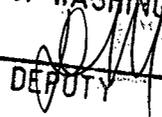


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COURT OF APPEALS  
DIVISION II

No. 41632-8-II

2012 MAY 14 AM 9:03

STATE OF WASHINGTON

BY  DEPUTY

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V.

JAKE CHRISTOPHER COHEN

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BRIEF OF APPELLANT

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ORIGINAL

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## A. ASSIGNMENTS OF ERROR

### Assignments of Error

1. The prosecutor committed prosecutorial misconduct when he called a material witness that he knew was going to present perjured testimony for the sole purpose of presenting otherwise inadmissible evidence.
2. Defense counsel did not provide effective assistance of counsel when he failed to object to the calling of witness who everyone knew was going to present perjured testimony.
3. Defense counsel did not provide effective assistance of counsel when he failed to object to the admission of any hearsay testimony.

### Issues Pertaining to Assignments of Error

Prior to trial, the alleged victim of a domestic violence assault by strangulation and unlawful imprisonment, recanted her statement and said she was going to give a version of facts far different from her statements at the time of and immediately following the incident.

1. Does a prosecutor commit prosecutorial misconduct by knowingly calling a witness who is going to present perjured testimony for the sole purpose of introducing her otherwise inadmissible hearsay statements?
2. Did defense counsel fail to provide effective assistance of counsel by failing to object to the presentation of a material witness who everyone knew was going to present perjured testimony?
3. Did defense counsel fail to provide effective assistance of counsel by failing to object to inadmissible hearsay?

## B. STATEMENT OF THE CASE

Jake Cohen was charged by first amended information with second degree assault by means of strangulation, unlawful imprisonment, and tampering with a witness. CP, 10. The alleged victim was Samantha Rivera, Mr. Cohen's on-again-off-again girlfriend. The jury convicted of all three charges and he was sentenced to 14 months in prison. RP, 75.

### The State's Theory of the Case

In the early morning hours of May 29, 2010, a 911 call was received of a possible domestic violence incident in Viewcrest Village in

Bremerton, Washington. Bremerton Police Officer Daniel Fatt was the first officer on the scene and contacted Samantha Rivera. RP, 124. When he arrived he discovered two males with Ms. Rivera. RP, 125. The two males, who were cooperative and apparently gave witness statements, are not identified in the record and did not testify. RP, 125.

When Officer Fatt arrived, Ms. Rivera was hysterical, very loud, crying, kept repeating herself, and seemed to be in a daze. RP, 125. In response to questions, Ms. Rivera told Officer Fatt she was confused because she woke up with Mr. Cohen standing over her and started an argument with her. RP, 128. She said they had been drinking earlier that evening and she could not remember why he was so angry. RP, 128. The argument started in the bedroom and moved to the living room. RP, 128. Twice in the living room, once on the sofa and once near the front door, Mr. Cohen strangled her. RP, 129. Every time she tried to leave by the front door, Mr. Cohen would grab her by the throat and shove her back into the room. RP, 129.

At some point the argument poured into the driveway. Ms. Rivera did not remember this development, but that was the information provided by the two unnamed witnesses to Officer Fatt. Officer Fatt repeated this hearsay to the jury without objection from defense counsel. RP, 129.

It is unclear from the record under which theory Officer Fatt was allowed to testify as to Ms. Rivera's hearsay statements. Defense counsel did not lodge an objection to the testimony and there was no discussion of hearsay exceptions. Arguably, the hearsay was admissible as an excited utterance, but without a timely objection, it is impossible to make that determination.

Officer Fatt arranged for Ms. Rivera to be transported to the hospital for medical care. Emergency room nurse Christine Ward was the triage nurse that morning. She asked her, "Were you afraid or has someone tried to hurt you?" Ms. Rivera answered, "Yes." RP, 177. She wrote, "21-year-old female here via [basic life support], from an ambulance for a fight with her boyfriend. Patient had been out drinking on her own at a bar. She came home, fell asleep, and woke up with her boyfriend on top of her and choking her. Does not know how she got the scrapes on her knees." RP, 175. She identified her boyfriend as Jake Cohen. RP, 181.

Ms. Rivera described her subjective pain level as a "6" (on a scale of 1 to 10) and said both sides of her neck and both her right and left legs were hurting. Nurse Ward described it as a "constant ache." RP, 178. She

noted red marks and probably scratch marks and possibly bruising on the neck and knees. RP, 180.

Defense counsel did not raise a contemporaneous objection to any of this testimony. Prior to the trial, a prosecution motion in limine suggested the evidence was admissible under the medical diagnosis hearsay exception. ER 803(a)(4). CP, 18. The trial court initially indicated an agreement with the State, but reserved ruling pending an offer of proof from the witness. RP, 6. No such offer of proof was given and the evidence was admitted without further ruling from the court.

Meanwhile, Officer Fatt started looking for Mr. Cohen. RP, 138. Mr. Cohen was located and arrested under circumstances that were never detailed for the jury. RP, 138. When contacted, he had what appeared to be fingernail scratches on his face. RP, 139.

A couple of days after the arrest, Detective Jason Vertefeuille was assigned to do follow-up. RP, 145. He located Ms. Rivera at her mother's house and interviewed her there. RP, 147. Although the detective could not recall the exact date of the interview, the most likely date was the morning of June 1. RP, 103. Again, there was no defense objection to his testifying about the content of the conversation, so it is impossible to determine what hearsay exceptions may apply.

According to what Ms. Rivera told Detective Vertefeuille, she started the evening at the Winterland Bar and somehow ended up home, though she was not sure how. RP, 148. She was awakened to find Mr. Cohen over her bed yelling at her. RP, 149. She ran towards the front door, but he grabbed her by the neck and threw her back on the couch. Mr. Cohen held her with one hand by the neck, strangling her. RP, 150. When Ms. Rivera tried to hold her breath in order to maintain breath control, Mr. Cohen punched her in the chest. RP, 151. During the struggle, she thinks she was able to knock his glasses off. RP, 152. When asked to describe her level of pain while being strangled, she described it as a ten on a scale of one to ten. RP, 151. She could not remember if she lost consciousness. RP, 152. Eventually, she saw two men at the door and she yelled at them to call the police. RP, 152. She then ran to the neighbor's house. RP, 152.

On the afternoon of June 1, Mr. Cohen made his first court appearance. RP, 103. Ms. Rivera asked to speak to the judge on the issue of bail. She told the judge, "This has never happened before. He's never hurt me before." RP, 104.

In the weeks following Mr. Cohen's arrest, he made multiple phone calls from the jail. RP, 52. These phone calls were recorded and

eventually played for the jury. The content of these phone calls became the basis of the tampering with a witness charge.

#### The State's Case Begins to Unravel

On June 2, 2011, Ms. Rivera contacted Detective Vertefeuille twice by telephone. RP, 154. In the first phone call, she wanted to know who Mr. Cohen's attorney was. Detective Vertefeuille referred her to the prosecutor's office. RP, 154.

Ms. Rivera called back shortly thereafter and asked how to drop the charges. RP, 154. She explained that she was "equally at fault" in what happened. RP, 154. Detective Vertefeuille asked her if she had participated in strangling herself and she answered in the negative. RP, 154. Detective Vertefeuille then told her that she had been attacked in her own house by someone who did not live there and could not be "equally at fault." RP, 154.

A week or two later, Ms. Rivera called Detective Vertefeuille a third time. RP, 155. (In his opening statement, the State's prosecutor suggested this conversation occurred on June 14. RP, 67.) This time she stated she had made two false reports and reiterated she wanted to drop the

charges. RP, 155. Detective Vertefeuille told her the charging decision was in the hands of the prosecutor's office. RP, 155.

Next Ms. Rivera allegedly called the Kitsap Prosecutor's Office and spoke to DPA Chad Enright. DPA Chad Enright, who was the prosecutor assigned to the case and tried it on behalf of the State, did not testify at trial. According to his opening statement, when she called, "She tells me she has no recollection of what occurred; none of Cohen's friends encouraged her to change her story." RP, 67.

At some point prior to trial, Ms. Rivera was interviewed by Chris Mace, an investigator retained by defense counsel. RP, 88. During that interview Ms. Rivera said she was attacked, not by Mr. Cohen, but by a Black man in a yellow shirt. RP, 108. Ms. Rivera threw a candleholder at the man in the yellow shirt and came out of the bedroom. RP, 88. Mr. Cohen was standing in the doorway and then he left. RP, 88.

The State's prosecutor gave a relatively lengthy opening statement. RP, 45-70. During the opening, after outlining some of the State's evidence, the prosecutor said, "Well, if that were all the evidence that was going to be presented, then this would be a much simpler case. Something happened next. In the days and weeks that followed, Ms. Rivera has changed her story. She has told multiple, distinctly different stories, from

‘I blacked out and don’t know what happened’ to ‘I work up and some black guy was in my apartment and assaulted me.’ Why did her story change? Well, maybe she’s telling the truth. Maybe she really did black out. Maybe a black guy really did come into her apartment. Maybe something else happened.” RP, 52. Near the end of the opening statement, he said, “Mr. Cohen has turned this case into a circus. Ms. Rivera is going to be the first witness that you hear from. We will see what her testimony ultimately is.” RP, 70.

#### The Testimony of Samantha Rivera

As promised in his opening statement, DPA Enright called Ms. Rivera as his first witness. RP, 78. The State’s questioning of her can be divided into three unequal parts. Prior to calling her, DPA Enright described her anticipated testimony for the Court as follows: “The State intends to call Ms. Rivera as the first witness. I anticipate she is going to contradict the statements that she made to law enforcement and contradict the statements she made to medical personnel. So, essentially, I will be then calling law enforcement asking them what she said. So I anticipate that’s kind of how this case is going to progress.” RP, 32. The Court responded, “Not unusual. That happens frequently. Well, not frequently, but it happens.” RP, 33.

In the first part of his questioning of Ms. Rivera, takes up roughly three pages of transcript, DPA Enright established some general background facts about her, such as the fact that she has lived her entire life in Kitsap County, has a small son named William, and is currently attending school to be a medical assistant. RP, 79-82. Ms. Rivera identified Mr. Cohen as someone with whom she had a prior dating relationship. RP, 81. She was asked to identify him in open court, which she did. RP, 80. After she identified him, DPA Enright commented, "The record should indicate, at the very least, that the witness has identified the defendant." RP, 81. Ms. Rivera described the first time she met Mr. Cohen. RP, 81.

In the second part of the questioning, Mr. Enright uses direct questions to allow Ms. Rivera to describe the events of May 28-29. This second part takes up roughly seven pages of testimony. RP, 82-88. According to Ms. Rivera, she was at the Winterland Bar in Bremerton, "excessively drinking." RP, 83. Around 8:30, Mr. Cohen arrived at the bar and joined her for a drink. RP, 83. At approximately 9:00, a female friend of Ms. Rivera, Kelly, showed up and Ms. Rivera spent time with her. RP, 83. At some point, the three of them went outside for a cigarette. RP, 84. The bartender followed them outside and told Ms. Rivera she had

left a \$20 bill on the bar. Ms. Rivera said, “Oh my God. Really?” and pocketed the bill. RP, 84.

According to Ms. Rivera, this is her last memory of the evening. She does not remember reentering the bar, any further drinks, or walking home. RP, 84-85.

Ms. Ribera’s next memory is waking up in her bed throwing a candleholder at someone who was leaving her bedroom. RP, 85-86. The person was wearing a black jacket, dark pants, and a yellow shirt. RP, 86. Sometime after that, she stood up from either the bed or the floor, ran to the front door, and discovered her house had been “trashed.” RP, 87.

At that point in Ms. Rivera’s testimony, DPA Enright started the process of systematically cross-examining her on her prior inconsistent statements. This cross-examination style of questioning constitutes the remaining 22 pages of his questioning of her. RP, 88-110. He started with her statements to defense investigator Mace. RP, 88. He then moved to Officer Fatt. RP, 89. Ms. Rivera testified she could not recall making any statements to Officer Fatt. RP, 90. He then asked about her statements to the nurses. RP, 91. He then reviewed with her the interview by Detective Vertefeuille. RP, 97. Ms. Rivera claimed she was stoned during that interview and could not remember many details of what she said. RP, 97.

He also quoted her at the June 1 court hearing where she said, “This has never happened before. He’s never hurt me before.” RP, 104. DPA Enright continued to cross-examine her for some time, including juxtaposing inconsistent statements made by her to defense investigator Mace and Detective Vertefeuille. RP, 108.

### C. ARGUMENT

An attorney may not knowingly present perjured testimony to a tribunal. Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935). A prosecutor commits prosecutorial misconduct and violates due process by knowingly presenting perjured testimony. Alcorta v. Texas, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957). Similarly, the right of a defendant to present a defense does not include the right to present perjured testimony and defense counsel may not be a party to, or in any way give aid to, presenting known perjury. Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986)

The rules regarding the presentation of perjured testimony are somewhat abrogated by the modern rule which allows a party to impeach its own witness. ER 607. But a party may not call a witness for the primary purpose of eliciting testimony in order to impeach the witness

with testimony that would be otherwise inadmissible. State v. Lavaris, 106 Wn.2d 340, 721 P.2d 515 (1986).

In this case, Ms. Rivera's testimony was necessary in order to present her otherwise inadmissible hearsay of the investigators and overcome any Confrontation Clause problems. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). But in order to overcome the Confrontation Clause objections, DPA Enright was required to present the testimony of a material witness he knew was going to present perjured testimony. His calling of Ms. Rivera for this purpose was error.

That DPA Enright's primary purpose in calling Ms. Rivera was to introduce otherwise inadmissible hearsay cannot be disputed. He told the court as much and he told the jury the same. He told the court, "I anticipate she is going to contradict the statements that she made to law enforcement and contradict the statements she made to medical personnel. So, essentially, I will be then calling law enforcement asking them what she said." RP, 32. He told the jury, "In the days and weeks that followed, Ms. Rivera has changed her story. She has told multiple, distinctly different stories, from 'I blacked out and don't know what happened' to 'I work up and some black guy was in my apartment and assaulted me.'

Why did her story change? Well, maybe she's telling the truth. Maybe she really did black out. Maybe a black guy really did come into her apartment. Maybe something else happened." RP, 52.

Having established that his primary purpose in calling Ms. Rivera was to introduce otherwise inadmissible hearsay, the next question is whether the jury in fact heard otherwise inadmissible hearsay. There are seven witnesses, four of whom actually testified, who presented hearsay statements of what Ms. Rivera told them. Because defense counsel did not object to any of the hearsay, some conjecture is necessary. It is helpful to start with the easiest and move to the most problematic. The one hearsay witness that was discussed pretrial was Nurse Ward. The State argued pretrial that her testimony was admissible pursuant to ER 803(a)(4) as necessary for medical diagnosis or treatment. The trial court initially indicated the proposed evidence was probably admissible, but reserved ruling pending further offer of proof. Defense counsel made no further objections. Given the relevant Washington case law, it is likely Nurse Ward's testimony was admissible pursuant to ER 803. State v. Sims, 77 Wn.App. 236, 890 P.2d 521 (1995).

The next hearsay to be discussed is Officer Fatt's recitation of what Ms. Rivera told him. Arguably, these statements could be

considered excited utterances. But the trial court did not make a determination that they were excited utterances because defense counsel failed to object. Further, even if the statements do qualify as excited utterances, it is impossible on this record to determine which statements may be testimonial and which are not. Pursuant to Davis v. Washington, statements made by a domestic violence victim whose primary purpose “is to enable police assistance to meet an ongoing emergency” are not testimonial and admissible, but statements made “to establish or prove past events” are generally testimonial. Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The absence of a timely objection makes evaluating Officer Fatt’s testimony extremely difficult.

The next witnesses are Detective Vertefeuille and defense investigator Chris Mace, who can be addressed together. It is difficult to conceive of what hearsay exception applies to their conversations with Ms. Rivera three days later and several weeks later respectively. Absent DPA Enright’s decision to present Ms. Rivera’s perjured testimony, these statements were completely inadmissible.

The next two witnesses are the unnamed men questioned by Officer Fatt. Officer Fatt recited the statements of these declarants without any objection from the defense and seemingly no applicable

hearsay rule. The statements of these completely anonymous declarants have no indicia of reliability and there is no conceivable theory for admitting their statements.

Finally, DPA Enright made himself an impeachment witness. According to his opening statement, Ms. Rivera called him and “[s]he tells me she has no recollection of what occurred; none of Cohen’s friends encouraged her to change her story.” RP, 67. An attorney may not make himself an unsworn witness by supporting his case by his own or anyone else’s veracity and position. People v. Moye, 12 N.Y.3d 743, 907 N.E.2d 267 (2009), affirming, 52 A.D.3d 1, 857 N.Y.S.2d 126 (2008). In Moye, the prosecutor assigned to the case went with police officers to the crime scene and photographed a recreation of the crime. During the trial, two of the witnesses gave conflicting versions of how the recreation was conducted. The prosecutor, in his closing argument, gave his version of how the recreation was conducted, opining that the version consistent with guilt was the correct version. The New York Court of Appeals reversed because the prosecutor had given unsworn testimony about disputed events and injected his opinion about the veracity of witnesses. DPA Enright also injected his unsworn testimony into the events.

There are two ways to analyze this case. On the one hand, the prosecutor committed prosecutorial misconduct by calling a witness he knew was going to present perjured testimony for the sole purpose of admitting otherwise inadmissible hearsay. On the other hand, defense counsel lodged almost no objections and specifically did not object to any hearsay statements, even egregious hearsay like the unnamed male passerby or DPA Enright himself. Admittedly, some of the hearsay may have been admitted despite a timely objection, such statements made for the purpose of medical diagnosis hearsay and possibly some of the excited utterances. But the failure of defense counsel to lodge a single objection to any of the hearsay, or to object to Ms. Rivera's testimony at all pursuant to Lavaris, fell below the objective standard of performance by defense counsel and meets the first prong of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

Further, defense counsel's failure to object actually prejudiced Mr. Cohen, as required by the second prong of Strickland. The State's theory for the second degree assault offense was that Mr. Cohen assaulted Ms. Rivera by strangulation. Strangulation is statutorily defined as the compression of a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the

person's blood flow or ability to breathe. RCW 9A.04.110 (26). Nurse Ward testified Ms. Rivara “came home, fell asleep, and woke up with her boyfriend on top of her and choking her.” RP, 175. While choking could constitute strangulation, the State would have been required to prove that the choking obstructed her blood flow or ability to breathe. Ms. Rivera’s description to Nurse Ward was not that specific. Additionally, there was little in the way of expert medical testimony. Although Nurse Ward described red marks, scratching and bruising, she did not describe any symptoms typical of strangulation. For instance, Nurse Ward did not describe the presence of petechiae, small red spots caused by bursting capillaries and a common symptom observed in strangulation victims. Nor is there anything in Nurse Ward’s notes that would constitute proof of unlawful imprisonment, that Ms. Rivera was somehow restrained in her home.

Parenthetically, a word should be said about the ethical and legal dilemma presented to the prosecutor by Mr. Cohen’s case. The assertion that a prosecutor may not knowingly present perjured testimony and commits prosecutorial misconduct by doing so fails to adequately address the unique circumstances presented by many domestic violence cases. The prevalence of recantations by domestic violence victims juxtaposed against the defendant’s Sixth Amendment Right of Confrontation often

presents prosecutors with this dilemma, though the anticipated testimony of Ms. Rivera was more outrageous than normal. On the one hand, the prosecutor may not ethically present perjured testimony; on the other hand, the prosecutor frequently will be unable to prove his or her case without giving the defendant the right to cross-examine the victim.

The domestic violence scenario is, therefore, fundamentally different than the scenario presented by cases such as Alcorta v. Texas, where the prosecutor presented perjured testimony in an effort to disguise from the defense and the jury a weakness in his case. In the domestic violence context, the opposite is true. The prosecutor questioning the recanting witness knows of the perjury, timely discloses the perjury, and tells the jury to expect perjured testimony. In a recent law review article, Professor Rutledge refers to this process as “turning a blind eye” to perjured domestic violence testimony.<sup>1</sup> According to Professor Rutledge, some studies have concluded as many as 80-90% of all domestic violence victims will recant in whole or in part.

Few courts have addressed the dilemma of knowingly presenting perjured recantation testimony of domestic violence victims. It is curious

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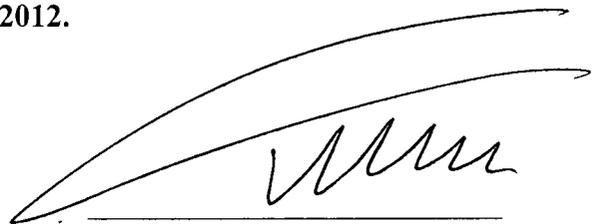
<sup>1</sup> Rutledge, Njeri Mathis, Turning a Blind Eye: Perjury in Domestic Violence Cases (July 18, 2008). New Mexico Law Review, 2009. Available at SSRN: <http://ssrn.com/abstract=1162926>.

that, in a desire to maintain the integrity of the judicial system, courts have held the constitutional right to present a defense must give way to the need to prevent perjured testimony. See Nix v. Whiteside. But courts have weighed the issue differently when the offense is domestic violence. Assuming Professor Rutledge is correct and the majority of courts are “turning a blind eye” to perjured domestic violence recantations, then apparently the need to prevent perjured testimony is giving way to the constitutional right to confront witnesses in order to prosecute these difficult cases.

#### D. CONCLUSION

Mr. Cohen’s convictions for second degree assault and unlawful imprisonment should be reversed and a new trial ordered.

**Dated this 9<sup>th</sup> day of May, 2012.**

A handwritten signature in black ink, appearing to read 'T. E. Weaver', is written over a horizontal line. The signature is stylized and cursive.

Thomas E. Weaver  
WSBA #22488  
Attorney for Defendant

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DIVISION II

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

STATE OF WASHINGTON,	)	Court of Appeals No: 41632-8-II
	)	
Plaintiff,	)	AFFIDAVIT OF SERVICE
	)	
vs.	)	
	)	
JAKE CHRISTOPHER COHEN,	)	
	)	
Defendant	)	

STATE OF WASHINGTON	)
	)
COUNTY OF KITSAP	)

WILLIAM J. S. BURKETT, Being a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On May 9, 2012, I sent original, via prepaid U.S. Post, of the BRIEF OF APPELLANT to the Court of Appeals Division II, 950 Broadway #300, Tacoma, WA 98402.

I sent a copy, via interoffice mail, of the BRIEF OF APPELLANT to the Kitsap County Prosecutor's Office, MS 35, 614 Division Street, Port Orchard, WA 98366.

I sent a copy, via postage prepaid, of the BRIEF OF APPELLANT

1 to Jake C. Cohen, at 127 South summit Avenue, Bremerton, WA 98312.

2  
3 Dated this 9th day of May, 2012.

4 

5 William J. S. Burkett  
6 Legal Assisstant

7  
8 SUBSCRIBED AND SWORN to before me this 9th day of May, 2012.

9 

10 Daphne L. Weaver  
11 NOTARY PUBLIC in and for  
12 the State of Washington.  
13 My commission expires: 03/21/2013

