked and excused

Sentencing set for Monday, May 6 a m

Defendant is held without bail, order signed

Order for pre-sentence report signed

69

Attachment -- C

Jaw

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GRAYS HARBOR COUNTY  
C. BROWN, CLERK

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SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON.

Plaintiff

No 12-1-338-9

vs

VERDICT FORM "B"

ROBERT E. JAMES.

Defendant

We the jury find the defendant, Robert E James.

Guilty

(Write in "Not Guilty" or "Guilty")

of the crime of **Rape in the Second Degree**

Michelle Barclay  
MICHELLE BARCLAY  
Presiding Juror

66

Attachment -- D

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Superior Court of Washington  
 County of Grays Harbor

State of Washington Plaintiff

No. 12-1-338-9

vs

Felony Judgment and Sentence --  
 Prison

ROBERT E JAMES  
 Defendant

RCW 9.94A.507 Prison Confinement  
 (Sex Offense and Kidnapping of a Minor Offense)  
 (FJS)

PCN  
 SID  
 DOB 06-29-1964

Clerk's Action Required, para 2,1, 4.1, 4.3a,  
 4.3b, 5.2, 5.3, 5.5 and 5.7  
 Defendant Used Motor Vehicle  
 Juvenile Decline  Mandatory  Discretion

I Hearing

1 1 The court conducted a sentencing hearing this date the defendant the defendant's lawyer Michael J Nagle and (deputy) prosecuting attorney Katherine L Svoboda were present

II Findings

2 1 Current Offenses The defendant is guilty of the following offenses based upon jury-verdict March 28 2013

Count	Crime	RCW (w/subsection)	Class	Date of Crime
1	RAPE IN THE SECOND DEGREE	9A 44 050	FA	On or about 06-30-2012 to 07-01-2012

Class FA (Felony-A) FB (Felony-B) FC (Felony-C) (If the crime is a drug offense include the type of drug in the second column)

Additional current offenses are attached in Appendix 2 1a

The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A 507

The jury returned a special verdict or the court made a special finding with regard to the following

The defendant engaged agreed offered attempted solicited another or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count \_\_\_\_\_ RCW 9 94A \_\_\_\_\_

The offense was predatory as to Count \_\_\_\_\_ RCW 9 94A 836

78

- The victim was **under 15 years of age** at the time of the offense in Count \_\_\_\_\_ RCW 9 94A 837
- The victim was **developmentally disabled** mentally disordered or a frail elder or vulnerable adult at the time of the offense in Count \_\_\_\_\_ RCW 9 94A 838 9A 44 010
- The defendant acted with **sexual motivation** in committing the offense in Count \_\_\_\_\_ RCW 9 94A 835
- This case involves **kidnapping** in the first degree kidnapping in the second degree or unlawful imprisonment as defined in chapter 9A 40 RCW where the victim is a minor and the offender is not the minor s parent RCW 9A 44 130

**2 2 Criminal History (RCW 9 94A 525)**

CRIME	DATE OF SENTENCE	SENTENCING COURT (County and State)	DATE OF CRIME	A (Adult) or J (Juvenile)	TYPE OF CRIME
Indecent Liberties (3 counts)		Quinault Tribal Court	9/14/2000	A	

\*DV Domestic Violence was pled and proved  Additional criminal history is attached in Appendix 2 2

- The defendant committed a current offense while on community placement/community custody (adds one point to score) RCW 9 94A 525
- The prior convictions listed as number(s) \_\_\_\_\_ above or in appendix 2 2 are one offense for purposes of determining the offender score (RCW 9 94A 525)
- The prior convictions listed as number(s) \_\_\_\_\_ above or in appendix 2 2 are not counted as points but as enhancements pursuant to RCW 46 61 520

**2 3 Sentencing Data**

Count No	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range(including enhancements)	Maximum Term
1	0	XI	78 to 102 months to Life	-NONE-	78 to 102 months to Life	Life/\$50 000

\* (F) Firearm, (D) Other deadly weapons (V) VUCSA in a protected zone (VH) Veh Hom see RCW 46 61 520 (JP) Juvenile present (SM) Sexual motivation, RCW 9 94A 533(8) (SCF) Sexual conduct with a child for a fee RCW 9 94A 533(9) (CSG) criminal street gang involving minor (AE) endangerment while attempting to elude

Additional current offense sentencing data is attached in Appendix 2 3

For violent offenses most serious offenses or armed offenders recommended sentencing agreements or plea agreements are  attached  as follows \_\_\_\_\_

- 2 4**  **Exceptional Sentence** The court finds substantial and compelling reasons that justify an exceptional sentence  within  below the standard range for Count(s) \_\_\_\_\_  above the standard range for Count(s) \_\_\_\_\_
- The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act
  - Aggravating factors were  stipulated by the defendant  found by the court after the defendant waived jury trial
  - found by jury by special interrogatory

Findings of fact and conclusions of law are attached in Appendix 2 4  Jury s special interrogatory is attached 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)
- The defendant has the present means to pay costs of incarceration RCW 9 94A 760

III Judgment

3 1 The defendant is guilty of the Counts and Charges listed in Paragraph 2 1 and Appendix 2 1

IV Sentence and Order

It is ordered

4 1 Confinement The court sentences the defendant to total confinement as follows

(a) Confinement RCW 9 94A 589 A term of total confinement in the custody of the Department of Corrections (DOC)

\_\_\_\_\_ months on Count ~~1~~

- The confinement time on Count(s) \_\_\_\_\_ contain(s) a mandatory minimum term of \_\_\_\_\_
- The confinement time on Count \_\_\_\_\_ includes \_\_\_\_\_ months as enhancement for  firearm  deadly weapon  sexual motivation  VUCSA in a protected zone  manufacture of methamphetamine with juvenile present  sexual conduct with a child for a fee

Actual number of months of total confinement ordered is \_\_\_\_\_

All counts shall be served concurrently except for the portion of those counts for which there is an enhancement as set forth above at Section 2 3 and except for the following counts which shall be served consecutively

The sentence herein shall run consecutively with the sentence in cause number(s) \_\_\_\_\_

but concurrently to any other felony cause not referred to in this Judgment RCW 9 94A 589

Confinement shall commence immediately unless otherwise set forth here \_\_\_\_\_

(b) Confinement RCW 9 94A 507 (Sex Offenses only) The court orders the following term of confinement in the custody of the DOC

Count I minimum term 102 months maximum term Life

(c) Credit for Time Served 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 jail shall compute time served

(d)  Work Ethic Program RCW 9 94A 690 RCW 72 09 410 The court finds that the defendant is eligible and is likely to qualify for work ethic program The court recommends that the defendant serve the sentence at a work ethic program Upon completion of work ethic program the defendant shall be released on community custody for any remaining time of total confinement subject to the conditions in Section 4 2 Violation of the conditions of community custody may result in a return to total confinement for remaining time of confinement

4.2 Community Custody (To determine which offenses are eligible for or required for community custody see RCW 9 94A 701)

(A) The defendant shall be on community custody for the longer of  
(1) the period of early release RCW 9 94A 728(1)(2) or  
(2) the period imposed by the court as follows

Count(s) \_\_\_\_\_ 36 months Sex Offenses

Count(s) \_\_\_\_\_ 36 months for Serious Violent Offenses

Count(s) \_\_\_\_\_ 18 months for Violent Offenses

Count(s) \_\_\_\_\_ 12 months (for crimes against a person drug offenses or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(Sex offenses only) For count(s) 1 sentenced under RCW 9 94A 507 for any period of time the defendant is released from total confinement before the expiration of the statutory maximum

(B) 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 restitution (service) (3) notify DOC of any change in defendant s address or employment (4) not consume controlled substances except pursuant to lawfully issued prescriptions (5) not unlawfully possess controlled substances while in community custody (6) not own use or possess firearms or ammunition (7) pay supervision fees as determined by DOC (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court (9) for sex offenses submit to electronic monitoring if imposed by DOC and (10) abide by any additional conditions imposed by DOC under RCW 9 94A 704 and 706 The defendant s residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody For sex offenders sentenced under RCW 9 94A 709 the court may extend community custody up to the statutory maximum term of the sentence

The court orders that during the period of supervision the defendant shall

consume no alcohol

have no contact with S J C

remain  within  outside of a specified geographical boundary to wit

not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone) RCW 9 94A 030(8)

participate in the following crime-related treatment or counseling services \_\_\_\_\_

undergo an evaluation for treatment for  domestic violence  substance abuse

mental health  anger management, and fully comply with all recommended treatment

comply with the following crime-related prohibitions

**▶ The defendant shall refrain from all further crimes against persons**

Other conditions

**▶ Not consume or possess any controlled substances or drug paraphernalia without a valid prescription.  
▶ Submit to random urinalysis/breathalyzer testing to monitor alcohol/drug-free status as requested by his/her Community Corrections Officer.  
▶ No consumption or possession of alcoholic beverages.  
▶ Follow all sex offender registration requirements.**

- ▶ Obtain a sexual deviancy evaluation and follow all treatment recommendations Must be from a therapist approved by his/her CCO;
- ▶ Submit to polygraph examinations to monitor compliance with conditions and/or treatment at the direction of CCO and/or therapist. Must not be found deceptive.

(C) For sentences imposed under RCW 9 94A 507 the Indeterminate Sentence Review Board may impose other conditions (including electronic monitoring if DOC so recommends) In an emergency DOC may impose other conditions for a period not to exceed seven working days

Court Ordered Treatment If any court orders mental health or chemical dependency treatment the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision RCW 9 94A 562

**4 3a Legal Financial Obligations** The defendant shall pay to the clerk of this court

JASS CODE

PCI	\$ 500 00	Victim assessment	RCW 7 68 035
CRC	\$ 200 00	Court costs including RCW 9 94A 760 9 94A 505 10 01 160 10 46 190	
PUB	\$ 500 00	Fees for court appointed attorney	RCW 9 94A 760
CLF	\$ 100 00	Crime lab fee [ ] suspended due to indigency	RCW 43 43 690
	\$ 100 00	DNA collection fee [ ] not imposed due to hardship	RCW 43 43 7541
JASS CODE	\$ 56 707 61	Restitution to	
		<b>Health Care Authority</b> <b>Office of Financial Recovery</b> <b>Medical-COR</b> <b>PO Box 9501</b> <b>Olympia, WA 98507-9501</b> <b>ID# 100302433WA</b>	
	\$ _____	<b>Total</b>	RCW9 94A 760

[X] 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  
 [X] shall be set by the prosecutor  
 [ ] is scheduled for \_\_\_\_\_ (date)

[X] The defendant waives any right to be present at any restitution hearing (sign initials) \_\_\_\_\_

[ ] **Restitution** Schedule attached

[X] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction RCW 9 94A 7602, RCW 9 94A 760(8)

[X] All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court commencing immediately unless the court specifically sets forth the rate here Not less than \$ \_\_\_\_\_ per month commencing \_\_\_\_\_  
 RCW 9 94A 760

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested RCW 9 94A 760(7)(b)

The court orders the defendant to pay costs of incarceration at the rate of \$\_\_\_\_\_ per day (actual costs not to exceed \$100 per day) (JLR) RCW 9 94A 760

he 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 73 160

**4.3b**  **Electronic Monitoring Reimbursement** The defendant is ordered to reimburse \_\_\_\_\_ (name of electronic monitoring agency) at \_\_\_\_\_ for the cost of pretrial electronic monitoring in the amount of \$\_\_\_\_\_

**4 4** **DNA Testing** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement RCW 43 43 754

**HIV Testing** The defendant shall submit to HIV testing RCW 70 24 340

The defendant must report to the Grays Harbor County Jail within 72 hours of sentence and provide a DNA sample

**4 5** **No Contact**

The defendant shall not have contact with S C including but not limited to personal verbal telephonic written or contact through a third party for life (which does not exceed the maximum statutory sentence)

A separate Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence

**4 6** **Other**

**4 7** **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** If you wish to petition or move for collateral attack on this Judgment and Sentence including but not limited to any personal restraint petition state habeas corpus petition motion to vacate judgment motion to withdraw guilty plea motion for new trial or motion to arrest judgment, you must do so 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** If you committed your offense prior to July 1 2000 you 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. If you committed your offense on or after July 1 2000 the court shall retain jurisdiction over you for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation regardless of the statutory maximum for the crime. RCW 9 94A 760 and RCW 9 94A 505(5) The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9 94A 760(4) and RCW 9 94A 753(4)
- 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 (DOC) or the clerk of the court 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 760 may be taken without further notice. RCW 9 94A 7606
- 5.4 Community Custody Violation** (a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation you may receive as a sanction up to 60 days of confinement per violation. RCW 9 94A 633 (b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9 94A 737(2)
- 5.5 Firearms** You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court 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

**5.6 Sex and Kidnapping Offender Registration** RCW 9A 44 130 10 01 200

**1 General Applicability and Requirements** Because this crime involves a sex offense or kidnaping offense involving a minor as defined in Laws of 2010 Ch 367 § 1 you are required to register.

If you are a resident of Washington, you must register with the sheriff of the county of the state of Washington where you reside. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of the state of Washington where you will be residing.

If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register within three business days of being sentenced unless you are in custody.

in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of your school, where you are employed, or where you carry on a vocation.

**2 Offenders Who are New Residents or Returning Washington Residents** If you move to Washington or if you leave this state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state.

**3 Change of Residence Within State** If you change your residence within a county, you must provide, by certified mail with return receipt requested or in person, signed written notice of your change of residence to the sheriff within three business days of moving. If you change your residence to a new county within this state, you must register with the sheriff of the new county within three business days of moving. Also within three business days, you must provide, by certified mail with return receipt requested or in person, signed written notice of your change of address to the sheriff of the county where you last registered.

**4. Leaving the State or Moving to Another State** If you move to another state, or if you work, carry on a vocation, or attend school in another state, you must register a new address, fingerprints, and photograph with the new state within three business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. If you move out of the state, you must also send written notice within three business days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

**5 Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12)** If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within three business days prior to arriving at the institution. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within three business days prior to beginning to work at the institution. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within three business days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within three business days prior to arriving at the school to attend classes. The sheriff shall promptly notify the principal of the school.

**6 Registration by a Person Who Does Not Have a Fixed Residence** Even if you do not have a fixed residence, you are required to register. Registration must occur within three business days of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within three business days after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last

registered If you enter a different county and stay there for more than 24hours you will be required to register with the sheriff of the new county not more than three business days after entering the new county You must also report weekly in person to the sheriff of the county where you are registered The weekly report shall be on a day specified by the county sheriff's office and shall occur during normal business hours You must keep an accurate accounting of where you stay during the week and provide it to the county sheriff upon request The lack of fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4 24 550

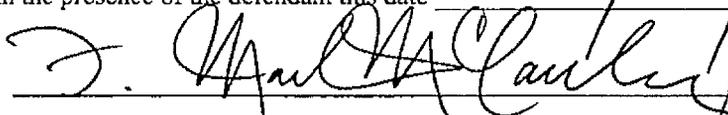
**7 Application for a Name Change** If you apply for a name change you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change If you receive an order changing your name you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order RCW 9A 44 130(7)

**57 Motor Vehicle** If the court found that you used a motor vehicle in the commission of the offense then the Department of Licensing will revoke your driver s license The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing which must revoke your driver s license RCW 46 20 285

**58 Other** \_\_\_\_\_

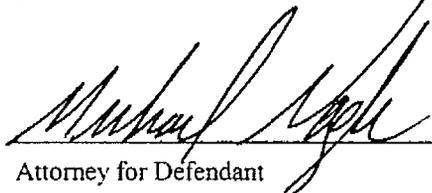
Done in Open Court and in the presence of the defendant this date

5/20/13

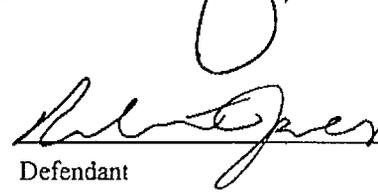
  
\_\_\_\_\_  
Judge ~~Gordon L. Godfrey~~ / F. Mark McCauley / ~~David L. Edwards~~

  
\_\_\_\_\_

Deputy Prosecuting Attorney  
WSBA # 34097  
Print Name  
KATHERINE L SVOBODA

  
\_\_\_\_\_

Attorney for Defendant  
WSBA # 20657  
Print Name  
MICHAEL J NAGLE

  
\_\_\_\_\_

Defendant  
Print Name  
ROBERT E JAMES

**Voting Rights Statement** I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of the Department of Corrections (not serving a sentence of confinement in the custody of the Department of Corrections and not subject to community custody as defined by in RCW 9 94A 030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: (a) a certificate of discharge issued by the sentencing court, RCW 9 94A 637; (b) a court order issued by the sentencing court restoring the right, RCW 9 92 066; (c) a final order of discharge issued by the indeterminate sentence review board, RCW 9 96 050; or (d) a certificate of restoration issued by the governor, RCW 9 96 020. Voting before the right is restored is a class C felony, RCW 29A 84 660. Registering to vote before the right is restored is a class C felony, RCW 29A 84 140.

Defendant's signature \_\_\_\_\_  


Any petition or motion for collateral attack on this judgment, including but not limited to any personal restraint petition, habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for a new trial, or motion to arrest judgment, must be filed within one year of the final judgment in this matter. The judgment in this matter will become final on the last of the following dates: The date it is filed with the clerk of the trial court, the date an appellate court issues its mandate disposing of a timely direct appeal in this case, or the date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming this conviction. Failure to file a petition or motion for collateral attack within one year of the final judgment will waive any right you may have to collaterally attack this judgment.

Defendant's signature \_\_\_\_\_  


I am a certified or registered interpreter or the court has found me otherwise qualified to interpret the \_\_\_\_\_  
language which the defendant understands I interpreted this Judgment and Sentence for the defendant into that language

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Signed at Montesano Washington on \_\_\_\_\_

\_\_\_\_\_  
Interpreter

\_\_\_\_\_  
Print Name

I \_\_\_\_\_ 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 the Court of said county and state by \_\_\_\_\_, Deputy Clerk

**VI IDENTIFICATION OF THE DEFENDANT**

SID No \_\_\_\_\_ Date of Birth 06-29-1964

(If no SID complete a separate Applicant card (Form FD-258) for State Patrol)

FBI No \_\_\_\_\_ Local ID No \_\_\_\_\_

PCN No \_\_\_\_\_ Other DOC No

Alias name, DOB \_\_\_\_\_

**Race**  Asian/Pacific  Black/African-American  Caucasian  Native American  Other \_\_\_\_\_

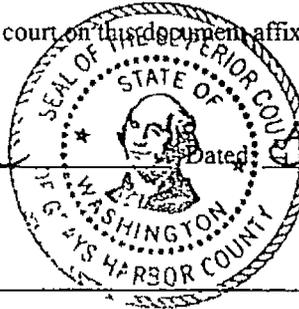
**Ethnicity**  Hispanic  Non-Hispanic

**Sex**  Male  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

**CHERYL BROWN**  
Clerk of the Court Deputy Clerk

*[Handwritten Signature]*



Dated 1/20/2013

The defendant's signature *[Handwritten Signature]*

Address \_\_\_\_\_

Phone Number \_\_\_\_\_

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously
<i>[Fingerprint impression]</i>	<i>[Fingerprint impression]</i>	<i>[Fingerprint impression]</i>	<i>[Fingerprint impression]</i>

Attachment -- E

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FILED  
GRAYS HARBOR COUNTY  
C. BROWN, CLERK

DIVISION II

2015 OCT 26 AM 8:36

STATE OF WASHINGTON,  
Respondent,

v.

ROBERT EDWARD JAMES,  
Appellant.

No. 44906-4-II

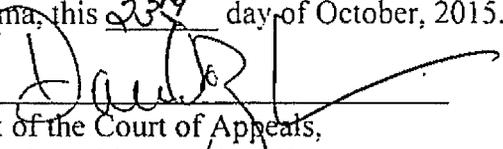
MANDATE

Grays Harbor County Cause No.  
12-1-00338-9

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

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on March 31, 2015 became the decision terminating review of this court of the above entitled case on September 30, 2015. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

IN TESTIMONY WHEREOF, I have hereunto set  
my hand and affixed the seal of said Court at  
Tacoma, this 23<sup>rd</sup> day of October, 2015.

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



cc: Hon. Mark McCauley  
Lise Ellner  
Katherine Lee Svoboda

Attachment -- F

FILED  
GRAYS HARBOR COUNTY  
C BROWN, CLERK  
2013 MAR 28 PM 2:28

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON

Plaintiff

No 12-1-338-9

vs

ROBERT E JAMES.

Defendant

COURT'S INSTRUCTIONS TO THE JURY

INSTRUCTION No. 1.

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

COURT'S INSTRUCTIONS

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65

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about, the ability of the witness to observe accurately, the quality of a witness's memory while testifying, the manner of the witness while testifying, any personal interest that the witness might have in the outcome or the issues, any bias or prejudice that the witness may have shown, the reasonableness of the witness's statements in the context of all of the other evidence, and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

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 to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

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

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole. As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

#### **INSTRUCTION No. 2.**

The defendant has been charged by Information with the crime of rape in the first degree.

A person commits the crime of rape in the first degree when he engages in sexual intercourse with another person by forcible compulsion when he inflicts serious physical injury.

#### **INSTRUCTION No. 3.**

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

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, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

#### **INSTRUCTION No. 4.**

To convict the defendant of the crime of rape in the first degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 30, 2012, to July 1, 2012, the defendant engaged in sexual intercourse with S J C.
- (2) That the sexual intercourse was by forcible compulsion.
- (3) That the defendant inflicted serious physical injury, and
- (4) That any of these 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 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. 5.**

Sexual intercourse means that

(a) the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight, or

(b) any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex. ~~or~~

**INSTRUCTION No. 6.**

Forcible compulsion means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury

**INSTRUCTION No. 7.**

Physical injury means physical pain or injury, illness or an impairment of physical condition

**INSTRUCTION No. 8.**

A person commits the crime of rape in the second degree when he engages in sexual intercourse with another person by forcible compulsion or when the other person is incapable of consent by reason of being physically helpless or mentally incapacitated

**INSTRUCTION No. 9.**

To convict the defendant of the crime of rape in the second degree, each of the following three elements of the crime must be proved beyond a reasonable doubt

(1) That on or about June 30 2012, to July 1, 2012, the defendant engaged in sexual intercourse with S J C .

(2) That the sexual intercourse occurred

(a) by forcible compulsion, or

(b) when S J C was incapable of consent by reason of being physically helpless or mentally incapacitated, and

(3) That this act occurred in the State of Washington

If you find from the evidence that elements (1) and (3) and either of the alternative elements (2)(a) or (2)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

#### **INSTRUCTION No. 10.**

Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

#### **INSTRUCTION No. 11.**

Mental incapacity is a condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance, or by some other cause.

A person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

#### **INSTRUCTION No. 12.**

A person commits the crime of rape in the third degree when he engages in sexual intercourse with another person not married to him when the other person did not consent to the sexual intercourse, and such lack of consent was clearly expressed by the other person's words or conduct.

### INSTRUCTION No. 13.

To convict the defendant of the crime of rape in the third degree, each of the following four elements of the crime must be proved beyond a reasonable doubt

- (1) That on or about June 30, 2012, to July 1, 2012, the defendant engaged in sexual intercourse with S J C .
- (2) That S J C was not married to the defendant.
- (3) That S J C did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct and
- (4) That any of these 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 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. 14

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

### INSTRUCTION No. 15

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and three verdict forms, A and B and C. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

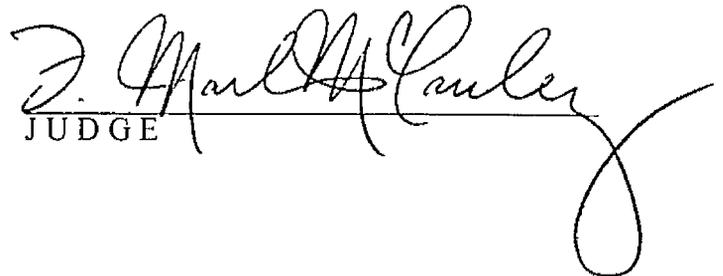
When completing the verdict forms, you will first consider the crime of Rape in the First Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B or C. If you find the defendant not guilty of the crime of Rape in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Rape in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B 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 Verdict Form B.

If you find the defendant guilty on verdict form B, do not use verdict form C. If you find the defendant not guilty of the crime of Rape in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Rape in the Third Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form C the words "not guilty" or the word "guilty," according to the decision you reach.

Because 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 must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

DATE 3/27/13

  
JUDGE

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON

Plaintiff.

No 12-1-338-9

vs

VERDICT FORM "A"

ROBERT E JAMES

Defendant

We, the jury, find the defendant, Robert E James, \_\_\_\_\_  
(Write in "Not Guilty" or "Guilty")

of the crime of **Rape in the First Degree**

\_\_\_\_\_  
Presiding Juror

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON

Plaintiff.

No 12-1-338-9

vs

VERDICT FORM "C"

ROBERT E JAMES.

Defendant

---

We the jury find the defendant, Robert E James

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(Write in "Not Guilty" or "Guilty")

of the crime of **Rape in the Third Degree**

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Presiding Juror

Attachment -- G

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44906-4-II

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

STATE OF WASHINGTON  
RESPONDENT  
VS

ROBERT E. JAMES

APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR GRAYS HARBOR

APPEALANT STATEMENT OF ADDITIONAL GROUNDS (SAG)

ADDITIONAL GROUNDS I

THE TRIAL COURT'S INSTRUCTION ON CONSENT AS AN AFFIRMATIVE DEFENSE GIVEN IN CONJUNCTION WITH THE INSTRUCTION ON SECOND DEGREE RAPE AS A LESSER INCLUDED OFFENSE VIOLATED DUE PROCESS BY IMPROPERLY SHIFTING THE BURDEN OF PROOF TO ME TO DISPROVE AN ELEMENT OF SECOND DEGREE RAPE.

"Constitutional error may be raised for the first time on appeal (RAP 2.5 (a)). This is particularly true of error affecting fundamental aspects of Due Process, such as the presumption of innocence and the right to have the state prove every element of the charges beyond a reasonable doubt" STATE VS JOHNSON, 100 Wn.2d. 607, 614, (1983), overruled on other grounds in STATE VS BERGEREN, 105 Wn.2d 1, (1985). A jury instruction which improperly shifts the burden of proof to the defendant violates due process and is a Constitutional question which may be raised for the first time on appeal, STATE VS McCULLUM, 98 Wn.2d 484, 488, (1983). The jury instructions given in my case raise a constitutional claim which this court must address.

The due process clause of the fourteenth amendment to the United States Constitution requires the state to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. SANDSTROM VS MONTANA, 442 U.S. 510, 520, 99 S.CT. 2450, 2457, 61 L.ED .2d 39, 48 (1979); In re WINSHIP, 397

U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.ed.2d 368, 375 (1970). Here, the instruction on consent relieved the state of its burden of proving the elements of incapacity to consent by reason of being physically helpless or mentally incapacitated in the lesser included offense of second degree rape, and shifted the burden of proving consent to me.

I was charged with First Degree Rape, pursuant to RCW 9A.44.040(1)(c). Over my objections the court gave instruction nine (9) on the lesser included offense of second degree rape which included the elements of the victim being incapable of consent by reason of being physically helpless, or mentally incapacitated. (RP 123 (a)7-24) The court also gave an instruction on the affirmative defense of consent, I never raised a consent defense.

In STATE VS CAMARA, 113 Wn.2d 631, (1989). The Supreme Court recognized consent as a valid defense to a charge of rape. In that case, the defendant was convicted of second degree rape under RCW 9A.44.050 (1)(a), the "forcible compulsion" alternative. Separate instructions were given that defined the terms forcible compulsion and consent for the jury. The defendant argued that consent negates the elements of forcible compulsion and therefore the state had the burden of proving the absence of consent beyond a reasonable doubt. The court rejected this argument and held the burden of proving consent could constitutionally be placed upon the defendant.

In CAMARA, the court did not address the situation in which the incapacity to consent or the lack of consent is an element of the offense charged. Nevertheless, the Court of Appeal in STATE VS LOUGH, 70 Wn.App. 302, 326, (1993), affirmed at 125 WN.2d. 847, (1995), approved placing the burden upon the defendant to prove consent in an indecent liberties case when the allegation was that the victim was incapable of consent by reason of being physically helpless. The court did note, however, that a defendant's consent defense is legally and logically superfluous when the state's sole theory is that the victim was legally incapable of giving consent, LOUGH, 70 Wn.App. 329

Camara and Lough are distinguishable from my case. Here, unlike in Camasra, incapacity to consent or mental incapacitation is an element of the lesser included offense of second degree rape that was submitted to the jury. Unlike Camara and Lough, I did not raise a defense of consent during trial and therefore there were no facts before the jury upon which they could consider the issue of consent, much less determine whether the state had met its burden of proving every element of second degree rape beyond a reasonable doubt. The state's theory of the case was that I engaged in "sexual intercourse with [the victim] by forcible compulsion where [I] inflict[ed] serious physical injury." RCW 9A.44.040(1)(c).

Instruction 9 (nine) allowed the jury to consider

the element of incapacity to consent or mental incapacitation without any facts relating to the issue of consent which, coupled with the instruction on consent, "erroneously indicated to the jurors that [I] had some burden of persuasion to carry, which, if not met, would preclude [the juror's] ability to acquit [me] of [the] lesser criminal act." MCCULLUM 98 Wn.2d 497. This relieved the state of its burden of proving every element of the lesser offense, and unconstitutionally shifted the burden of proving consent to me. *Id.*

The trial court committed prejudicial error by submitting both instruction to the jury. "Since the error infringed upon a constitutional right . . . , the error is presumed prejudicial, and the state has the burden of proving the error was harmless." MCCULLUM *Supra* at 497

Neither, the consent instruction was misleading. "A reasonable juror could have mistakenly concluded that [I] had not met [my] 'burden of proof' to establish a 'reasonable doubt,' and thus convicted [me] of [second degree rape]." *Id.* at 498. "Since the instruction in [my case] could well have affected the final outcome of the case, the error cannot be deemed harmless beyond a reasonable doubt. *Id.* My conviction must be reversed and my case remanded for a new trial.

ADDITIONAL GROUNDS II

I contend that the trial Court erred in instructing the jury on the lesser degree offense of rape in the second degree. There were no allegations or testimony from the victim or myself that only the elements of the lesser offense were committed. All evidence and testimony presented at trial concerned the first degree rape offense resulting in the serious physical injuries, which was the aggravating factor elevating the offense to rape in the first degree.

RCW 10.61.006; 010;. The factual prong of the WORKMAN, test for determining whether a lesser included offense instruction is warranted is satisfied when, viewing the evidence in the light most favorable to the party requesting the instruction, substantial evidence support a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater.

Courts should give lesser degree offense instruction only when there is evidence that defendant committed only the lesser degree offense. STATE VS PETTUS, (1998) 89 Wn.App 688, review denied, 136 Wn.2d 1010, under all relevant statutes and cases, there is a requirement that there exist some substantial evidence indicating that only the lesser degree offense has been

committed, to the exclusion of the greater, before the giving of a lesser degree instruction is warranted. That is obviously not the situation in my case. It is unconstested that S.C. suffered serious bodily injury as a result of the assault upon her. The only point of contention at trial was whether I was the person who assaulted S.C. and caused her injuries. S.C. never claimed that she was forced to engage in sexual intercourse other than the assault which resulted in her injuries.

A case which bears directly on mine is STATE VS BROWN, 127 Wn.2d. 749 (1995). which concerns a decision by the Washington Supreme Court in which a defendant, charged with rape in the first degree, is improperly convicted of the lesser degree of rape in the second degree. The victim, T.C. testified that Brown and other forced her to have sexual intercourse and that he held a gun to her head at one point. Brown denied raping her. Based on this testimony, Brown argues that neither [127 Wn.2d 755] party presented evidence that would support the conclusion that he raped T.G. but did not threaten to use a deadly weapon.

The Court of Appeals concluded that there was affirmative evidence that Brown committed only second degree rape because there was evidence which tended to impeach T.G.'s claim that a gun was used. Brown, however, wisely asserts that

the court of Appeal's ruling contradicts this courts precedent. In FOWLER, we held that "affirmative evidence" requires something more than the possibility that the jury could disbelieve some of the state's evidence, FOWLER: see also STATE VS SPEECE, SUPRA.

The State, nevertheless, contends that it did produce affirmative evidence, and focuses on the fact that the gun was not originally used to force T.G. to submit to sexual intercourse.

However, under the statute, RCW 9A.44.040., the use or threaten use of a deadly weapon during the assault constituted the rape is an aggravating factor elevating this crime to first degree rape. The plain language of the statute supports no other conclusion (emphasis in original). We (Supreme Court) think its unlikely that the state would argue under subsection (c) that it an assault inflicts serious physical injury of his victim only after completing sexual intercourse, he is guilty of only second degeree rape.

Based on the foregoing, we conclud that the state has failed to satisfy the factual prong of WORKMAN. As a result, it was error to instruct the jury on the lesser included offense of second degree rape.

Our reversal here is not based on the insufficiency of the evidence to support a charge of second degree rape,

b

but the impropriety of allowing the jury to consider that charge as a lesser included offense of first degree rape. Accordingly, we reverse and remand for a new trial on second degree rape.

The Supreme Court, in the case above, used an clearly prescient analogy in describing its decision to reverse the conviction of the defendant in STATE VS BROWN, which is "We think it unlikely that the state would argue under subsection (c) that if an assailant inflicts serious physical injury only after completing sexual intercourse, he is guilty of only second degree rape."

The statement above exactly describe the argument used by the state to justify the giving of the lesser degree instruction to the jury in my case. The aggravating factors elevating the offense to the charge of rape in the first degree in my case was the serious physical injuries inflicted on S.C. during her assault.

While the aggravating factors elevating the offense to first degree rape differ in the two cases, it is my contention that the analogy used by the court describes exactly the unlikely argument the state utilizes to justify the giving of the lesser degree instructions of rape in the second degree which resulted in my conviction. Namely, the state seems to be arguing that

I am guilty of only second degree rape, despite the injuries suffered by S.C. and the fact there was no evidence presented to commit only the lesser offense had been committed. Using the Supreme court reasoning, Courts the plain language of the statute supports no other conclusion, which is the infliction of serious physical injury during the assault constituting the rape is an aggravating factor elevating the crime to first degree rape.

Accordingly, I contend that my conviction should be reversed based on the decision reached in STATE VS BROWN. Namely that the court erred in giving the jury improper instructions of rape in the second degree.

Further advancing this argument, the following cases and articles of the Washington Constitution support my contention that the giving of the lesser degree instruction to the jury by the court was an improper comment on the evidence, giving the impression to the jury that the court considered there to be sufficient evidence of my guilt, and that it was for the jury to decide the required element and severity of the crime committed. Specifically, the giving of the improper jury instructions allowed the jury to consider alternative

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means to commit the crime alleged, where no evidence or testimony concerning those alternative means were never produced, by the state or myself, during the trial.

Article IV, Section 16 of the Washington Constitution prohibits a judge from conveying his or her personal perception of the merits of the case or giving an instruction that implies matters of fact have been established as a matter of law.

A jury instruction is not an impermissible comment on the evidence when sufficient evidence support it and the instruction is an accurate statement of the law. State vs Johnson

While the State did produce evidence and argument contenting that S.C. had consumed a certain amount of alcohol and as a result was physically helpless and unable to consent to sexual intercourse, this was presented to support the chain of events which led to S.C.s' eventual assault, which resulted in the injuries elevating the offense to rape in the first degree. mony

I am obviously not a trained legal professional, and not certain if the decisions and cases cited here are the final, guiding principals in the areas of law in question, especially as I have been denied access to the clerk papers, which contain the actual jury instructions and any discussion regarding them.

Nevertheless, I content that the facts of my case, and the decisions reached in the cases cited, warrant reversal of my improper conviction of the lesser degree offense of rape in the second degree.

ADDITIONAL GROUNDS III

I was denied effective assistance of counsel. This resulted in an improper conviction on the lesser degree of rape in the second degree. This lack of effective assistance was manifest in several areas, which I will list and address below.

A

Defense counsel failed to make a motion to suppress the initial identification based on impermissibly suggestive photo montage.

After informing officers that the person who had assaulted her was named Louis Pluff (RP 3-26-13, pg 103, 104) who was 6'4, and who had grown up with her brother, the victim, S.C., was then shown a photo montage (exhibit #18) prepared by Det. Snedgrass, who testified (RP 3-27-13, pg 11) that he used black and white photos to insure my photo did not stand out in any way. I contend that the reverse is true, and that the photo of me was used, and the fact that all photos were black and white, resulted in a photo montage in which I stood out considerably. In the photo montage, I am wearing a white and blue flannel, button-up work shirt, and all others in the photo montage are wearing black and grey T-shirt. I mentioned

this to my defense counsel soon after viewing discovery, which was many months prior to trial, and he assured me that he would make a motion to suppress the photo identification of me. If defense counsel had made a motion to suppress, the court would have been able to examine the photo to determine if the montage was impermissibly suggestive.

S.C.'s initial conflicting identification, her mental confusion when viewing the photos, and the fact that an impermissible suggestive photo montage was used, would have provided the doubt required to create a reasonable probability that the motion to suppress would have been granted.

B

Defense counsel was ineffective for failing to make a motion requesting a psychiatric examination of S.C..

C

Defense Counsel was ineffective for failing to include psychiatric experts to testify regarding the effect of S.C.'s mental disability on her ability to accurately recall and recount events.

S.C. testified that she, "is on disability because I've got the mind of a 12 year-old (RP 3-26-13, pg 20), and in her statement to emergency room nurse Mirian Thompson (RP 3-27-13, PG 66-70), S.C. told the nurse that she had three

different personalities, and described their characteristics. While it is not known if S.C. has been diagnosed as suffering from D.I.D. (Disassociative identity disorder), more commonly known as Multiple personality, she clearly has some level of mental disability, as evidenced by the fact that she has been deemed eligible for disability benefits by the state.

"An adult witness is incompetent to testify if he or she is of "unsound mind", or appears incapable of receiving and relating accurate impressions. of the facts about which they are examined." STATE VS JOHNSTON 143 Wn.App 1 (2007). S.C. clearly had trouble remembering events accurately, as evidenced by conflicting identification, and general mental confusion. Combined with her self professed psychiatric condition and state determination of disability, I believe a motion for a psychiatric examination could have been granted.

In STATE VS DEMOS 94 Wn.2d 733 (1980), the Washington Supreme Court ruled that, "The vast majority holds that the trial court does have discretion to order a psychiatric examination of the complaining witness where a compelling reason is shown. We align ourselves with the majority. This appears to be the rule adopted by our court of Appeals". STATE VS BRAXTON 20 Wn.App. 489, 492 (1978).

There is a reasonable probability that such an examination, if requested, would have been granted. This would have allowed for an opportunity to investigate the basis of S.C.'s disability status, and the effect of that on her memory. The failure of defense counsel to request a competency hearing was clearly an omission which denied me the opportunity to present the jury with evidence of S.C.'s mental disability and the effect it may have had on her ability to accurately recall and recount events. McFARLAND, 127 Md.2d at 357 n.4, "This Court will not find ineffective assistance of counsel for the failure to request a competency hearing unless . . . can make a showing that the trial court would have likely found . . . incompetent as a witness. Otherwise . . . has failed to demonstrate prejudice."

For the reasons and arguments presented above, I also contend that defense counsel provided ineffective assistance of counsel by failing to request a defense expert to testify as to S.C.'s mental condition and the effect it may have had on her ability to accurately recall and recount events. MATTER OF PERSONAL REPRESENTATIVE OF LORD (1994), "at trial court level, appointment of experts is part of defendant's constitutional right to assistance of counsel."

5.

D.

Defense Counsel was ineffective for failing to present a cohesive defense, and failing to effectively cross examine witness.

Defense counsel failed to present witnesses by defense by failing to effectively cross examine witnesses. Defense did not question any witnesses on the presence of other possible suspects in or near the motel room in question before S.C. was found.

My defense to the charge against me was that I am not the person who committed the assault, and that S.C. was talking with a transient as I left, who I then believe continued drinking with S.C. and eventually, with others, committed the assault upon her. Defense counsel never attempted to establish the existense of the person by questioning any witness regarding him. Further, while cross examining S.C. (RP3-26-13 pg 19-21), defense counsel never asked her if I was the person who assaulted her. Her earlier statement to the prosecutor that she didn't remember anything after accepting a ride until waking up in the motel room (RP 3-26-13. Pg 7-8) is a clear implication that she did not know who raped her, and a simple question by defense counsel would have made clear to juries that S.C. did not know who had assaulted her, and that considering her lack of memory, my theory of events was possible, and could have been sustanted by further questioning of S.C. and other witness. If this line of quesstion would have been pursued,

I contend that the jury would have been presented with additional reasonable doubt as to whether I had been the one to commit the assault upon S.C.

An answer of "I don't know", to the question of "was Mr. James the one who assaulted you" would have been a clear indication of reasonable doubt, and combined with her earlier insistence that the person who assaulted her was named Louis Pluff, and was 6'-3 or 6'-4, would have provided more than ample reasonable doubt to require an acquittal.

E.

Defense Counsel was ineffective for failing to confirm results of Washington State Patrol lab DNA results.

After receiving the Crime Laboratory report from the Washington State Patrol. Defense counsel met with me at the Gray Harbor County Jail in Montesano, Washington to discuss the results of the DNA test. These concerned the results of tests comparing my DNA to evidence received from the crime scene, as well as DNA evidence collected during S.C.'s medical examination.

Defense counsel informed me that he had just received the DNA results, and that it was a "home run". When I asked what that meant, he told me that the results confirmed that the only DNA of mine recovered during S.C.'s medical examination

<sup>cam</sup>e from sample taken from her neck, which was consistent with my testimony that we had been "making out". Defense counsel told me that there was also DNA found elsewhere on S.C.'S body from "another unidentified male." (defense trial Brief, pg 2, line 14, 15).

The relevant paragraph from the crime laboratory report (pg 2) is the last one in the section marked CONCLUSIONS/INTERPRETATIONS, and reads "The deduced male profile obtained from the "Rt neck" sample was entered into and searched against the Washington State Patrol Combined DNA index system (CODIS) database and no matches to a forensic unknown were found."

After reading the lab report, I told defense counsel that the paragraph he was referring to was somewhat vague, and asked him if he was sure that is what the paragraph in question meant. He assured me that it was, and told me that as a result "the case is all but over". While very happy to be told this I was still in doubt that he was correct in his interpretation of the lab results, and asked him to contact the Washington State Patrol Laboratory to confirm these results. Defense counsel assured me that he would, and that I could

now "rest easy".

Over the next several months, on the few occasions that I was able to talk with defense counsel, I asked him if he had confirmed the DNA results with the laboratory yet. On each occasion he told me that he had not, but would do so soon. This continued until the day of trial.

Defense counsel never confirmed the DNA results, and on the second day of the trial, while questioning Marion Clark, the forensic scientist from the Washington State Patrol Laboratory on the results of the DNA test (RP3-27-13, pg 83-84) Defense counsel raised the question of DNA from an unidentifiable male for the first time. He is then corrected and informed of the correct interpretation, which is that my sample did not match any "unknown" in the state database.

I contend that defense counsel failed to conduct the required investigation to confirm the results of the DNA tests, and as a result did not provide me the correct information which would have enabled me to accurately gauge the strengths and weakness of my case. Defense Counsels incorrect interpretation of test results allowed counsel to operate under the mistaken impression that evidence existed that would prove my innocence conclusively, and therefore he failed to present a cohesive defense, by conducting a more thorough investigation of the facts, and a more aggressive cross examination of witnesses.

This basic investigation failure to confirm lab results is a clear and prejudicial example of ineffective assistance of counsel, which could have been prevented by simply placing a phone call to confirm the results of DNA testing.

Accordingly, I contend that my conviction should be reversed for the reasons set forth above.

ADDITIONAL GROUNDS IV

The cumulative effect of the many errors committed during my trial, by defense counsel and the court, denied me a fair trial.

While several of the issues addressed in this statement of additional grounds and the direct appeal are of Constitutional magnitude and warrant reversal of my conviction individually, I contend that the cumulative effect of these errors are more than sufficient to sustain a reversal and, if not a dismissal due to insufficient evidence, a remand for a new trial on the charge of rape in the second degree.

The Washington Supreme Court in STATE VS WEBER 159 W.2d 252, 279 (2006), stated that "under cumulative error doctrine, reversal of a defendant's conviction may be warranted if the combined effect of trial errors effectively denied the defendant a fair trial, even if each error standing alone may be considered

harmless"

Based on this decision, I contend that the many errors committed by the court and defense counsel in my case combined to effectively deny me a fair trial and believe a reversal of my conviction is warranted.

SUBMITTED ON THIS 23 DAY OF March, 2014

Respectfully

Robert E. James

Robert E. James,

Attachment -- H

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

IN RE PERSONAL RESTRAINT PETITION  
OF:  
ROBERT E. JAMES,

No.: 49767-1-II  
**DECLARATION OF  
KATHERINE L. SVOBODA**

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**DECLARATION**

I, Katherine L. Svoboda, declare and states as follows:

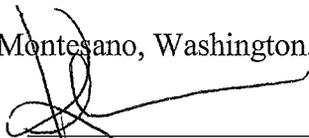
1. I was the prosecutor assigned to this case and I conducted the jury trial on behalf of the State.
2. I have reviewed the transcripts filed by Ms. Teagarden, Ms. Dalthorp, and Ms. Garcia for March 26, 27, and 28, 2013.
3. To the best of my recollection, these transcripts are an accurate record of what occurred on the days in question.
4. At no time did defense counsel leave the Petitioner on the stand with no one to question him.
5. I have reviewed the physical court file in Grays Harbor Superior Court cause no. 12-1-338-9.
6. There is no record of a note being sent by the jury in this matter.
7. I have no independent recollection as to whether a note was sent or not.
8. It is the usual practice of our court to have all parties, including the defendant, present when the court drafts its response.

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9. It is also the usual practice that all notes and responses are made part of the court file.

I declare under penalty of perjury under the laws of the State of Washington that the  
above statement is true and correct.

DATED this 14 day of March, 2017, in Montesano, Washington.

  
\_\_\_\_\_  
WSBA #34097

**GRAYS HARBOR COUNTY PROSECUTOR**  
**March 14, 2017 - 2:23 PM**  
**Transmittal Letter**

Document Uploaded: 6-prp2-497671-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 49767-1

Is this a Personal Restraint Petition?  Yes  No

**The document being Filed is:**

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Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Respondent's

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: \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: Katherine L Svoboda - Email: [ksvoboda@co.grays-harbor.wa.us](mailto:ksvoboda@co.grays-harbor.wa.us)

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

IN RE PERSONAL RESTRAINT PETITION  
OF:

No.: 49767-1-II

ROBERT E. JAMES,

**DECLARATION OF MAILING**

**DECLARATION**

I, Brandi M. Toyra, hereby declare as follows:

On the 14<sup>th</sup> day of March, 2017, I mailed a copy of the Respondent's Brief to Robert E. James; DOC no. 365127, MCC/TRU/C-403-2; PO Box 888; Monroe, WA 98272, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 14<sup>th</sup> day of March, 2017, in Montesano, Washington.

Brandi M. Toyra

**GRAYS HARBOR COUNTY PROSECUTOR**  
**March 14, 2017 - 2:24 PM**  
**Transmittal Letter**

Document Uploaded: 6-prp2-497671-3-14 DECLARATION OF MAILING 49767-1.pdf

Case Name:

Court of Appeals Case Number: 49767-1

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**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

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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: Declaration of Mailing

**Comments:**

No Comments were entered.

Sender Name: Katherine L Svoboda - Email: [ksvoboda@co.grays-harbor.wa.us](mailto:ksvoboda@co.grays-harbor.wa.us)