No. 92421-0

71388-4

71388-4

NO. 71388-4-I

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

In re the Personal Restraint Petition of:

BOBBY COLBERT,

Petitioner.

FILED
Mar 20, 2015
Court of Appeals
Division I
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE PRESENTED

In a prosecution for second degree rape, did the trial court violate the petitioner's due process rights by allocating to him the burden of proving that the complainant consented?

B. STATEMENT OF THE CASE[1]

1. Charges, verdicts, and incarceration

On July 9, 2004, the State charged petitioner Bobby Colbert with third degree rape involving B.J., second degree rape involving K.P.,[2] and indecent liberties involving C.A. The crimes were alleged to have occurred in Mount Vernon during late 2003 and the first half of 2004. Information (attached to this Brief as Appendix A).

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[1] This petition refers to the verbatim reports as follows: 1RP – 6/30/04; 2RP – 1/31/05; 3RP – 2/1/05 (morning); 4RP – 2/1/05 (afternoon); 5RP – 2/2/05; 6RP – 2/3/05; 7RP – 2/4/05; 8RP – 2/7/05 (morning); 9RP – 2/7/2005 (afternoon; volume with handwritten corrected date on cover page, with proceedings erroneously identified as beginning at 9:30 a.m.); 10RP – 2/8/05; and 11RP – 3/31/05. A motion to transfer the transcripts from case no. 61160-7-I is being filed contemporaneously with this brief.

[2] RCW 9A.44.050(1)(a) provides that "[a] person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [b]y forcible compulsion." "Forcible compulsion" is defined as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.010(6). Neither provision has undergone a substantive change since the charging dates.

Following trial on the rape charges, a jury convicted Colbert as charged. Verdict forms (attached as Appendix B). Colbert was, however, acquitted of indecent liberties following a separate trial. Verdict form (attached as Appendix C). Colbert remains incarcerated on the charges. Judgment and Sentence (attached as Appendix D).

The second degree rape charge involving K.P. is the only one at issue in this petition.

2. Appeal and personal restraint petitions

At Colbert's first trial, over defense objection, the court instructed the jury that Colbert had the burden of proving consent as to the second degree rape charge. 10RP 5-7; Personal Restraint Petition ("PRP"), Exhibit 1 at Instruction 15. Counsel for Colbert acknowledged the proposed instruction was consistent with then-existing case law as set forth in State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989). But counsel argued Camara was "inartful" and "dealt confusingly with the burdens as to consent." 10RP 6.

The court overruled the objection[3] and instructed the jury,

> Consent is a defense to a charge of rape in the second degree. This defense must be established by a preponderance of the evidence. Preponderance of the

[3] The court noted that the defense had the benefit of any evidence, regardless of which party presented it, but did not specifically address the burden allocation aspect of the defense objection. 10RP 7.

> evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

PRP, Exhibit 1 at Instruction 15.

Colbert did not address any related issue on his direct appeal, which primarily argued that the two rape counts should have been severed and considered at separate trials. State's Response to PRP ("Response"), App. A (Brief of Appellant, case no 56298-3-I); Response, App. C (Unpublished Opinion, case no 56298-3-I).

Colbert did, however, allude to a related issue in his first PRP, filed in 2008, by arguing that counsel on the direct appeal failed to raise issues related to certain jury instructions, to which counsel had objected at trial. Response, App. F (2008 Personal Restraint Petition, case no. 61160-7-I) at 9-10; Response, App. G (State's Response to PRP) at 16. This Court rejected Colbert's related ineffective assistance claims as "too conclusory." Response, App. H (Order of Dismissal, case no. 61160-7-I) at 1-3.

According to Colbert's Brief in Support of Personal Restraint Petition ("PRP Brief"), he filed a second personal restraint petition again arguing the counts should have been severed. This petition was also rejected. PRP Brief at 2.

Colbert filed this personal restraint petition, his third, in the Supreme Court on December 26, 2013. Colbert argued the jury instructions placing on the defense the burden of proving consent violated his right to control his defense as well as his due process rights, which required the State to prove each element of the crime beyond a reasonable doubt. PRP at 2.

At the time the petition was filed, Colbert relied in part on State v. Lynch, 178 Wn.2d 487, 493-94, 309 P.3d 482 (2013), which held the trial court violated Lynch's Sixth Amendment right to control his defense by instructing the jury on the affirmative defense of consent. Although Lynch introduced evidence of consent, he objected to the jury instructions imposing upon him the burden of proof. The Lynch Court held that by "[i]mposing a defense on an unwilling defendant," the trial court "impinge[d]" upon Lynch's autonomy to conduct his defense. Lynch, 178 Wn.2d at 493 (citing State v. Coristine, 177 Wn.2d 370, 377, 300 P.3d 400 (2013)).

A three-justice concurrence in Lynch would have reversed on due process grounds and overruled Camara, the controlling case. As the concurrence stated, requiring an accused to prove by a preponderance of the evidence that a rape complainant consented was "tantamount to a

presumption of guilt." Lynch, 178 Wn.2d at 518 (Gordon McCloud, J., concurring).

Colbert's 2013 PRP was transferred to this Court. Meanwhile, the Supreme Court issued a decision in State v. W.R., Jr., 181 Wn.2d 757, 759, 336 P.3d 1134 (2014), which held that the due process clause does indeed require the State to prove all elements of charged crime—including the absence of consent—in the case of second degree rape. The W.R. case involved a bench trial but reversed based on misallocation of the burden of proof by the juvenile court judge. Id. at 760-61, 770-71.

C. ARGUMENT

THE TRIAL COURT VIOLATED COLBERT'S DUE PROCESS RIGHTS BY REQUIRING HIM TO PROVE CONSENT BY A PREPONDERANCE OF THE EVIDENCE, THE PETITION IS NOT PROCEDURALLY BARRED, AND COLBERT CAN SHOW HE WAS PREJUDICED BY THE ERROR.

1. Colbert is unlawfully restrained following the Court's decisions in *Lynch* and *W.R.*

Colbert is unlawfully restrained because there has been a significant change in the law that is material to his conviction. RAP 16.4(c)(2).

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In W.R., 181 Wn.2d at 759, the Supreme Court held

the due process clause requires that the State, not the defendant, hold the burden as to the issue of the complainant's consent.

The W.R. Court explicitly overruled two earlier cases, Camara and State v. Gregory, 158 Wn.2d 759, 801-04, 147 P.3d 1201 (2006). Those cases held that, notwithstanding the "conceptual overlap" between consent and the statutory element of forcible compulsion, an accused asserting that complainant consent could be required to prove such consent by a preponderance of the evidence. W.R., 181 Wn.2d at 763.

Those cases were, however, incorrect and harmful because "[r]equiring a defendant to do more than raise a reasonable doubt is inconsistent with due process principles." Id. at 766, 768.

As discussed in above, the decision in W.R. was foreshadowed by the three-justice concurrence in Lynch, in which three justices would have overruled Camara and Gregory. The "unwanted [consent] instruction" violated Lynch's due process rights by shifting the burden. Moreover, those cases "misconstrue[d] the legislative intent embodied in Washington's rape laws. Lynch, 178 Wn.2d at 496-97 (Gordon McCloud, J., concurring).

Here, Colbert raised a consent defense but objected to an instruction informing the jury he held the burden to prove that K.P. consented to sex with him. In the more than 10 years since the jury

reached a verdict in Colbert's case, the law has undergone a significant change that is material to his conviction. RAP 16.4(c)(2).

2. Colbert's petition is not time-barred because there has been a significant change in the law that is material to Colbert's conviction.

Collateral attacks generally must be raised within one year after the judgment becomes final. RCW 10.73.090. But this Court may review untimely filed petition if the petitioner satisfies one of the exceptions set forth in RCW 10.73.100. RCW 10.73.100(6) excuses filing beyond a year where

> [(1)] [t]here has been a significant change in the law, whether substantive or procedural, which is [(2)] material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and [(3)] either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

As stated above, W.R. explicitly overruled precedent. Where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a "significant change in the law" for purposes of exemption from procedural bars. In re Pers. Restraint of Greening, 141 Wn.2d 687, 697, 9 P.3d 206, 212 (2000); see also State v. Miller, 181 Wn.

App. 201, 211, 324 P.3d 791 (2014) (explicit reversal of established precedent is not necessary in order for a decision to qualify as a significant intervening change in the law). In this case, there was an explicit reversal of established precedent. This was a significant change in the law.

The change in the law was, moreover, material to the conviction in this case. Washington courts have refused to consider a petition challenging a jury instruction later declared improper where the instruction was "superfluous." In re Pers. Restraint of Taylor, 95 Wn.2d 940, 632 P.2d 56 (1981) (finding, as a threshold matter, that instruction allowing jury to presume intent under certain circumstances was superfluous given particular allegation); see also In re Pers. Restraint of Hagler, 97 Wn.2d 818, 828, 650 P.2d 1103 (1982) (materiality of change in law is a threshold question separate from prejudice) (Utter, J., concurring). Here, the consent instruction was not superfluous. It removed the State's burden on an element and placed the burden on the defense. The element at issue, consent, was the central issue in the case.

3. Because the *W.R.* opinion rests on interpretation of a 1975 statute, retroactivity is not at issue.

Generally speaking, a new rule will not be given retroactive application to cases on collateral review. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992) (citing Teague v. Lane,

489 U.S. 288, 311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)). But "[w]here a statute has been construed by the highest court of the state, the court's construction is deemed to be what the statute has meant since its enactment. In other words, there is no question of retroactivity." State v. Moen, 129 Wn.2d 535, 538, 919 P.2d 69 (1996). Although Colbert's claim is based in part on due process, the case he relies on, W.R., is firmly rooted in an interpretation of the 1975 amendments to the statute. Similarly, the primary case that W.R. overruled purported to rely on statutory interpretation, although that interpretation was ultimately discredited in W.R.

a. *Camara* and *W.R.* are rooted in statutory interpretation of the 1975 rape statute amendments, as well as constitutional concerns.

As explained by the Lynch concurrence, "[t]he history of rape law reform in Washington indicates that our legislature has always regarded nonconsent as an essential element of sexual intercourse or contact by forcible compulsion." Lynch, 178 Wn.2d at 519 (Gordon McCloud, J., concurring). That was not the case under Camara, the controlling the law at the time Colbert was convicted. See Spicer v. Gregoire, 194 F.3d 1006, 1008 (9th Cir. 1999) (noting Camara decision was based in part on conclusion that Washington legislature had removed non-consent as element of second degree rape).

A brief examination of federal cases leading up to Camara is necessary to an understanding of the constitutional limitations on burden-shifting by legislative bodies. While the State may not require a defendant to disprove an element of the crime charged, it may require a defendant to prove the existence of mitigating factors. In Patterson v. New York, 432 U.S. 197, 207, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), the Court held that a defendant could be required to prove such a factor, as long as it "does not serve to negative any facts of the crime." The Patterson Court's primary concern was to permit state legislatures to recognize mitigating circumstances (by codifying affirmative defenses) without increasing the prosecutorial burden. It upheld a statute requiring a defendant charged with second degree murder to prove he or she had "acted under the influence of extreme emotional disturbance." Id. at 206. In doing so, however, the Patterson Court cautioned that there were "constitutional limits" on the State's authority to "reallocate burdens of proof." Id. at 210.

The Court revisited these "constitutional limits" 10 years later in Martin v. Ohio, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987). There, the Court applied Patterson's holding to a statute that required defendants charged with aggravated murder to prove that they had acted in self-defense. The Martin Court upheld the statute, reasoning that "the

elements of aggravated murder and self-defense overlap [only] in the sense that evidence to prove the latter will *often* tend to negate the former." Id. at 234. Essential to the Court's holding was the fact that because self-defense *could* coexist with "a purposeful killing by prior calculation and design" (the elements of aggravated murder under Ohio law), "Ohio does not shift to the defendant the burden of disproving any element of the state's case." Id.

The Washington Supreme Court addressed Martin in Camara. Camara was charged with second degree rape. He challenged a jury instruction because it implied that he had to prove the complainant consented to intercourse. Camara, 113 Wn.2d at 635. Camara maintained a reasonable juror could have believed he or she had to convict unless Camara *disproved* the State's allegation of forcible compulsion. Id.

"Following Martin, it appears that assignment of the burden of proof on a defense to the defendant is not precluded by the fact that the defense "negates" an element of a crime." Camara, 113 Wn.2d at 640. In reaching that conclusion, the Court modified the two-part test (derived from Patterson) that it had previously used to determine whether a defendant could be burdened with proving a defense. Camara, 113 Wn.2d at 638 (quoting State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983) (quoting Patterson, 432 U.S. at 210)). Under the test, the Court

asked first whether the legislature *intended* to equate an element of the crime with the "absence" of the defense in question and second whether any element of the defense in question *in fact* negated an element of the crime. Id. An affirmative answer to either question meant that the State bore the burden of disproving the defense. Camara, 113 Wn.2d at 638 (quoting McCullum, 98 Wn.2d at 490) (quoting Patterson, 432 U.S. at 210)).

Applying the first prong, the Camara Court concluded Washington's legislature had intentionally shifted the burden of proof on consent to the defendant when it reformed the State's rape statutes in 1975. Id. at 638-39. As for the second prong, it concluded that "while there is a conceptual overlap between the consent defense to rape and the rape crime's element of forcible compulsion, we cannot hold that for that reason alone the burden of proof on consent must rest with the State." Id. at 640.

The Camara court thus based its decision in part on the legislative history of Washington's rape statutes. It concluded that Washington's 1975 rape statute reforms[4] were intended to burden the defense with

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[4] The 1909 criminal code described rape as

> sexual intercourse . . . committed against the person's will and without the person's consent. . . . (2) When the person's

proving consent. Camara, 113 Wn.2d at 639. As the Court observed, "the removal from the prior rape statute of language expressly referring to nonconsent evidences legislative intent to shift the burden of proof on that issue to the defense. This conclusion finds support in the history and purposes of rape law reform." Id. at 638-39 (citations omitted) (quoting Wallace Loh, The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study, 55 Wash. L. Rev. 543, 557 (1980)).[5] The Court concluded that while there was a "conceptual overlap" between the consent defense the element of forcible compulsion, "we cannot hold that for that reason alone the burden of proof on consent must rest with the

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> resistance is forcibly overcome; or (3) When the person's resistance is prevented by fear of immediate and great bodily harm which the person has reasonable cause to believe will be inflicted upon her or him . . . .

RCW 9.79.010 (1974). According to the Camara Court, "[t]he law was well settled under this statute that the State bore the burden of proving an alleged rape victim's lack of consent." Id. at 636 (citing State v. Chambers, 50 Wn.2d 139, 140, 309 P.2d 1055 (1957); State v. Thomas, 9 Wn. App. 160, 510 P.2d 1137, review denied, 82 Wn.2d 1012 (1973)).

[5] The following passage was relied on by Camara:

> [T]he new law channels the jury's focus, via instructions, on the culpability of the actor rather than the response of the victim. . . . The reform statutes announce society's interest in accurately identifying perpetrators of rape, not in reinforcing traditional assumptions regarding appropriate behavior of [virtuous] [men and] women.

113 Wn.2d at 639 (alterations in Camara) (quoting Loh, 55 Wash. L. Rev. at 557).

State. Rather, . . . that burden lies, *as we understand the Legislature to have intended*, with the defendant." Camara, 113 Wn.2d at 640 (emphasis added).

In 2006, the year after Colbert was convicted, the Gregory Court declined to overrule Camara:

> So long as the jury instructions allow the jury to consider all of the evidence, including evidence presented in the hopes of establishing consent, to determine whether a reasonable doubt exists as to the element of forcible compulsion, the conceptual overlap between the consent defense and the forcible compulsion element does not relieve the State of its burden to prove forcible compulsion beyond a reasonable doubt.

Gregory, 158 Wn.2d at 803-04.

In W.R., the Court recited Camara's interpretation of Martin, that requiring an accused to prove a defense by a preponderance of the evidence was "not precluded by the fact that the defense 'negates' an element of a crime." Id. But, the Court continued, this reading "failed to appreciate" the limitation of the Martin decision. In Martin, due process was not offended because a purposeful killing could coexist with self-defense, so an act of self-defense did not necessarily negate a purposeful killing. In any event, the United States Supreme Court had meanwhile clarified the State must always bear the burden of disproving a defense that necessarily negates an element of the charged offense. Smith v.

United States, ___ U.S. ___, 133 S. Ct. 714, 719, 184 L. Ed. 2d 570 (2013).[6] Read together, the W.R. Court determined, Martin and Smith held that when a defense necessarily negates an element of the crime, it violates due process to place the burden of proof on the accused. The key to whether a defense necessarily negates an element is whether the completed crime and the defense can coexist. W.R., 181 Wn.2d at 765.

In W.R., the State did not dispute the "negates" analysis controlled the outcome but argued—as the State has argued in this case[7]—that Camara and Gregory were correctly decided because consent does not necessarily negate the element of forcible compulsion under the 1975 rape statute amendments: "[T]he overlap is not complete." W.R., 181 Wn.2d at 765 (citing State's brief and brief of amicus curiae).

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[6] As the Smith Court explained:

> The State is foreclosed from shifting the burden of proof to the defendant . . . "when an affirmative defense *does* negate an element of the crime." Where an affirmative defense "excuse[s] conduct that would otherwise be punishable," but "does not controvert any of the elements of the offense itself," the Government has no constitutional duty to overcome the defense beyond a reasonable doubt.

Id. (alteration in original) (quoting Martin, 480 U.S. at 237 (Powell, J., dissenting), and Dixon v. United States, 548 U.S. 1, 6, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006)).

[7] Response at 17-21.

But as defined under RCW 9A.44.010(6), "forcible compulsion" contemplates force that overcomes actual resistance or threats that place a person in actual fear. Thus, W.R. held, "[t]here can be no forcible compulsion when the victim consents, as there is no resistance to overcome. Nor is there actual fear of death, physical injury, or kidnapping when the victim consents." 181 Wn.2d at 765. The W.R. court stated, moreover, that

> Recognizing that the State's burden to prove forcible compulsion encompasses the concept of nonconsent is consistent with rape reform laws. LAWS OF 1975, 1st Ex.Sess., ch. 14. . . . Washington and "[m]odern statutory and decisional law do not treat force and nonconsent as separate formal elements." [Loh, 55 Wash. L. Rev.] at 552 n. 43. Rather, force is an objective indicator of nonconsent. Id.

W.R., 181 Wn.2d at 767. The Court also stated:

> We hold that consent necessarily negates forcible compulsion. . . .While the defendant may be tasked with producing evidence to put consent in issue, such evidence need only create reasonable doubt as to the victim's consent.

Id. at 768. Again, this contradicted the Camara Court's conclusion that even the "conceptual overlap" did not trump the legislature's intent in placing the burden on the accused. Camara, 113 Wn.2d at 640.

b. Under *Moen* and *Grasso*, Colbert's petition is not barred by retroactivity analysis.

As demonstrated by the foregoing argument, statutory interpretation—the question of whether consent negates forcible compulsion under chapter 9A.44 RCW, and the legislative allocation of the burden on the related element of the crime—forms the backbone of the W.R. decision and a substantial basis for overruling Camara. As such, W.R. establishes what the statute has meant since its enactment in its current form in 1975. Accordingly, this Court need not engage in an analysis as to retroactivity.

In determining whether retroactivity is even at issue, In re Personal Restraint of Grasso is instructive regarding the interplay of statutory analysis and constitutional principles. 151 Wn.2d 1, 11-12, 84 P.3d 859 (2004) (three-justice lead opinion). There, Grasso was charged with molesting a child, R.G. The complainant took the stand at trial. But in an untimely personal restraint petition, Grasso argued that, because the prosecutor gave R.G. permission to answer some questions with "I don't want to talk about it," R.G. did not "testify" within the meaning of the child hearsay statute, RCW 9A.44.120(2)(a). Grasso therefore argued admission of the child's hearsay statements violated his right of

confrontation. Grasso based his claim on the meaning of "testify" as set forth in State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997).

Previously, State v. Borland was the only decision addressing the RCW 9A.44.120(2)(a) "testifies" requirement. 57 Wn. App. 7, 786 P.2d 810 (1990). The Borland Court had held that the requirement was satisfied when the child is "both competent and physically available," regardless of whether she actually testifies. Id. at 13.

The Rohrich court "disapproved" of Borland and redefined the word "testifies" as used in RCW 9A.44.120(2)(a). Rohrich, 132 Wn.2d at 481-82 n.16. Because "[t]he Legislature intended the child hearsay statute to be constitutional and 'carefully drafted [it] to avoid any confrontation clause problems,'" the Rohrich Court interpreted the language "in light of the requirements of the Confrontation Clause." Id. at 476. Thus, "'testifies,' as used in RCW 9A.44.120(2)(a), meant the child takes the stand and describes the acts of sexual contact alleged in the hearsay." Rohrich, 132 Wn.2d at 480-81.

A majority of justices ultimately dismissed Grasso's petition based on failure to show prejudice. But the lead opinion soundly rejected the State's argument that the new rule announced in Rohrich should not be applied retroactively to Grasso's case. The lead opinion held that, even though Rohrich was based on constitutional principles, "'there is no

question of retroactivity.'" Grasso, 151 Wn.2d at 12 (quoting Moen, 129 Wn.2d at 538). This was because, "'the court's construction is deemed to be what the statute has meant since its enactment.'" Grasso, 151 Wn.2d at 12 (quoting Moen, 129 Wn.2d at 538).[8]

Although the lead opinion was signed by only three justices, four other justices agreed the Court appropriately reached the merits of the petition, and noted the Rohrich decision rested on statutory as well as constitutional grounds. But those four justices would have found Grasso showed prejudice and would have therefore granted the petition. Grasso, 151 Wn.2d at 25-27, 34.

Similar to the statutory-constitutional interplay in Grasso, W.R. and its predecessors rely on statutory interpretation as well as due process principles to allocate the burden of proof as to consent. There is no question of retroactivity because W.R. establishes that chapter 9A.44 RCW has, since 1975, placed the burden of proof as to consent on the State. Accordingly, Colbert need not show an exception to the rule barring retroactive application of a new rule on collateral review.

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[8] Although the justices later noted that, based on the specific facts of the case, Grasso's direct appeal was not yet final when Rohrich, decided, the initial discussion citing Moen is not dicta. State v. Ruem, 179 Wn.2d 195, 206 n.8, 313 P.3d 1156 (2013) (holding rejecting a *per se* argument before addressing other fact-specific arguments is not dicta).

4. In the alternative, the rule in *W.R.* corrects a burden shifting error and therefore must be applied retroactively under a *Teague* exception.

As discussed above, in St. Pierre,[9] Washington courts adopted the test from Teague, 489 U.S. 288, to determine whether a new rule will be applied to a case on collateral review. See In re Gentry, 179 Wn.2d 614, 627, 316 P.3d 1020 (2014). Assuming for the sake of argument that W.R. sets forth a new rule, such a rule will have retroactive application if it satisfies one of two requirements. It must either be a substantive rule that places certain behavior "'beyond the power of the criminal law-making authority to proscribe'" or a watershed rule of criminal procedure "'implicit in the concept of ordered liberty.'" Teague, 489 U.S. at 311 (internal quotation marks omitted) (quoting Mackey v. United States, 401 U.S. 667, 692-93, 91 S. Ct. 1160, 28 L. Ed. 2d 404 (1971)). Recognition of such "watershed" procedural rules is limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." Teague, 489 U.S. at 313.

Courts have been reluctant to declare rules "watershed." See In re Pers. Restraint of Markel, 154 Wn.2d 262, 269 n.2, 111 P.3d 249 (2005) (noting that in review of 11 claimed watershed rules, the United States Supreme Court had yet to declare any a watershed rule triggering

[9] 118 Wn.2d at 327.

retroactivity). The United States Supreme Court has cited the rule announced in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), guaranteeing the right to counsel for criminal defendants, as an example of a watershed rule of criminal, procedure, although the decision in Gideon predated Teague by several years. Saffle v. Parks, 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990). But the Supreme Court has not recognized another example. Likewise, Washington courts have yet to announce such a rule. Gentry, 179 Wn.2d at 627 (citing Markel, 154 Wn.2d at 273 (holding the rule announced in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), is not a watershed rule of criminal procedure); State v. Evans, 154 Wn.2d 438, 447-48, 114 P.3d 627 (2005) (same result as to rules requiring juries to find all elements of charged crimes)).

On the other hand, federal lower courts have found some rules to apply retroactively. In Hall v. Kelso, 892 F.2d 1541, 1543 n.1 (11th Cir. 1990), the Eleventh Circuit explained that an instructional burden-shifting error in violation of Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)[10] would be subject to retroactive correction on

[10] In Sandstrom the United States Supreme Court held that an instruction stating "the law presumes that a person intends the ordinary consequences of his voluntary acts," violates the Fourteenth Amendment's requirement

habeas review. A challenged instruction told the jury that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will." The presumption here was mandatory, although rebuttable. Hall, 892 F.2d at 1544. The court held that the burden-shifting instruction violated due process because it "relieved the state of its burden of proving, beyond a reasonable doubt, that Hall intentionally committed the felony which was the necessary predicate for a felony murder conviction." Hall, 892 F.2d at 1546.

Hall also held the rule should be applied retroactively under the Teague test. Not only was the rule in Sandstrom a "bedrock, 'axiomatic and elementary' [constitutional] principle," Yates v. Aiken, 484 U.S. 211, 214, 108 S. Ct. 534, 98 L. Ed. 2d 546 (1988) (quoting Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (quoting Winship, 397 U.S. 358)), but it is also an error that diminishes the "likelihood of an accurate conviction." Teague, 489 U.S. at 290 (plurality); see also Humphrey v. Cain, 138 F.3d 552, 553 (5th Cir. 1998) (jury instructions defining reasonable doubt lowered the State's burden of proof below the constitutional minimum, and therefore applying retroactively the rules set forth under Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d

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that the State prove every element of a criminal offense beyond a reasonable doubt. Sandstrom, 442 U.S. at 512.

339 (1990), and Victor v. Nebraska, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)), cert. denied, 525 U.S. 943 (1998); Harmon v. Marshall, 69 F.3d 963, 967 (9th Cir.1995) (where jury was not provided instructions listing elements of the crime, retroactively applying the rule announced in Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), that a constitutionally deficient reasonable doubt instruction requires reversal); but see Johnson v. McKune, 288 F.3d 1187, 1197-200 (10th Cir. 2002) (Sandstrom did not announce one of the rare "watershed rules of criminal procedure" that "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding" and therefore court declined to apply it retroactively).[11]

The Hall court found the rule set forth in Sandstrom and its progeny satisfied the second Teague exception. The related rule announced in W.R. likewise stands for it an "axiomatic" and "elementary" constitutional principle. Hall, 892 F.2d at 1543 n. 1. Similar to the rule derived from Sandstrom and its progeny, it is also a "bedrock" rule that a defendant bears no burden to disprove the elements of a crime. Just as this

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[11] Washington courts have never addressed the issue of Sandstrom's retroactivity, instead deciding pre-Teague cases on other grounds. E.g., In re Pers. Restraint of Music, 104 Wn.2d 189, 191, 199, 704 P.2d 144 (1985); In re Pers. Restraint of Griffith, 102 Wn.2d 100, 101-02, 683 P.2d 194 (1984); Hagler, 97 Wn.2d at 827.

rule may not be avoided by couching the State's burden in terms of a rebuttable presumption, the rule may not avoided by characterizing an element as an affirmative defense.

Moreover, a burden-shifting error, such as the ones in Sandstrom, its progeny, and W.R., also diminishes the "likelihood of an accurate conviction." Teague, 489 U.S. at 313. Such an error requires an accused to prove something that the law does not require him to prove. It is not a jury's function to "solve" a case, State v. McCreven, 170 Wn. App. 444, 472, 284 P.3d 793 (2012), review denied, 176 Wn.2d 1015 (2013), so the concept of accuracy must therefore address the validity of the jury's resolution as to the elements of the crime. A burden-shifting instruction undermines the validity of a jury verdict because it makes it impossible to tell whether the State has proven all the elements beyond a reasonable doubt. The rule in W.R. therefore satisfies the second prong of Teague's procedural rule exception.

Because W.R. falls under the "watershed rule of criminal procedure" exception, as set forth in Teague and as adopted by this Court in St. Pierre, this Court should apply the decision retroactively to Colbert's case and consider his petition on its merits.

5. The petition is not barred as a successive petition under RAP 16.4(d) and RCW 10.73.140.

A significant intervening change in law constitutes "good cause" justifying exception from bar on successive petitions. State v. Brown, 154 Wn.2d 787, 794-95, 117 P.3d 336 (2005) (holding RAP 16.4(d) and RCW 10.73.140 did not preclude filing of petition following change in law). Assuming for the sake of argument that Colbert's first personal restraint petition suggested a related issue, there was a significant intervening change in the law, and therefore the petition is not barred as a successive petition.

6. Colbert was prejudiced by the erroneous instruction, which shifted the burden of proof and forced him to prove consent by a preponderance of the evidence rather than to argue there was a reasonable doubt as to forcible compulsion.

"[I]n order to prevail in a collateral attack, a petitioner must show that more likely than not he was prejudiced by the error." Hagler, 97 Wn.2d at 825-26. The court determines actual prejudice "'in light of the totality of circumstances.'" In re Brockie, 178 Wn.2d 532, 539, 309 P.3d 498 (2013) (quoting In re Pers. Restraint of Music, 104 Wn.2d 189, 191, 704 P.2d 144 (1985)). "Those circumstances include 'the jury instructions given, the arguments of counsel, weight of evidence of guilt, and other relevant factors in evaluating whether a particular instruction caused

actual prejudice.'" Brockie, 178 Wn.2d at 539 (quoting Music, 104 Wn.2d at 191).

Colbert can show prejudice. As a preliminary matter, the court explicitly found, and instructed the jury, that the charges in this case were to be considered separately. 6RP 106-09; PRP, Ex. 1, at Instruction 18 (stating that "[a] separate crime is charged in each count. Your verdict on one count should not control your verdict on any other count."). Jurors are presumed to follow the law. State v. Hightower, 36 Wn. App. 536, 548, 676 P.2d 1016 (1984). Thus, this Court should reject any argument from the State relating to the third degree rape count and its effect on the jury's consideration of the second degree count.

The sole charge at issue involving complainant K.P. was alleged to have occurred March 18, 2004. Colbert was K.P.'s neighbor and an acquaintance of K.P.'s on-again, off-again boyfriend Justin. 4RP 38-40, 42; 5RP 128. According to K.P., Colbert had previously exposed his penis in her bedroom after Justin left the house to get food for the group. 4RP 42. K.P. declined to engage in sexual activity at that time. 4RP 42-43. After the bedroom incident, K.P. continued to have social contact with Colbert. 4RP 90; 5RP 225 (testimony by K.P.'s friend that she had been to Colbert's with K.P.).

A few weeks after the initial incident, K.P. went to Colbert's house to ask for a cigarette. 4RP 45. According to K.P., Colbert attempted to persuade her to have sex with him, but K.P. resisted, stating that she could not betray Justin. 4RP 51. Colbert told K.P., "[b]aby, one time, just one time," and attempted to unbutton K.P.'s pants. Meanwhile, K.P. tried to re-button them.

Eventually, Colbert was able to pull down K.P.'s pants. 4RP 75-76. As K.P. bent to pull up her pants, Colbert put his penis inside her vagina. 4RP 78-79. Colbert's placed his arm on the small of K.P.'s back. 4RP 75-79. K.P. was prevented from moving away because a wall was in front of her and Colbert was behind her. 4RP 101.

K.P. testified she did not fight back because she had received training that one should not resist an attacker to avoid injury. 5RP 132-33. K.P. acknowledged Colbert never threatened her, struck her, or used rough language with her. 5RP 133.

Colbert stopped after about a minute, and K.P. left Colbert's apartment ran to her friend Breanna's apartment in the same building. 4RP 81. Breanna testified K.P. was hysterical. 5RP 211-12. Breanna then accompanied K.P. to her home because K.P.'s behavior was scaring Breanna's daughter. 5RP 213-14. K.P. called the police from her home

and went to the hospital later that day for an examination.[12] 4RP 81-82; 5RP 214. The examining physician testified K.P. suffered no injuries, although a lack of injury was consistent with either consensual or non-consensual sex. 6RP 42-44.

K.P. testified she suffered long-term emotional effects from the incident. 6RP 122-23, 127-28. K.P. acknowledged that although she had not been diagnosed with postpartum depression she had been experiencing hormonal changes related to the birth of a child shortly before trial. 6RP 124-25; see also 4RP 62-64 (voir dire of K.P. based on concerns that she was suffering some form of mental impairment at trial). Before the jury, K.P. also acknowledged that she had a Colorado theft conviction. 5RP 144.

In contrast, Colbert testified that he and K.P. had consensual intercourse in his kitchen. 7RP 115-23. K.P. came to his apartment unannounced and was the instigator of the sexual contact. 8RP 38-39, 46. The incident was, moreover, preceded by three previous sexual encounters occurring in K.P.'s bedroom while Justin was at work. 7RP 111-12; 8RP 67-78. Colbert testified the intercourse was brief because the positioning hurt his back. 7RP 120-21, 123. K.P. then left while Colbert was in the

[12] Breanna testified K.P. said she did not want to go to the hospital because Colbert had threatened to hurt her if she told anyone. 5RP 221. But K.P. denied Colbert made any threats. 4RP 79-80; 5RP 133.

shower because she had to return to her children, who were being cared for by K.P.'s sister. 7RP 123.

Colbert maintained the sex was consensual from his first interview with police. 7RP 126, 129. Colbert also revealed to Justin that he had sex with K.P. 7RP 126; 8RP 70-72. Colbert did not understand why K.P. would claim the act was nonconsensual and acknowledged he had had difficulty coming up with theories for why K.P. would claim rape. 8RP 48-50.

In closing, the State argued that

> as to [K.P.] there is offered the defense of consent. But there has to also be some type of explanation as to why [K.P.] would do this, would complain, would say she was forced if she wasn't. . . . So there's several theories that Mr. Colbert has offered up. None of them hold water.

10RP 17. The State recounted K.P.'s testimony regarding the intercourse and her behavior after leaving Colbert's apartment. 10RP 18-19. The State then suggested that, given her post-incident behavior for the defense theory to have been correct, she would have had to have concocted a conspiracy. The State further argued that there had to be a motive for such behavior, yet there was no such motive. 10RP 19. The State later argued that the theories Colbert offered on why K.P. would fabricate the charges were unbelievable. 10RP 30-32.

In closing, defense counsel acknowledged that, unlike in the case of the third degree charge involving B.J., the defense had the burden of proving consent on the count involving K.P. 10RP 37-38, 49-52. Counsel pointed out K.P. was reluctant to go to the hospital, because she feared it would expose the falsity of her claim, and pointed out that K.P. had misrepresented to Breanna that Colbert had threatened her. 10RP 59. While acknowledging Colbert's testimony on certain details was inconsistent, including whether K.P.'s bedroom door had a lock, Colbert had consistently maintained that K.P. had consensual sex with him. 10RP 61-63.

Based on the jury instructions given, the arguments of counsel, weight of evidence of guilt, and other relevant factors, Brockie, 178 Wn.2d at 539, Colbert can show prejudice.

The court instructed the jury that:

> Consent is a defense to a charge of rape in the second degree. This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably truer than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

PRP, Exhibit 1 at Instruction 15.

Colbert and K.P. both testified at trial and presented diametrically opposed versions of the sexual act itself. Both were impeached, either with inconsistencies regarding details unrelated to the act itself, or with a prior conviction for dishonesty.

The defense theory was consent. To assert this defense, rather than simply being permitted to marshal the facts to sow doubt as to forcible compulsion, the defense was required to embrace a "more likely than not" standard. 10RP 49. The State then utilized this standard to suggest that Colbert was required to assert a good reason K.P. would have fabricated the charges. Colbert was unable to do so. 10RP 17. But, under the law, Colbert did not have the burden to do so. Without more, this argument permitted the jury to find Colbert had failed to prove consent and that he was therefore guilty. It was, therefore, likely the jury's verdict was affected by the misallocation of the burden.

Colbert has met his burden of showing likely prejudice based on the misallocation of the burden as to consent.

D. CONCLUSION

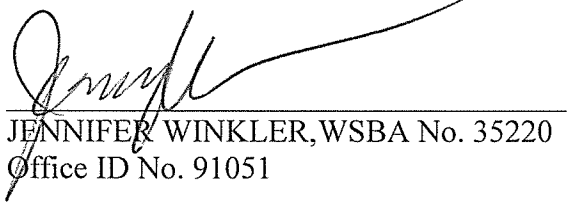
The trial court violated Colbert's due process rights by misallocating the burden of proving that the complainant consented. For the reasons stated, this petition is not procedurally barred. Moreover, because Colbert

has shown prejudice, this Court should grant the petition and reverse Colbert's second degree rape conviction.

DATED this 20TH day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER, WSBA No. 35220
Office ID No. 91051

Attorneys for Petitioner

APPENDIX A

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SKAGIT COUNTY, WA

2004 JUL -9 PM 1:18

SKAGIT COUNTY SUPERIOR COURT STATE OF WASHINGTON	
STATE OF WASHINGTON, Plaintiff, vs. **BOBBY D. COLBERT,** Defendant.	NO: 04-1-00497-6 INFORMATION

TO: **BOBBY D. COLBERT**
AKA: UNK
DOB: DECEMBER 13, 1970
LKA: 428 N. 1ST STREET #4, MOUNT VERNON, WA 98273
PHY: BLACK/AFRICIAN-AMERICAN/MALE/HT:603/205 LBS/BRN EYES/BLK HAIR
ID#: SID#:WA15944149; DOL#:WA COLBEBD304RL; DOC#:UNK; PCN#UNK
AGENCY: MVPD #03-M20076/04-M05014/04-M11568

By this Information, the Skagit County Prosecuting Attorney accuses you of the crime(s) of:

COUNT I

Rape in the Third Degree (Lack of Consent) - RCW 9A.44.060(1)(a) – A Class C Felony

On or about November 29, 2003, in the County of Skagit, State of Washington, the above-named Defendant did engage in sexual intercourse with another person who was not married to the defendant, to wit: B.L.J., and B.L.J. did not consent to the sexual intercourse and such lack of consent was clearly expressed by B.L.J. words or conduct; contrary to Revised Code of Washington 9A.44.060(1)(a).

Adult Penalty: (Maximum Penalty -- Five (5) years imprisonment and/or a $10,000 fine pursuant to RCW 9A.44.060(2) and 9A.20.021(1)(c), plus restitution and assessments.)
(If the defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(32), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to 9.94A.030(32)(a) and 9.94A.120(4) or 9.94A.570.)

ORIGINAL

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3RD ST. – COURTHOUSE ANNEX
MOUNT VERNON, WASHINGTON 98273
PH: (360) 336-9460

COUNT II

Rape in the Second Degree (Forcible Compulsion) - RCW 9A.44.050(1)(a).- a Class A Felony.

On or about March 18, 2004, in the County of Skagit, State of Washington, the above-named Defendant did engage in sexual intercourse by forcible compulsion with K.L.P.; contrary to Revised Code of Washington 9A.44.050(1)(a).

Adult Penalty: (Maximum Penalty -- Life imprisonment and/or a $50,000 fine pursuant to RCW 9A.44.050(2) and 9A.20.021(1)(a), plus restitution and assessments.)

(If the defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(32), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to 9.94A.030(32)(a) and 9.94A.120(4) or 9.94A.570.)

(If the defendant has previously been convicted in this state, in federal court, or elsewhere on one separate occasion of rape in the first or second degree, child molestation in the first degree or indecent liberties by forcible compulsion, or any of the following, provided there is a finding of sexual motivation: murder in the first or second degree, kidnapping in the first or second degree, assault in the first or second degree, and burglary in the first degree, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to 9.94A.030(32)(b) and 9.94A.120(4) or 9.94A.570.)

COUNT III

Indecent L iberties (Mentally I ncapacitated/Physically H elpless) - - R CW 9 A.44.100(1)(b), Class B Felony.

On or about the 21st day of June, 2004, in the County of Skagit, State of Washington, the above-named Defendant did knowingly cause C.A., who was not the defendant's spouse, to have sexual contact with the defendant or another when C.A. was incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless; contrary to Revised Code of Washington 9A.44.100(1)(b).

(Maximum Penalty-- Ten (10) years imprisonment and/or a $20,000 fine pursuant to RCW 9A.44.100(2) and 9A.20.021(1)(b), plus restitution and assessments.)

(If the defendant has previously been convicted on two separate occasions of a "most serious offense" as defined by RCW 9.94A.030(32), in this state, in federal court, or elsewhere, the mandatory penalty for this offense is life imprisonment without the possibility of parole pursuant to 9.94A.030(32)(a) and 9.94A.120(4) or 9.94A.570.)

SKAGIT COUNTY PROSECUTING ATTORNEY

DATED: July 9, 2004

By: _____ 20010806

DONA BRACKE, WSBA#29753
CHIEF CRIMINAL DEPUTY PROSECUTOR

SKAGIT COUNTY PROSECUTING ATTORNEY
605 S. 3RD ST. – COURTHOUSE ANNEX
MOUNT VERNON, WASHINGTON 98273
PH: (360) 336-9460

APPENDIX B

KAGIT COUNTY, WASH
FILED

FEB 8 - 2005

NANCY K. SCOTT, CO. CLERK
By: D

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SKAGIT COUNTY

STATE OF WASHINGTON, Plaintiff, v. BOBBY COLBERT, Defendant	No. 04-1-00497-6 VERDICT FORM A

We, the jury, find the defendant guilty (write in "not guilty" or "guilty")
of the crime of Rape in the Third Degree as charged in Count 1.

Heather L Watkins
Foreperson

69

SKAGIT COUNTY, WASH
FILED
FEB 8 - 2005
NANCY K. SCOTT, CO. CLERK
By:

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

STATE OF WASHINGTON, Plaintiff, v. BOBBY COLBERT, Defendant	No. 04-1-00497-6 VERDICT FORM B

We, the jury, find the defendant guilty (write in "not guilty" or "guilty") of the crime of Rape in the Second Degree as charged in Count 2.

Heather L Watkins
Foreperson

70

APPENDIX C

RECEIVED
05 MAR 31 PM 4:14
RICK GRIMSTEAD, SHERIFF

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA
2005 MAR 31 PM 3:54

SKAGIT COUNTY SUPERIOR COURT STATE OF WASHINGTON	
STATE OF WASHINGTON, Plaintiff, vs. BOBBY D. COLBERT, Defendant. SID: WA15944149 If no SID, use DOB: 12/13/1970 Agency No: MVPD 03-M20076/04-M05014	No. 04-1-00497-6 **JUDGMENT AND SENTENCE** (JS) **Prison** [ ] Restitution Hearing Set _____

I. HEARING

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

II. FINDINGS

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

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 02/08/2005 by jury verdict of:

RAPE IN THE THIRD DEGREE, Count 1; RCW 9A.44.060(1)(a); DOV: 11/29/2003
RAPE IN THE SECOND DEGREE, Count 2; RCW 9A.44.050(1)(a); DOV: 03/18/2004
COUNT 3 –SEVERED 07/30/2004 – TRIAL PENDING

as charged in the Original Information.

3 cc pd

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[ ] Additional current offenses are attached in Appendix 2.1.

[X] The court finds that the defendant is subject to sentencing under RCW 9.94A.712.

[ ] A special verdict/finding for use of **firearm** was returned on Count(s)_____. RCW 9.94A.602 (Ch 290 L 2002 § 11, effective 7/1/03 Ch. 379 L 2003 §10).

[ ] A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s)_____. RCW 9.94A.602 (Ch 290 L 2002 § 11, effective 7/1/03 Ch. 379 L 2003 §10).

[ ] A special verdict/finding of **sexual motivation** was returned on Count(s)_____. RCW 9.94A.835.

[ ] A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s)_____, RCW 69.50.401 and RCW 69.50.435, taking 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.

[ ] A special verdict/finding that the defendant committed the crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s)_____. RCW 9.94A.605, RCW 69.50.401(a), RCW 69.50.440.

[ ] The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and therefore a violent offense. RCW 9.94A.030.

[ ] 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 court finds that the offender has a ***chemical dependency*** that has contributed to the offense(s). RCW 9.94A.607.

[ ] The crime charged in Count(s)_____ involve(s) **domestic violence.**

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.360):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1	NO FELONY HISTORY					
2						
3						
4						
5						
6						
7						

* (SV) Serious Violent, (V) Violent, (SEX) Sex Offense.

[ ] Additional criminal history is attached in Appendix 2.2.

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

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

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUS-NESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCE-MENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
1	3	V	15-20 MOS		15-20 MOS	5YR/$10,000
2	3	XI	102-136 MOS		102-136 MOS	10YR/$20,000
3	N/A					
4						

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

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

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

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

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

_____

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

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 _____. [ ]The defendant is found NOT GUILTY.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

JASS CODE $ Ø Restitution to:_____

(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

RTN/RJN RESTITUTION. $

PCV $ 500 Victim assessment ..... RCW 7.68.035

CRC $_____ Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee $ 110 FRC

Witness costs $ _____ WFR

		Sheriff service fees $ _____ SFR/SFS/SFW/WRF	
		Jury demand fee $ _____ JFR	
		Extradition costs $ _____ EXT	
		Other $ _____	
PUB	$_____	Fees for court appointed attorney	RCW 9.94A.760
WFR	$_____	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	$_____	Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ] VUCSA additional fine deferred due to indigency RCW 69.50.430.	
CDF/LDI/FCD NTF/SAD/SDI	$_____	Drug enforcement fund of _____	RCW 9.94A.760
CLF	$_____	Crime lab fee [ ] suspended due to indigency	RCW 43.43.690
	$ 100	Felony DNA collection fee [X] not imposed due to hardship	RCW 43.43.7541
	$_____	Emergency response costs (Veh. Assault, Veh. Homicide only, $1000 max.)	RCW 38.52.430
		Agency Name:_____ Agency Address:_____	
	$_____	Other 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_____

[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 and on a schedule established by the DOC or the court clerk, commencing immediately, unless the court specifically sets forth the rate here: in the amount of $50.00 per month commencing 30 days after entry of this judgment and sentence unless ordered as follows:_____. RCW 9.94A.760.

The defendant shall report as directed by the clerk of the court and provide financial information as requested. RCW 9.94A.760(7)(b).

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

The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190 and RCW 9.94A.780(5).

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.

4.2 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, the County or Department of Corrections, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

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

4.3 The defendant shall not have contact with Brandi Jones 7-25-85 Kelly Peterson 4-21-86 (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 5 years / life years (not to exceed the maximum statutory sentence).

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

4.4 OTHER: Register as a sex offender for life.
~~Have no contact with minors, anyone under 18 years old.~~

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

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

20 months on Count I - concurrent with Ct. II months on Count _____

_____ months on Count _____ _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

Actual number of months of total confinement ordered is: _____.
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____.

_____

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.712: The defendant is sentenced to the following term of confinement in the custody of the DOC:

Count	_____	Minimum term	_____	maximum term	_____
Count	II	Minimum term	136 months	maximum term	life

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

4.6 [ ] COMMUNITY PLACEMENT is ordered as follows: Count _____ for _____ months; Count _____ for _____ months; Count _____ for _____ months;

[X] COMMUNITY CUSTODY for count(s) II, sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

[X] COMMUNITY CUSTODY is ordered as follows:

Count I for a range from 36 to 48 months;
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and Chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 commited before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include

sex offenses not sentenced under RCW 9.94A.712 and violent offenses commited on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant commited a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

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) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.

[ ] Follow all conditions of Appendix A.

~~[X] Defendant shall have no contact with:~~ any minor under 18 y.o. JPV.

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

[X] The defendant shall participate in the following crime-related treatment or counseling services: sexual deviancy evaluation + treatment

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: obey all laws

[X] Other conditions: Follow all DOC/CCO rules, regulations, requirements

[X] For sentences imposed under RCW 9.94A.712, other conditions may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than 7 working days.

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

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections:_____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within *one year of the final judgment in this matter*, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment for an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCE 9.94A.760(4) and RCW 9.94A.7534.

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 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 **RESTITUTION HEARING.**
[ ] Defendant waives any right to be present at any restitution hearing *(sign initials)*:_____

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

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

Cross off if not applicable:

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. 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 immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. 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 out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington state, you must also send written notice within 10 days of moving to the county sheriff with whom you last

registered in Washington State.

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 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. 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 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. 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 10 days of such termination.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours 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 or within 48 hours excluding weekends and holidays after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in 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. The county sheriff's office may require you to list the locations where you have stayed during the last seven days. 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.

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 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

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).

5.8 [ ] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 **FORFEITURE OF FIREARMS.** The firearm(s) involved in this case, _____, is(are) forfeited in accordance with the law.

5.10 **OTHER:**_____

DONE in Open Court and in the presence of the defendant this date: 3-31-05.

Susan K Cook SUSAN K. COOK
JUDGE Print name:

Deputy Prosecuting Attorney
DONA BRACKE, WSBA#29753

Attorney for Defendant
GLEN C. HOFF, WSBA#24645

Defendant
BOBBY D. COLBERT

Translator signature/Print name:_____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CAUSE NUMBER of this case: 04-1-00497-6

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

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by:_____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID NO.: WA15944149 (If no SID take fingerprint card for State Patrol)

DATE OF BIRTH: 12/13/1970

FBI NO.: 773952EB3

LOCAL ID NO.: SO 40046

PCN NO.: UNK

DOC NO.: UNK OTHER:

AKA:UNK, SSN; DOB:

RACE: BLACK/AFRICIAN-AMERICAN

SEX: MALE

FINGERPRINTS I declare/attest under penalty of perjury of the laws of the State of Washington that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto.

~~Deputy/Clerk/~~Bailiff of the Court: Deputy _____ ~~Deputy/Clerk/~~Bailiff. Dated: 3/31/05

DEFENDANT'S SIGNATURE: x _____

DEFENDANT'S CURRENT ADDRESS: D. O. C.

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously

SUPERIOR COURT OF WASHINGTON COUNTY OF SKAGIT	
STATE OF WASHINGTON, Plaintiff, vs. BOBBY D. COLBERT, Defendant. SID: WA15944149 If no SID, use DOB: 12/13/1970	No. 04-1-00497-6 **WARRANT OF COMMITMENT**

THE STATE OF WASHINGTON:

TO: The Sheriff of Skagit County, and to the proper offices of the Department of Corrections. The Defendant has been convicted of the crime(s) of:

RAPE IN THE THIRD DEGREE, COUNT 1; MVPD #03-M20076
RAPE IN THE SECOND DEGREE, COUNT 2; MVPD #04-05014
COUNT 3 – SEVERED ON 07/30/2004 – TRIAL PENDING

and the court has ordered that the defendant be punished by serving the determined sentence of:

Count	Total Confinement	Work Release/EHM	Work Crew	Community Service
1	20 months	concurrent		
2	136 months → life			
~~3~~				
~~4~~				

to commence: forthwith before 6:00 p.m..

Defendant shall receive _____ day(s) credit for time served. ☒ Credit to be determined.

~~You have been given the option, if eligible and approved by the Skagit County Jail, to serve a portion of your sentence through a sentencing alternative other than total confinement.~~
~~The option given to you is ____ days Work Release / Electronic Home Monitoring / Work Crew, IF DETERMINED TO BE ELIGIBLE BY THE SKAGIT COUNTY JAIL. It must be started by the date stated above. If you participate in this program, you must abide by the terms as set forth by the Skagit County Jail. If you violate any of those terms as determined by the Skagit County Jail, you will be subject to immediate arrest and your option to participate in alternative sentencing will be revoked and any remaining time left to be served shall be converted to straight jail time. Additionally, you may be subject to a probation violation hearing, which may result in further jail time.~~
~~I have read the above and agree to abide by the terms set forth by the Skagit County Jail.~~
~~Defendant: Approved; Attorney for Defendant:~~

YOU, THE SHERIFF, ARE COMMANDED to receive the defendant for classification, confinement, and placement as ordered in the Judgment and Sentence.

Dated: 3-31-05

SUSAN K. COOK
Judge

NANCY K. SCOTT, CLERK By Kristin [illegible] Deputy Clerk

APPENDIX F

STATE OF WASHINGTON VS. BOBBY D. COLBERT 04-1-00497-6

COUNT I & II

Conditions of Supervision: In addition to the standard conditions, I recommend the following special conditions:

1. Obey all laws.
2. Have no direct or indirect contact with B.L.J. (DOB 07/25/85) and K.L.P. (DOB 04/21/86).
3. Pay the costs of crime-related counseling and medical treatment required by B.L.J. and K.L.P.
4. Do not possess or consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale.
5. Do not possess or consume controlled substances unless you have a legally issued prescription.
6. Do not associate with known users or sellers of illegal drugs.
7. Participate in offense related counseling programs, to include Department of Corrections sponsored offender groups, as directed by the supervising Community Corrections Officer.
8. Your residence, living arrangements and employment must be approved by the supervising Community Corrections Officer.
9. Register as a sex offender with the county of your residence for the period provided by law.

APPENDIX D

FILED
KAGIT COUNTY CLERK
SKAGIT COUNTY, WA
2005 MAY 16 AM 11:03

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

STATE OF WASHINGTON Plaintiff, vs. BOBBY D. COLBERT, Defendants,	)	NO. 04-1-00497-6 VERDICT FORM

We, the jury, find the defendant, BOBBY D. COLBERT NOT GUILTY (write in not guilty or guilty) of the crime of INDECENT LIBERTIES, as charged.

DATED 16th day of MAY 2005.

FOREPERSON

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

In re Personal Restraint Petition of:	)	
	)	
BOBBY COLBERT,	)	
	)	COA NO. 71388-4-I
Petitioner.	)	
	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF MARCH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] BOBBY COLBERT
NO. 879561
STAFFORD CREEK CORRECTIONS CERNTER
191 CONSTANTINE WAY
ABERDEEN, WA 9852

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF MARCH 2015.

x Patrick Mayovsky