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Court of Appeals
Division II
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No. _____

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

In re the Personal Restraint of:

LAWRENCE DIESE,

Petitioner.

PERSONAL RESTRAINT PETITION

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Petitioner

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS	<u>Page</u>
Table of Authorities	iii
A. STATUS OF PETITIONER	1
B. STATEMENT OF THE CASE	1
1. <u>Sources of facts</u>	1
2.. <u>Trial testimony</u>	1
C. LEGAL ARGUMENT AND AUTHORITIES.....	15
1. Diese is entitled to a new trial because he was denied his constitutional right to effective assistance of counsel	16
a. Trial counsel should have called an expert to explain touch DNA and significant of the absence of DNA in this case	17
b. Trial counsel should have called an audio expert regarding the recording made by Det. Aldridge	19
D. STATEMENT OF FINANCES	22
E. REQUEST FOR RELIEF	22
F. CONCLUSION	23

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>In re Personal Restraint of Brett</i> , 142 Wn.2d 868, 16 P.3d 601 (2001)	.21
<i>In re Personal Restraint of Caldellis</i> , 187 Wn.2d 127, 385 P.3d 135 (2016)	21
<i>In re Pers. Restraint of Cook</i> , 114 Wn.2d 802, 792 P.2d 506 (1990)	15
<i>In re the Pers. Restraint of Crace</i> , 174 Wn.2d 835, 842, 280 P.3d 1102 (2012)	16
<i>State v. Crawford</i> , 159 Wn.2d 86, 147 P.3d 1288 (2006)	22
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994)	17
<i>In re Pers. Restraint of Hagler</i> , 97 Wn.2d 818, 650 P.2d 1103 (1982)	..15
<i>In re Personal Restraint of Hews</i> , 99 Wn.2d 80, 660 P.2d 263 (1983)	22
<i>State v. Long</i> , 104 Wn.2d 285, 705 P.2d 245 (1985)	16
<i>State v. McKee</i> , 3 Wash.App.2d 11, 413 P.3d 1049 (2018)	19
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	16,17
<i>In re Pers. Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004)	.22
<i>In re Pers. Restraint of Stockwell</i> , 161 Wn.App. 329, 254 P.3d 899 (2011)	15
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	17
<i>In re Pers. Restraint of Yates</i> , 177 Wn.2d 1, 296 P.3d 872 (2013)	15
<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	16,21
<i>U.S. v. Ortiz</i> , 776 F.3d 1042, 96 Fed. R. Evid. Serv. 669 (9th Cir. 2015)	20

OTHER CASES

Byrd v. Trombley, 580 F. Supp. 2d 542 (E.D. Mich. 2008), aff'd, 352 Fed.Appx. 6 (6th Cir. 2009)18

Eaddy v. State, 845 So. 2d 961 (Fla. Dist. Ct. App. 2003)18

In re Wireman (1977), 270 Ind. 344, 267 N.E.2d 1368, cert. den. 436 U.S. 904, 98 S.Ct. 2234, 56 L.Ed.2d 402.....20

FEDERAL RULE OF EVIDENCE

Page

901(a) 20

901 (a)(b)(5)..... 20

A. STATUS OF PETITIONER

Lawrence Diese (hereinafter “Diese”) challenges his 2015 Clark County conviction for rape in the second degree, in cause no. 14-1-00407-9). See Judgment and Sentence attached as Appendix A. Mr. Diese is incarcerated at Stafford Creek Correctional Facility at Aberdeen, Washington following imposition of an exceptional sentence of 129 months and is restrained pursuant to the Judgment and Sentence entered on April 3, 2015.

Mr. Diese appealed his conviction in Cause No. 47432-8-II. This Court affirmed his conviction at 198 Wash.App. 1062 (2017); pet. rev. denied, 189 Wash.2d 1019, 404 P.3d 482 (2017). The mandate issued in the direct appeal on November 20, 2017.

This personal restraint petition is timely filed.

B. STATEMENT OF THE CASE

1. **Sources of facts:**

The facts relating to this petition are based on the unpublished opinion filed in the Court of Appeals decision No. 47432-8-II on May 2, 2017, the clerk's papers and exhibits, and transcripts filed in the direct appeal.

2. **Trial testimony:**

Lawrence Diese met Juline Dual in 2008 when they were both working at a Home Depot being constructed in Warrenton, Oregon. 4RP at 343. Ms.

Dual and her daughter N.B. moved in with Mr. Diese in his house Vancouver, Washington in late 2008 or 2009, when N.B. was 14 years old. 4RP at 344, 345. Mr. Diese's daughter Kary Diese also lived in the house. 4RP at 344. The relationship was troubled and the couple argued frequently. 4RP at 346. The relationship seemingly came to an end when Mr. Diese, upset that Ms. Dual went through his phone messages, became angry with her. 4RP at 347. Ms. Dual stated that N.B. came downstairs and he "grabbed her by the scruff of the neck and threw her out the front door" and then returned and also physically threw Ms. Dual out the door. 4RP at 347. Regarding this alleged incident. N.B. stated Mr. Diese and her mother had a fight and that she stepped between them and he grabbed the hood portion of N.B.'s jacket and threw her out of the house. 3RP at 231. She stated that her shoulder was injured as a result and she was taken to the hospital. 3RP at 231. N.B. stated that he also grabbed her mother's hair and dragged her out of the house. 3RP at 232.

Ms. Dual stated that she and N.B. stayed at her friend's house for a while and then moved to the Pine Grove apartments in Portland, Oregon, where they lived from 2009 through 2012. 3RP at 232, 4RP at 348, 5RP at 414. N.B. moved to Longview, Washington to live with her cousin and Ms. Dual moved to Notchlog Apartments in Vancouver. 5RP at 415.

After living in a variety of places, N.B. went to live with her father in California. Four to five months later Ms. Dual started to date Mr. Diese again in

2012. 3RP at 233, 234, 4RP at 350, 5RP at 415. She moved in with Mr. Diese in a house on Algona Drive in Vancouver, Washington in May, 2013. 4RP at 353. Ms. Dual stated that she drove to California and picked up her daughter for a summer visitation in Washington, and that N.B. decided not to return to California because she did not get along with her father's new wife. 5RP at 418.

When N.B. returned to Washington she was upset to discover that her mother was dating Mr. Diese again. 3RP at 234, 4RP at 350. She told her mother that he had raped her when they lived together, and stated that her mother did not believe her. 3RP at 235.

N.B. moved to her cousin's house in Kelso. 3RP at 236. However, N.B.'s cousin was expecting a baby and needed room in her residence. N.B. initially moved to a Community House, and in December, 2013, she asked to move in with her mother and Mr. Diese. Ms. Dual stated that she asked Mr. Diese about her request, and he was "adamantly against it." 4RP at 354. Ms. Dual stated she pushed to let N.B. stay with them and eventually Mr. Diese relinquished, but made it clear that it would be short term. N.B. moved into the duplex on Algona Drive with her mother and Mr. Diese in late December 2013 or early January in 2014. 3RP at 239, 4RP at 354.

Mr. Diese did not make this decision lightly: N.B. was permitted to return on the condition that she (1) pick up after herself, (2) go to counselling

for Attention Deficit Hyperactivity Disorder (ADHD), (3) get a job, and (4) when her mother was not home, she was not allowed to be in the house. 3RP at 238, 4RP at 354.

After she moved in with them, N.B. slept on the couch at night. Ms. Dual said that Mr. Diese made it clear that he did not want her there and told her on a daily basis that she needed to find a new place to live. 4RP at 356.

Ms. Dual said that on Sunday, February 23, 2014, she went horseback riding with a friend. 4RP at 357. When she was loading her horse in a trailer, she received texts from Mr. Diese saying that he was “done” and that N.B. needed to leave. She also received texts from N.B. that Mr. Diese was going to dump her belongings at the house a friend. 4RP at 358. Ms. Dual turned off her cell phone so that she could enjoy her horse ride. 4RP at 358.

When Ms. Dual returned she found N.B. outside the house waiting for her to come home. 4RP at 358. She stated that Mr. Diese talked with N.B. alone in the duplex backyard, and when she returned she appeared to be upset. 4RP at 360.

Ms. Dual went to a RedBox Kiosk to rent movies and was gone for approximately thirty minutes. 4RP at 360, 361. When she returned, N.B. was in the living room watching television and Mr. Diese was in the kitchen doing dishes. 4RP at 361. She said that everyone went to bed that night and that Mr. Diese went to work the next day and that everything seemed normal. 4RP at

361.

Ms. Dual said that over the next few days she received texts from Mr. Diese saying that N.B. was not at home doing the chores that she agreed to do. 4RP at 362. Ms. Dual testified that when she returned from work on Wednesday, February 26, N.B. told her "I told you he was raping me." 4RP at 363. She said N.B. then played her recording that she made using her cell phone. 4RP at 363. N.B. had a counselling appointment already scheduled for the next morning at Columbia River Mental Health, so they went to the counselling appointment together. 4RP at 364. N.B. played the recording at her session and her counselor called the police. 4RP at 289, 290. After the appointment with the counsellor they were both taken to the Vancouver Police Department and then to the hospital. 4RP at 365.

Mr. Diese was subsequently arrested. After he was arrested, he wrote a letter and a postcard to Ms. Dual from the jail. 4RP at 367. Exhibits 24 and 25.

N.B. testified that Mr. Diese sexually assaulted her when she and her mother lived with him in 2009. 2RP at 113. She stated that he would tell her to take off her clothes while in her mother's bedroom and then would touch her breasts and digitally penetrate her vagina and then rape her and that this happened on many occasions. 3RP at 217, 218, 219. She stated that on one occasion she returned home and he told her that he could either call the police

or go upstairs to her room. 3RP at 223. He told her to go to his room, and he came upstairs and spanked her with a spatula that he brought from the kitchen. She stated that he then threw her against the wall, giving her a fat lip. 3RP at 223, 224. She stated that she was afraid of him and that he was violent. 3RP at 225. She said that she did not tell her mother because she was afraid of him and she believed that if she her, she would talk to him and that the sexual abuse would get worse. 3RP at 225.

N.B stated that on February 23, 2014, she returned after riding horses and found her belongings were stacked outside. 3RP at 242. She packed her things and went to a park near the house and waited until her mother got off work. 3RP at 244. She stated that her mother texted her, telling her that she would have to move out of the house by March 25. 4RP at 323. She said that Mr. Diese told her to walk with him and that during the walk he said that in order for her to return she had to do everything he said without argument. 3RP at 245. When she and Mr. Diese returned to the house, Ms. Dual left to go to a Redbox kiosk to rent movies for the evening. 3RP at 246. N.B. testified that after her mother left she sat on the couch in the living room and turned on her phone and began recording because she was unconformable being alone in the house with Mr. Diese. 3RP at 248. She stated that Mr. Diese said that it was time for her to live up to her word, which she took to mean that she would do housework. 3RP at 248. She said that he grabbed her hand and that she was

afraid that he would become violent and if she resisted. 3RP at 252, 253 255. She got off the couch and he took her by one hand into the bathroom and then stood behind her and took her pants off. 3RP at 258, 259. She stated that he touched her vaginal area and then inserted his penis into her vagina. 3RP at 261.

The State played the recording that N.B. made for the jury. 3RP at 270. Exhibit 1. Detective Anderson also met with Mr. Diese at the Vancouver Police Department, and testified that he recognized his voice as being the other person on the recording. 7RP at 660.

N.B. testified that afterward she waited for her mother to return and was crying. 4RP at 281. Mr. Diese went the kitchen and was cooking when her mother came home. 4RP at 281. She said that they ate dinner and that she went to bed, but she did not tell her mother about the incident. 4RP at 282. She said that she was afraid to call the police because “he was in the house.” 4RP at 284.

On February 26, 2014—three days after the incident—she played the recording for her mother. 4RP at 286. She stated that she was no longer afraid because Mr. Diese was at work at the time. 4RP at 286. N.B. stayed in the house with her mother that night and then went to at Columbia River Mental Health the following day. 4RP at 289. after hearing the recording, the counselor called the police. 4RP at 289, 290.

Erik Anderson, a detective with the Vancouver Police Department, testified that he met with law enforcement at Columbia River Mental Health where he was dispatched pursuant to N.B.'s report of abuse on February 27, 2014. Prior to talking with her, he listened to the recording made by N.B. 7RP at 654. He stated that recognized one of the two voices in the recording as being N.B. 7RP at 657. After interviewing N.B. and Ms. Dual, he went to their house and collected articles of clothing that N.B. stated that she wore on February 23. 7RP at 663. That clothing was submitted the Washington State Patrol Crime Lab. 7RP at 664.

Detective Anderson provided N.B.'s cell phone to detective Aldrich, who made a recording of the original recording and transferred it to CD. 7RP at 691. Detective Aldrich also looked at between five and ten text message threads on the phone around the date of the alleged offense, but did not view every message on the phone and did not view every message near the time period of February 23, 2014. 7RP at 720-21.

Detective Anderson testified that Mr. Diese was happy that he collected DNA evidence from him and cooperated fully with the procedure. 8RP at 770. Trevor Chowen of the Washington State Patrol Crime Lab examined clothing provided to him by Detective Anderson, belonging to N.B. for potential DNA evidence. 6RP at 579-81. He found no male DNA sample on the clothing examined and created no profile that could be compared to the sample taken

from Mr. Diese. 6RP at 596-97, 602.

A small amount of male DNA—the equivalent of two cells—was found in a rape kit obtained as part of the police investigation, but no profile was created of a potential donor. 6RP at 633-34. The amount was so small that a profile could not be developed using the Y-STR amplification method. 6RP at 635-36.

Chaleen Destephano, a sexual assault nurse examiner (SANE), evaluated N.B. on February 27, 2014. 6RP at 545. The result of the examination showed that she had a one millimeter hematoma near the entry to her vaginal opening. 6RP at 537.

Investigator Paul Prather stated that he interviewed N.B. on October 21. Mr. Prather stated that Ms. Dual stated that she did not receive any telephone calls when she was getting movies from Redbox. 8RP at 772. He stated that on the other hand, N.B. told him that she called her mother to tell her that she was alone with Mr. Diese that that Ms. Dual told her to stay in the house. 8RP at 773. He also testified that N.B. told him that she did not see Mr. Diese's penis and that she had her hands and arms over her face. 8RP at 773. He stated that she was questioned by the State's counsel, she provided contrary statements, telling them that she had seen his penis through her hands. 8RP at 774. Mr. Prather stated that Ms. Destephano stated it was unlikely that the hematoma would be present three days after the event. 8RP at 774.

Tyler Lobes lived with Mr. Diese, his daughter Kary Hertz, Ms. Dual and N.B. in Vancouver. 7RP at 724. He stated that there was frequent arguing in the house between Ms. Dual and N.B., often over performance of chores. 7RP at 737. He stated that Ms. Dual would punish N.B., but that she would not follow through with performing her chores, which lead to more arguments and tension in the house. 7RP at 737. He stated that no one wanted N.B. in the house because “she was always causing trouble.” 7RP at 737.

Kary Hertz lived with N.B. and her mother and her father for approximately a year and a half. 8RP at 764. She testified that N.B. never discussed the allegations that her father raped N.B. in 2008 or 2009, as she alleged. 8RP at 765.

Mr. Diese stated that he had very little contact with N.B. and would see her when he picked up Ms. Dual for a date or when they would take her for dinner or to see a movie. 8RP at 783. After her house was burglarized, Ms. Dual moved in with him in Vancouver. 8RP at 784. His daughter Kary, N.B. and her mother initially lived in the house, and later Tyler Lobes also moved in. 8RP at 785. The relationship was initially very good, however, he said that after N.B. moved in, he started to see constant conflict between N.B. and her mother and that he started to isolate himself by staying in his room or working on cars or working in the yard in order to avoid their arguments. 8RP at 788-89. He felt that was losing Ms. Dual because of N.B.’s behavior and also

started to feel that she was going to choose N.B., and end her relationship with him. 8RP at 789. His relationship started to deteriorate and there was tension because they would not interact with N.B. 8RP at 790.

In 2009 the relationship ended, and resumed in 2012 and they moved into the house on Algona Drive in Vancouver. 8RP at 792, 793. He stated that when they resumed living with each other in December, 2013, Ms. Dual told him that N.B. had no place to go and asked if she could stay with them. 8RP at 794. He initially said no, but said that he loved Ms. Dual and did not want to lose her because of N.B., so he agreed to let her daughter stay in the house on a temporary basis. 8RP at 795. Despite the previous accusation, he stated that he agreed but that he “did it against my better judgment.” 8RP at 795. Before she could move in, however, he wanted certain conditions which included that she go back to counseling, that she get back on her medication, and that she help with household chores. 8RP at 795-96. He also stated that he refused to be in the house with her if no one else was there. 8RP at 796. Despite this, he still felt angry and resentful about her presence in the house. 8RP at 796. He stated that he would tell her to get the work done and sometimes yell at her and that because he has a military background he set “a tone” to get N.B. to live up her agreement to help around the house. 8RP at 799, 800. He said that she reacted by frequently crying and complaining that she had to do work around the house. 8RP at 800.

Mr. Diese acknowledged that he physically threw N.B. out of the house in 2009 by grabbing her by the back of her sweatshirt and that he grabbed Ms. Dual by the hair and threw her out. 8RP at 829. Mr. Diese stated that he learned in 2012 to 2013 from Ms. Dual that N.B. had accused him of raping her. 8RP at 829, 830. He said that N.B.'s accusation was designed to break up the relationship with her mother. 8RP at 793. He stated that he was horrified at the amount of "hate and how much she doesn't want me to be with her mom." 8RP at 793.

Mr. Diese denied that he raped N.B. 8RP at 827. He explained that he usually worked from 6 p.m. to 2 a.m. Monday through Friday. 8RP at 796. He stated that on February 23, 2014, he woke up after working his swing shift, came out of the room and saw once again that nothing had been done around the house. He said "I had enough. I couldn't do it anymore . . ." 8RP at 801. He stated that he gathered N.B.'s things and found out where she was in order to drop them off, and that he was going to kick her out of the house. 8RP at 801. Mr. Diese took her belongings and "dumped the items off." 8RP at 803. He had kicked her out of the house at least two other times. 8RP at 801. N.B. and Ms. Dual returned together at 3:00 or 4:00 p.m. and he told them that he had kicked N.B. out because she was not upholding her agreement. 8RP at 803. He stated that Ms. Dual yelled at N.B. and told her that she had one last chance and if she did not do her chores she would be out of the house by March

25. 8RP at 804. He said the Ms. Dual wanted him to have a private conversation with N.B. in order work things out between the two of them, so they went to the backyard to talk. 8RP at 804-05. He stated that the conversation with N.B. lasted three minutes. 8RP at 805. He stated that he was willing to try to work things out with N.B. because Ms. Dual said that she would leave if N.B. could not stay and that she was actually in the process of packing her things to leave. 8RP at 806. He and Ms. Dual went for a walk and she agreed to stay. 8RP at 806. After they returned from the walk, Ms. Dual went to a Redbox kiosk to rent two movies so they could have dinner, watch movies and have a Sunday 'family night' together. 8RP at 807. Ms. Dual went to the kiosk by herself and told Mr. Diese that she wanted some time alone. 8RP at 807.

Before Ms. Dual left, she told N.B. to get started on doing her chores. 8RP at 808. Mr. Diese then started laundry and then started to clean the kitchen in order to get ready to make dinner. 8RP at 808. N.B. was in the living room lying on the couch. 8RP at 809. Her pants were low and exposing her rear, so he told her to pull them up, and then went to his bedroom to fold clothes. 8RP at 809. He came out of the bedroom to see if she was doing her household chores. 8RP at 809. Mr. Diese did not know that he was being recorded by N.B. on her phone. 8RP at 800.

N.B. still had not started doing her chores, so he said "let's see if you're

a person of your word.” 8RP at 810. He explained at trial that he meant for her to get up off the couch and starting doing her chores as she had agreed to do in the backyard and when her mother had told her before she left. 8RP at 810. He left the room to take laundry from the washing machine and N.B. went to the bathroom. 8RP at 810. He said that when he said “drop them,” he was referring to a cat that N.B. had on her lap when she was on the couch. 8RP at 824. He noticed that her pants were hanging down again when she got up to go to the bathroom, and he told her “your pants are halfway down.” 8RP at 810, 857. He stated that earlier he had told her to pull them up because they were sagging. 8RP at 857. He stated that he was frustrated that she still was not doing what she was supposed to do and went into what he called his “military tone” and started to count “one, two, three” to get her to do her chores. He said during their conversation, she was in the living room or bathroom and the television set was on, and he was moving between the kitchen, hallway and bedroom. 8RP at 811, 849, 850. He had to repeatedly ask her “what.” 8RP at 811, 845. He stated that he did not go into the bathroom with N.B., as she claimed. 8RP at 842, 843. He stated that he was in the habit of looking in the bathtub for cat litter tracked into the tub by his cat, and that he would rinse the tub if it was dirty. 8RP at 842. He stated that she went to the bathroom by herself, apparently to clean the litter box, which was one of her chores. 8RP at 843, 852. He testified that N.B. cried frequently and would start crying when

upset or when she did not want to do something, and she was crying because she did not want to work. 8RP at 812. Mr. Diese stated that he believed that N.B. made sexually provocative statements to him because she thought he would tell Ms. Dual, which would lead to breaking them up, which he stated was N.B.'s goal. 8RP at 821. He said N.B. was jealous of her mother because she was provided for by Mr. Diese. 8RP at 821.

C. LEGAL ARGUMENT AND AUTHORITIES

“When considering a timely personal restraint petition, courts may grant relief to a petitioner only if the petitioner is under an ‘unlawful restraint,’ as defined by RAP 16.4(c).” *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 16, 296 P.3d 872 (2013) (quoting RAP 16.4(c)). The collateral relief afforded under a personal restraint petition is limited and requires the petitioner to “show that he was prejudiced by the alleged error of the trial court.” *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 819, 650 P.2d 1103 (1982). There is no presumption of prejudice on collateral review. *Id.* at 823. The petitioner must either make a prima facie showing of a constitutional error that, more likely than not, constitutes actual and substantial prejudice, or a non-constitutional error that inherently constitutes a complete miscarriage of justice. *In re Pers. Restraint of Stockwell*, 161 Wn.App. 329, 334, 254 P.3d 899 (2011), *aff'd*, 179 Wn.2d 588, 316 P.3d 1007 (2014).

1. Diese is entitled to a new trial because he was denied his constitutional right to effective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees an accused the right to legal counsel in criminal trials. Like the federal constitution, Washington's Constitution also grants an accused, in a criminal prosecution, the right to appear by counsel. WASH. CONST. art. I, § 22. The right to counsel under the state and federal constitutions are coextensive. *State v. Long*, 104 Wn.2d 285, 288, 705 P.2d 245 (1985).

Our Supreme Court has held that a personal restraint petitioner meets his burden to show actual and substantial prejudice when he makes a successful ineffective assistance of counsel showing under *Strickland v. Washington*, 466 U.S. 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *In re the Pers. Restraint of Crace*, 174 Wn.2d 835, 842, 846–47, 280 P.3d 1102 (2012). To prevail on an ineffective assistance of counsel claim, a criminal defendant must demonstrate (1) deficient performance by counsel and (2) resulting prejudice. *Strickland*, 466 U.S. at 687. Therefore, to establish ineffective assistance of counsel in a collateral attack, Diese needs to show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d

1239 (1997), cert. denied, 523 U.S. 1008 (1998). There is a strong presumption of effective assistance, and Mr. Diese bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To show prejudice, Mr. Diese must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335.

Courts presume counsel's representation was effective. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335. The presumption is rebutted if there is no possible tactical explanation for counsel's action. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Legitimate trial tactics or strategy cannot form the basis for an ineffective assistance of counsel claim. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

- a. **Trial counsel should have called an expert to explain the touch DNA and significant of the absence of DNA in this case.**

N.B. alleged that Diese raped her, but no evidence of his DNA was presented at trial, despite a police investigation within days after N.B. alleged that the offense took place. An expert from the Washington State Patrol Crime Lab examined clothing obtained from N.B. A minuscule amount of male DNA—the equivalent of two cells—was found in a rape kit

obtained as part of the police investigation, but no profile was created of a potential donor. 6RP at 633-34; 9RP at 936-37.

The defense called five witnesses at trial, including Mr. Diese and his daughter, but did not provide testimony from an expert witness. In the case, expert testimony regarding the significance of the absence of DNA was merited; the absence of “touch” DNA in the clothing obtained from N.B. is compelling and supports Mr. Diese’s claim of innocence. Diese submits that trial counsel performed deficiently by failing to call an expert as a witness regarding the prevalence of touch DNA in rape cases, and the significance of the absence of DNA on clothing obtained by law enforcement following the alleged offense.

Other jurisdictions have addressed this issue. In *Eaddy v. State*, 845 So. 2d 961 (Fla. Dist. Ct. App. 2003), the reviewing court granted Eaddy post-conviction relief on the allegation that his counsel failed to hire a DNA expert to explain evidence. In *Byrd v. Trombley*, 580 F. Supp. 2d 542 (E.D. Mich. 2008), aff’d, 352 Fed.Appx. 6 (6th Cir. 2009), the federal court granted the defendant’s habeas corpus relief on the ground that his defense counsel failed to investigate and present expert medical testimony that could have led to an acquittal on criminal sexual misconduct.

In this case, there is no legitimate strategic or tactical reason not to call such an expert. Defense counsel should have realized that this case

presented an unusual fact pattern and that the emphasis of the absence of anything other than minute amount of male DNA found on N.B.'s feminine hygiene product would strengthen the defense case. Given the absence of DNA evidence—particularly where such evidence would reasonably have been expected to be presented, expert testimony in the field of DNA would have confirmed Diese's testimony that he did not assault N.B. and in fact that the incident could had happened exactly as he said in his testimony.

b. Trial counsel should have called an audio expert regarding the recording made by Det. Aldridge

A critical piece of evidence introduced by the State is a recording made by Detective Aldridge of an audio recording that N.B. stated that she made of the incident using her cell phone. Exhibit 1. Detective Aldridge testified that although she stated that she was trained in the use of Cellebrite,¹ she did not preform a "Cellebrite dump" of all the material on the phone, but instead took N.B.'s phone and played the audio "while I recorded it with a digital recorder." 7RP at 699. The result is that the exhibit was a recording of a recording. The low quality of the recording was noted by the jury, who requested that that the audio be played two times for the jury during deliberation. RP at 9RP at 990, 995.

Audio recordings today "have almost universal approval as an acceptable form of evidence providing a proper foundation is first

¹ Cellebrite software obtains all information saved on the cell phone as well as deleted information and transfers the data from the cell phone to a computer. See *State v. McKee* 3 Wash.App.2d 11,413 P.3d 1049 (2018).

established for their admission.” A.L.R., Admissibility of sound recordings in evidence, 58 A.L.R. 2d 1034 § 4. Before introducing any audio recording as evidence, the proponent must "lay a foundation," through a properly qualified witness, which addresses the elements of relevance, authentication, and perhaps miscellaneous objections going to competence. Thus, the "first requirement for introducing a tape recording is that a foundation must be laid demonstrating that the tape is authentic and correct." *In re Wireman* (1977), 270 Ind. 344, 267 N.E.2d 1368, cert. den. 436 U.S. 904, 98 S.Ct. 2234, 56 L.Ed.2d 402. Lay opinion may be used to make a prima facie case that the voice on a tape recording is in fact the defendant's so long as the witness testifying has the identifying witness is minimally familiar with the voice he identifies; once the offering party meets this burden, the probative value of the evidence is a matter for the jury. Fed.Rules Evid.Rule 901(a), (b)(5), 28 U.S.C.A. *U.S. v. Ortiz*, 776 F.3d 1042, 96 Fed. R. Evid. Serv. 669 (9th Cir. 2015). In this case, however, the unusual method of making a recording of the recording implicates issues of authenticity because the recording played was in essence “created” or reproduced by the detective by recording it on another device outside the presence of any other person. 7RP at 699. The "requirement of authentication ... as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Foundation for Audio Recordings as Evidence, 23 Am Jur, Proof of Facts 3d 315, October 2015, citing

Federal Rule of Evidence 901(a). The testimony of a forensic audio expert, in which the expert gives his technical opinion as to the authenticity or genuineness of an audio recording, may play a critical role in the trial judge's determination of both the authenticity or genuineness of a recording and the broader question of whether a sufficient foundation has been laid. Here, an audio expert could have ascertained whether the recording had been altered or otherwise edited. Given the pivotal nature of the recording, having the recording evaluated by an expert constituted a logical and fundamental requirement of the defense. At the very least, an expert could have discussed the Cellebrite software in greater detail than the cursory testimony elicited from Detective Alridge, thus permitting the jury to place what weight it deemed appropriate on the evidence after hearing testimony regarding Cellebrite.

In order to establish ineffective assistance of counsel, Diese must also establish that the ineffective assistance prejudiced him. Prejudice is established when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *In re Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694 (1984); *In re Personal Restraint of Caldellis*, 187 Wn.2d 127,141, 385 P.3d 135 (2016).

Here, the Court should grant the personal restraint petition, and remand the cause for a hearing to determine whether counsel was

ineffective by failing to produce an audio expert to discuss the Cellebrite system and to discuss possible anomalies in the quality of the recording by Detective Aldridge, and to discuss the significance of the absence of DNA in all materials examined, as well as the possible source of the male DNA cells found in the feminine hygiene product. See, e.g. *In re Personal Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). Because of the absence of DNA in clothing examined by the State Crime Lab and because of the unusual way the audio recording was made, confidence in the outcome of the trial is undermined.

For claims of ineffective assistance of counsel, the appropriate remedy on appeal is to remand to the trial court for a new trial, which places the “defendant back in the position he would have been in if the Sixth Amendment violation had not occurred.” *State v. Crawford*, 159 Wn.2d 86, 107–08, 147 P.3d 1288 (2006); see *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004) (holding that the proper remedy for counsel's failure to raise on appeal the violation of appellant's public trial right was remand for a new trial). Because Mr. Diese received ineffective assistance of counsel, this Court should grant the PRP and remand to the trial court for a new trial.

D. STATEMENT OF FINANCES

Petitioner asks the court to file this petition without making him pay the filing fee because he is indigent and cannot pay that fee. Petitioner has been found indigent at all stages of his trial and appeal.

Undersigned counsel appears pro bono. A Declaration of Petitioner establishing his current financial status will be submitted at a later date.

E. REQUEST FOR RELIEF

For the reasons set forth above, Petitioner asks the Court to:

- a. Grant Petitioner leave to proceed on this petition in forma pauperis;
- b. Grant Petitioner such other relief as is necessary for a full and fair adjudication of Petitioner's claims and this Petition.
- c. Refer this matter to a Superior Court Judge to resolve any disputed issues of fact material to the resolution of this petition in a reference hearing;
- d. Reverse Petitioner's conviction of second degree rape for the reasons set forth above.

F. CONCLUSION

For the foregoing reasons, petitioner respectfully asks this court to grant the petition.

DATED: November 16, 2018.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that on November 16, 2018, that this Petition for Review was sent by the JIS link to Clerk of the Court, Court of Appeals, Division II, and to Anne Mowry Cruser, at Clark County Prosecuting Attorneys office, Lawrence Diese, Appellant, by email to the following:

Anne Mowry Cruser
Clark County Prosecuting Attorney
PO Box 5000
Vancouver, WA 98666-5000
Anne.cruser@clark.wa.gov

Mr. Derek M. Bryne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Lawrence E. Diese, DOC #380704
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 16, 2018.



PETER B. TILLER

ATTACHMENT A

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 DG
 Diane Grecco
 CESUX2



FILED

APR 03 2015
 4:19
 Scott G. Weber, Clerk/Clark Co

**Superior Court of Washington
 County of Clark**

State of Washington, Plaintiff,

vs.

LAWRENCE E DIESE,
 Defendant.

SID: WA25121163
 If no SID, use DOB: 12/7/1961

No. 14-1-00407-9

Felony Judgment and Sentence --
 Prison

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

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 Discretionary

15-901213-0

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court **Finds:**

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon
 guilty plea jury-verdict 2/17/2015 bench trial :

Count	Crime	RCW (w/subsection)	Class	Date of Crime
01	RAPE IN THE SECOND DEGREE - DOMESTIC VIOLENCE	10.99.020/9A.44.050(1)(a)	FA	2/23/2014

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.839.

The offense was predatory as to Count _____ RCW 9.94A.836.

The victim was under 15 years of age at the time of the offense in Count _____ RCW 9.94A.837.

Felony Judgment and Sentence (FJS) (Prison)
 (Sex Offense and Kidnapping of a Minor Offense)
 (RCW 9.94A.500; .505)(WPF CR 84.0400 (7/2009))

215
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- 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.
- The defendant used a firearm in the commission of the offense in Count _____, RCW 9.94A.825, 9.94A.533.
- The defendant used a deadly weapon other than a firearm in committing the offense in Count _____, RCW 9.94A.825, 9.94A.533.
- Count _____, Violation of the Uniform Controlled Substances Act (VUCSA), RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, when a juvenile was present in or upon the premises of manufacture in Count _____, RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- Count _____ is a criminal street gang-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that minor in the commission of the offense. RCW 9.94A.833.
- Count _____ is the crime of unlawful possession of a firearm and the defendant was a criminal street gang member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A._____.
- The defendant committed vehicular homicide vehicular assault proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count _____ involves attempting to elude a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- Count _____ is a felony in the commission of which the defendant used a motor vehicle. RCW 46.20.285.
- The defendant has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.
- For crime(s) charged in Count 01 domestic violence was pled and proved. RCW 10.99.020.
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

	Crime	Cause Number	Court (county & state)
1.			

Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	DV?*	Type
I	No known felony convictions						

*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 for _____ are one offense for purposes of determining the offender score (RCW 9.94A.525).
- The prior convictions for _____ 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	Maximum Fine
01	0	XI	78 MONTHS to 102 MONTHS		78 MONTHS to 102 MONTHS	LIFE	\$50,000.00

* (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:

- below the standard range for Count(s) _____.
 - above the standard range for Count(s) 1.
 - 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.
 - within the standard range for Count(s) _____ but served consecutively to Count(s) _____.
- 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.
- In the case of more than one aggravating factor, the Court finds that the same sentence would be imposed if any one of the aggravating factors is not upheld on appeal.

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 to pay the legal financial obligations imposed herein. RCW 9.94A.753.
- That the defendant is presently indigent but is anticipated to be able to pay financial obligations in the future. RCW 9.94A.753.
- That the defendant is indigent and disabled and is not anticipated to be able to pay financial obligations in the future. RCW 9.94A.753.
- Other: _____, 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.

3.2 The court *dismisses* Counts _____ in the charging document.

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):

126 months on Count 01

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: 126 months

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 any other sentence previously imposed in any other case, including other cases in District Court or Superior Court, unless otherwise specified herein: _____

Confinement shall commence immediately unless otherwise set forth here: _____

The total time of incarceration and community supervision shall not exceed the statutory maximum for the crime.

(b) **Confinement.** RCW 9.94A.507 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count 01 minimum term 126 months maximum term Statutory Maximum / LIFE

(c) **Credit for Time Served:** The defendant shall receive ~~40~~ 401 days credit for time served prior to sentencing for confinement that was solely under this cause number. RCW 9.94A.505. The jail shall compute earned early release credits (good time) pursuant to its policies and procedures.

(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 placement or community custody see RCW 9.94A.701)

(A) The defendant shall be on community placement or 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 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)
Count(s) _____, _____ months. RCW 9.94A.701(9)

(Sex offenses, only) For count(s) 01, 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.

The total time of incarceration and community supervision/custody shall not exceed the statutory maximum for the crime.

(B) While on 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 on 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 on 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: NATASHA ROSE BRAATEN
- 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:

Sexual deviancy: ~~the~~ evaluation and recommended treatment

- 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: _____

Additional conditions are imposed in Appendix 4.2, if attached or are as follows: _____

(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

RTN/RJN	\$ 1,104.02	Restitution to: <u>CRIME VICTIMS COMPENSATION PROGRAM (\$1,104.02)</u> (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
PCV	\$ 500.00	Victim assessment	RCW 7.68.035
PDV	\$ 100.00	Domestic Violence assessment	RCW 10.99.080
CRC	\$ _____	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ 200.00	FRC <i>waived</i>
		Witness costs \$ _____	WFR
		Sheriff service fees \$ 70.00	SFR/SFS/SFW/WRF <i>waived</i>
		Jury demand fee \$ 250.00	JFR <i>waived</i>
		Extradition costs \$ _____	EXT
		Other \$ _____	
PUB	\$ 2,250.00	Fees for court appointed attorney	RCW 9.94A.760
WFR	\$ 12,977.50	Court appointed defense expert and other defense costs	RCW 9.94A.760
	\$ 5,000	DUI fines, fees and assessments	
FCM/MTH	\$ 500.00	Fine RCW 9A.20.021; <input type="checkbox"/> VUCSA chapter 69.50 RCW, <input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD	\$ _____	Drug enforcement Fund # <input type="checkbox"/> 1015 <input type="checkbox"/> 1017 (TF)	RCW 9.94A.760
NTF/SAD/SDI	\$ _____		
	\$ 100.00	DNA collection fee	RCW 43.43.7541
CLF	\$ _____	Crime lab fee <input type="checkbox"/> suspended due to indigency	RCW 43.43.690
FPV	\$ _____	Specialized forest products	RCW 76.48.140
RTN/RJN	\$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI only, \$1000 maximum)	RCW 38.52.430
		Agency: _____	
	\$ _____	Other fines or costs for: _____	
	\$ _____	Total	RCW 9.94A.760

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

shall be set by the prosecutor.

is scheduled for _____ (date).

The defendant waives any right to be present at any restitution hearing (sign initials): _____.

Restitution Schedule attached.

Restitution ordered above shall be paid jointly and severally with:

RJN	Name of other defendant	Cause Number	Victim's name	Amount

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).

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.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

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.

4.5 **No Contact:**

The defendant shall not have contact with NATASHA ROSE BRAATEN including, but not limited to, personal, verbal, telephonic, written or contact through a third party for NINETY-NINE (99) years (which does not exceed the maximum statutory sentence).

The defendant is excluded or prohibited from coming within:

500 feet 880 feet 1000 feet of:

NATASHA ROSE BRAATEN (name of protected person(s))'s

home/ residence work place school

(other location(s)) PERSON

other location _____
for 99 years (which does not exceed the maximum statutory sentence).

A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 Other: No contact with minors

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: _____

4.8 For Offenders on Community Custody, when there is reasonable cause to believe that the defendant has violated a condition or requirement of this sentence, the defendant shall allow, and the Department of Corrections is authorized to conduct, searches of the defendant's person, residence, automobile or other personal property. Residence searches shall include access, for the purpose of visual inspection, all areas of the residence in which the defendant lives or has exclusive/joint control/access and automobiles owned or possessed by the defendant.

4.9 If the defendant is removed/deported by the U.S. Immigration and Customs Enforcement, the Community Custody time is tolled during the time that the defendant is not reporting for supervision in the United States. The defendant shall not enter the United States without the knowledge and permission of the U.S. Immigration and Customs Enforcement. If the defendant re-enters the United States, he/she shall immediately report to the Department of Corrections if on community custody or the Clerk's Collections Unit, if not on Community Custody for supervision.

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.

*Felony Judgment and Sentence (FJS) (Prison)
(Sex Offense and Kidnapping of a Minor Offense)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2009))*

(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.714.

5.5a Firearms. You may not own, use or possess any firearm, and under federal law any firearm or ammunition, unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, 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 and RCW 9.41.047.

5.5b **Felony Firearm Offender Registration.** The defendant is required to register as a felony firearm offender. The specific registration requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Sex and Kidnapping Offender Registration Laws of 2010, ch. 367 § 1, 10.01.200.

1. General Applicability and Requirements: Because this crime involves a sex offense or a kidnapping 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 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 the 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 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 24 hours, 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 a 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 three business days of the entry of the order. RCW 9A.44.130(7).

8. Length of Registration:

Class A felony – Life; Class B Felony – 15 years; Class C felony – 10 years

5.7 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.

5.8 Other: _____

5.9 Persistent Offense Notice

The crime(s) in count(s) 1 is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030, 9.94A.570

The crime(s) in count(s) 1 is/are one of the listed offenses in RCW 9.94A.030 ⁽³⁷⁾ ~~(31)~~(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

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

4-3-15

Judge/Print Name

Suzanne L. Clark

John Farra
Deputy Prosecuting Attorney
WSBA No. 45627
Print Name: John Farra

Diane Grecco
Attorney for Defendant
WSBA No. 27955
Print Name: Diane Grecco

Lawrence E. Diese
Defendant
Print Name:
LAWRENCE E DIESE

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 DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined 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.84.600. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature:

Lawrence E. Diese

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in 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 Vancouver, Washington on (date): _____

Interpreter

Print Name

I, Scott G. Weber, 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

FILED

FEB 17 2015

11:52
Scott G. Weber, Clerk, Clark Co

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

LAWRENCE E. DIESE,

Defendant.

No. 14-1-00407-9

SPECIAL VERDICT FORM -
AGGRAVATING CIRCUMSTANCE -
UNITARY TRIAL

We, the jury, having found the defendant guilty of Rape in the Second Degree,
return a special verdict by answering as follows:

Was the crime an aggravated domestic violence offense?

ANSWER: YES (Write "yes" or "no")

DATED this 17th day of FEBRUARY, 2015.

[Signature]
PRESIDING JUROR

Received by:
[Signature]

2-17-15 11:48 AM
Filed 12-0

[Signature]
198
88

Superior Court of Washington
County of

State of Washington, Plaintiff,

No. 14-1-00407-9

vs. Lawrence Diese
Defendant:

Findings of Fact and Conclusions of Law for
an Exceptional Sentence
(Appendix 2.4B Judgment and Sentence)
(Optional)
(FNFLC)

The court imposes upon the defendant an exceptional sentence above within below the standard range for
Count 1 based upon the following Findings of Fact and Conclusions of Law:

Findings of Fact

I. The exceptional sentence is justified by the following aggravating circumstance(s):
(a) Under RCW 9.94A.535(3)(h): The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present: (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time; (ii) ~~The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years;~~ or (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

The grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This court would impose the same sentence if only one of the grounds listed in the preceding paragraph is valid.

II. _____

Conclusions of Law

I. There are substantial and compelling reasons to impose an exceptional sentence pursuant to RCW 9.94A.535.

II. _____

Dated: 4-3-15

J. Farrer
Deputy Prosecuting Attorney
WSBA No. 43627
Print Name: John Farrer

Diane Grecco
Attorney for Defendant
WSBA No. 20955
Print Name: Diane Grecco

[Signature]
Judge/Print Name: _____
[Signature]
Defendant
Print Name: _____

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,
Plaintiff,
v.
LAWRENCE E DIESE,
Defendant

No. 14-1-00407-9

DECLARATION OF CRIMINAL HISTORY
14-1-00407-9

COME NOW the parties, and do hereby declare, pursuant to RCW 9.94A.525 that to the best of the knowledge of the defendant and his/her attorney, and the Prosecuting Attorney's Office, the defendant has the following undisputed prior criminal convictions:

CRIME	COUNTY/STATE CAUSE NO.	DATE OF CRIME	DATE OF SENTENCE	DV?*	PTS.
No known felonies at this time					

* DV:Domestic Violence was pled and proved.

The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360.

DATED this 2 day of April, 2015.

Defendant

SUSAN A. STAUFFER, WSBA #11374
Attorney for Defendant


JOHN FARRA, WSBA #45627
Deputy Prosecuting Attorney

DECLARATION OF CRIMINAL HISTORY
Revised 9/14/2000

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON)	Cause No.: 14-1-00407-9
)	
)	JUDGMENT AND SENTENCE (FELONY)
)	APPENDIX F
DIESE, Lawrence E.)	ADDITIONAL CONDITIONS OF SENTENCE
)	
)	
DOC No. 380704)	

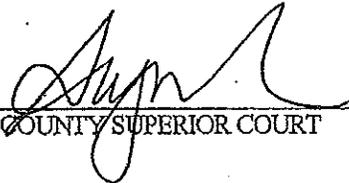
CRIME RELATED CONDITIONS:

- No victim contact
- Complete sexual deviancy evaluation and any recommended treatment
- Submit to polygraph examinations at the direction of the Community Corrections Officer
- Sex offender registration

DATE

4-3-15

JUDGE, CLARK COUNTY SUPERIOR COURT



Identification of the Defendant

LAWRENCE E DIESE

14-1-00407-9

SID No: WA25121163
(If no SID take fingerprint card for State Patrol)

Date of Birth: 12/7/1961

FBI No. 814229NB8

Local ID No. 198004

PCN No. _____

Other _____

Alias name, DOB:

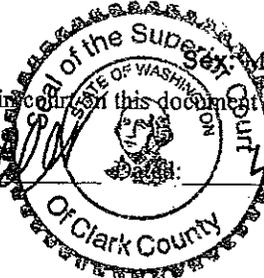
Race: W

Ethnicity:

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, _____

[Handwritten signature]
Clerk of the Court, Deputy Clerk, _____



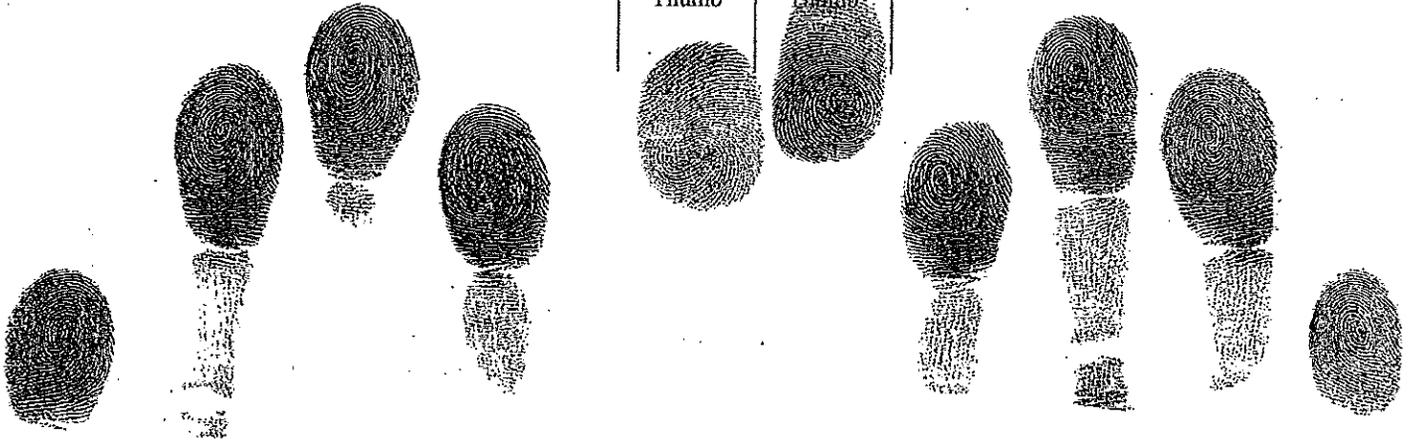
The defendant's signature: _____

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously



SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff,

v.

LAWRENCE E DIESE,

Defendant.

SID: WA25121163

DOB: 12/7/1961

NO. 14-1-00407-9

WARRANT OF COMMITMENT TO STATE
OF WASHINGTON DEPARTMENT OF
CORRECTIONS

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
01	RAPE IN THE SECOND DEGREE - DOMESTIC VIOLENCE	10.99.020/9A.44.050(1)(a)	2/23/2014

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of :

COUNT	CRIME	TERM
01	RAPE IN THE SECOND DEGREE - DOMESTIC VIOLENCE	126 Day/Months

These terms shall be served concurrently to each other unless specified herein:

The defendant has credit for 400 days served.

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

And these presents shall be authority for the same.

HEREIN FAIL NOT.

WITNESS, Honorable _____

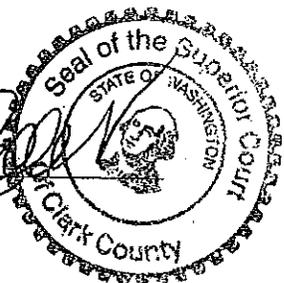
[Handwritten signature]

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE: _____

4/3/15

SCOTT G. WEBER, Clerk of the
Clark County Superior Court

By: *[Handwritten signature]*
Deputy



THE TILLER LAW FIRM

November 16, 2018 - 4:38 PM

Filing Personal Restraint Petition

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: Case Initiation
Trial Court Case Title: Diese, Lawrence E
Trial Court Case Number: 14-1-00407-9
Trial Court County: Clark Superior Court
Signing Judge:
Judgment Date:

The following documents have been uploaded:

- PRP_Personal_Restraint_Petition_20181116163536D2390803_6686.pdf
This File Contains:
Personal Restraint Petition
The Original File Name was 20181116163133652.pdf

Comments:

Sender Name: Becca Leigh - Email: bleigh@tillerlaw.com

Filing on Behalf of: Peter B. Tiller - Email: ptiller@tillerlaw.com (Alternate Email: bleigh@tillerlaw.com)

Address:
PO Box 58
Centralia, WA, 98531
Phone: (360) 736-9301

Note: The Filing Id is 20181116163536D2390803