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

IN RE THE PERSONAL RESTRAINT OF

Rodney Cooley,

Petitioner.

REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

Many of the state's responses reveal a misunderstanding of the personal restraint petition (PRP) process. The state begins, for example, by asserting that RAP 2.5(a) bars Mr. Cooley from raising the claim concerning the seizure of Ms. Novotney for the first time on *appeal*. But this is a PRP, not an appeal; RAP 2.5(a) is completely inapplicable. Section II.

The state next argues that Mr. Cooley lacks standing to raise the claim concerning the seizure of Ms. Novotney. But the state here ignores the automatic standing rule that we discussed, and also ignores the fact that Mr. Cooley had a legitimate expectation of privacy in his home. Section III.

When it finally gets to the merits of the claim concerning the seizure of Ms. Novotney, the state fails to respond to the authorities we cited for the rule that a search warrant can issue to seize things – but only an arrest warrant based on probable cause to believe the person committed a crime, or a material witness warrant, can be issued to seize a person. We assume that they did not discuss this because they found no contrary authority. Section IV.

The state then fails to respond to the new and unsettling definition of torture advanced by the government, which exempts even the most

abusive practices (such as assaults, indignities and deprivations) from torture's definition. Section V.

With regard to the claim concerning the insufficiency of evidence of torture, the state responds that this was raised on direct appeal and, hence, cannot be raised now; but this issue was not raised, and this problem with meeting the definition of torture was not discussed. Section VI.

The state is correct that the claim concerning Blakely[1] and Recuenco[2] is currently pending before the state Supreme Court. Section VII.

With regard to the first ineffective assistance claim, the state responds with unsupported speculation about how Mr. Cooley supposedly would have rejected any plea offer. Such speculation is not sufficient to rebut the sworn declarations to the contrary previously submitted by Mr. Cooley – and the additional declaration submitted with this Reply (attached as Appendix A) – and his lawyer on the question of whether counsel's undisputed misadvice prevented Mr. Cooley from accepting the favorable plea offered to him. Section VIII.

The state then errs in asserting that the decision about whether to

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[1] Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

[2] State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188, rev'd on other grounds, 126 S.Ct. 2456 (2006).

call a witness or not is always insulated from review for ineffective assistance; in fact, the rule is just the opposite. Section IX.

The claim of ineffective assistance in failing to move to suppress the evidence gained from the arrest of Ms. Novotney will stand or fall with this Court's decision about the merits of such a suppression motion. Section X.

Finally, the state claims that it has no duty to disclose exculpatory material if it is not known to the deputy prosecutor. Under controlling federal law, however, it actually has a duty to search the prosecutor's office and other government agencies for such material. Section XI.

II. THE STATE CLAIMS THAT RAP 2.5(a) BARS MR. COOLEY FROM RAISING THE CLAIM CONCERNING THE SEIZURE OF MS. NOVOTNEY FOR THE FIRST TIME ON APPEAL. BUT THIS IS A PRP, NOT AN APPEAL; RAP 2.5(a) IS COMPLETELY INAPPLICABLE.

The state's first response is that RAP 2.5(a) bars Mr. Cooley from raising his claim about the unlawful seizure of alleged victim Janice Novotney pursuant to a "seizure" warrant, for the first time on appeal. Response, p. 5. It cites a litany of direct appeal cases, holding that certain claims cannot be raised for the first time on the direct appeal. Response, pp. 5-6.

RAP 2.5, however, applies only to appeals.

This is not an appeal. It is a personal restraint petition, which is a new and separate civil action. In re Personal Restraint of Davis, 152 Wn.2d 647, 691, 101 P.3d 1 (2004) (PRP is civil, not criminal); In re Personal Restraint of Gentry, 137 Wn.2d 378, 409-10, 972 P.2d 1250 (1999), amended by, 1999 Wash. LEXIS 448 (June 30, 1999) (PRP is civil and is collateral attack on conviction, not direct attack like an appeal). It is an original action, filed in the appellate court, not on appeal. RAP 16.3(c) (PRP is original action in appellate court).

RAP 2.5 does not apply to such an original filing in the appellate court. RAP 16.1 et seq. governs PRP's. They do not say what RAP 2.5 says.

In fact, PRP's are designed for claims that were not previously raised. It is often the most appropriate way to raise claims that were never even mentioned in the trial court, such as ineffective assistance of counsel or prosecutorial withholding of exculpatory information. In re Personal Restraint of Lord, 123 Wn.2d 737, 870 P.2d 964 (1994) (raising ineffective assistance issues which were never raised in trial court); RAP 16.4(c) (listing claims that can be raised in PRP, and including claims based on facts "which have not bee previously presented and heard.").

The state therefore errs in claiming that Mr. Cooley cannot raise the claim concerning the warrant to seize Janice Novotney for the first

time in a PRP. In fact, that is precisely what a timely PRP is designed for: to raise new, important, issues, even issues like this of a constitutional magnitude.

III. THE STATE NEXT CLAIMS THAT MR. COOLEY LACKS STANDING TO RAISE THE CLAIM CONCERNING THE SEIZURE OF MS. NOVOTNEY; IT COMPLETELY IGNORES THE AUTOMATIC STANDING RULE AND ALSO IGNORES THE FACT THAT MR. COOLEY HAD A LEGITIMATE EXPECTATON OF PRIVACY IN HIS HOME

The state next claims that Mr. Cooley cannot raise the claim concerning the seizure of Ms. Novotney because he lacks standing to do so. Response, pp. 9-10. It cites to the general rule that a defendant should have a personal expectation of privacy in the material seized to raise a challenge to that seizure. Id.

That is certainly the general rule. But in Washington, there is an exception: the automatic standing rule. We cited State v. Evans, 159 Wn.2d 402, 406-07, 150 P.3d 105 (2007), and State v. Simpson, 95 Wn.2d 170, 175, 622 P.2d 1199 (1980), in support of that exception, in the Opening Brief. The state does not even acknowledge that the automatic standing exception exists in Washington, or explains why we are wrong about its applicability in this case.

We also explained in the Opening Brief that Mr. Cooley himself had a privacy interest in the area that was invaded to accomplish the

seizure – that is, in his home. The state deals with this matter in a footnote (Response, p. 10, n.8). The footnote says that there are too many factual questions posed by the notion that Mr. Cooley had a privacy interest in his home to resolve in a PRP. Id. ("The record is simply insufficient to decide this claim ...").

This response again belies a misunderstanding of the nature of the PRP. The PRP is designed to resolve just such factual disputes, if they are material to the issues presented (as this footnote seems to concede they are in this case). In fact, under In re Personal Restraint of Rice, 118 Wn.2d 876, 886-87, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992), if "the petitioner ... present[s] evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay ... the court will then examine the State's response to the petition. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence." In fact, the Rice court concludes that, "If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions." Id.

The state therefore errs in asserting that there are material disputed

issues of fact concerning Mr. Cooley's legitimate expectation of privacy in his home, and, hence, the PRP should be dismissed. If there are material disputed issues of fact concerning his expectation of privacy in his home, then his PRP should be referred to the trial court for an evidentiary hearing to resolve those issues.

As a practical matter, though, we suspect that the issue is really not disputed. Since Mr. Cooley lived in the home, then, as a matter of law, he had a legitimate expectation of privacy in the home.

It seems that the only disputed fact identified by the state is whether the officers had some other basis for entering the home to arrest Mr. Cooley, other than the Novotney warrant – and the only other possible basis identified by the state is "exigent circumstances." Response, p. 10, n.8. If the question comes down to whether exigent circumstances excused the entry – since the "seizure" warrant did not – then, under Rice, that matter should be referred for an evidentiary hearing. It should not be considered a basis for dismissal.

IV. ON THE MERITS OF THE CLAIM CONCERNING THE SEIZURE OF MS. NOVOTNEY, THE STATE FAILS TO RESPOND TO THE AUTHORITIES WE CITED FOR THE RULE THAT A SEARCH WARRANT CAN ISSUE TO SEIZE THINGS – BUT ONLY AN ARREST WARRANT BASED ON PROBABLE CAUSE TO BELIEVE THE PERSON COMMITTED A CRIME, OR A MATERIAL WITNESS WARRANT, CAN BE ISSUED TO SEIZE A *PERSON.*

With regard to the merits of the claim concerning the seizure of Ms. Novotney, the state fails to respond to most of the authorities we cited.

We cited federal constitutional authority for the rule that a search warrant can issue to seize things, but a warrant to seize a person is different. E.g., U.S. Const. amend IV; Zurcher v. Stanford Daily, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978). The state does not discuss those authorities.

We cited controlling state authority for the rule that a warrant to seize a person can be issued if there is probable cause to suspect that that person is involved in criminal activity. We even cited a controlling Washington Supreme Court case for the rule that without probable cause to suspect that the individual who is the subject of a warrant committed a crime, that individual cannot be forced to do anything. In re Armed Robbery, Albertson's On August 31, 1981, 99 Wn.2d 106, 659 P.2d 1092

(1983) (individual may not be seized in any manner – not even forced to participate in a lineup – unless there is probable cause to believe that he or she himself or herself has committed the offense under investigation; based on Fourth Amendment and Wash. Const. art. 1, § 7). The state does not even bother to mention that case, which certainly seems to limit issuance of a seizure warrant to the criminal himself (not to someone else).

We even cited authority for the exception to that rule, that is, authority stating that a person could be seized even if he is not suspected of criminal activity at all but has evidence to offer against another. That is the material witness warrant rule, CrR 4.10(a). As we explained in the Opening Brief, under this rule, a material witness warrant can issue for witness "testimony."[3] But under the provision allowing issuance of a material witness warrant, a witness's refusal to obey a lawfully issued subpoena or other court order, or the likelihood that that will occur, is a necessary prerequisite to issuance of a material witness warrant. See State v. Jordan, 110 Wn. App. 1074, 2002 WL 254542 (2002) at * 2, n.5. And we explained that neither prerequisite was satisfied in this case, because the warrant issued for Janice Novotney did not seek testimony and because she had never disobeyed any lawfully issued process of the court.

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[3] In addition, the testimony must also be material. State v. Hartley, 51 Wn. App. 442, 446, 754 P.2d 131 (1988); City of Bellevue v. Vigil, 66 Wn. App. 891, 895-96, 833 P.2d 445 (1992).

The state does not mention the material witness warrant rule at all, or explain why its specific prerequisites are inapplicable here.

V. THE STATE FAILS TO APPRECIATE THE NEW AND UNSETTLING DEFINITION OF TORTURE ADVANCED BY THE GOVERNMENT, WHICH EXEMPTS EVEN THE MOST ABUSIVE PRACTICES (SUCH AS ASSAULTS, INDIGNITIES AND DEPRIVATIONS) FROM TORTURE'S DEFINITION

In responding to the claim that the assault-by-torture statute is either vague in general, or vague as applied to the hitting, slapping, and indignities alleged in this case, the state cites to numerous cases on the definition of torture.

Some of them involved instances of torture that were so egregious, resulting in death and worse, that they are not comparable to the hitting, slapping, and indignities alleged here. E.g., State v. Cornell, 741 P.2d 501 (Ore. 1987). If fact, the state cites cases where the courts held that torture required actual infliction of "intense" physical pain – not the sort of slapping, hitting and indignities occurred here. Id.

And the state's cases are all from the pre-Abu Ghraib period. They fail to take account of the shifting, unexpected, and unsettling definitions of torture that the government now advances, in order to exclude assaults, deprivations, and indignities far worse than those alleged in Mr. Cooley's case, from the definition of "torture." See *Working Group Report on*

Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations 6 March 2003 (hereinafter "Report"), the "secret" torture memo produced at the Pentagon, leaked by THE WALL STREET JOURNAL on June 8, 2004, and available at www.isthatlegal.org/mil_torture.pdf.

Even if the definition of "torture" were a thing of common understanding before that time, it certainly is not now. See, for example, the NPR Morning Edition (March 15, 2005) program entitled, *Defining Torture after Abu Ghraib* by Jackie Northam, described by NPR as follows: "Some in Congress defend the right of interrogators to engage in what they call "pressure," or making subjects physically or psychologically uncomfortable. A look at torture, "pressure" and the distinctions some make – or don't – between the two." The link for that story is: http://www.npr.org/templates/story/story.php?storyId=4535190. Or, note the photographs in the book Torture and Truth: America, Abu Ghraib and the War on Terror, by M. Danner, containing photographs of the alleged torture that the government claims did not meet the definition of torture; link at http://www.amazon.com/gp/reader/1590171527/ref=sib_dp_pt/103-1056895-7278220#reader-link. See also January 19, 2005, *Rice Refuses to Describe Detainee Abuse at Abu Ghraib as Torture*, explaining that Secretary Rice refused to describe what occurred at the Abu Ghraib prison as

torture at her confirmation hearing for Secretary of State; available at http://www.democracynow.org/article.pl?sid=05/01/19/159259.

This Court need not agree or disagree with the viewpoints expressed in these examples from popular culture and official government positions. The point is that the definition of "torture" has become much more slippery, much more opaque, much less definite, since 2000, and so every prior case holding that the definition of "torture" is clearly defined must now be reevaluated. The state neglects to address this aspect of the argument.

VI. THE STATE CLAIMS THAT THE INSUFFICIENCY OF EVIDENCE OF TORTURE ISSUE WAS RAISED ON DIRECT APPEAL AND, HENCE, CANNOT BE RAISED NOW; BUT THIS ISSUE WAS NOT RAISED, AND THIS PROBLEM WITH MEETING THE DEFINITION OF TORTURE WAS NOT DISCUSSED.

On the insufficiency of evidence of torture claim, the state asserts that this issue was raised and rejected on direct appeal.

In the August 10, 2004, Opening Brief on direct appeal, however, we find the following assignments of error:

1. The Trial Court erred in not dismissing a charge of second degree assault while armed with a deadly weapon.

2. The Trial Court erred in not dismissing charges of first degree assault against the Appellant.

3. The Trial Court erred in admitting hearsay evidence.

Opening Brief, p. 1. We do not find an assignment of error concerning the sufficiency of evidence of assault in the second degree by torture.

In that same brief, we then find these issues presented:

> 1. Did the Trial Court err in allowing the jury to consider charges where the State failed to prove all elements of those charges?
>
> 2. Did the Trial Court err in allowing hearsay testimony from a police officer about statements made by alleged victim in this case?

Opening Brief, p. 1.

Neither the assignments of error nor the statement of issues seems to cover the issue presented in the Opening Brief concerning the sufficiency of evidence on the second-degree assault-by-torture count.

VII. THE STATE IS CORRECT THAT THE CLAIM CONCERNING *BLAKELY* AND *RECUENCO* IS CURRENTLY PENDING BEFORE THE STATE SUPREME COURT.

The state is correct that the challenge to the firearm enhancement on the ground that it violates Blakely and Recuenco is currently pending before the state Supreme Court. We will all benefit from a decision in State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), review pending, 2007 Wash. LEXIS 102 (Jan. 30, 2007) if and when review is granted.

VIII. THE STATE'S UNSUPPORTED SPECULATON ABOUT HOW MR. COOLEY SUPPOSEDLY WOULD HAVE REJECTED ANY PLEA OFFER IS NOT SUFFICIENT TO REBUT THE SWORN DECLARATIONS TO THE CONTRARY SUBMITTED BY MR. COOLEY AND HIS LAWYER, ON THE QUESTION OF WHETHER COUNSEL'S UNDISPUTED MISADVICE PREVENTED MR. COOLEY FROM ACCEPTING THE FAVORABLE PLEA OFFERED TO HIM.

Mr. Cooley's PRP and Opening Brief explained that his lawyer had a duty to provide accurate advice about his maximum sentencing exposure under the SRA guidelines, in advance of trial, so that Mr. Cooley could make a well-counseled decision about whether to plead guilty or go to trial. Opening Brief, pp. 36-37. The state does not dispute this.

The PRP and Opening Brief explained that, "'By grossly underestimating [the defendant's] sentencing exposure ..., [counsel] breache[s] his duty as a defense lawyer in a criminal case to advise his client fully on whether a particular plea to a charge appears desirable.'" Opening Brief, p. 37 (citation omitted). The state did not dispute that, either.

The PRP and Opening Brief then explained that Mr. Cooley's lawyer did exactly what was prohibited. Rod Cooley's trial counsel grossly underestimated Mr. Cooley's sentencing exposure upon conviction, and Mr. Cooley's declaration clearly states that he relied upon that misadvice in

rejecting the very favorable 1-3 month sentencing deal plea offer that was made to him – because he calculated the risks and the benefits and determined that he did not face that much more risk at trial. In fact, Mr. Cooley's affidavit states that he believed, based on his lawyer's advice, that he would essentially be released with time served even if he lost at trial.

The state did not dispute the fact that Mr. Cooley received grossly inaccurate information from his lawyer about his actual sentencing exposure.

Instead, the state speculates that Mr. Cooley would not have taken the plea bargain that was offered to him even if he received accurate advice about his sentencing exposure after trial. Response, pp. 20-21. The state offers no support whatsoever for this claim. It offers no declarations, affidavits, letters, or other evidence to bolster its position.

Mr. Cooley, however, did provide evidentiary support for his assertions. He provided his own declaration, along with the somewhat conflicting declaration of his attorney. Even though they conflict on how much time Mr. Cooley was advised he faced, they agree in one respect: defense trial counsel grossly underestimated Mr. Cooley's actual sentencing exposure after trial. And no evidence disputes Mr. Cooley's key assertion: that if he had been provided with accurate information about the extent of his sentencing exposure, he would have been shocked and certainly would have taken the deal for a plea to 1-3 months worth of incarceration. Cooley

Declaration (Appendix F), ¶ 1, p. 1 ("Since I was told that the sentencing range for that crime was 1-3 months, and I had been in jail two months, I believed that if I accepted the deal, I would be out almost immediately.")

If that were not clear from the previous declarations, it is certainly clear from the new one submitted as Appendix A to this Reply. Mr. Cooley's declaration here explicitly states that he rejected that plea offer precisely because of the incorrect advice he was given about his time:

> 3. I believe that I am innocent of all the crimes charged. However, I also make rational decisions. If my lawyer had told me the truth about my sentencing exposure – if he had told me that I faced up to 14 years in prison if convicted on all charges and could easily get such a sentence as a standard range sentence – then I certainly would have taken the plea offer. Under the plea offer, I would walk out of jail immediately. If I had been given proper advice about the true sentencing maximum and sentencing guidelines exposure, such a deal would have seemed much more appealing.
>
> 4. If I had known about the real sentencing exposure I faced; if I had known that I could plead guilty under Alford without admitting guilty; then I would have taken the deal. As I said in the original declaration, "Because I believed Mr. Cross' estimate of my risk, I rejected the plea offer." If I had understood what my real risk was, I would not have rejected that plea offer.

Appendix A, Second Declaration, pp. 1-2, ¶ ¶ 3, 4.

The fact that the state offers only speculation, rather than proof, in opposition to these well-supported claims, is fatal to its position. This is clear from the Washington Supreme Court's decision in In re the Personal

Restraint of Rice, 118 Wn.2d 876, 886. In that case, the Court ruled that PRP petitioners must state with particularity the facts upon which their claims are based, and must present documentary support – in the form of affidavits or declarations based on first-hand knowledge, "or other corroborative evidence." Id. "In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." Id.

The proof submitted along with the Opening Brief suffices under this standard. Mr. Cooley has submitted documentation, first-hand declarations, attesting to the factual allegations in the PRP and Opening Brief.

If the state disputes that evidentiary showing, it must do more than just speculate. It must come forward with admissible evidence of its own sufficient to challenge each of the factual allegations and evidentiary submissions presented by petitioner:

> Once the petitioner makes this threshold showing, the court will then examine the State's response to the petition. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. *In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence.* If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.

Rice, 118 Wn.2d at 886-87 (emphasis added). Thus, if the state disputes

the factual allegations and supporting evidence produced by Mr. Cooley about the advice he was given and how he relied upon it, the state must "meet the petitioner's evidence with its own competent evidence." Id. Then, and only then, is the state entitled to an evidentiary hearing on any disputed questions of material fact. If the state fails to do this, then no evidentiary hearing is necessary – because the allegations and evidence of the petition are deemed unchallenged and the petition must be decided based on the facts alleged and supported by the PRP petitioner.

The state failed to meet that standard in its Response is this case. It has submitted no declarations or affidavits. It has not indicated that it made any effort to contact anyone to obtain any declarations or affidavits. It provides only the bare argument that Mr. Cooley would not have pled guilty no matter what – an unsworn assertion that flatly contradicts the actual evidence provided.

That is not enough under Rice. Mr. Cooley and his lawyer have both submitted sworn declarations stating that he would have pled guilty but for his lawyer's false assurances about the consequences of a trial, and explaining their reasoning. This Court cannot simply reject these sworn allegations as unbelievable, without any offer of contrary factual data from the state. Instead, given the absence of any factual data to rebut Mr. Cooley's sworn statements, this Court must accept them as true.

IX. THE STATE ERRS IN ASSERTING THAT THE DECISION ABOUT WHETHER TO CALL A WITNESS OR NOT IS ALWAYS INSULATED FROM REVIEW FOR INEFFECTIVE ASSISTANCE; IN FACT, THE RULE IS JUST THE OPPOSITE.

The state's complete response to the claim that trial counsel was ineffective in failing to call additional witnesses is that this was "a strategic decision." Response, p. 23. This is pure speculation. The state provides no proof that counsel made a tactical or strategic judgment, rather than simply failing to investigate or follow through on his commitments.

Further, the state relies on the platitude that the decision to call witnesses is insulated from review – because it is one of those strategic matters that will never support a claim of ineffective assistance of counsel. Response, p. 23.

This is completely incorrect. As the court held in Lord v. Wood, 184 F.3d 1083 (9th Cir 1999), cert. denied, 528 U.S. 1198 (2000), trial counsel's failure to call three witnesses constituted ineffective assistance and reversible error in an aggravated murder case where those witnesses stated that they saw the victim alive, the day after she was supposedly killed by Mr. Lord. The Ninth Circuit rejected the notion that the decision about whether to call certain witnesses was always immune from review for ineffective assistance. It found that the failure to interview, investigate, and present witnesses certainly can support a claim of

ineffective assistance, if it likely affects the outcome of the trial.

Although Lord v. Wood overturned a Washington Supreme Court decision, it is consistent with authority from jurisdictions around the country. Decisions of other federal courts affirmatively *support* the notion that a decision not to call an exculpatory witness is not insulated from review for ineffective assistance. In fact, several circuits have already held that the failure to call witnesses is not insulated from review when defense trial counsel never evaluated that witness' credibility with an interview.[4] Similarly, other circuits have ruled that the failure to call critical alibi witnesses, eyewitnesses, or witnesses necessary to prove an important fact bearing on guilt or innocence, will also be examined for ineffective assistance.[5]

Even the Washington courts now recognize that, following Lord v. Wood, trial counsel's decision about whether to call witnesses is not completely insulated from review. In re Personal Restraint of Davis, 152 Wn.2d 647, 721, n.225, 101 P.3d 1 (2004) (citing Lord v. Wood for this

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[4] Chambers v. Armontrout, 907 F.2d 825, 828-30 (8th Cir.), cert. denied, 498 U.S. 950 (1990) (failure to interview or call self-defense witnesses deprived defendant of effective assistance); Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986) (failure to investigate and interview available alibi witnesses constituted ineffective trial preparation).

[5] E.g., Griffin v. Warden, 970 F.2d 1355, 1358 (4th Cir. 1992) (alibi witnesses); Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991) (alibi witnesses); Chambers v. Armontrout, 907 F.2d 825, 829-32 (self-defense witness); Lawrence v. Armontrout, 900 F.2d 127, 129-30 (8th Cir. 1990) (alibi witnesses); Blackburn v. Foltz, 828 F.2d 1177, 1182-83 (6th Cir. 1987), cert. denied, 485 U.S. 970 (1988) (alibi witness); Code v. Montgomery, 799 F.2d 1481 (alibi witness); Nealy v. Cabana, 764 F.2d 1173, 1177-78 (5th Cir. 1985) (alibi witness).

proposition).

Further, there was more to this claim than simple failure to call witnesses. It also involved failure to investigate, and there is absolutely no indication that trial counsel ever interviewed the witnesses whose declarations we have provided. In fact, there is no indication that trial counsel investigated the background of the allegedly abused Ms. Novotney. As her attached Declaration – Appendix B – makes clear, she was intoxicated on methamphetamines, not only during the alleged crimes but also during the trial. When she finally sobered up, she admitted that any prior allegations she made stemmed from drug-induced hallucinations, and that she was the one who acted violent and rageful towards Mr. Cooley, not the other way around.

X. THE CLAIM OF INEFFECTIVE ASSISTANCE IN FAILING TO MOVE TO SUPPRESS THE EVIDENCE GAINED FROM THE ARREST OF MS. NOVOTNEY WILL STAND OR FALL WITH THIS COURT'S DECISION ABOUT THE MERITS OF SUCH A SUPPRESSION MOTION.

The state argues that any motion to suppress the evidence gleaned from the seizure of Ms. Novotney would have failed, so counsel was not ineffective for ignoring this issue.

It is true that the claim of ineffective assistance in failing to move to suppress the evidence gained from the seizure of Ms. Novotney will

stand or fall based on this Court's decision about the merits of such a suppression motion. We simply disagree with the state about the merits of that claim.

XI. THE STATE ERRS IN CLAIMING THAT IT HAS NO DUTY TO DISCLOSE EXCULPATORY MATERIAL IF IT IS NOT KNOWN TO THE DEPUTY PROSECUTOR; UNDER CONTROLLING FEDERAL LAW, IT HAS A DUTY TO SEARCH THE PROSECUTOR'S OFFICE AND OTHER GOVERNMENT AGENCIES FOR SUCH MATERIAL.

Finally, the state asserts that it had no duty to disclose exculpatory information about Ms. Novotney

The state agrees that the government must disclose all evidence "favorable to the accused upon request." Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The state seems to agree that impeachment evidence – like the DSHS material – falls within the disclosure mandate of Brady. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).[6]

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[6] United States v. Bagley, 473 U.S. 667, 676 ("Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule."); Benn v. Lambert, 283 F.3d 1040 (9th Cir.), cert. denied, 537 U.S. 942 (2002) (granting writ of habeas corpus after defendant learned that state withheld material facts affecting credibility of police informant who implicated defendant); United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1993) ("The jury, not the prosecutor, has the duty to sift through the inconsistencies of testimony, to weigh the credibility of witnesses and to resolve any ambiguities in the evidence"; reversing, because there was reasonable probability that had memorandum been disclosed, "the result of the proceeding would have been different such that our confidence in the outcome is undermined"); United States v. Endicott, 869 F.2d 452 (9th Cir. 1989) ("the obligation under Brady to produce evidence material to a defendant's guilt or punishment

The state claims there was no duty to disclose because the records were not kept in the prosecutor's office, and the prosecutor on the case did not know about them. Response, p. 27. The state cites to state law, not federal law, for this proposition. Id.

Federal law trumps state law on this point, because it is based on the due process clause-based right to exculpatory information identified in Brady v. Maryland. And federal law says just the opposite. In fact, under controlling Supreme Court authority, the fact that the records were maintained by a different agency is completely irrelevant. The government has a duty to search not just its own prosecutorial offices, but also other agencies for such impeachment material. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (writ granted where state failed to disclose statements by witnesses even though only police, and not prosecutor, knew about the statements); Carriger v. Lewis, 132 F.3d 463, 479 (9th Cir. 1997) (*en banc*), cert. denied, 523 U.S. 1133 (1998).

For that reason, it does not matter if the prosecutor on the case does not know about the evidence. Under controlling Supreme Court authority he has a duty to seek it out nevertheless. See, e.g., Kyles v. Whitley, 514 U.S.

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includes production of impeachment evidence"); Hart v. United States, 565 F.2d 360, 362 (5th Cir. 1978) (remanding for hearing on 28 U.S.C. § 2255 motion alleging that key government witness and informant lied about not facing federal charges; "arrests may be admissible to show that an informer might falsely testify favorably to the government in order to put his own cases in the best light possible"); In re Personal Restraint of Delmarter, 124 Wn. App. 154, 167, 101 P.3d 111 (2004) (Brady evidence includes impeachment).

419, 437 (prosecution duty to learn of favorable evidence known to the others working on the government's behalf in the case, including the police).[7]

There is no requirement that the prosecutor have actual knowledge of the impeachment evidence. In United States v. Bagley, 473 U.S. 667, for instance, the Supreme Court held that the prosecutor's failure to disclose evidence that might have been helpful to the defendant for impeachment during cross-examination amounted to constitutional error, despite the fact that the prosecutor did not even know it existed.[8]

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[7] United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) (FDA must, in criminal trial, disclose contents of Investigational New Drug applications that bear on safety of drug defendant is charged with dispensing unlawfully); United States v. Brooks, 966 F.2d 1500, 1502-03 (D.C. Cir. 1992) (government duty to search other agencies includes duty to search police department and Internal Affairs file); United States v. Perdomo, 929 F.2d 967, 980 (3rd Cir. V.I. 1991) (prosecution team with duty to disclose includes both investigative and prosecution personnel); United States v. Osorio, 929 F.2d 753, 760 (1st Cir. 1991); United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973), overruled on other grounds, United States v. Henry, 749 F.2d 203 (5th Cir. 1983) (government duty to search personnel file of Postal employee who testified against defendants).

[8] United States v. Butler, 567 F.2d 885, 891 (9th Cir. 1978) ("The prosecution is responsible for the nondisclosure of assurances made to his principal witnesses *even if such promises by other government agents were unknown to the prosecutor.* Since the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, were guilty of nondisclosure.") (emphasis added). See also United States v. Perdomo, 929 F.2d 967, 969-70 ("It is well accepted that a prosecutor's lack of knowledge does not render information unknown for Brady purposes"); United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir.), cert. denied, 493 U.S. 858 (1989) ("The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant"); United States ex rel. Smith v. Fairman, 769 F.2d 386, 391-92 (7th Cir. 1985) (prosecutor's ignorance of a police worksheet did not justify State's failure to provide information); United States v. Auten, 632 F.2d 478, 481 (5th Cir. 1980) (prosecutor chose not to run NCIC (National Crime Information Center) check on witness due to shortness of time; prosecutor's lack of knowledge not an excuse for a Brady violation: "In the interests of inherent fairness," prosecution is obligated to produce evidence actually or constructively in its possession or accessible to it); United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979) (for purposes of

The state therefore errs in arguing that it had not duty to provide information maintained by another agency, even if it was exculpatory. Under controlling federal due process law, it did.

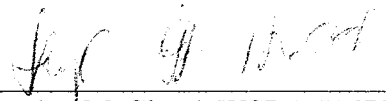
And DSHS is just such another agency. As discussed in the Opening Brief, that agency awarded state's witness Janice Novotney disability payments for her mental problems – and had backdated her entitlement to DSHS compensation for that disability to August 31, 2003. Appendix L. That predated or coincided with the dates of all of the counts of conviction in this case. Further, the DSHS award was based on diagnoses of "schizophrenia paranoid type r/o schizoaffective disorder and amphetamine dependence in remission." Medical records show such critical problems with Janice Novotney's ability to accurately perceive, recall, and relate, as the fact that she is subject to hallucinations. Appendix M.

XII. CONCLUSION

For all of the foregoing reasons, the PRP should be granted.

DATED THIS 2nd day of October, 2007.

Respectfully submitted,



Sheryl Gordon McCloud, WSBA #16709
Attorney for Petitioner, Rodney Cooley

Brady rule, prosecutor's office and investigators in case are treated as "prosecution team").

CERTIFICATE OF SERVICE

I certify that on the ___ day of October, 2007, a true and correct copy of the foregoing Reply Brief was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Alicia Burton, Deputy Prosecutor
Pierce County Prosecutor's Office
Appellate Unit
930 Tacoma Avenue South
Tacoma WA 98402-2171

Rodney Cooley
DOC# 922445
N.F.C.F.
1605 E. Main
Sayre, OK 73662

COURT OF APPEALS
07 OCT -5 PM 1:50
STATE OF WASHINGTON
BY

Sheryl Gordon McCloud

APPENDIX A

NO. 36209-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT OF

Rodney Cooley,

Petitioner.

SECOND DECLARATION OF RODNEY COOLEY IN SUPPORT OF PERSONAL RESTRAINT PETITION

Sheryl Gordon McCloud
710 Cherry St.
Seattle, WA 98104-1925
(206) 224-8777
Attorney for Petitioner,
Rodney Cooley

DECLARATION OF RODNEY COOLEY

I, Rodney Cooley, do state:

1. I rejected a plea agreement offered by the state during the trial in my case. As my original declaration states, that offer was for the state to dismiss most of the charges, in exchange for my plea of guilty to one count of third-degree assault; in addition, that plea offer contained the provision that the state would recommend a sentence of credit for time served. I was also advised that the sentencing range for that third-degree assault crime was 1-3 months, so I believed that if I accepted the deal, I would be out almost immediately.

2. I rejected the deal because I thought I could not do much worse after trial. As my first Declaration states, my defense lawyer never advised me that I faced 14 years, or 12 ½ years, or anything like that. He advised me that the maximum sentence I could receive would not be much more than the time that I had spent in jail pre-trial.

3. I believe that I am innocent of all the crimes charged. However, I also make rational decisions. If my lawyer had told me the truth about my sentencing exposure – if he had told me that I faced up to 14 years in prison if convicted on all charges and could

easily get such a sentence as a standard range sentence – then I certainly would have taken the plea offer. Under the plea offer, I would walk out of jail immediately. If I had been given proper advice about the true sentencing maximum and sentencing guidelines exposure, such a deal would have seemed much more appealing.

4. If I had known about the real sentencing exposure I faced; if I had known that I could plead guilty under Alford without admitting guilty; then I would have taken the deal. As I said in the original declaration, "Because I believed Mr. Cross' estimate of my risk, I rejected the plea offer." If I had understood what my real risk was, I would not have rejected that plea offer.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

_____ _____

Date/Place Rodney Cooley, Declarant

APPENDIX B

03-1-04835-8 25032127 DCLR 02-28-06
RECEIVED
AUG 10 2006
S. GORDON McCLOUD

FILED
IN COUNTY CLERK'S OFFICE
A.M. FEB 27 2006 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE Superior COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF Pierce

STATE OF WA Plaintiff, v. Rodney K Cooley Defendant	No. 03-1-04835-8 DECLARATION OF Janice Elaine Novotney

This declaration is made by:

Name: Janice Elaine Novotney
Address: 6720 Pacific Ave
Tacoma, WA 98408
Telephone: 253-441-8762
Age: 39
Occupation: n/a
Relationship to the parties in this action:
Fiance

I DECLARE that:
I Janice Elaine Novotney humbly and Respectfully submit this declaration of

statement in faith of hope that the truth be heard without restraint at the mercy of the Supreme Court, and is henceforth considered and recognized into action to prevail towards Justice in truth regarding this case matter.

At this time, I will add to the case file the following declarations.

1.) I Janice Elaine Novotney was infact intoxicated by the use of Methamphetamine during the entire trial, as well as when I was called to witness. That I infact used methamphetamine together with Theresa Gorham early in the morning on the days of the trial that we car pooled together from Yelm, WA to the Pierce County City Building. 2.) I Janice

(Attach Additional Pages if Necessary and Number Them.)

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

Signed at TACOMA, WA [City and State] on 2-27-06 [Date].

Signature

Janice Novotney

Print or Type Name

Elaine Novotney had been self medicating with Methamphetamine every single day for approximately six months prior to the arrest of Rodney Kenneth Cooley, And that frequently I experienced Hallucinations of Grandeur that caused me to Act out in violent rage! To more closely clarify my us of the terms "Act out" some of my violent acts were as follows.

— pointing a 38 lady Smith and Wesson pistol, in a drunken Hallucinative state (my Father Dunne Frank Novotney could be of verificational testimony as he came to our residence and collected that same pistol from me and to my knowledge, continues to

(Attach Additional Pages if Necessary and Number Them.)

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

Signed at Tacoma, WA [City and State] on 2-27-06 [Date].

Signature

Sonie Novotney

Print or Type Name

have it in his possesion)
- postured in a aggresive mannur
with a full size wooden baseball bat,
again in a alchoholic and methamphet-
amine intoxicated Hallucinative state.
- On more than several occasions I
locked Rodney Kenneth Cooley and
his two young daughters out of our
home we shared. Often times it
would be in the middle of the night
and without a vehicle or even a way
to contact a rescueing party.
- I again on more than one occasion
postured in a threatening and aggrusive
manner toward Rodney Kenneth Cooley
with Butcher knives, trying to cut
him. 3.) I Janice Elaine Moutney

(Attach Additional Pages if Necessary and Number Them.)

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

Signed at Tacoma, WA [City and State] on 2-27-06 [Date].

J Moutney
Signature

Janice Moutney
Print or Type Name

was previously married and recently divorced prior to getting together with Rodney Kenneth Cooley. That my former marriage of 15 years duration was infact a living Hell of physical and psychological abuse, both recieved and given to each other by my ex-husband Christian Guilliaume and myself. 4.) I Janice Elaine Novotney had put upon Rodney Kenneth Cooley the burden of a entire life time of displaced hurt and anger stemming from

- infantile sexual abuse
- chronic psychological illnesses
(+ bi-polar + post trauma stress syndrome)
- chronic alcoholism and Chemical Dependancy

(Attach Additional Pages if Necessary and Number Them.)

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

Signed at Tacoma WA [City and State] on 2-27-06 [Date].

Signature

Janice Novotney
Print or Type Name

- 15 years of horrific Domestic Violence in my Former marriage.
5.) I Janice Elaine Novotney swear under oath that these Acts of rage are but a few in statement compared to the true and on-going list.
6.) Furthermore, I Janice Elaine Novotney would like to add that Rodney Kenneth Cooley never actively sought to hurt me, it was more rather that Rodney sought to keep his children as well as himself safe, He sought to keep me safe, and He sought to keep our home in tact and in order. 7.) I Janice Elaine Novotney am most definately and assuredly not afraid of Rodney Kenneth

(Attach Additional Pages if Necessary and Number Them.)

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

Signed at Tacoma, WA [City and State] on 2-27-06 [Date].

Signature

Janice Novotney
Print or Type Name

Codey, but in fact love him with all my heart and soul. And more over that in the future I plan to become married to Rodney Kenneth Codey because I am in love with him Indeed. 7.) And finally, that I have for once been living clean and sober for the past approximate four months, for the first time since the age of twelve years. As also I am currently residing at the well known Foundation for Living (McKinley) housing program.

As of 3-1-06 I will Rusding at "Our House", (Another clean & sober program) 6720 Pacific Ave Tacoma, WA 98408

(Attach Additional Pages if Necessary and Number Them.)

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

Signed at Tacoma, WA [City and State] on 2-27-06 [Date].

J Martinez

Signature

Janice Martinez

Print or Type Name