

No. \_\_\_\_\_

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

---

IN RE THE PERSONAL RESTRAINT PETITION OF:

**JAY E. McKAGUE,**

PETITIONER.

---

**PERSONAL RESTRAINT PETITION**

---

Jeffrey E. Ellis #17139  
B. Renee Alsept #20400  
*Attorneys for Mr. McKague*

Law Office of Alsept & Ellis, LLC  
621 SW Morrison St., Ste 1025  
Portland, OR 97205  
[JeffreyErwinEllis@gmail.com](mailto:JeffreyErwinEllis@gmail.com)  
[ReneeAlsept@gmail.com](mailto:ReneeAlsept@gmail.com)

A. STATUS OF PETITIONER

Jay McKague (hereinafter “McKague”) challenges his judgment of convictions for second-degree assault and theft. Mr. McKague (DOC # 967048) is currently incarcerated at Stafford Creek Corrections Center in Aberdeen, Washington.

This is Mr. McKague’s first collateral attack on his judgment.

B. FACTS

*Procedural History*

Jay McKague was charged with robbery, theft and second-degree assault by an Information filed on October 22, 2008. He was tried by a jury at end of March, 2009. On April 1, 2009, the jury returned guilty verdicts on theft, but not robbery, and second-degree assault. McKague was sentenced to life without parole as a persistent offender for the assault conviction on April 2, 2009.

McKague appealed to this Court (Case No. 390876). This Court affirmed in an opinion dated January 18, 2011. *State v. McKague*, 159 Wash.App. 489, 246 P.3d 558 (2011). McKague then filed a petition for review on February 18, 2011. The Washington Supreme Court accepted review. *State v. McKague*. 172 Wash.2d 802, 262 P.3d 1225 (2011). The Supreme Court affirmed, but criticized the Court of Appeals decision.

After reconsideration was denied on November 28, 2011, the mandate was issued on December 7, 2011.

This timely PRP follows.

*Facts from Trial*

The Washington Supreme Court summarized the facts as follows:

McKague shoplifted a can of smoked oysters from Kee Ho Chang's convenience store. Chang followed McKague out of the store and confronted him in the parking lot. When McKague tried to leave, Chang grabbed his sweat shirt. McKague punched Chang in the head several times and pushed him to the ground, causing Chang's head to strike the pavement. While Chang was on the ground, McKague punched him several more times, and then left in a friend's car. Chang tried to get up, but he was dizzy, and unable to stand for a time. Officer George Samuelson arrived at the store and noted that the side of Chang's face was extremely puffy. Officer Samuelson described Chang as seeming out of sorts, appearing distracted and stunned. Detective Sam Costello interviewed Chang and noted injuries to Chang's face and the back of his head.

Chang reported a headache and severe neck and shoulder pain to his doctor. He was diagnosed with a concussion without loss of consciousness, a scalp contusion and lacerations, and head and neck pain. He also had lacerations on his arm. A computed tomography scan showed a possible fracture of Chang's facial bones. Chang's neck and shoulder pain remained severe for more than a week, and residual pain lasted another two months. Police photographs taken three days after the assault showed bruising around Chang's eye.

McKague was charged with first degree robbery, with third degree theft as an inferior offense, and second degree assault predicated on the infliction of substantial bodily injury. At McKague's request, the court also instructed the jury on third degree assault as an inferior offense of second degree assault. The jury convicted McKague of third degree theft and second degree assault.

172 Wash.2d at 804-05.

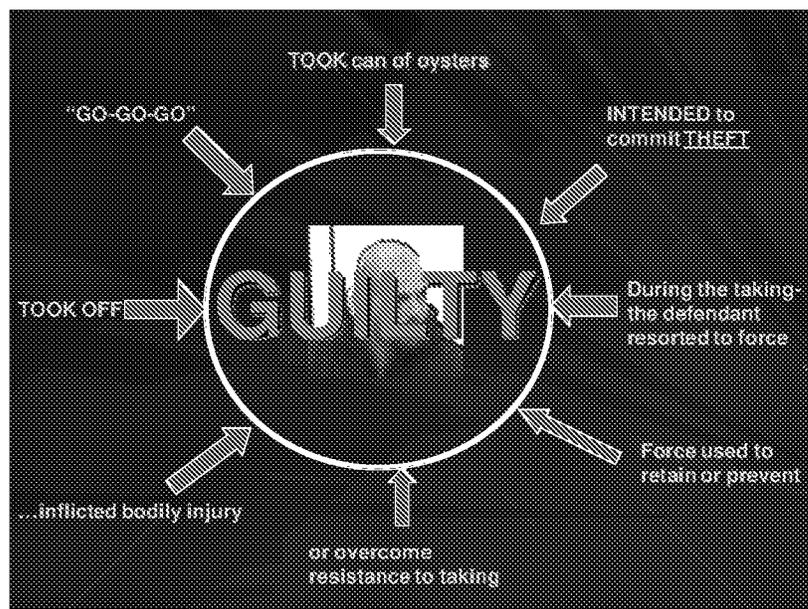
Facts relevant to the claims raised in this petition appear at the beginning of each claim, as well as in the appendices attached to this petition.

## C. ARGUMENT

1. MR. MCKAGUE WAS DEPRIVED OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL BY THE PROSECUTOR'S USE OF A POWERPOINT SLIDE WHICH SUPERIMPOSED THE WORD "GUILTY" OVER MCKAGUE'S FACE SIMILAR TO THE CONDEMNED SLIDE FROM *IN RE PRP OF GLASMANN*.
2. MR. MCKAGUE WAS DEPRIVED OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE POWERPOINT SLIDE.

### *Introduction*

The prosecutor's closing argument was accompanied by a PowerPoint slide show. The slides shown to McKague's jury are attached. See PowerPoint Closing at Appendix A (obtained through a public disclosure request). The final slide was a screen capture of McKague with the word "GUILTY" superimposed on McKague's face. In addition, a number of arrows (representing certain facts) were pointed at McKague's face and the upper case, superimposed "GUILTY."



The prosecutor's final slide is virtually indistinguishable from the slides that the Washington Supreme Court recently condemned in *In re PRP of Glasmann*, \_\_ Wash.2d \_\_, 286 P.3d 673 (2012). The only difference is the number of times the word "guilty" was pasted over the defendant's face (three times in *Glasmann*; once in this case). Despite what the dissenting opinion called overwhelming evidence, the Supreme Court reversed all of Glasmann's convictions concluding that the prosecutor's argument was highly improper and prejudicial. The evidence was much less persuasive in this case. As a result, this Court should also reverse.

#### *Prosecutorial Misconduct by PowerPoint*

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wash.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wash.2d 757, 762, 675 P.2d 1213 (1984). "A "[fair trial]" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.' " *State v. Monday*, 171 Wash.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting *State v. Case*, 49 Wash.2d 66, 71, 298 P.2d 500 (1956); see *State*

*v. Reed*, 102 Wash.2d 140, 145–47, 684 P.2d 699 (1984)).

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgerson*, 172 Wash.2d 438, 448, 258 P.3d 43 (2011), a prosecutor must “seek convictions based only on probative evidence and sound reason.” *State v. Casteneda–Perez*, 61 Wash.App. 354, 363, 810 P.2d 74 (1991); *State v. Huson*, 73 Wash.2d 660, 663, 440 P.2d 192 (1968). “The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.” American Bar Association, Standards for Criminal Justice std. 3–5.8(c) (2d ed. 1980); *State v. Brett*, 126 Wash.2d 136, 179, 892 P.2d 29 (1995); *State v. Belgarde*, 110 Wash.2d 504, 755 P.2d 174 (1988).

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *Thorgerson*, 172 Wash.2d at 442, 258 P.3d 43. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.*; *State v. Ish*, 170 Wash.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003). Because McKague failed to object at trial, the errors he complains of are waived unless he establishes that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice. *Thorgerson*, 172 Wash.2d at 443, 258 P.3d 43; *State v.*

*Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994). For a claim of ineffective assistance of counsel, a defendant must show (1) deficient performance; and (2) a reasonable likelihood of a different outcome. *Strickland v. Washington*, 466 U.S. 668 (1984).

This case is a carbon copy (to use a technologically outdated metaphor) of *Glasmann*. In *Glasmann*, the State argued to the Supreme Court that its PowerPoint slides, which prominently featured the use of the word “guilty” superimposed over a photograph of the defendant, merely combined an admitted photograph of defendant with the court's instructions and fair argument. The Supreme Court rejected the State’s claim and concluded that the prosecutor's modification of a photograph by adding the “guilty” captions was the equivalent of unadmitted evidence. *Id.* at 678 (“And there were no sequence of photographs in evidence with ‘GUILTY’ on the face or ‘GUILTY, GUILTY, GUILTY.’ ”).

The Supreme Court also found that the slide amounted to a personal opinion. It is well established that a prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case. The commentary on *American Bar Association Standards for Criminal Justice* std. 3–5.8, quoted with approval in *Glasmann*, emphasizes:

The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.

Likewise, *Glasmann* noted that many cases warn of the need for a prosecutor to avoid expressing a personal opinion of guilt. *E.g.*, *State v. McKenzie*, 157 Wash.2d 44, 53, 134 P.3d 221 (2006) (finding it improper for a prosecuting attorney to express his individual opinion that the accused is guilty, independent of the testimony in the case (citing *State v. Armstrong*, 37 Wash. 51, 79 P. 490 (1905))). The *Glasmann* court concluded: “By expressing his personal opinion of Glasmann’s guilt through both his slide show and his closing arguments, the prosecutor engaged in misconduct.” *Id.* at 679.

The *Glasmann* court concluded:

The case law and professional standards described above were available to the prosecutor and clearly warned against the conduct here. We hold that the prosecutor's misconduct, which permeated the state's closing argument, was flagrant and ill intentioned.

Moreover, the misconduct here was so pervasive that it could not have been cured by an instruction. ‘[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.’ *State v. Walker*, 164 Wash.App. 724, 737, 265 P.3d 191 (2011) (citing *Case*, 49 Wash.2d at 73, 298 P.2d 500).

*Id.* at 679.

While there were additional improper slides in *Glasmann*, the “GUILTY” slide was the Court’s primary focus. In contrast to *Glasmann*, the State’s evidence in this case was much weaker. In that case, the Supreme Court reversed all counts despite the strong evidence:

We cannot say that the jury would not have returned verdicts for lesser offenses, or even acquittal, *i.e.*, we cannot even presume the jury would have accepted defense counsel's concessions even as to the obstruction charged. The impact of such powerful but unquantifiable material on the jury is exceedingly difficult to assess but substantially likely to have affected the *entirety* of the jury deliberations and its verdicts. Even the dissent agrees that the misconduct mandates reversal of the assault conviction. The requisite balance of impartiality was upset. Mr. Glasmann's right to a fair trial must be granted in full. In this way, we give substance to our message that ‘prejudicial prosecutorial tactics will not be permitted,’ and our warnings that prosecutors must avoid improper, prejudicial means of obtaining convictions will not be empty words.

*Id.* at 682 (emphasis in original).

The bottom line is: *Glasmann* controls. Reversal is required.

3. MR. MCKAGUE’S FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS SIXTH AMENDMENT RIGHT TO A FAIR JURY TRIAL WERE VIOLATED BY THE COURT REQUIRING HIM TO WEAR A SHOCK DEVICE AT TRIAL.
4. MR, MCKAGUE’S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN COUNSEL FAILED TO OBJECT TO THE SHOCK DEVICE WHERE NO SECURITY CONCERN JUSTIFIED REQUIRING MCKAGUE TO WEAR THE DEVICE.
5. MR. MCKAGUE’S RIGHT TO BE PRESENT AT TRIAL WAS VIOLATED BY REQUIRING MCKAGUE TO WEAR A SHOCK DEVICE AT TRIAL VIOLATING THE GUARANTEES OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

6. MR. MCKAGUE'S RIGHT TO COUNSEL WAS VIOLATED BY REQUIRING MCKAGUE TO WEAR A SHOCK DEVICE AT TRIAL SUBSTANTIALLY INTERFERING WITH MCKAGUE'S ABILITY TO CONSULT WITH COUNSEL.

*Introduction*

Requiring a defendant to wear a shock device at trial without first conducting a hearing to determine whether there is an individualized security need violates the Constitution whether or not the device is seen by jurors. If jurors see the device, viewing the device implies dangerousness and interferes with the presumption of innocence. But even if jurors do not see it, the psychological effect of a shock device infringes on a defendant's ability to fully participate in his own trial. If the law does not always presume harm to a defendant from the negative psychological effects, then this Court should remand for a hearing where McKague can prove that he was harmed, either because jurors saw the device and/or because the overwhelming psychological effect substantially affected McKague's ability to participate in his own trial.

*Facts*

During his trial, McKague was required to wear a leg brace and shock device called the "REACT Band It." McKague describes the device as a shock unit strapped to his leg. *See* Declaration of McKague attached as Appendix B.

There was no security reason for the device. Instead, jail officers decided to require McKague to wear the device apparently because he was facing a life sentence. The trial judge did not conduct a hearing. On the first day of trial the judge said, “One more thing I was told in chambers that I went over with the attorneys was that the Court was made aware, Mr. McKague, that the jail staff have put some kind of device on you. I can’t see it. My presumption is that you probably feel something physically on your body at this point. My understanding is that if you do what you are doing now, which is sit quietly and not make any quick movements or do any behaviors that are out of line, you are not going to feel anything other than the physical presence of what you are wearing. I just want to double-check that you have had a chance to talk to Mr. Woodrow about that and that you are not going to be any issues either with how that feels for you or with the jail staff needing to or thinking they need to use anything.” RP Vol. I, p. 13-14. In other words, the judge did not find that McKague presented a security risk. The judge simply deferred to the decision by jail personnel. *Id.*

At the end of the first day of trial, the court went on to note: “The last thing I want to do is I want to clarify just for the record and ask you, Mr. Woodrow and Mr. McKague, it seems that there is not any issue with respect to the restraints. The Court has been noticing that you are behaving fine. I am assuming that you are not uncomfortable and that everything is

working out. I have not noticed one way or the other. Mr. Woodrow?" Mr. Woodrow responded, "I haven't asked Jay." RP Vol. I, p.. 93. Mr. Woodrow also noted that Mr. McKague had gotten looser fitting pants and "that's helped some." *Id.*

The device was worn under McKague's pants. Contrary to an offhand remark by the trial court, an outline of the device was likely visible to jurors—a bulky square box near the top of his pants. The court room was extremely small and McKague was sitting approximately 10 feet from the jury. Although the box was may not have been visible while McKague was sitting still, its outline could be seen when he moved. McKague stood for the jury numerous times throughout the day. *See* Declaration of McKague attached as Appendix B.

In addition, after she was apparently informed of a vague allegation involving an undefined incident in the jail, the trial judge informed McKague that any problems with his behavior in court would result in consequences. This occurred at the beginning of the second day of trial, when the Court noted, "It was brought to my attention, Mr. McKague, that there has been some discussion by you in the facility downstairs about potential disruptions in the courtroom, and I just want to put you on notice that that is why we had that discussion yesterday about the lap band." After Mr. McKague nodded affirmatively, the Court went on to say, "From my perspective yesterday you behaved perfectly appropriate. I did not see any

problems with anything, but the lap band was on you because the jail had some concerns about potential behavior and potential disruptive behavior in the court room. Hang on a minute. I want to just finish saying what I want to say." Mr. McKague said, "Sorry." The Court continued, "I want to caution you that the Court is not going to tolerate any disruptive behavior, frankly by anybody in the courtroom. You have the constitutional right to be present at any of these proceedings, and the Court respects that and wants you to be present. I will not, however, tolerate any disruptive behavior. If there is any indication of any disruption that is looking like it is going to happen or does happen, I am going to have you removed from the courtroom." Mr. McKague responded, "Yes, ma'am." RP Vol. II, p. 100-101. Mr. McKague responded to the Court, "Your Honor, there will not be no disruptive behavior on my part, and I just wanted to add that the reason why I was told that I have the band on is because of the amount of time that I'm looking at." RP Vol. II., p.. 102.

Because of the shock device, McKague felt he could not freely talk with his attorney during his trial. He was afraid to move. McKague thought about this device nearly every moment of his trial. At the end of each day of trial, he had red marks from this device and from the leg brace that was on his left leg. *See* Declaration of McKague attached as Appendix B.

Furthermore, anytime that McKague leaned over to speak to his attorney, the guard that was sitting right behind him would lean forward and whisper in his ear, “don’t move.” This happened twice and made McKague even more fearful of moving, even to talk to his attorney. *Id.*

#### *Argument*

No individualized security reason justified requiring McKague to wear a shock device during trial. He was prejudiced in multiple ways.

A stun belt is an electronic device that is secured either around a prisoner’s waist or is attached to leg brace. When activated, intentionally or otherwise, the shock device delivers a “50,000-volt, three or four milliamperes shock lasting eight seconds.” *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1241 (9<sup>th</sup> Cir. 2001). The shock administered “causes incapacitation in the first few seconds and severe pain during the entire period,” may also cause “immediate and uncontrolled defecation and urination, and the belt’s metal prongs may leave welts on the wearer’s skin requiring as long as six months to heal.” *Hawkins*, 251 F.3d at 1234 and *People v. Mar*, 28 Cal.4th 1201, 1214, 52 P.3d 95 (2002) (internal citation and quotation marks omitted)). The wearer generally is knocked to the ground by the shock and convulses uncontrollably. *Mar*, 28 Cal.4th at 1215. Activation of a shock device can cause muscular weakness for approximately thirty to forty-five minutes as well as heartbeat irregularities or seizures. *Mar*, 28 Cal.4th at 1214. “Accidental activations are not

unknown.” *United States v. Durham*, 219 F.Supp.2d 1234, 1239 (N.D.Fla.2002); *aff’d* 287 F.3d 1297 (11th Cir. 2002) (reporting a survey that showed 11 out of 45 total activations, or 24.4%, were accidental).

The United States Supreme Court has recognized that the use of physical restraints is an “inherently prejudicial practice” which raises a number of constitutional concerns. *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986). The use of physical restraints, such as a shock device, during trial implicates a defendant’s Fifth and Fourteenth Amendment rights to due process. *Deck v. Missouri*, 544 U.S. 622, 628-29 (2005). Even a restraint that is less severe than a stun belt, like shackles, can interfere with the accused’s Sixth Amendment “ability to communicate” with his lawyer. *Illinois v. Allen*, 397 U.S. 337, 343-4 (1970). Thus, whenever a court is considering restraints of any kind, it must impose only the least restrictive security measure and only upon a showing of a specific security need. *Id.*

Forcing Mr. McKague to wear a shock device was the most restrictive security measure possible – not the least. There was absolutely no individualized security reason for the psychological torture device.

Increased courtroom security measures are unconstitutional if they create “an unacceptable risk . . . of impermissible factors coming into play.” *Holbrook v. Flynn*, 475 US 560, 571 (1986). Such measures run the risk of infringing on the defendant’s due process presumption of innocence. *Morgan v. Aispuro*, 946 F2d 1462, 1464 (9th Cir. 1991). They are only

permissible if justified by “an essential state interest,” where the court considers, and rejects, less restrictive measures. *Flynn*, 475 US at 568; *Gonzalez v. Plier*, 341 F3d 897, 901 (9th Cir. 2003).

“[T]he balancing of the competing concerns for the presumption of innocence and for the integrity of the courtroom and its proceedings is best left to the sound discretion of the trial judge,” not a sheriff’s department or other member of the non-judicial branches. *United States v. Childress*, 58 F3d 693, 705 (D.C. Cir. 1995).

Many courts have recognized the psychological impact that a stun belt has on a defendant. In fact, shock device manufacturers tout the psychological “supremacy” of the device. However, while the threat of intense, debilitating pain may make it an effective security device, it also serves to interfere with several critical trial rights. For example, in *Durham*, 287 F.3d 1297 (11th Cir. 2002), the court stated:

A stun belt seemingly poses a far more substantial risk of interfering with a defendant’s Sixth Amendment right to confer with counsel than do leg shackles. The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant’s inclination to make any movements during trial—including those movements necessary for effective communication with counsel.

*Id.*

The Eleventh Circuit also held that a stun belt has a negative impact on a defendant’s Sixth Amendment and due process rights to be present at trial and to participate fully in his defense:

Wearing a stun belt is a considerable impediment to a defendant's ability to follow the proceedings and take an active interest in the presentation of his case. It is reasonable to assume that much of a defendant's focus and attention when wearing one of these devices is occupied by anxiety over the possible triggering of the belt. A defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial. We have noted that the presence of shackles may 'significantly affect the trial strategy [the defendant] chooses to follow.' A stun belt is far more likely to have an impact on a defendant's trial strategy than are shackles, as a belt may interfere with the defendant's ability to direct his own defense."

*Id.* at 1306.

In *Durham*, the court held that defendant's right to be present at trial and to participate in his own defense was affected by the shock device, and thus, reversal was required because the prosecution did not prove that the error was harmless. *Id.* at 1309.<sup>1</sup> See also *People v. Mar*, 28 Cal.4th 1201 (Cal. 2002) (holding that trial court erred in compelling defendant to wear a stun belt).

Similarly in *Gonzalez v. Pfliler*, 341 F.3d 897 (9th Cir. 2003), the Ninth Circuit held that the trial court erroneously required the defendant to wear a stun belt, and remanded the case to decide whether the defendant was prejudiced in being forced to wear such a device. The court recognized the fear and anxiety that wearing a stun belt can have on a defendant:

---

<sup>1</sup> The Eleventh Circuit also held that the "decision to use a stun belt must be subjected to at least the same 'close judicial scrutiny' required for the imposition of other physical restraints." *Id.* Thus, a court must make the following findings of fact: (1) criteria for triggering the stun belt; (2) possibility of accidental discharge; (3) whether an essential governmental interest is served by making the defendant wear the stun belt; (4) whether less restrictive means of restraint are available; and (5) the court must place its rationale on the record. *Id.* at 1306-07.

This “increase in anxiety” may impact a defendant’s demeanor on the stand; this demeanor, in turn, impacts a jury’s perception of the defendant, thus risking material impairment of and prejudicial affect on the defendant’s ‘privilege of becoming a competent witness and testifying in his own behalf.

*Id.* at 901 (citations omitted).

It is important to note that unjustified interference with the right to counsel constitutes a structural error. *See generally United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (“We have little trouble concluding that the erroneous deprivation of the right to counsel of choice, ‘with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as “structural error””) (citations omitted). Thus, this type of prejudice alone always justifies reversal.

McKague was prejudiced in several ways. First, if jurors saw the device, then he was prejudiced because it was likely that the device implied dangerousness—interfering with the presumption of innocence. Even if jurors could not see the device’s outline, McKague was prejudiced because he could not fully participate in trial. McKague’s fear of being electrocuted made him focus on the device, not trial. As a result, he did not consult with counsel. *See Declaration of McKague.*

This Court should conclude that the court’s failure to conduct a hearing before requiring McKague to wear the stun belt was plain error. However, if this Court determines it must evaluate McKague’s claim of

ineffectiveness, then there was no tactical reason for counsel not to object. See *In re PRP of Elmore*, 162 Wash.2d 236, 172 P.3d 335 (2007) (finding deficient performance for failing to object to shackles despite counsel's claimed strategic reason for wanting jurors to see shackles). As a result, trial counsel performed deficiently and McKague was prejudiced.

The law ordinarily presumes prejudice from the shock device. *United States v. Durham*, 287 F.3d 1297, 1309 (11th Cir. 2002). As a result, this Court can reverse if the State does not contest that requiring McKague to wear the device was unjustified. If this Court does not apply the presumed prejudice, then this Court should remand for an evidentiary hearing pursuant to RAP 16.11. McKague has presented evidence that he was prejudiced in several ways from the unjustified use of a shock device at his trial.

7. MR. MCKAGUE'S RIGHT TO BE PRESENT AT HIS OWN TRIAL WAS VIOLATED WHEN MANY ISSUES, INCLUDING THE EXCUSAL OF JURORS, WAS CONDUCTED IN HIS ABSENCE.

Multiple parts of trial were conducted in Mr. McKague's absence. Every trial day began with a private conference with the attorneys, but not Mr. McKague. See Declaration of Defense Attorney Woodrow attached as Appendix C. During these meetings, the facts and the law were repeatedly discussed. The lawyers reached a stipulation about the facts. The lawyers and the Court responded to a jury inquiry by permitting the viewing of a videotape again.

Perhaps most significantly, the exercise of peremptory challenges was conducted privately without allowing Mr. McKague to be present.

“A criminal defendant has a fundamental right to be present at all critical stages of a trial.” *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citing *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983)). This includes the right to be present during voir dire and empanelling of the jury. *Diaz v. United States*, 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500 (1912). The right to be present derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id.* The United States Supreme Court has recognized that this right is protected by the Due Process Clause in situations where the defendant is not actually confronting witnesses or evidence against him. *Irby*, 170 Wn.2d at 880–81 (quoting *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985)). In those situations, the Supreme Court has said that the “defendant has a right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.’” *Id.* at 881 (quoting *Snyder v. Commw. of Mass.*, 291 U.S. 97, 105–06, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds sub nom by Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)). But “because the relationship between the defendant's presence and his ‘opportunity to defend’ must be ‘reasonably

substantial,’ a defendant does not have a right to be present when his or her ‘presence would be useless, or the benefit but a shadow.’”. *Id.* (quoting *Snyder*, 291 U.S. at 106–07).

*State v. Irby* is dispositive. There, the charges included first degree felony murder with aggravating circumstances, first degree felony murder, and first degree burglary. During a pretrial hearing, the State and Irby both agreed to the trial judge's suggestion that neither party needed to attend the first day of jury selection. Both sides agreed that they would appear and begin questioning jurors on the following day. *Id.* at 877.

As agreed, on the first day of jury selection, the judge swore in the members of the venire and then gave them a jury questionnaire to fill out. After all of the potential jurors submitted their completed questionnaires, the judge sent an e-mail to the prosecuting attorney and defense counsel suggesting that 10 venire members be removed from the panel for various reasons. Four had been excused after one week by the court administrator. One home schooled, and the court stated “3 weeks is a long time.” One had “a business hardship.” And four “had a parent murdered.” The judge asked for the thoughts of counsel, indicating that if any were going to be let go, he would like to do it that day. *Id.* at 878.

Irby's counsel agreed to the release of all ten potential jurors. The prosecutor objected to the release of three of the four potential jurors who indicated they had a parent murdered, and then the court released the

remaining seven identified in the e-mail . Irby was in custody at the time of this exchange between the court and counsel and the record provided no indication that he was consulted about the dismissal of any of the potential jurors. *Id.* at 878–79.

Jury selection continued on the following day in Irby’s presence.

Irby appealed, arguing that the trial court's dismissal of the seven potential jurors via e-mail exchange violated his right to be present at all critical stages of trial. The Supreme Court agreed, holding that conducting a portion of jury selection in Irby’s absence violated his Fourteenth Amendment and article I, section 22 rights and that this violation was not harmless beyond a reasonable doubt. *Id.* at 887.

“[J]ury selection is ‘a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present.’” *Id.* at 883–84. “[A] defendant's presence at jury selection ‘bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend’ because ‘it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.’” *Id.* at 883 (quoting *Snyder*, 291 U.S. at 106 (citing *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892))).

The court distinguished *Irby* from other cases where courts have concluded that a defendant's absence from a portion of jury selection does not implicate the right to be present. The court explained that the fact that

jurors were being evaluated individually and dismissed for cause distinguishes this proceeding from other, ostensibly similar proceedings that courts have held a defendant does not have the right to attend. *Id.* at 882. The court concluded that the fact that the decision making took place after the venire was sworn in indicated that it was part of the jury selection process. *Id.* at 882, 884. “[C]onducting jury selection in Irby’s absence was a violation of his right under the due process clause of the Fourteenth Amendment to the United States Constitution to be present at this critical stage of trial.” *Id.* at 884.

In this case, Mr. McKague was excluded from the exclusion of jurors through the exercise of peremptory challenges. McKague had the same right to be present as Irby. Likewise, he was prejudiced in the same manner. Because *Irby* controls, this Court should reverse.

8. MR. MCKAGUE’S RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY WERE VIOLATED BECAUSE THE JURY WAS SELECTED ANONYMOUSLY—MCKAGUE WAS NOT PERMITTED TO KNOW THE NAMES OF JURORS AND JURORS KNEW THEIR IDENTITIES WERE PRIVATE.

#### *Introduction*

Anonymous juries violate the Constitution both because a defendant who cannot know the names of his potential jurors is precluded from fully participating in jury selection and because the use of numbers instead of names, without an instruction explaining otherwise, sends a signal that the court is concerned about the safety of jurors.

### *Facts*

The Court told the jurors, “I also want to let you know that while the jury selection process is designed to gather information about you, I want you to understand that your privacy is protected. You are randomly selected, but as I stated at the beginning, your addresses are not released to the parties, and if you are selected for jury duty you will remain anonymous to the public. Your names and addresses won’t be released to the news media, and they are not permitted to identify you.” RP Jury Voir Dire, p. 10 (Excerpt of Voir Dire attached as Appendix D). As a result, the lawyers were not permitted to know where the jurors lived. In addition, McKague was precluded from learning both the names and addresses of the jurors. *See* Declaration of McKague. During jury selection, jurors were referred to by number, not name. As a result, McKague’s only identifying information about the jurors was their randomly assigned numbers.

### *Argument*

Washington courts do not appear to have addressed the use of anonymous jurors. However, the federal courts have adopted a constitutionally-mandated, two-step test – one step designed to determine the need for anonymity and the second tailored to protect the accused’s rights to a fair trial and to an impartial jury – which must be met before an

anonymous jury may be employed.<sup>2</sup> The trial court must determine whether there is “a strong reason for concluding it is necessary to enable the jury to perform its fact finding function, or to ensure juror protection; and [] reasonable safeguards [must be] adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused.” *Shyrock*, 342 F3d at 970 (citing and adopting test from *DeLuca*, 137 F3d at 31).<sup>3</sup>

In determining whether there is a “strong reason” to impanel an anonymous jury, the trial court must weigh the following factors:

(1) [T]he defendants’ involvement with organized crime; (2) the defendants’ participation in a group with the capacity to harm jurors; (3) the defendants’ past attempts to interfere with the judicial process or witnesses; (4) the potential that the defendants will suffer lengthy incarceration if convicted; and (5) extensive publicity that could enhance the possibility that jurors’ names would become public and expose them to intimidation and harassment.

*United States v. Fernandez*, 388 F3d 1199, 1244-45 (9th Cir. 2004). If those factors support the use of an anonymous jury, then the trial court must ensure “reasonable safeguards are adopted . . . .” *Shyrock*, 342 F3d at 970.

---

<sup>2</sup> See, e.g., *United States v. Childress*, 58 F3d 693, 702 (D.C. Cir. 1995); *United States v. DeLuca*, 137 F3d 24, 31 (1st Cir. 1998); *United States v. Paccione*, 949 F2d 1204, 1215 (2d Cir. 1991); *United States v. Krout*, 66 F3d 1420, 1427 (5th Cir.1995); *United States v. Talley*, 164 F3d 989, 1001 (6th Cir. 1999); *United States v. Crockett*, 979 F2d 1204, 1215 (7th Cir. 1992); *United States v. Darden*, 70 F3d 1507, 1532 (8th Cir. 1995); *Shyrock*, 342 F3d at 971 (9th Cir. 2003); *United States v. Ross*, 33 F3d 1507, 1520 (11th Cir. 1994).

<sup>3</sup> The American Bar Association recommends similar restrictions. “Courts should limit the use of anonymous juries to compelling circumstances, such as when the safety of the jurors is an issue or when there is a finding by the court that efforts are being made to intimidate or influence the jury’s decision.” Patricia Lee Refo, *ABA Principles for Juries and Jury Trials*, 78 ALI 753, 829 (2005).

A simple, constitutionally acceptable safeguard is to offer “neutral justifications for the jury’s anonymity.” *Fernandez*, 388 F.3d at 1245.

Safeguards are necessary because, if used improperly, an anonymous jury may infringe “upon the fundamental rights of the accused,” including the presumption of innocence. *Shyrocks*, 342 F3d at 970; *see* U.S. Const. amend. XIV; *DeLuca*, 137 F.3d at 31. That is because “anonymous juries may infer that the dangerousness of those on trial required their anonymity, thereby implicating defendants’ Fifth Amendment right to a presumption of innocence.” *Shyrocks*, 342 F3d at 971. Moreover, “the use of an anonymous jury may interfere with defendants’ ability to conduct voir dire and to exercise meaningful peremptory challenges, thereby implicating defendants’ Sixth Amendment right to an impartial jury.” *Id.*<sup>4</sup>

The trial court in Mr. McKague’s case never determined that “strong reasons” or “compelling circumstances” required an anonymous jury. *Cf. Fernandez*, 388 F3d at 1244. In failing to do so, it abused its discretion. Moreover, the trial court’s total failure to implement any safeguards or to offer the jury an explanation – neutral or otherwise – explaining why jurors were anonymous—prejudiced McKague and was legal error. *Cf. Fernandez*, 388 F.3d at 1245; *McConney*, 728 F2d at 1202. The trial

---

<sup>4</sup> Massachusetts authorizes its trial courts to conduct anonymous jury selection. *Commonwealth v. Angiulo*, 415 Mass. 502, 527, 615 NE2d 155, 171 (1993). Like the federal courts, these trial courts must take specific steps to protect the accused’s constitutional rights. They must make written findings outlining the reasons for utilizing

court's dual failure – first, failing to find a strong reason to impanel an anonymous jury; and second, failing to provide any safeguards – infringed upon Mr. McKague's fundamental rights. *See Shyrock*, 342 F3d at 970; *see* Or Const, Art I, Section 11; US Const amend V, VI, XIV; *DeLuca*, 137 F.3d at 31.

This Court should reverse and remand for a new trial.

9. THE STATE FAILED TO DISCLOSE EXCULPATORY EVIDENCE ABOUT THE EXTENT OF THE VICTIM'S INJURY.

10. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT TESTIMONY ABOUT THE EXTENT OF THE VICTIM'S INJURY.

#### *Introduction*

On direct appeal, the Supreme Court upheld the assault conviction reasoning as follows: “Chang's resulting facial bruising and swelling lasting several days, and the lacerations to his face, the back of his head, and his arm were severe enough to allow the jury to find that the injuries constituted substantial but temporary disfigurement. And Chang's concussion, which caused him such dizziness that he was unable to stand for a time, was sufficient to allow the jury to find that he had suffered a temporary but substantial impairment of a body part or an organ's function. 172 Wash.2d at 807.

---

anonymous selection in the particular case. *Id.* In this way, appellate courts can review a court's exercise of discretion and ensure that the accused's rights were not violated.

In this PRP, McKague presents evidence that the victim's injuries were not as serious as he contended and the State portrayed at trial. Jurors did not hear this evidence either because it was not disclosed or because trial counsel did not know he possessed it, so did not use it at trial. Either way, reversal is required because there is a reasonable probability of a different outcome if jurors had heard this material evidence.

*Facts*

At trial, Officer Samuelson testified that Mr. Chang "was injured" and went to the hospital "at some point." RP Vol. I, p. 49-50. Mr. Chang testified he was punched "about six times or something like that." RP Vol. I, p. 63. He then testified "I got very dizzy, so I sat and then later got up." RP Vol. I, p. 64. When asked if he had a concussion Mr. Chang responded, "My head was cut, and I was bleeding." RP Vol. I, p. 66. When asked if he was prescribed medication he responded, "In Korean I think it's anti-inflammatory medication." *Id.*

Other than this testimony, the injury was described as "his eye is swollen" and "it's [an] abrasion or laceration..." RP Vol. II p. 175. The medical record from the hospital was placed into evidence through a stipulation as exhibit 34. RP Vol. II, p. 177. This stipulation was agreed to *in chambers* and neither counsel nor the Court ever discussed this with Mr. McKague. *See* Declaration of Woodrow attached as Appendix C.

After trial, McKague made a public disclosure request and received the reports from the medic that Mr. Chang saw after the incident and the Labor and Industry claim of Mr. Chang. *See* Declaration of McKague; Medical Reports attached as Appendix E.

Mr. Woodrow does not recall being given these documents prior to trial and did not see these documents until one year after the trial. *See* Declaration of Woodrow. The previously undisclosed medical records suggest that the victim's injuries were less serious than the testimony at trial suggested. For example, the Olympia Fire Department Emergency Medical notes indicate that the victim's injuries were "minor." The notes further noted "minor neck soreness," with "no loss of ROM [range of movement]." The notes further indicated that the "patient denying any other sx [symptoms] or need for tx [treatment]." There was no suggestion of a concussion. The victim was not transported to the hospital. Instead, he was left at the scene with a cold pack. *Id.*

#### *Brady Claim*

The Fifth and Fourteenth Amendments require the Government to disclose evidence favorable to the accused. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The elements of a *Brady* claim are well-established: "The government violates its constitutional duty to disclose material exculpatory evidence where (1) the evidence in question is favorable to the accused in that it is exculpatory or impeachment evidence, (2) the government

willfully or inadvertently suppresses this evidence, and (3) prejudice ensues from the suppression (*i.e.*, the evidence is ‘material’).” *Silva v. Brown*, 416 F.3d 980, 985-86 (9th Cir. 2005) (citing *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

The *Brady* rule cannot be undermined by allowing an investigating agency to prevent production by keeping a report out of the prosecutor's hands. *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995). Moreover, actual awareness (or lack thereof) of exculpatory evidence in the government's hands, is not determinative of the prosecution's disclosure obligations. Rather, the prosecution has a *duty to learn* of any exculpatory evidence known to others acting on the government's behalf. Because the prosecution is in a unique position to obtain information known to other agents of the government, *it may not be excused from disclosing what it does not know but could have learned*. *Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir.1997) (en banc) (citations omitted) (emphases added). The holding in *Carriger* drew directly from holdings of the Supreme Court, which state that “[i]n order to comply with *Brady*, ‘the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in th[e] case, including the police.’” *Strickler*, 527 U.S. at 281 (quoting *Kyles*, 514 U.S. at 437).

“*Brady* suppression occurs when the government fails to turn over *even* evidence that is ‘known only to police investigators and not to the

prosecutor.’” *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (*per curiam*) (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them.)).

The prosecution’s duty to disclose exculpatory evidence includes information that the defense could use to impeach witnesses. *Giglio v. U.S.*, 405 U.S. 150, 154-55 (1972). *See generally United States v. Bagley*, 473 U.S. 667, 676 (1985) (“Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule.”). *Brady* violations have been found in a number of cases where the prosecution failed to disclose evidence that would have undermined the credibility of important witnesses. *See, e.g., Kyles v. Whitley*, 514 U.S. at 436 (finding violation where prosecutor failed to disclose information that would have revealed inconsistency and unreliability of witness testimony and physical evidence); *Benn v. Lambert*, 283 F.3d 1040, 1053-54 (9th Cir. 2002) (finding violation where prosecutor failed to disclose that key witness was a drug user and had lied to the police).

The government's duty under *Brady* arises regardless of whether the defendant specifically requests the favorable evidence. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Similarly, the disclosure requirements set forth in *Brady* apply to a prosecutor even when the knowledge of the exculpatory evidence is in the hands of another prosecutor. *See Giglio v. United States*, 405 U.S. at 154 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government.").

#### *Ineffective Assistance of Counsel Claim*

Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. "A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance." *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir.1999) (quoting *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir.1999)) (internal quotation marks omitted and second alteration in original). In particular, if counsel's failure to investigate possible methods of impeachment is part of the explanation for counsel's impeachment strategy (or a lack thereof), the failure to investigate may in itself constitute ineffective assistance of counsel. *See Tucker v. Ozmint*, 350 F.3d 433, 444 (4th Cir.2003) ("Trial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and

failure to do so may constitute ineffective assistance of counsel.”).

Although trial counsel is typically afforded leeway in making tactical decisions regarding trial strategy, counsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision. See *Riley v. Payne*, 352 F.3d 1313, 1324 (9th Cir.2003) (holding that, under clearly established Supreme Court law, when defense counsel failed to contact a potential witness, counsel could not “be presumed to have made an informed tactical decision” not to call that person as a witness); see also *Williams v. Washington*, 59 F.3d 673, 681 (7th Cir.1995) (“Because investigation [of the witnesses] might have revealed evidence bearing upon credibility (which counsel believed was the sole issue in the case), the failure to investigate was not objectively reasonable.”); cf. *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir.1994) (“Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made.” (citations, emphasis, and internal quotation marks omitted)).

The duty to investigate is especially pressing where, as here, witness credibility is crucial to the State’s case. See *Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir.1998) (collecting cases).

In this case, there was evidence that the victim’s injuries were not as

serious as he contended. What the victim told the emergency medical personnel was much different than what he later stated.

Mr. McKague was prejudiced. Jurors were keenly interested in the extent of the victim's injuries. *See* Declaration of Juror Godat attached as Appendix F. If jurors had been presented with evidence that the victim's injuries were not as serious as the uncontested evidence stipulated to by trial counsel, there is a reasonable likelihood that jurors would not have convicted. *Id.*

11. THE FAILURE TO REQUEST A LESSER INCLUDED INSTRUCTION OF ASSAULT IN THE FOURTH DEGREE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

*Introduction*

Defense counsel sought and received a lesser included instruction for third-degree assault. He did not seek an additional instruction for fourth-degree assault. Counsel did not consider the option of having lesser included instructions for third and fourth-degree assault and did not discuss it with Mr. McKague. Because there is a reasonable likelihood that jurors would have returned a fourth-degree assault conviction, McKague was prejudiced. In fact, the presiding juror has declared that there was a reasonable probability of a fourth-degree assault conviction, if it had been offered. *See* Declaration of Godat attached as Appendix F.

### *Facts*

Initially defense argued for lesser included offense to second-degree assault of third-degree assault and was denied that request when the Court stated that “the evidence that has been presented over the last day and a half does not support the lesser offense of assault in the third degree.” RP II, p.s 202-209. With the denial of the third-degree assault, the Court asked the State, “Is the State opposing that lesser included?” RP Vol. II, p. 215. Mr. Bruneau for the State responded, “Of assault fourth?” and the Court answered, “Yes” to which Mr. Bruneau responded, “No objection, Your Honor.” *Id.*

The following day the Court noted that after an *in chambers* meeting that morning she “was willing to rethink the decision yesterday to not allow the lesser included third degree offense.” RP Vol. III, p. 230. The Court went on to rule, “So I am going to allow the lesser degree to be included of third degree assault and not fourth.” The Court then said, “Mr. Woodrow, I think you indicated you are not choosing to proposed a fourth degree assault; is that correct?” Mr. Woodrow responded, “Yes, Your Honor, that’s correct.” RP Vol. III, p. 233. This decision by defense counsel was not discussed with Mr. McKague at any time. *See* Declaration of McKague attached as Appendix B.

*Argument*

Second degree assault requires both intent and substantial bodily harm. One means of committing third degree assault is by negligence that causes bodily harm. Under that theory of liability, the *mens rea* is substantially lessened. Fourth degree assault, like second degree, is an intentional crime with a less severe injury. RCW 9A.36.021; 031; 041.

In this case, there was evidence from which McKague could have argued he intentionally assaulted the victim, but that the victim did not suffer substantial bodily harm. Under that scenario, there is a reasonable likelihood jurors would have convicted him of fourth degree, but not second- or third-degree assault.

A successful ineffective assistance of counsel claim requires the defendant to show that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland*, 466 U.S. 668; *State v. Thomas*, 109 Wash.2d 222, 743 P.2d 816 (1987). The Court in *Strickland* defined prejudice as the “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” 466 U.S. at 694.

McKague was entitled to instructions on lesser included offenses if counsel had requested them and there was evidence supporting the lesser. In *State v. Workman*, 90 Wash.2d 443, 447–48, 584 P.2d 382 (1978), the

Washington Supreme Court set forth a two-pronged test to determine whether a criminal defendant is entitled to an instruction on a lesser included offense. “First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.” (Citation omitted.)

In this case, there was evidence that McKague committed only a fourth degree assault. In fact, the evidence provides much stronger support for that theory than the one advanced by defense counsel for third-degree assault. McKague’s actions were not negligent. However, there was reason to conclude that the victim’s injuries were not substantial.

Counsel had no tactical reason not to offer a fourth-degree assault instruction. Counsel did not discuss the matter with McKague. *See* Declaration of McKague. Because the evidence better supports a fourth-degree assault theory, there is a reasonable probability that jurors would have returned a verdict on that count. In fact, the affidavit of the presiding juror says just that. *See* Declaration of Godat.

This Court should either remand this claim for a hearing or should grant relief.

12. MR. MCKAGUE IS ENTITLED TO A NEW TRIAL BASED ON THE CUMULATIVE PREJUDICE FROM MULTIPLE ERRORS.

Where the cumulative effect of multiple errors so infected the

proceedings with unfairness a resulting conviction or death sentence is invalid. *See Kyles v. Whitley*, 514 U.S. 419, 434-35, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995). As the Ninth Circuit pointed out in *Thomas v. Hubbard*, 273 F.3d 1164 (9th Cir.2001), “[i]n analyzing prejudice in a case in which it is questionable whether any single trial error examined in isolation is sufficiently prejudicial to warrant reversal, this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review.” *Id.* at 1178 (internal quotations omitted) (citing *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996)); *see also Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir.1984) (“Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.”).

Mr. McKague asserts that each of the errors described previously merits relief. However, considered cumulatively, they certainly resulted in sufficient prejudice to merit a new trial.

//

//

//

//

D. CONCLUSION AND PRAYER FOR RELIEF

This Court should call for a response from the State. If the State contests McKague's evidence, this Court should remand to the trial court for either an evidentiary hearing or for a determination on the merits. RAP 16.11-.13. Otherwise, this Court should reverse and remand for a new trial.

DATED this 26<sup>th</sup> day of November, 2012.

Respectfully Submitted:

/s/Jeffrey E. Ellis

Jeffrey E. Ellis #17139

B. Renee Alsept #20400

*Attorneys for Mr. McKague*

Law Office of Alsept & Ellis

621 SW Morrison St., Ste 1025

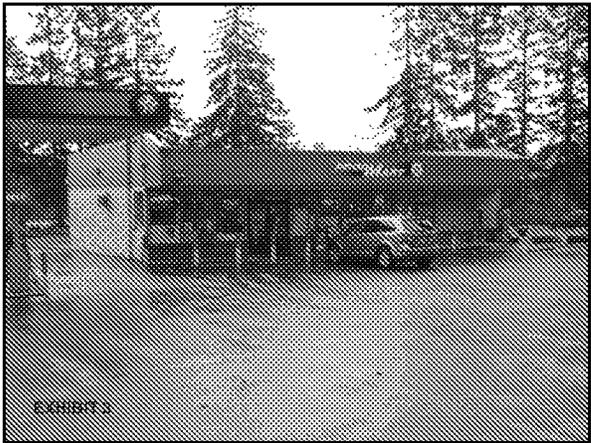
Portland, OR 97205

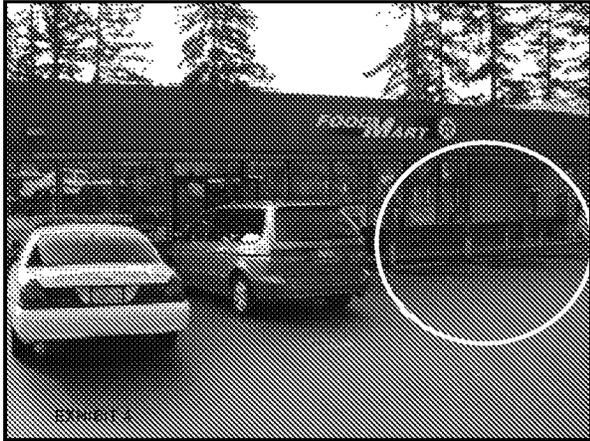
JeffreyErwinEllis@gmail.com

ReneeAlsept@gmail.com

## **EXHIBIT A**

STATE OF WASHINGTON  
VS.  
JAY EARL MCKAGUE









ROBBERY IN THE FIRST DEGREE  
OR  
ASSAULT IN THE SECOND DEGREE

- ⊗ A defendant is presumed innocent.
- ⊗ This presumption continues throughout the entire trial... Until overcome by evidence "beyond a reasonable doubt."
- ⊗ A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.
- ⊗ It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence.
- ⊗ If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

"DIRECT" -- OBSERVATION THROUGH SENSES  
(SEE, HEAR, SMELL)

"CIRCUMSTANTIAL" -- "REASONABLE INFERENCES"  
- DRAWN FROM "COMMON EXPERIENCES"

"LAW MAKES NO DISTINCTION" BETWEEN THEM

- ROBBERY IN THE FIRST DEGREE
- ⊗ (1) That on or about October 17, 2008, the defendant unlawfully took personal property from the person in the presence of another;
  - ⊗ (2) That the defendant intended to commit theft of the property;
  - ⊗ (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of another;
  - ⊗ (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

## ROBBERY IN THE FIRST DEGREE – Cont'd

- ⌘ (5) That in the commission of these acts or in the immediate flight therefrom the defendant inflicted bodily injury; and
- ⌘ (6) That any of these acts occurred in the State of Washington.

## ROBBERY

- ⌘ Unlawfully, with intent to commit theft
- ⌘ Takes personal property from the person OR in the presence of another person
- ⌘ By the use OR threatened use, of force, violence, or fear of injury...
- ⌘ The force or fear must be used to
  - Obtain (the property) OR
  - Retain (possession of the property) OR
  - Prevent or overcome resistance to the taking (of the property)

## ROBBERY IN THE FIRST DEGREE

When, during Robbery, or in flight from Robbery, defendant inflicts bodily injury

- ⌘ Intended to commit theft
- ⌘ Took property from a person OR in presence of another
- ⌘ The taking was against the person's will by the defendant's use of force
- ⌘ That the force was used to obtain OR overcome resistance to the taking
- ⌘ That during these acts OR in immediate flight therefrom, the defendant inflicted bodily injury
- ⌘ On October 17, 2008

## ROBBERY IS A TRANSACTION

- ⌘ a taking...
- ⌘ with intent to steal
- ⌘ by force, or threat or force... used to
  - obtain, OR
  - retain, OR
  - prevent/overcome resistance
  - (by owner) to the taking

AND

During robbery or in flight from robbery,  
– inflict bodily injury

## ASSAULT IN THE SECOND DEGREE

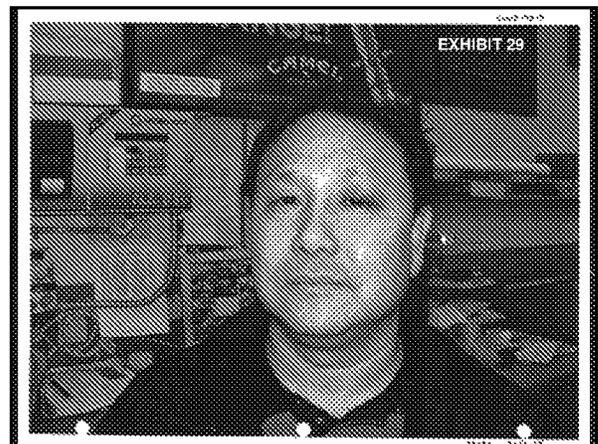
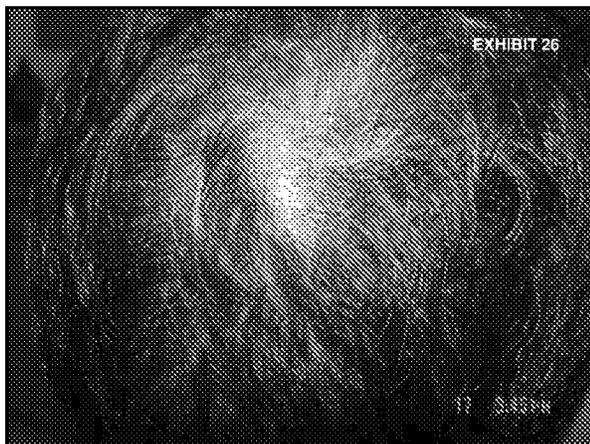
- ⌘ (1) That on or about October 17, 2008, the defendant intentionally assaulted KEE HO CHANG;
- ⌘ (2) That the defendant thereby recklessly inflicted substantial bodily harm on KEE HO CHANG; and
- ⌘ (3) That this act occurred in the State of Washington.

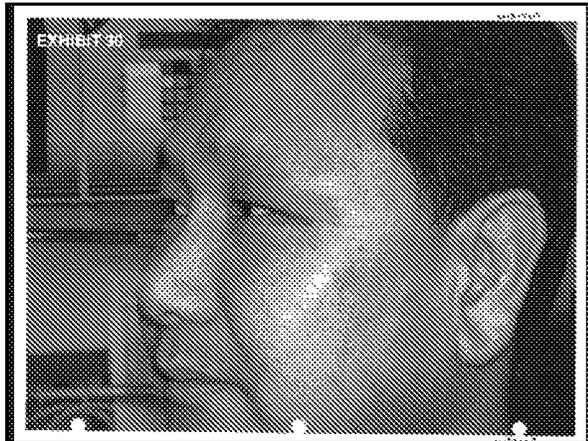
**BODILY INJURY  
(ROBBERY IN THE FIRST DEGREE)**

Bodily injury means physical pain or injury, illness, or an impairment of physical condition.

**SUBSTANTIAL BODILY HARM  
(ASSAULT IN THE 2<sup>ND</sup> DEGREE)**

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.



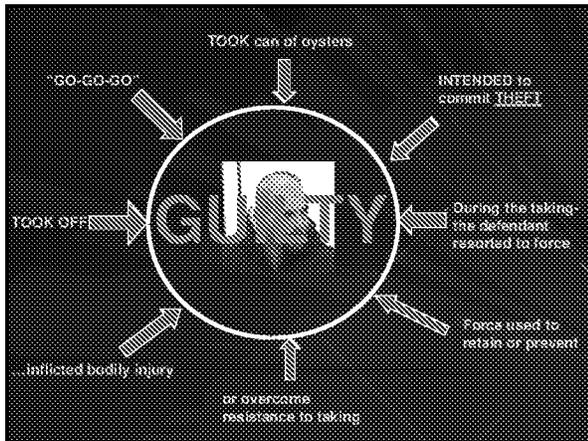


TO BE TAKEN TO COURT... [illegible text]

**CLINICAL REPRESSION**

DATE	TIME	LOCATION	DESCRIPTION
10/10/80	10:00	...	...
10/11/80	11:00	...	...
10/12/80	12:00	...	...
10/13/80	13:00	...	...
10/14/80	14:00	...	...
10/15/80	15:00	...	...
10/16/80	16:00	...	...
10/17/80	17:00	...	...
10/18/80	18:00	...	...
10/19/80	19:00	...	...
10/20/80	20:00	...	...
10/21/80	21:00	...	...
10/22/80	22:00	...	...
10/23/80	23:00	...	...
10/24/80	24:00	...	...
10/25/80	25:00	...	...
10/26/80	26:00	...	...
10/27/80	27:00	...	...
10/28/80	28:00	...	...
10/29/80	29:00	...	...
10/30/80	30:00	...	...
10/31/80	31:00	...	...

[Additional illegible text and tables follow]



## **EXHIBIT B**

## DECLARATION OF JAY E. McKAGUE

I, Jay E. McKague, declare:

1. I am the Petitioner in this case. I am making this declaration to the best of my memory.
2. During trial, I was forced to wear a shock device. The jail officers called it a Band It. I did not want to wear the shock device. During trial, I was constantly in fear of being shocked. The Band It was worn under my pants. I think that jurors could probably see the outline of the device under my pants—it looked like a box—every time when I stood up during a break. I was only a few feet away and all they would have had to do was to look closely at me and they would have seen that I was wearing something under my pants. In addition, the jail officers sat close to me and whispered to me several times during trial when jurors were present.
3. The jail officers told me about what would happen if they activated the shock device. They told me not to make any sudden movements or do anything unexpected. In addition, after the first day of trial the judge told me that they were going to watch me closely, apparently because of something that happened in the jail that I had nothing to do with. As a result, I sat still and tried not to show any emotion. It was difficult to concentrate on what was happening in court because I was so afraid of getting shocked. In addition, I did not consult with my attorney during trial because I was afraid that I would be shocked if I made an effort to tell him something. My strategy to avoid getting shocked was to sit still and be quiet.
4. During jury selection, I was not permitted to learn the names or addresses of any of the jurors. Instead, I only knew the jurors by numbers. I do not know if my attorney knew their names and/or addresses. I only know that I was prevented from learning that information.
5. When it came time to excuse jurors, the judge asked my attorney and the prosecutor to come up to the bench and talk privately. I was not invited to participate. I felt that if I tried to go up the judge's bench, I would have been shocked. I wanted to help my attorney pick jurors, but could not do anything from where I was forced to sit.
5. My attorney never explained to me why he failed to offer a lesser of fourth-degree assault. I wanted the jury to consider any crimes that were not a strike.
6. During closing, the prosecutor showed a picture of me with the word "guilty" over my face. It was a powerful moment. I wanted my attorney to object because it seemed wrong to me.

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

10-10-12  
Date and Place

Jay McKague  
Jay McKague

## **EXHIBIT C**

## DECLARATION OF RICHARD WOODROW

I, Richard Woodrow state:

1. I am attorney. I was admitted to the Washington State Bar in 1989. My practice focuses on criminal defense.
2. I represented Jay McKague, who was charged in Thurston County with robbery and assault. Because of his prior record, Mr. McKague was a potential persistent offender or "three striker."
3. I was recently contacted by post-conviction counsel for Mr. McKague about this case. I do not have a great memory of this case, in part, because I tried several cases, including a murder case, around the same time.
4. I was recently shown a report from Emergency Medical personnel who responded on this case. That report documents what the victim stated about his injuries and what they observed. I do not remember having received that document at the time of trial. I did not find a copy in my file. If I had received a copy, I would have sought to use it at trial because the victim's injuries appear to be less serious than claimed by the State's witnesses at trial. In addition, I do not believe that at the time of trial I had received a copy of the victim's request for L&I benefits. If I had, I would have also sought to use it to impeach the victim.
5. During trial, the judge met with us in chambers at the beginning of every court day. During those meetings, we discussed what we expected would happen in court that day. For example, during one of the meetings we reached a stipulation about the medical evidence. While the jury was deliberating, the judge asked the attorneys to meet in chambers to discuss how to respond to a question about watching the videotape again. Mr. McKague was not present for any of these meetings. No member of the public was present, either.
6. During jury selection, the judge called the lawyers up to the bench and had us exercise our peremptory challenges privately. Mr. McKague was not up at the bench with me when the judge asked us to come up and exercise our challenges. Throughout trial, the judge asked the lawyers to come up to "side bar" to talk about legal issues.
7. I proposed an Assault 3 lesser instruction. I proposed that instruction because Assault 3 was not a strike. The only reason I did not propose an Assault 4 instruction <sup>also</sup> was because I did not think of it. I did not discuss the issue with Mr. McKague.

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

Richard Woodrow

11-13-12

## **EXHIBIT D**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 vs. )  
 JAY EARL MCKAGUE, )  
 )  
 Defendant. )

NO. 08-1-01905-9  
COA NO. 39087-6-II

**COPY**

VERBATIM REPORT OF PROCEEDINGS  
Jury Voir Dire

BE IT REMEMBERED that on March 30, 2009, the  
above-entitled and numbered cause came on for jury trial  
before the HONORABLE ANNE HIRSCH, judge of Thurston  
County Superior Court, Olympia, Washington.

Cheri L. Davidson  
Official Court Reporter  
Thurston County Superior Court  
Olympia, Washington 98502  
(360) 786-5569  
davidscc@co.thurston.wa.us

**RECEIVED**

SEP 17 2009

Washington Appellate Project

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A P P E A R A N C E S

For the Plaintiff: DAVID BRUNEAU  
Deputy Prosecuting Attorney  
Thurston County Prosecutor's Office  
2000 Lakeridge Drive SW  
Olympia, WA 98502

For the Defendant: RICHARD WOODROW  
Attorney at Law  
3732 Pacific Avenue SE  
Olympia, WA 98501

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

Jury Voir Dire

Page Reference

4 - 82

1 MARCH 30, 2009

2 \* \* \* \* \*

3 (Jury panel present.)

4 THE COURT: Good morning. You can all be  
5 seated.

6 I want to welcome all of you to Thurston County  
7 Superior Court. I am Judge Anne Hirsch. On behalf of  
8 the Court, I want to thank you all for being here.

9 I always like to start by asking how many of you  
10 were excited when you received your summons. My guess  
11 is that at least some of you might have had some other  
12 feelings in addition to or instead of excitement and  
13 that you might have had other things you wished or you  
14 felt that you needed to be doing today. It is pretty  
15 normal, and to be expected frankly, that when you  
16 receive your summons you have several different  
17 emotions, including wishing that you did not have to  
18 come to court.

19 I am here to tell you that you have a very  
20 important job ahead of you today. Your being here  
21 allows someone in our community who has been accused of  
22 a crime to have the decision on his guilt or innocence  
23 determined by a jury of his peers. I am told that when  
24 the framers of the Constitution got together to hammer  
25 out all of our rights they disagreed about many, many

1 things, and one of the very few things that they all  
2 agreed upon was the critical importance of the jury  
3 system, so it is very important. It has always been  
4 recognized as very important, and on behalf of the  
5 Court, I want to thank you for being here to participate  
6 in this important process.

7 Sometimes people wonder how it is that they are  
8 chosen to be here. You get picked into the pool for  
9 jury service by one of two things: Either you are  
10 registered to vote or you have a Washington State issued  
11 identification or driver's license. Either of those two  
12 things will get you into a random system where you are  
13 selected to serve on a jury. I have heard Judge Tabor  
14 say that it is like being picked for the lottery or  
15 winning the lottery. Whether you feel that you have won  
16 the lottery will be up to you to decide after you are  
17 finished, but it is a random system, and that is how you  
18 were selected to be here.

19 I am going to introduce you to some of the people  
20 in the courtroom and let you know a little bit about  
21 what they do. First is the court reporter and that is  
22 Cheri Davidson. She is sitting to my right, your left,  
23 right in front of you in the purple sweater. She  
24 records everything that is said or done in the courtroom  
25 during the proceedings. She is responsible for

1 recording everything accurately, and what she records is  
2 referred to as the record.

3 The court clerk is Alissa Williams, and she's  
4 sitting to my left, your right. Her job is to keep  
5 track of all the documents and exhibits that are  
6 admitted and to make a record of any rulings the Court  
7 makes during the course of the trial.

8 The bailiff for the trial you have already met,  
9 Betty Benefiel. She is sitting in the back of the  
10 courtroom. Her job is to keep things running smoothly  
11 during the course of the trial. My guess is you have  
12 already experienced that. You came in very nicely and  
13 quietly and in order. That always tells me she is doing  
14 her job. She will help you with any problems that you  
15 have that are related to jury service. You should  
16 please make sure that you follow any instructions that  
17 she gives you.

18 This trial is the State of Washington versus Jay  
19 McKague. The State of Washington is being represented  
20 by Mr. Bruneau, who is over to my left, your right.

21 MR. BRUNEAU: Good morning, ladies and  
22 gentlemen. Ladies and gentlemen, with me at counsel  
23 table is Detective Sam Costello of the Olympia Police  
24 Department.

25 THE COURT: Thank you.

1 Mr. McKague is being represented by Mr. Rich  
2 Woodrow, and they are sitting right in front of me! Go  
3 ahead, Mr. Woodrow.

4 MR. WOODROW: Thank you.

5 Good morning. My name is Richard Woodrow. I'm a  
6 private attorney, and this is my client, Mr. Jay  
7 McKague.

8 THE DEFENDANT: Good morning.

9 THE COURT: Thank you.

10 During our jury selection process the remarks that  
11 I make, the questions I ask, and the questions I permit  
12 the attorneys to ask along with the instructions I give  
13 are directed to the attention of each of you in the  
14 courtroom, and I am going to ask that you please pay  
15 close attention.

16 The trial today involves criminal charges filed by  
17 the State of Washington, so the State is the plaintiff,  
18 and, as I noted, the plaintiff is being represented by  
19 Mr. Bruneau. Mr. McKague has been accused of a crime,  
20 so he is the defendant. Mr. McKague is being  
21 represented by Mr. Woodrow.

22 Mr. McKague is charged by information with one  
23 count of robbery in the first degree or in the  
24 alternative one count of assault in the second degree  
25 relating to events alleged to have occurred on or about

1           October 17th of 2008. The information in the case is  
2           only an accusation against the defendant that informs  
3           him of the charge. You are not to consider the filing  
4           of the information or its contents as proof of the  
5           matters charged. The defendant has entered a plea of  
6           not guilty. The plea puts in issue every element of the  
7           crime charged.

8           If you are selected for the jury it will be your  
9           duty to determine the facts in this case from the  
10          evidence produced in court. The Court will instruct you  
11          later on the law that applies to the charge. You are to  
12          apply the law given to you in the instructions to the  
13          facts as you find them from the evidence and in this way  
14          decide the case.

15          A defendant is presumed innocent. This presumption  
16          continues throughout the entire trial unless you find  
17          during your deliberations it has been overcome by the  
18          evidence beyond a reasonable doubt. The State has the  
19          burden of proving each element of the crime beyond a  
20          reasonable doubt. The defendant has no duty of proving  
21          that a reasonable doubt exists. The defendant has no  
22          duty to call witnesses or to produce evidence.

23          In order for the case to be tried before an  
24          impartial jury, the lawyers and I are going to ask you  
25          questions to determine if you are impartial and without

1           preconceived ideas which might affect the case. You  
2           should not withhold information in order to be seated on  
3           the jury. Please be straightforward in your answers  
4           rather than answering in a way that you think that the  
5           lawyers or I want you to answer or expect you to answer.  
6           For many questions there is no right or wrong answer.

7           When a jury has been selected and accepted by both  
8           sides, I will expect that each of you keep an open mind  
9           until the evidence is completed and the case submitted  
10          to you for your deliberation. I will expect that each  
11          of you accept my instructions on the law, and I will  
12          expect that each of you base any decision upon the facts  
13          and the law uninfluenced by any other considerations.  
14          The purpose of the jury selection process is to make  
15          sure and to determine that you have that frame of mind.

16          The Court has the responsibility to seat jurors who  
17          will be fair and impartial. Both the plaintiff and the  
18          defendant have the right and the duty to challenge any  
19          juror who they believe could not be fair or impartial.  
20          Each lawyer also has the right to question that a  
21          certain number of potential jurors be excused without  
22          stating any reason. I am going to ask that you please  
23          not take personal offense if you are excused during this  
24          process. This is our system's way of getting a jury  
25          that is satisfactory to both sides. Though it might not

1 help, I want to assure you that the Court has been in  
2 that same position. Parties have the right to request  
3 that a judge not hear a case under certain  
4 circumstances, and I can assure you that it has happened  
5 to me and I try not to take it personally. I want to  
6 let you know that it is rare that the first 12 jurors  
7 that are called actually are the 12 jurors that sit on a  
8 case.

9 I also want to let you know that while the jury  
10 selection process is designed to gather information  
11 about you, I want you to understand your privacy is  
12 protected. You are randomly selected, but, as I stated  
13 at the beginning, your addresses are not released to the  
14 parties, and if you are selected for jury duty you will  
15 remain anonymous to the public. Your names and  
16 addresses won't be released to the news media, and they  
17 are not permitted to identify you.

18 At this time I am going to administer an oath on  
19 voir dire to each of you, so I am going to ask that you  
20 each stand up and raise your right hand. While I give  
21 you the oath if you are able to do so I would like you  
22 to say "I do" when you are finished. Everybody raise  
23 their right hand, please.

24 (Jury panel was sworn.)

25 THE COURT: Thank you. You can be seated.

1           Did anybody fail to affirm the oath? The record  
2 should reflect that no jurors so indicated.

3           We are going to start now the process that is  
4 called voir dire. Loosely translated - and I am not  
5 really a French speaker - it means to speak from the  
6 heart or to speak the truth. The voir dire system that  
7 this Court uses is called the struck jury system. I  
8 know that you learned a little bit about that when you  
9 watched the presentation earlier this morning. This is  
10 a system where first the Court and then the attorneys  
11 are going to ask you questions.

12           When we first started using this system years ago,  
13 I recall that it was referred to as the Donahue system.  
14 Now, that dates me a little bit, but it is like a talk  
15 show format. People refer to it now I think as the  
16 Oprah system. It is a system where first I will start  
17 by asking questions of the entire panel. You may have  
18 answers that cause me to ask some follow-up questions  
19 for some of you. When I am finished with my questions,  
20 I am going to give each of the attorneys a block of time  
21 to use as they choose. They might ask individual  
22 questions of you. They might ask you to discuss  
23 concepts that are relevant to a criminal trial.  
24 Whichever method is selected, the purpose is to gather  
25 information that will assist us in choosing an impartial

1 jury. We expect and need you to volunteer information  
2 and answer freely, so please don't hesitate to speak up.

3 I want to just remind you, if you have not already  
4 heard, there are two things that are pretty important  
5 during this part of the process. First, we all need to  
6 hear you, so please speak in a strong voice. Secondly,  
7 the questions and answers are reported by the court  
8 reporter up here, so we need to identify you by number.  
9 For this reason you are going to need to make sure that  
10 I can see your number and identify your number in each  
11 response. We can only have one of you talking at a  
12 time.

13 All right. So with that by way of introduction, I  
14 am going to begin by asking a few questions touching on  
15 your qualifications to sit as jurors in the case.

16 VOIR DIRE EXAMINATION

17 BY THE COURT:

18 Q. Is anyone here less than 18 years of age? No?

19 Anyone here not a citizen of the United States?

20 No.

21 Is anyone here no longer a resident of Thurston  
22 County? No hands.

23 Is there anyone here not able to communicate in the  
24 English language? No hands.

25 Has anyone here been convicted of a felony and not

1 had his or her civil rights restored? No hands.

2 Who has served on a jury before? Keep your hands  
3 up till I call out your number. 5, 6, 12, 24, 23, 22,  
4 21, 18, 17, 16, 15, 28, 29, 33, and 34. Did I get  
5 everybody? Okay.

6 So for those of you that raised your hands, raise  
7 your hand if you have been on a civil trial before. I  
8 will just stand back up. 5, 15, 16, 18, 22, 23, 33.  
9 Thank you.

10 I think I missed somebody back there. Sometimes  
11 people don't know. Anybody not know if they were on a  
12 civil or criminal trial? Okay. No hands.

13 And who has been on a criminal trial? Okay. 6,  
14 12, 24. Is that you, 21?

15 A. (Juror No. 21) (Nods affirmatively.)

16 Q. Okay. Thank you.

17 33, 34, 17, 15, 28, and 29. Okay. Did everybody  
18 raise their hand whose been on jury service before?

19 Do any of you know the defendant, Mr. McKague? No  
20 hands raised.

21 Do any of you know the lawyers on either side of  
22 the case? No hands.

23 Do any of you know me or any of the court staff I  
24 previously introduced? No hands.

25 Are any of you or any of your family members or

1 close friends connected in any way with a law  
2 enforcement agency? Okay. I'll start with you, 4. Who  
3 do you know?  
4 A. (Juror No. 4) My husband was a county sheriff.  
5 Q. For?  
6 A. Thurston County.  
7 Q. Sheriff?  
8 A. (Nods affirmatively.)  
9 Q. So that's a new -- okay. Do you know anybody else that  
10 works or is connected in any way with the law  
11 enforcement agency?  
12 A. Not anymore.  
13 Q. But you did?  
14 A. Mm-hmm.  
15 Q. Okay. And would either your past contacts or your  
16 relationship with your husband affect your ability to be  
17 fair and impartial if you were a juror in this case?  
18 A. I don't think so.  
19 Q. No?  
20 A. (Shakes head negatively.)  
21 Q. Okay. Who else? Number 10, who do you know?  
22 A. (Juror No. 10) A friend. Do you need their names?  
23 Q. No.  
24 A. And my son-in-law.  
25 Q. Okay. And what is their connection?

1 A. Well, one is a Puyallup officer and the other one works  
2 for the state patrol.

3 Q. Okay. And would either of those relationships affect  
4 your ability to be fair and impartial if you were a  
5 juror in this case?

6 A. No, I don't think so.

7 Q. Okay. I think I see -- there is kind of a glare on your  
8 number.

9 A. (Juror No. 24) 24.

10 Q. 24? No, I'm going to go in front of you first.  
11 Number 12, go ahead.

12 A. (Juror No. 12) Friends with City of Olympia Police  
13 Department and City of Lakewood.

14 Q. So do you know the detective from the City of Olympia  
15 Police Department that is sitting at counsel table?

16 A. Umm, only because he was part of the last jury I sat on.

17 Q. Okay.

18 A. Not personally, but --

19 Q. So you have seen him testify before?

20 A. Mm-hmm.

21 Q. Okay. And would either that experience or your  
22 relationship with the people you know in law enforcement  
23 affect your ability to be fair and impartial if you were  
24 a juror in this case?

25 A. No.

1 Q. Okay. 24.

2 A. (Juror No. 24) Two sons, one the military police, one a  
3 regular officer, retired medically after ten years,  
4 injured in the line of duty.

5 Q. Okay. And would that affect your ability to be fair and  
6 impartial if you were a juror in this case, sir?

7 A. I don't believe so.

8 Q. So 20?

9 A. (Juror No. 20) My husband is a deputy for Thurston  
10 County.

11 Q. Thurston County Sheriff's Office?

12 A. Mm-hmm.

13 Q. And would that affect your ability to be fair and  
14 impartial if you were a juror in this case, ma'am?

15 A. No.

16 Q. Okay. 29?

17 A. (Juror No. 29) I have a friend, former friend who is a  
18 lieutenant with the Tumwater Police Department and was  
19 police chief.

20 Q. Same person?

21 A. Same person.

22 Q. Would that relationship affect your ability to be fair  
23 and impartial if you were a juror in this case, sir?

24 A. I don't think so.

25 Q. Okay. 26?

1 A. (Juror No. 26) I work with the Washington State  
2 Department of Corrections.

3 Q. You do now?

4 A. I do now.

5 Q. So you know people that work there as well?

6 A. Yes.

7 Q. And would either your work or your relationships with  
8 those people affect your ability to be fair and  
9 impartial if you were a juror in this case?

10 A. No.

11 Q. Anybody else? Did I get everybody?

12 I can't see your number. 31?

13 A. (Juror No. 31) Father-in-Law, San Diego Sheriff's  
14 Department.

15 Q. Okay. And would that affect your ability to be fair and  
16 impartial if you were a juror in this case?

17 A. No.

18 Q. Okay. I can't see your number. Oh, you are 33. Go  
19 ahead.

20 A. (Juror No. 33) I know Justice Mary Fairhurst of the  
21 Supreme Court, Washington State Supreme Court.

22 Q. Okay. And would knowing Justice Fairhurst affect your  
23 ability to be fair and impartial if you were a juror in  
24 this case?

25 A. No.

1 Q. No? Okay.

2 Anybody else over on this side of the room? Okay.

3 13?

4 A. (Juror No. 13) I have two relatives in Pierce County,  
5 one in Morton, and a good friend in Seattle.

6 Q. In law enforcement?

7 A. Yes.

8 Q. Okay. And would either of those relationships affect  
9 your ability to be fair and impartial if you were a  
10 juror in this case?

11 A. No, ma'am.

12 Q. Okay. Any more hands?

13 Anybody that -- the question was are you or any of  
14 your family members or close friends connected in any  
15 way with a law enforcement agency?

16 Okay. How about this one: Are any of you or any  
17 of your family members or close friends connected in any  
18 way with our court system? This would include people  
19 that work at the courthouse, attorneys, that kind of  
20 thing. I can't see your number, ma'am.

21 A. (Juror No. 25) 25.

22 Q. 25. Go ahead, please.

23 A. I work for Thurston County, and I do know some staff  
24 from my work here, especially Superior Court.

25 Q. Okay. Would that affect your ability to be fair and

1 impartial if you were a juror in this case?

2 A. No.

3 Q. Okay. So I forgot to ask a question when I was asking  
4 the folks who have served on a jury before. The  
5 question I forgot to ask was whether your prior jury  
6 service would affect your ability to be fair and  
7 impartial if you were called as a juror in this case?  
8 Anybody have a problem with that? No? No hands. Okay.

9 The responsibility to serve on a jury is one of the  
10 basic obligations we assume as citizens in this country,  
11 and the right to have a jury trial is as old as our  
12 Constitution. Serving on a jury is also one of the most  
13 interesting and fulfilling of our civic duties.  
14 However, sometimes we have conflicts in our lives that  
15 we can't change and when we are called to sit on a jury  
16 or to serve on a jury it may not be the best time. The  
17 Court recognizes that that sometimes happens.

18 The attorneys in this case are predicting that the  
19 case will take three days. Deliberations will commence  
20 at that time, and they will take as long as the jury  
21 needs them to take. We conduct court during regular  
22 business hours. We start around 9:00. We will take a  
23 regular morning break. We recess from noon to 1:30, and  
24 we take an afternoon break as well. We don't have court  
25 after hours. We will, however, require your presence

1 during the hours that I just went through. You are not  
2 going to be kept together until you begin your  
3 deliberations. You will be allowed to come and go from  
4 the courthouse, but once you begin deliberating the  
5 Court will excuse you at 5:00.

6 So with all of that in mind, would serving on this  
7 particular jury at this time present any insurmountable  
8 hardships for any of you? Okay. I see a hand in the  
9 back. Are you -- 35.

10 A. (Juror No. 35) I'm supposed to leave to Hawaii on  
11 Wednesday for my sister's wedding on Saturday.

12 Q. Okay. So not the best time for you perhaps.

13 A. (Nods affirmatively.)

14 Q. But you could serve a different time?

15 A. Yeah.

16 Q. Okay. Thank you, 35.

17 Anybody else? 35, I just want to ask whether being  
18 required to serve on the jury would affect your  
19 consideration of the case if the Court did not excuse  
20 you.

21 A. No.

22 Q. It would not?

23 A. Oh, yes, it would, yes.

24 Q. Let me ask that again just so we are all on the same  
25 page. Knowing that the trial will last at least through

1 Wednesday, would that affect your consideration of the  
2 case?

3 A. Yes.

4 Q. Do any of you have any physical or health conditions  
5 that would so affect your ability to hear and decide  
6 this case that it would impair your ability to be fair  
7 and impartial? 16?

8 A. (Juror No. 16) 16, yes. I have this -- well, it  
9 wouldn't affect my decision-making process, but  
10 physically I have this problem that I need to get up  
11 once in a while to stretch my legs.

12 Q. So if the Court gave regular breaks on a schedule I just  
13 said and allowed folks to stand up and stretch in  
14 addition to that, would that --

15 A. That's -- it's a physical thing. It's not a  
16 decision-making process. I can --

17 Q. Okay. So your physical concerns, as long as the Court  
18 accommodated your need to stand up --

19 A. Stand and stretch.

20 Q. -- you would be able to be fair and impartial?

21 A. Yes, ma'am.

22 Q. Okay. Thank you.

23 Have any of you heard of this case before? If you  
24 have, just raise your hand, and unless I ask you, don't  
25 relate anything specific that you might have heard. No

# **EXHIBIT E**

## **DECLARATION OF TRACY J. GODAT**

I, Tracy Godat, declare:

1. I was the foreperson on the case of State v. Jay McKague in 2009. I am currently self-employed as an independent kitchen consultant as well as an administrative assistant for the State of Washing. I presently live in Thurston County.

2. I have a detailed memory of the case and the jury deliberations because I took my duties as foreperson seriously. It should be noted that in March 2008 I served on another jury with the same prosecutor, defense attorney and investigating detective. Although none of the attorneys asked me about that experience, I also have a good memory of that case.

3. During the deliberations, the jury felt very strongly that Mr. McKague was not guilty of Robbery, but rather only the lesser included crime of Theft.

4. Likewise, we looked closely at the charge of Assault in the Second Degree and carefully considered the only lesser included charge that we were instructed about: Assault in the Third Degree based on the jury instructions given to us.

5. First, we all felt that Mr. McKague had struck Mr. Chang and that he was not justified in doing so. The question we struggled with was what crime he committed.

6. We considered the lesser included because we did not feel that the crime that Mr. McKague had committed merited the greater degree of Assault in the Second Degree, but the elements of Assault in the Third Degree also did not seem to be an exact fit, either.

7. As a jury, we took the definitions very seriously and read them carefully.

8. Because we felt that the assault was intentional, we could not find that it was reckless, even though we wanted to convict him of the lesser included. If we had been instructed to consider a degree of assault that was committed intentionally, but was less serious than Assault in the Second Degree, we probably would have convicted of that crime. We as a jury felt the assault was intentional, however, we were only given two assault charges to chose from so we picked the one that best fit the evidence. If there were a third choice given to us we might have chosen it.

9. It was also important to us as a jury that the testimony of Mr. Chang was not refuted by the defense in any way.

10. Had the jury been told that the doctor in the emergency room had concluded that Mr. Chang had not suffered from a concussion that would have been information that the jury would have seriously considered.

11. It should be noted that I was one of the jurors who felt that a life sentence is excessive for the extent of the crime that we deliberated over. My hopes are that Mr. McKague served some time for this crime and can be rehabilitated and enter society as a law abiding and tax paying citizen.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Nov. 13, 2012, Olympia      Tracy Godat  
Date and Place      WA      Tracy Godat

## **EXHIBIT F**

December 6, 2011

Jay Mc Kague  
Clallam Bay Correctional Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

RE: Request for Public Disclosure Records

Dear Jay Mc Kague:

Your public records request for EMT report #2008-0006844 and the fax cover sheet of the report with the date and time it was faxed to the Olympia Police Department and the Thurston County Prosecutor's office dated December 1, 2011 was received by the City of Olympia on December 6, 2011.

The record, EMT report #2008-0006844 you requested is exempt from public disclosure under Chapter 70.02 RCW \*(as provided by RCW 42.56.520) because Except as authorized in RCW 70.02.050, a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization. A disclosure made under a patient's written authorization must conform to the authorization. We do not have authorization from the patient to release this record to you.

According to our records, the report was not faxed to the Olympia Police Department. It was faxed to the Thurston County Prosecutor's Office in response to a subpoena with a copy of the subpoena used as a cover sheet. Attached are the following records in response to your request:

- Subpoena Duces Tecum No. 08-1-01905-9 from the Thurston County Prosecuting Attorney
- Fax cover sheet from the Thurston County Prosecutor's Office requesting record.
- Fax Confirmation sheet, including date and time the record was faxed to the Thurston County Prosecutor's office.

This completes and closes my response to your request.

Sincerely,

Stephanie Zink  
Olympia Fire Department

November 9, 2011

Jay Mc Kague  
Clallam Bay Correctional Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

RE: Information Request

Dear Mr. Mc Kague:

We received your request for information on November 8, 2011.

According to our records, report # 2008-0006844 was provided to the Thurston County Prosecutor's office on March 27, 2009.

This completes and closes my response to your request.

Thank you,



Stephanie Zink  
Administrative Secretary  
Olympia Fire Department  
100 Eastside Street NE  
Olympia, WA 98506  
360.753.8348

Incident Report

Olympia Fire Department

2008-0006844 -000

Basic	
Alarm Date and Time	09:02:06 Friday, October 17, 2008
Arrival Time	09:08:05
Controlled Date and Time	
Last Unit Cleared Date and Time	09:16:25 Friday, October 17, 2008
Response Time	0:05:59
Priority Response	Yes
Completed	Yes
Reviewed	Yes
Fire Department Station	02
Shift	A
Incident Type	321 - EMS call, excluding vehicle accident with injury
Initial Dispatch Code	21R2
Aid Given or Received	N - None
Action Taken 1	32 - Provide basic life support (BLS)
EMS Provided	Yes
Apparatus - Suppression	1
Personnel - Suppression Personnel	3
Property Use	511 - Convenience store
Location Type	Address
Address	2020 BLACK LAKE BLVD SW
City, State Zip	OLYMPIA, WA 98512
District	25
Census Tract	2

Person Involved/Property Owner - Chang, Kee	
EMS Patient	Yes
Owner	Yes
Last Name	Chang
First Name	Kee
Street Address	2020 BLACK LAKE BLVD SW
City, State Zip	OLYMPIA, WA 98512

EMS Scene	
Service Type	Exam Only
Mass Casualty Incident	Not Applicable
ID of First Unit on Scene	E2
Number of Patients This Incident	1
Response Mode to Scene	Emergency - Code Red

Incident Report

Olympia Fire Department

2008-0006844 -000

Apparatus - E2	
Apparatus ID	E2
Response Time	0:04:23
Apparatus Dispatch Date and Time	09:02:09 Friday, October 17, 2008
En route to scene date and time	09:03:42 Friday, October 17, 2008
Apparatus Arrival Date and Time	09:08:05 Friday, October 17, 2008
Apparatus Clear Date and Time	09:16:25 Friday, October 17, 2008
Apparatus priority response	Yes
Number of People	3
Apparatus Use	1
Apparatus Action Taken 1	32 - Provide basic life support (BLS)
Apparatus Type	11 - Engine
Personnel 1	1854 - Bradley, Steve Position: LT
Personnel 2	2494 - Hermann, Russell Position: FF
Personnel 3	2753 - Hall, Jerry Position: FF

Authority	
Reported By	1854 - Bradley, Steve 11:14:26 Friday, October 17, 2008
Officer In Charge	1854 - Bradley, Steve 11:14:28 Friday, October 17, 2008
Reviewer	0783 - Boyd, Richard 08:34:12 Monday, October 20, 2008

Special Studies	
Special Study Name	Special Study 19307
Special Study ID	19307

End of Report

Incident Report

Olympia Fire Department

2008-0006844 -000

EMS Patient - Chang, Kee	
First Name	Kee
Last Name	Chang
Street Address	
Gender	1 - Male
Date of Birth	May 4, 1954
Age	54
Provider Impression / Assessment	38 - Trauma
Highest Level of Care	2 - EMT-B (Basic)
Patient Status	2 - Remained Same
Disposition	3 - Left at scene
Initial Level of Care	2 - EMT-B (Basic)
Severity of Injury	Non-Urgent
Chief Complaint Code	Face - Closed Minor Injury

EMS Patient - Chang, Kee Flow Chart	
09:15:00 - Assessment / Vitals	BP = 178/118; Pulse = 76; Resp. = 16
Provider	2753 - Hall, Jerry
Charge	\$0.00

EMS Patient - Chang, Kee Narrative	
Narrative Name	BLS Assault
Narrative Type	EMS
Narrative Date	11:09:29 Friday, October 17, 2008
Author	1854 - Bradley, Steve
Author Rank	LT
Author Assignment	1
Narrative Text	Exam by FF Hermann

S - BLS response to a 54 YOM for an assault secondary to a robbery. Pt was struck several times in the face by the assailant. PMHx of HTN, no meds or allergies.

O - Pt found in presence of OPD assisting them with details of the incident. He appears upset but with no noticeable deficiencies. Exam finds swelling to L eye and temple. Minor L sided neck soreness with no loss of ROM, nothing significant found on exam and palp. Vitals as noted with elevated BP with Hx, eyes PEARL but a bit watery. Pt denying any other Sx or need for Tx.

A - Minor injuries secondary to an assault

P - Exam, vitals, Hx, cold pack, left at scene to follow up with PMD if he feels necessary

State of Washington  
**Department of Labor and Industries**  
P.O. Box 44144 • Olympia, WA • 98504-4299

December 17, 2008

SHOP FAST  
2020 BLACK LAKE BLVD SE  
OLYMPIA WA 98502

Account No:  
803,007-00  
Risk Class:  
3410 00  
Claim No:  
-----  
Worker:  
KEE HO CHANG

Dear Employer:

Your employee named above has filed a workers' compensation claim. The information reported by your worker and the worker's doctor is enclosed. Please review it carefully.

If you have not already done so, please fill out the enclosed *Employer Report of Industrial Injury or Occupational Disease* form and return it to us right away, or register at the Claim and Account Center ([www.ClaimInfo.LNI.wa.gov](http://www.ClaimInfo.LNI.wa.gov)) to complete the form online. Provide as many details as you can. L&I wants to consider your information when we make a decision on the claim.

You can help control how this claim affects your future workers' compensation rates:

1. Encourage your employee to get proper medical attention.
2. Consider keeping your employee on salary.
3. Look for light-duty work; ask the doctor about work restrictions and get approval.
4. Respond promptly to this request and all other L&I paperwork to help protect your rights and avoid delays that can increase your costs.

Information to help you manage claims and control costs is included on the back of this letter. More information is available online at [www.LNI.wa.gov/ClaimsIns/](http://www.LNI.wa.gov/ClaimsIns/) or you may call 1-800-LISTENS. Please call me directly if you need assistance.

Sincerely,

SAM B RIENBOLT  
Account Manager  
(360) 902-4659

# Claim Information Reported by the Worker and Doctor

## Worker Information

Language Preference: **KOREAN**

1. Name <b>(EE HO CHANG</b>		2. Sex <b>MALE</b>	3. Social Security number [REDACTED]	4. Home phone [REDACTED]	CLAIM NUMBER <b>AH02892</b>
5. Birthdate [REDACTED]	6. Home address [REDACTED]	7. Height <b>5 FT 3 IN</b>	9. Mailing address (if different from home address) <b>2020 BLACK LK BLVD SW OLYMPIA WA 98512</b>		10. Marital Status <b>MARRIED</b>
8. Weight <b>165 LBS</b>		11. Dependent children Name Legal Custody Birthdate		12. Spouse's name <b>UN CHANG</b>	
13. Name and address of children's legal guardian			14. Date of injury <b>10/17/08</b>	15. Time of injury <b>9 AM</b>	16. Shift <b>DAY</b>
7. Part of body injured or exposed			19. Doing regular job? <b>YES</b>		
8. Description of how injury or exposure occurred <b>A MAN ASSULTED ME AT MY STOPE HE HIT MY FACE AND S LAPPED ME TO THE GROUND I STILL HAVE PAIN IN MY SH OULDER HE PINNED ME TO THE GROUND</b>			20. Where did the injury or exposure occur? <b>JOB SITE</b>		
1. Address where injury or exposure occurred <b>2020 BLACK LK BLVD OLYMPIA WA 98512</b>			22. Was this incident caused by failure of a machine or product OR someone who is not a co-worker? <b>YES</b>		
2. Witnesses			24. Expected return to work date?	25. Date last worked?	
3. Incident reported to employer? Name and title of person reported to			27. Date reported <b>10/17/08</b>	28. Was employer contributing to family's medical, dental, and/or vision insurance on the day of injury?	
2. Business name of employer <b>SHOP FAST GAS STATION</b>		30. Type of business <b>GAS STATION</b>			
1. How long worked at business <b>8 YEARS</b>	32. Employer phone number <b>(360) [REDACTED]</b>	33. Employer address <b>2020 BLACK LK BLVD SW OLYMPIA WA 98512</b>		40. Owner, partner, or officer? <b>OWNER</b>	
1. Job title and duties <b>SELF EMPLOYED</b>		3. Rate of pay		36. Hours/day	37. Days/week
3. Additional earnings (daily average)		39. Number of paying jobs? <b>1</b>		41. Signed? <b>YES</b> Date of signature	

(over)

# Doctor Information

42. Diagnosis 1 HD INJ WITH CCN 2 NK SH STR 3 RD FACIAL FX		43. ICD Diag. Codes	44. Date first visit for this condition 10/17/08
45. Subjective complaints supporting diagnosis			
45. Objective findings supporting diagnosis TENDER R AND OCCIPITAL SCLP L ORBIT CTSN TENDER R POSTERIOR NK NEURO OK			
47. Treatment and diagnostic testing recommendations FACIAL BONE CT EQUALS NEG		48. Was the diagnosed condition caused by this injury or exposure? YES	
50. Is there any pre-existing impairment of the injured area? NO		49. Will the condition cause the patient to miss work? YES 7 DAYS	
51. Has the patient ever been treated for the same or similar condition? NO			
52. Are there any conditions that will prevent or retard recovery? NO			
53. Referral physician for follow-up			
54. Name of hospital or clinic CAPITAL MEDICAL CENTER 3900 CAPITAL MALL BLVD OLYMPIA WA 98502		55. Attending physician ROBERT A TAYLOR (HOSP) 3900 CAPITOL MALL DR SW OLYMPIA WA 98502-8654	
56. Place of service EMERGENCY ROOM		57. Provider number	58. Signed? YES
			Date of signature 12/06/08



# RICHARD WOODROW

## Attorney At Law

3732 Pacific Avenue Southeast  
Olympia, Washington 98501

Office: (360)-352-9911  
Fax: (360)-352-9955

September 28, 2011

Jay McKague  
Clallam Bay Corrections  
1830 Eagle Crest Way  
Clallam Bay, WA 98326-9723

Dear Jay McKague:

I spoke with Mr. Woodrow about the documents you are asking about, and he does not remember these documents. I looked through your file and we do not have these documents.

Sincerely,



Amy at Richard Woodrow's Office

MODE = MEMORY TRANSMISSION

START=MAR-27 08:21

END=MAR-27 08:22

FILE NO.=855

STN NO.	COMM.	ONE-TOUCH/ ABBR NO.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	2	93529955	004/004	00:00:38

-TCPAO-EDWARD G HOLM -

\*\*\*\*\* -TCPAO-ED G HOLM - \*\*\*\*\* - 360 754 3358- \*\*\*\*\*

Thurston County Prosecuting Attorney's Office  
EDWARD G. HOLM - Prosecuting Attorney

2000 Lakeridge Drive SW

Olympia, WA 98502

PHONE: (360) 786-5540

FAX: (360) 754-3358

FAX COVER SHEET

DATE: 3/27/09

TO: RICH WOODROW

FAX #: 352-9955

FROM: BRUNEAU, PAO

RE: McKAGUE

NUMBER OF PAGES: 4 (Including cover sheet)

HARD COPY:  Will Follow  Will Not Follow

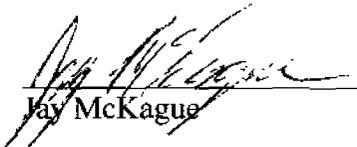
COMMENTS: EMT REPORT OF LT. BRADLEY OFD re Chang

THIS FACSIMILE MAY CONTAIN CONFIDENTIAL, PRIVILEGED INFORMATION  
INTENDED ONLY FOR THE INDIVIDUAL OR ENTITY TO WHOM IT IS ADDRESSED.  
DO NOT READ, COPY, OR DISSEMINATE THIS INFORMATION UNLESS YOU ARE THE

VERIFICATION BY PETITIONER

I, Jay McKague, declared that I have received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

10-10-12  
Date and Place

  
Jay McKague