71388-4

No. 92421-0

71388-4

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2013 DEC 31 PM 2:03

71388-4-I

IN THE SUPREME COURT OF WASHINGTON STATE

In re Personal Restraint Petition of:	) No. ~~xxxxxxxxxxxxxx~~ 89707-7
	) PERSONAL RESTRAINT PETITION
Bobby Darrell Colbert,	)
	) RAP 16.3
Petitioner.	)

STATUS OF PETITIONER

I, Bobby Colbert, apply for relief from confinement. I am now in custody serving sentence upon my conviction of a crime.

1. I was convicted and sentenced in Skagit County Superior Court.

2. I was convicted of Second Degree Rape and Third Degree Rape.

3. I was sentenced after trial, March 31, 2005.

4. My trial lawyer was: Glen Hoff/Public Defender Office, 606 S. 3rd, Mt.Vernon,WA 98273.

5. I appealed the decision of the trial court to the Division One Court of Appeals. My lawyer on appeal was: C.D. Aza/Elaine Winters, Washington Appellate Project, 1511 3rd Ave, Ste.701, Seattle,WA 98101.

6. Since my conviction I have asked a court for some relief from my sentence other than I have already written above. The court I asked relief from was [This] Court and Relief was denied on: May 1,2007.

12/26/13 PAYMENT OF FILING FEE WAIVED

Ronald R. Carpenter
Supreme Court Clerk

GROUNDS FOR RELIEF

Colbert raises two new claims based on the following Washington State Supreme Court and U.S. Supreme Court decisions rendered in 2013: State v. Lynch, ___ Wn.2d ___, 309 P.3d 482 (2013); State v. Coristine, 177 Wn.2d 370,375, 300 P.3d 400 (2013); Smith v. U.S., ___ U.S. ___, 133 S.Ct 714, 184 L.Ed.2d 570(2013).

GROUND ONE

The jury instructions violated Colbert's 6th Amendment Right to control his defense by imposing upon Colbert the affirmative defense of consent over Colbert's objection.

GROUND TWO

In violation of Colbert's 5th Amendment and Fourteenth Amendment Right of Due Process, the jury instructions improperly imposed upon the defendant the burden of proving consent and relieved the state of its burden of proving beyond a reasonable doubt the element of forcible compulsion required to establish rape in the Second Degree.

STATEMENT OF FINANCES

1. I ask the Court to file this petition without making me pay because I am so poor, I cannot pay the fee.
2. I have $0.00 in my institutional account.
3. I am not employed.
4. I ask the Court to appoint a lawyer for me.
5. In the last 12 months I have not got any money from a business, profession or other form of self-employment.

6. In the last 12 months, I have not got any rent payments, interest, or dividends. I do not have any savings or checking accounts and do not own stocks, bonds, or notes.

7. I have no real estate, other property, or things of value which belong to me. I also do not have any interest or received payments from such entities.

8. I am not married.

9. All my family, especially my Mother, needs me home.

10. All the bills I owe are unlimited, and owed to the Department of Corrections, Washington State.

REQUEST FOR RELIEF

For the two new claims set forth above and argued in the Brief in Support of Personal Restraint Petition, Mr. Colbert respectfully requests this Court reverse his Rape Convictions and remand his case for new and Separate trials.

RESPECTFULLY SENT BY,

Bobby D. Colbert,
Pro Se

* No Notary Available

PLRA IN FORMA PAUPERIS STATUS REPORT
FOR DEFINED PERIOD : 05/31/2013 TO 11/30/2013

DOC# :	0000879561	NAME :	COLBERT BOBBY	ADMIT DATE :	05/17/2005
DOB :	12/13/1970			ADMIT TIME :	15:15

AVERAGE MONTHLY RECEIPTS	20% OF RECEIPTS	AVERAGE SPENDABLE BALANCE	20% OF SPENDABLE
30.00	6.00	6.84	1.37

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
OFFICE OF CORRECTIONAL OPERATIONS
STAFFORD CREEK CORRECTION CENTER
CERTIFIED BY: Yvonne Dayton

DOC#: 0000879561 Name: COLBERT, BOBBY D DOB: 12/13/1970
LOCATION: S01-224-H4109U

ACCOUNT BALANCES Total: 329.52 CURRENT: 299.52 HOLD: 30.00

SUB ACCOUNT	05/31/2013 START BALANCE	11/30/2013 END BALANCE
SPENDABLE BAL	0.44	0.01
SAVINGS BALANCE	290.59	299.15
WORK RELEASE SAVINGS	0.00	0.00
EDUCATION ACCOUNT	0.00	0.00
MEDICAL ACCOUNT	0.00	0.00
POSTAGE ACCOUNT	0.32	0.37
COMM SERV REV FUND ACCOUNT	0.00	0.00

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
OFFICE OF CORRECTIONAL OPERATIONS
STAFFORD CREEK CORRECTION CENTER
CERTIFIED BY: Yvonne Lefton

DEBTS AND OBLIGATIONS

TYPE	PAYABLE	INFO NUMBER	AMOUNT OWING	AMOUNT PAID	WRITE OFF AMT.
DEND	DENTAL COPAY DEBT	09272005	0.00	5.18	0.00
COIS	COST OF INCARCERATION /07112000	05172005	UNLIMITED	585.66	0.00
SPHD	STORES PERSONAL HYGIENE DEBT	07202005	0.00	1.55	0.00
SPHD	STORES PERSONAL HYGIENE DEBT	08032012	0.00	9.03	0.00
LMD	LEGAL MAIL DEBT	03122012	0.00	3.00	0.00
POSD	POSTAGE DEBT	05182009	0.00	3.59	0.00
TVD	TV CABLE FEE DEBT	11122011	0.13	4.98	0.00
LFO	LEGAL FINANCIAL OBLIGATIONS	20050520	UNLIMITED	580.90	0.00
COI	COST OF INCARCERATION	05172005	UNLIMITED	0.00	0.00
CVCS	CRIME VICTIM COMPENSATION/07112000	05172005	UNLIMITED	150.67	0.00
CSAF	COSTS, SANCTIONS, AND ATTORNEY FEES	82033-3	0.00	100.00	0.00
TVD	TV CABLE FEE DEBT	08132005	0.00	8.49	0.00
COPD	COPY COSTS DEBT	07232009	0.00	1.20	0.00
MEDD	MEDICAL COPAY DEBT	07282005	0.00	3.00	0.00
LMD	LEGAL MAIL DEBT	02242006	0.00	3.83	0.00
COPD	COPY COSTS DEBT	01242011	0.00	2.04	0.00
MISCD	MISCELLANEOUS DEBT	05262005	0.00	5.74	0.00
CVC	CRIME VICTIM COMPENSATION	05172005	UNLIMITED	127.92	0.00
MEDD	MEDICAL COPAY DEBT	07272012	0.00	4.00	0.00
POSD	POSTAGE DEBT	11242009	0.00	0.52	0.00
EL	ESCORTED LEAVE	11072011	UNLIMITED	0.00	0.00
HYGA	INMATE STORE DEBT	08052005	0.00	4.94	0.00
HYGA	INMATE STORE DEBT	05112009	0.00	1.55	0.00
HYGA	INMATE STORE DEBT	05192005	0.00	38.71	0.00
TVD	TV CABLE FEE DEBT	05092009	0.00	1.33	0.00

TRANSACTION DESCRIPTIONS -- SPENDABLE BAL SUB-ACCOUNT

DOC#: 0000879561 Name: COLBERT, BOBBY D DOB: 12/13/1970
LOCATION: S01-224-H4109U

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
09/27/2013	OTH	OTHER DEPOSITS-COLBERT, ROBIN	10.00	23.50
09/27/2013	DED	Deductions-LFO-20050520 D D	(2.00)	21.50
09/27/2013	DED	Deductions-CVCS-05172005 D D	(0.50)	21.00
09/27/2013	DED	Deductions-SAV-11072011 D D	(1.00)	20.00
09/27/2013	DED	Deductions-COIS-05172005 D D	(2.00)	18.00
10/01/2013	CRS	CRS SAL ORD #7451667	(1.89)	16.11
10/04/2013	OTH	OTHER DEPOSITS - COLBERT, ROBIN	10.00	26.11
10/04/2013	DED	Deductions-LFO-20050520 D D	(2.00)	24.11
10/04/2013	DED	Deductions-CVCS-05172005 D D	(0.50)	23.61
10/04/2013	DED	Deductions-SAV-11072011 D D	(1.00)	22.61
10/04/2013	DED	Deductions-COIS-05172005 D D	(2.00)	20.61
10/10/2013	CRS	CRS SAL ORD #7464819	(3.90)	16.71
10/12/2013	TV	I05 - TV CABLE FEE	(0.50)	16.21
10/14/2013	OTH	OTHER DEPOSITS-COLBERT, ROBIN	10.00	26.21
10/14/2013	DED	Deductions-LFO-20050520 D D	(2.00)	24.21
10/14/2013	DED	Deductions-CVCS-05172005 D D	(0.50)	23.71
10/14/2013	DED	Deductions-SAV-11072011 D D	(1.00)	22.71
10/14/2013	DED	Deductions-COIS-05172005 D D	(2.00)	20.71
10/21/2013	CRS	CRS SAL ORD #7479772	(4.50)	16.21
10/21/2013	CLB	Due to All Clubs-Inside/Out Fundraiser	(16.00)	0.21
10/24/2013	OTH	OTHER DEPOSITS-COLERT, ROBIN	10.00	10.21
10/24/2013	DED	Deductions-LFO-20050520 D D	(0.21)	10.00
10/30/2013	CRS	CRS SAL ORD #7493084	(9.94)	0.06
11/01/2013	OTH	OTHER DEPOSITS - COLBERT, ROBIN	10.00	10.06
11/01/2013	DED	Deductions-LFO-20050520 D D	(0.06)	10.00
11/09/2013	TV	I05 - TV CABLE FEE	(0.50)	9.50
11/18/2013	OTH	OTHER DEPOSITS-COLBERT, ROBIN	10.00	19.50
11/18/2013	DED	Deductions-LFO-20050520 D D	(2.00)	17.50
11/18/2013	DED	Deductions-CVCS-05172005 D D	(0.50)	17.00
11/18/2013	DED	Deductions-SAV-11072011 D D	(1.00)	16.00
11/18/2013	DED	Deductions-COIS-05172005 D D	(2.00)	14.00
11/20/2013	CRS	CRS SAL ORD #7520504	(13.99)	0.01

TRANSACTION DESCRIPTIONS -- SAVINGS BALANCE SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
07/08/2013	DED	Deductions-SAV-11072011 D D	1.00	291.59
07/12/2013	DED	Deductions-SAV-11072011 D D	1.00	292.59
07/19/2013	DED	Deductions-SAV-11072011 D D	0.56	293.15
08/05/2013	DED	Deductions-SAV-11072011 D D	1.00	294.15
09/23/2013	DED	Deductions-SAV-11072011 D D	1.00	295.15
09/27/2013	DED	Deductions-SAV-11072011 D D	1.00	296.15
10/04/2013	DED	Deductions-SAV-11072011 D D	1.00	297.15
10/14/2013	DED	Deductions-SAV-11072011 D D	1.00	298.15
11/18/2013	DED	Deductions-SAV-11072011 D D	1.00	299.15

TRANSACTION DESCRIPTIONS -- WORK RELEASE SAVINGS SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE

No. 89702-7

IN THE WASHINGTON STATE SUPREME COURT

In re Personal Restraint Petition of:

Bobby Darrell Colbert, Petitioner.

BRIEF IN SUPPORT OF

PERSONAL RESTRAINT PETITION

Bobby D. Colbert #879561
SCCC, H4-B-109
191 Constantine Way.
Aberdeen,WA 98520

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2013 DEC 26 P 2:54
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CLERK

A. PROCEDURAL HISTORY OF THE CASE.

1. The Direct Appeal.

On direct review before the Washington Court of Appeals, Colbert claimed that the trial court's denial of his motions to sever the rape counts denied the due process right to a fair trial. On July 24, 2006, the Washington Court of Appeals found no error.

On August 24, 2006, Colbert filed his petition for review with the Washington Supreme Court. Citing the Fifth Amendment and Fourteenth Amendment, Colbert claimed that the denial of the motions to sever violated his constitutional right to a fair trial. Colbert also challenged the sufficiency of the evidence. The Washington Supreme Court denied review on May 1, 2007.

2. First Personal Restraint Petition.

On January 14, 2008, Colbert filed his personal restraint petition. Asserting protections under the state and federal constitutions, Colbert claimed (1) ineffective assistance of appellate counsel concerning misjoinder and other issues, and (2) misjoinder based on constitutional error and failure to conduct an Evidence Rule 404(b) analysis. In dismissing the personal restraint petition on July 16, 2008, the Washington Court of Appeals held that it would not review the severance claim because it already had been raised and considered on direct appeal.

On August 8, 2008, Colbert filed his motion for discretionary review, claiming ineffective assistance of appellate counsel and misjoinder. He also claimed that review should be accepted to address whether actual and substantial prejudice arose from the trial court's failure to conduct a balancing analysis under Evidence Rule 404(b). In moving for accelerated review on August 18, 2008, Colbert invoked the state and federal constitutions.

On October 30, 2008, the Washington Supreme Court Commissioner denied review. The Commissioner concluded that the interests of justice do not warrant relitigation of the severance claim.

3. Second Personal Restraint Petition.

Shortly after the Ninth Circuit's decision denying habeas relief on exhaustion grounds, Colbert filed on October 21, 2010, a second collateral attack before the Washington Court of Appeals. In asserting his misjoinder claim, Colbert expressly relied on the United States Constitution and Rule 404(b) of the Federal Rules of Evidence. The Acting Chief Judge rejected Colbert's personal restraint petition because the one-year statute of limitations under RCW 10.73.090 had expired, and because an essentially identical claim had been rejected on direct and collateral review. Colbert did not petition the Washington Supreme Court for review.

B. COLBERT'S SIXTH AMENDMENT AND DUE PROCESS CLAIMS ARISING FROM THE TRIAL COURT'S CONSENT INSTRUCTION HAVE SUBSTANTIVE MERIT AND ARE NOT PROCEDURALLY BARRED UNDER WASHINGTON STATE LAW.

1. The Washington State Supreme Court's Majority Opinion In *State v. Lynch* Constitutes A Significant Intervening Change In The Law Providing A Basis For Collateral Relief In State Court.

In *State v. Lynch*, 309 P.3d 482 (Wash. Sup. Ct. 2013), the Washington State Supreme Court reversed a second degree rape conviction in holding that the trial court violated the defendant's Sixth Amendment right to control his defense by instructing the jury on the affirmative defense of consent over defense counsel's objection. The trial court in *Lynch* granted the State's request to give the following jury instruction regarding consent:

> A person is not guilty of RAPE or INDECENT LIBERTIES if the sexual intercourse or sexual contact is consensual. Consent means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.
>
> The defendant has the burden of proving that the sexual intercourse or sexual contact was consensual by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

State v. Lynch, 309 P.3d 482, 484 (Wash. Sup. Ct. 2013). Defense counsel objected to the consent instruction on the grounds that it violated the defendant's right to control his defense. *Id.* In arguing that the instruction improperly shifted to the defendant the burden of proving consent, defense counsel asserted that he introduced evidence of consent in order to create a reasonable doubt concerning whether the State had proved the element of forcible compulsion. *Id.*

Relying on *State v. Coristine*, 177 Wash.2d 370, 375, 300 P.3d 400 (2013), as dispositive authority, the Washington Supreme Court in *Lynch* held that instructing the jury on an affirmative defense of consent, over the defendant's objection, violated the Sixth Amendment by

interfering with the defendant's autonomy to present a defense. *State v. Lynch*, 309 P.3d 482, 485 (Wash. Sup. Ct. 2013). The Washington Supreme Court in *Lynch* detailed that in *Coristine*, the statute under which the defendant was charged provided that a person is guilty of second degree rape if the "victim is incapable of consent by reason of being physically helpless or mentally incapacitated." *Lynch*, 309 P.3d at 485. The Washington State statute provided that a person is not guilty of second degree rape if the defendant proves by a preponderance of the evidence that he "reasonably believed" that the alleged victim was not mentally incapacitated or physically helpless. *Id.* Mr. Coristine objected to the instruction because he did want the burden of proof. *Id.* His trial strategy was to show that the State failed to prove that the complainant was physically helpless or mentally incapacitated during sexual intercourse. *Id.*

The Washington Supreme Court explained that as in *Coristine*, the defendant in *Lynch* attempted to cast doubt on the element of forcible compulsion and objected to the affirmative defense instruction because he did not want to bear the burden of proof. *Lynch*, 309 P.3d at 485-86. The Washington Supreme Court in *Lynch* held that the trial court impinged on the defendant's autonomy to conduct his own defense by imposing a defense on an unwilling defendant. *Id.* at 486.

The Washington Supreme Court in *Lynch* also held that the constitutional error was not harmless because instructing the jury that the defendant had the burden of proving consent was inconsistent with the defendant's trial strategy of casting doubt on the element of forcible compulsion, and because the consent instruction imposed a burden that was greater than the burden necessary to create a reasonable doubt about forcible compulsion. *Lynch*, 309 P.3d at 486. The Washington Supreme Court held that the error violated the Sixth Amendment even though the consent instruction was an accurate statement of the law. *Id.* at 486. In light of the

Sixth Amendment violation, the majority in *Lynch* declined to consider whether the consent instruction impermissibly violated the Fourteenth Amendment by shifting the burden of proof to the defendant. *Id.* at 487.

2. The Concurring Opinion In *State v. Lynch* Reflects That United States Supreme Court Case Law Rendered In 2013 Establishes Grounds For Reversal Under The Due Process Clause Where The Jury Instruction Characterizes As An Affirmative Defense A Fact That Negates An Essential Element Of The Offense.

Justice Gordon McCloud's concurring opinion in *State v. Lynch* provides that the consent instruction violated the Fourteenth Amendment's Due Process Clause because the consent instruction impermissibly shifted the burden of proof from the State to the defendant. *State v. Lynch*, __ Wash.2d __, 309 P.3d 482, 487, 487-90 (Wash. Sup. Ct. 2013) (Gordon McCloud, J., concurring). The concurring opinion, joined by two other justices, specified that a State may not lessen the prosecutorial burden by characterizing as an affirmative defense (which the defendant must prove by a preponderance) a fact that simply negates an essential element of the offense. *Id.* at 487.

Justice Gordon McCloud urged that the Washington Supreme Court's decisions in *State v. Camara*, 113 Wash.2d 631, 781 P.2d 483 (1989), and *State v. Gregory*, 158 Wash.2d 759, 147 P.3d 1201 (2006), be overruled because they impermissibly shifted the burden of proof in violation of the Fourteenth Amendment's due process clause and conflicted with United States Supreme Court precedent. *Lynch*, 309 P.3d at 485. Justice Gordon McCloud stated that the *Camara* court improperly conflated affirmative defenses that "overlap" an element of the charged crime with those that "negate" an element of the crime. *Id.* at 489.

Significantly, Justice Gordon McCloud looked to the United States Supreme Court's January 9, 2013, opinion in *Smith v. United States*, ___ U.S. ___, 133 S. Ct. 714, 184 L.Ed.2d

570 (2013), as the authority supporting her conclusion that relief should be based on the Due Process Clause. Justice Gordon McCloud wrote:

> Today, there is no question that *Camara's* reasoning conflicts with United States Supreme Court precedent. In *Smith v. United States*, —U.S.—, — U.S. —, 133 S.Ct. 714, 184 L.Ed.2d 570 (2013), the Court clarified that the prosecution must always bear the burden of disproving a defense that controverts an element of the charged crime:
>
>> The State is foreclosed from shifting the burden of proof to the defendant only "when an affirmative defense does negate an element of the crime." *Martin v. Ohio*, 480 U.S. [at 237] (Powell, J., dissenting). Where instead it "excus[es] conduct that would otherwise be punishable," but "does not controvert any of the elements of the offense itself," the Government has no constitutional duty to overcome the defense beyond a reasonable doubt. *Dixon v. United States*, 548 U.S. 1, 6, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006).
>
> *Smith*, 133 S.Ct. at 719 (second alteration in original).

Lynch, 309 P.3d at 490. Here, Justice Gordon McLeod highlighted that *Smith* "clarified" that the State must always bear the burden of disproving the defense. As Justice Gordon McCloud further explained:

> If *Martin*[1] created any doubts as to the constitutional distinction between defenses that "excuse" a crime (or "overlap" an element), on the one hand, and those that "negate" an element of the crime charged, on the other, *Smith* resolved those doubts. The State may burden a defendant with proving a defense that "excuses" the crime or that "overlaps" one of its elements, but the State may not burden a defendant with proving a defense that "negates" an element. *Camara* and its progeny are inconsistent with that rule.

Lynch, 309 P.3d at 490. As reflected by Justice Gordon McCloud's analysis in *Lynch*, the basis for due process claims challenging affirmative defense instructions was not clear until the United States Supreme Court decided *Smith* in 2013.

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[1] *Martin v. Ohio*, 480 U.S. 228, 234 (1987).

Similarly, the basis for the Sixth Amendment claim was not apparent until the Washington Supreme Court decided *Lynch* on September 19, 2013, or at the earliest, when the Washington Supreme Court decided *State v. Coristine*, 177 Wash.2d 370, 375, 300 P.3d 400 (2013), on May 9, 2013. Indeed, the Washington Supreme Court noted that "*Coristine* is *dispositive* in resolving this case" and that "*[u]nder* Coristine . . . giving such an instruction over a defendant's objection violates the defendant's right to control his defense regardless of the instruction's accuracy." *State v. Lynch*, 309 P.3d 482, 486 (Wash. Sup. Ct. 2013) (emphasis added). Further, *Lynch* appears to be the first case addressing the constitutionality of affirmative defense instructions which burden the defendant with proving consent in second degree rape cases alleging forcible compulsion. In short, Colbert cannot be faulted for not previously raising a claim challenging the affirmative defense instruction on Sixth Amendment or due process grounds.

3. Colbert Has Viable Grounds To Seek Collateral Review Because His Trial Counsel Objected To Jury Instructions Which Closely Resemble The Constitutionally Infirm Instructions In *State v. Lynch*.

Colbert's trial counsel objected to jury instructions closely resembling the challenged instructions in *State v. Lynch*. As in *Lynch*, the jury instructions in Colbert's case charged the defense with the burden of proving by a preponderance of the evidence the affirmative defense of consent.[2] In Colbert's case, Jury Instruction No.15, the affirmative defense instruction, states:

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

[2] Jury instructions 11, 12 and 15 in Colbert's trial mirror or closely follow the challenged jury instructions in *Lynch*. *See* Exhibit A & *Lynch*, 309 P.3d at 484.

See Exhibit A (Trial Court's Instructions, Instruction No. 15) & Exhibit B (State's Proposed Jury Instruction, p. 15, WPIC 45.04).[3]

Prior to closing argument, defense counsel raised objections to the inclusion of the State's proposed affirmative defense instruction (Instruction 45.04),[4] which the trial court ultimately adopted. Defense counsel argued:

> The other objection the defense has is that, is the inclusion of the State's 45.04. And my objection is based upon, with exception to the last statement, I think it's, while inconsistent, the second sentence preponderance of the evidence means you must be persuaded. I think that's appropriately September 4th in another instruction. But that is kind of a structural objection. And I don't think that that is a misstatement of the law at all. But then it says if you find that the defendant has established this defense it will be your duty to return a verdict of not guilty. *I think that that's inappropriate* because -- I guess I'll cite State v. Camara[5] for this proposition. I think that that decision was in artful (sic). And it didn't quite -- it dealt confusingly with the burdens as to consent and whether the State has a burden and so forth or whether the defense had the burden. *I do believe it uses language to the effect that the defendant had the burden, but I don't think that the defendant has to establish the defense*. When I think of establishing defenses I think of putting on witnesses, exhibits, and so forth and that this sentence is inappropriate because it can confuse the jury. *They could go back into the deliberation room and think well, what did the defendant do*? What did his attorney do? What exhibits did he admit? What testimony did he put on that established this defense regardless of what the State did? *And it's my presumption that the defense doesn't have to do anything*. If the defense is established by the State's witnesses, by the State's exhibits and so forth. Then, not only can the defense argue it, but the defense can be establish it. So it's unnecessarily confusing for the jury and I would object to it.

(Emphasis added). Here, as in *Lynch*, defense counsel argued that the consent instruction improperly imposed upon the defendant the obligation to present an affirmative defense. Like the defense counsel in *Lynch*, Colbert's counsel objected to the consent instruction because it effectively shifted the burden of proof to the defendant and required the defense to affirmatively present evidence to support the affirmative defense. Similarly, in alleging the misjoinder claim,

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[3] The defense's proposed instructions are attached as Exhibit C.

[4] *See* Exhibit B (State's Proposed Jury Instruction, p. 15, WPIC 45.04).

[5] *State v. Camara*, 113 Wash.2d 631, 781 P.2d 483 (1989).

Colbert's appellate counsel argued that the jury instructions violated Colbert's due process right to a fair trial by blurring and shifting the burden of proof.

4. The Jury Instructions Concerning Consent Violated Colbert's Sixth Amendment Right To Control His Defense And His Fifth Amendment And Fourteenth Amendment Right To Due Process By Imposing The Burden To Establish An Affirmative Defense And Relieving The State Of Its Burden To Establish Each Element Of The Offenses Charged.

In denying Colbert's objection to the jury instructions concerning consent, the trial court violated Colbert's Sixth Amendment right to control his defense and his Fifth Amendment and Fourteenth Amendment right to due process. The trial court ruled as follows:

> All right. I think you're concerned (sic) about the consent defense instruction is properly addressed by paragraph 5 of Instruction Number 1. And if you're concerned about that, that paragraph what you should focus on, every party is entitled the benefit of the evidence whether produced by that party or by another party.

Paragraph five of Instruction No. 1, to which the trial court referred, states:

> In determining whether any proposition has been proved; you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

See Exhibit A (Trial Court's Instructions, Instruction No. 1). The trial court's reliance on this portion of Instruction No. 1 falls far short of safeguarding Colbert's Sixth Amendment right to control his defense, and his due process right under *In re Winship*, 397 U.S. 358, 364 (1970), resting the burden on the State to establish proof of guilt beyond a reasonable doubt.

Clearly, then, Colbert may raise his Sixth Amendment and due process claims in a personal restraint petition because they are based on significant changes in the law as established by the following decisions rendered by the Washington State Supreme Court and the United States Supreme Court in 2013: *State v. Lynch*, ___ Wash.2d ___, 309 P.3d 482 (Wash. Sup. Ct.

2013); *State v. Coristine*, 177 Wash.2d 370, 375, 300 P.3d 400 (2013); and *Smith v. United States*, ___ U.S. ___, 133 S. Ct. 714, 184 L.Ed.2d 570 (2013).

C. COLBERT'S PERSONAL RESTRAINT PETITION SHOULD NOT BE PROCEDURALLY BARRED UNDER WASHINGTON STATE LAW.

Washington State law should not procedurally bar Colbert's new personal restraint petition because Colbert has not been dilatory in seeking collateral relief, and because there has been a significant change in the law which may be applied retroactively.

1. Washington State's Statute of Limitations Does Not Apply Where There Has Been A Significant Change In The Law.

According to RCW 10.73.090, a collateral attack may not be filed "more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." The Washington Supreme Court emphasized that RCW 10.73.100 contains "broad exceptions" to the one-year statute of limitations, including later developments in the law which bring into question "the continued validity and fairness of the petitioner's incarceration." *In re Greening*, 141 Wash.2d 687, 697, 9 P.3d 206, 212 (2000) (quoting *In re Personal Restraint of Runyan*, 121 Wash.2d 432, 440, 444-45, 853 P.2d 424 (1993)). Significantly, RCW 10.73.100(6) provides that the one-year time limit does not apply if:

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

The Washington Supreme Court has repeatedly held that appellate court decisions can effect a significant change in the law warranting an exception to the one-year statute of limitations.[6]

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[6] *See, e.g., In re Jeffries,* 114 Wash.2d 485, 488, 789 P.2d 731,735 (1990); *In re Taylor*, 105 Wash.2d 683, 686-89, 717 P.2d 755, 757-58 (1986); *In re Vandervlugt*, 120 Wash.2d 427, 432-35, 842 P.2d 950, 953-54 (1992).

The Washington Supreme Court specified that while litigants have a duty to raise available arguments in a timely fashion and may later be procedurally penalized for failing to do so, they should not be faulted for having omitted arguments that were essentially unavailable at the time. *In re Greening*, 141 Wash.2d 687, 697, 9 P.3d 206, 212 (2000). Where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a "significant change in the law" for purposes of exemption from procedural bars. *Id.* One test to determine whether an appellate decision represents a significant change in the law is whether the defendant could have argued the issue before publication of the decision. *In re Stoudmire*, 145 Wash.2d 258, 264, 36 P.3d 1005, 1008 (2001).

In Colbert's case, the statute of limitations has not expired because these decisions constituting a significant change in the law were rendered less than one year from now. Indeed, the Washington State Supreme Court decided *Lynch* on September 19, 2013, and *Coristine* on May 9, 2013. The United States Supreme Court decided Smith on January 9, 2013. In short, Colbert has not been dilatory in seeking relief.

2. Washington State's Successive Petitions Rule Does Not Bar Review Where There Is A Material Intervening Change In The Law.

Rule 16.4(d) of the Washington Rules of Appellate Procedure provides, in part, that "[n]o more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown."[7] A successive petition seeks "similar relief" if it either renews claims already "previously heard and determined" on the merits or raises "new" issues in

[7] RCW 10.73.140 also limits successive personal restraint petitions. However, RCW 10.73.140 does not limit the Washington Supreme Court's power of review as the Washington Supreme Court has original jurisdiction of post-conviction relief proceedings. *In re Personal Restraint Petition of Johnson*, 131 Wn.2d 558, 563-66, 933 P.2d 1019, 1021-22 (1997).

violation of the abuse of the writ doctrine. *In re Greening*, 141 Wash.2d 687, 699, 9 P.3d 206, 212 (2000).

The successive petition rule set forth in RAP 16.4(d) applies only to successor personal restraint petitions raising a similar claim and not a different claim. *In re Stoudmire*, 145 Wash.2d 258, 264, 36 P.3d 1005, 1008 (2001); *In re Haverty*, 101 Wn.2d 498, 503, 681 P.2d 835 (1984). Colbert's misjoinder claim has previously been heard and determined by the Washington State appellate courts. However, RAP 16.4(d) does not bar Colbert from asserting the prospective Sixth Amendment claim and due process claim because those claims do not simply repeat or reframe the misjoinder claim.

Even if Colbert's prospective Sixth Amendment and due process claims are held to have been previously heard and determined, his claims should not be barred as successive because they are based on a material intervening change in the law. The Washington Supreme Court has interpreted RAP 16.4(d) to mean that an issue that was heard and determined on appeal or in a prior petition cannot be heard on the merits in a personal restraint petition unless the petitioner can show that the "ends of justice" would be served by re-hearing the issue. *In re Taylor*, 105 Wn.2d 485, 489, 780 P.2d 731 (1986). The Washington Supreme Court has repeatedly held that the "ends of justice" are served where there is an intervening change in the law. *E.g., State v. Evans*, 154 Wash.2d 438, 455, 114 P.3d 627, 636 (2005); *In re Personal Restraint of Vandervlugt*, 120 Wash.2d 427, 432–35, 842 P.2d 950 (1992). Whether the ends of justice would be served by reconsideration will depend upon the nature of the issue raised, the extent to which the refinement constitutes a change in the law, and the seriousness of the consequences of error. *In re Jeffries*, 114 Wn.2d 485, 489, 789 P.2d 731 (1990).

3. Colbert's Prospective Claims Are Not Barred By Washington State's Statute Of Limitations Or The Rule Against Successive Attacks Because Colbert's Claims Are Based On Significant Intervening Changes In The Law.

There are significant intervening changes in the law which are material to Colbert's case and call into question the fairness of Colbert's conviction. Indeed, the United States Supreme Court and the Washington Supreme Court have issued significant new decisions concerning jury instructions which impose upon defendants facing rape charges the burden of proving the affirmative defense of consent. The relevant decisions which constitute significant intervening changes in the law are as follows: *Smith v. United States*, ___ U.S. ___, 133 S. Ct. 714, 184 L.Ed.2d 570 (2013); *State v. Lynch*, ___ Wash.2d ___, 309 P.3d 482 (Wash. Sup. Ct. 2013); and *State v. Coristine*, 177 Wash.2d 370, 375, 300 P.3d 400 (2013). The majority and concurring opinions in *Lynch* make it clear that until these decisions were rendered in 2013, there was no clear basis to assert the Sixth Amendment and due process claims concerning jury instructions which impose the affirmative defense of consent and shift the burden of proof away from the State. *See Lynch*, 309 P.3d at 486 ("*Coristine* is *dispositive* in resolving this case"). *See also Lynch*, 309 P.3d at 490 (Gordon McLeod, concurring) (*Smith* "clarified" that the State must always bear the burden of disproving the defense).

4. Because The Sixth Amendment And Due Process Claims Rest On Statutory Interpretation, The New Washington State Supreme Court And United States Supreme Court Case Law May Be Applied Retroactively To Colbert's Prospective Claims.

The holdings in *Smith*, *Lynch* and *Coristine* may be applied retroactively because they rest on statutory interpretation, and because Washington State's second degree rape statute (RCW 9A.44.050(l)(a)), was enacted in 1975, long before Colbert's conviction became final.

In Washington State, the statutory construction by the state's highest court operates as if that construction was originally written into the statute. *In re Moore*, 116 Wash.2d 30, 37, 803

P.2d 300 (1991). Indeed, in construing a statute, the Washington Supreme Court effectively sets out what the statute has meant since the statute's enactment. *In re Hinton*, 152 Wash.2d 853, 860, 100 P.3d 801, 804 (2004). *See also State v. Moen*, 129 Wash.2d 535, 538, 919 P.2d 69 (1996).

The Washington Supreme Court has repeatedly given retroactive effect in collateral proceedings in which the petitioner's claims require statutory interpretation. *See In re Grasso*, 151 Wash.2d 1, 11-12, 84 P.3d 859, 864-65 (2004); *Matter of Vandervlugt*, 120 Wash.2d 427, 436, 842 P.2d 950, 955 (1992). Colbert's claims should not be barred because even though the majority in *Lynch* focused on the violation of the defendant's Sixth Amendment right to control his defense, the majority relied on statutory interpretation in holding that the constitutional error was not harmless. As Justice Gordon McCloud pointed out in her concurring opinion:

> The reason the instruction caused so much harm, though, is not just that it was unwanted. The major harm was caused by the fact that the unwanted instruction was itself unconstitutional. *As the majority states*, "The consent instruction imposed a burden on Lynch that was greater than the burden necessary to create a reasonable doubt about forcible compulsion." *Id.* at 8, 300 P.3d 400 (citing *Martin v. Ohio*, 480 U.S. 228, 234, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987)).

Id. at 487 (emphasis added). Here, Justice Gordon McCloud noted that the majority recognized that the consent instruction improperly shifted the burden of proof by relieving the State from proving beyond a reasonable doubt the elements of rape in the second degree. In addressing the proper apportionment of the burden of proof, the majority effectively interpreted Washington State's second degree rape statute. Indeed, as Justice Gordon McCloud specified, the apportionment of the burden of proof to show consent is tied to the proper construction of Washington's rape statutes. Justice Gordon McCloud explained:

> In fact, that unwanted instruction impermissibly shifted the burden on that element away from the State and on to Mr. Lynch. Such impermissible shifting of the burden of proof is a Fourteenth Amendment due process clause problem. The

> source of that problem is this court's decisions in *State v. Camara*, 113 Wash.2d 631, 781 P.2d 483 (1989) and *State v. Gregory*, 158 Wash.2d 759, 147 P.3d 1201 (2006). It is now clear that those two decisions conflict directly with United States Supreme Court precedent interpreting the due process clause. They also misconstrue *the legislative intent embodied in Washington's rape laws*.

Id. at 487 (emphasis added).

In evaluating whether the jury instruction resulted in a due process violation, Justice Gordon McCloud engaged in an extensive and thorough statutory construction. She interpreted the language of the second degree rape statute, analyzed the structure and language of the chapter concerning sex offenses (RCW 9A.44 et seq.), provided an extensive history of Washington State's rape laws, and analyzed the legislative history of Washington State's rape laws. *Lynch*, 309 P.3d at 490-97. Justice Gordon McCloud stated that the Washington State Legislature clearly did not intend to exclude consent as an element of rape, and that the Legislature intentionally declined to impose upon the defendant the burden of proving consent for second degree rape. *Id.* at 491-92.

In sum, Colbert's claims should not be barred on non-retroactivity grounds because the Washington Supreme Court in *Lynch* relied on statutory interpretation in determining whether to reverse the conviction. This conclusion is not changed by the fact that the Washington Supreme Court majority recognized that the consent instruction derived from a pattern jury instruction, and that the Sixth Amendment violation occurred even though the jury instruction constitutes an accurate statement of the law. *Lynch*, 309 P.3d at 486. Indeed, the majority and concurring opinions in *Lynch* made it clear that the violation was not harmless because it imposed a burden on the defendant which was greater than the burden necessary to create a reasonable doubt about the element of forcible compulsion. *Id.* at 486-87.

5. Even If Colbert's Claims Rely On A "New Rule," The Holdings And Analysis In The Recent Decisions By The Washington State Supreme Court And United States Supreme Court Case May Be Applied Retroactively Because The Consent Instruction In Colbert's Case Improperly Criminalized Conduct Beyond The Power Of The State To Proscribe By Shifting The Burden Of Proof To The Defendant.

The Washington Supreme Court has attempted to stay in step with federal retroactivity analysis. *In re St. Pierre*, 118 Wash.2d 321, 324, 823 P.2d 492, 494 (1992). Following the test adopted by the United States Supreme Court in *Teague v. Lane*, 489 U.S. 288, 311 (1989) (O'Connor, J., opinion), the Washington Supreme Court has provided that a new rule will not be given retroactive application to cases on collateral review except where either (1) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (2) the rule requires the observance of procedures implicit in the concept of ordered liberty. *St. Pierre*, 118 Wash.2d at 324, 823 P.2d at 495. Nonretroactivity is presumed if the new constitutional rule affects only procedure. However, if the new constitutional ruling affects substantive criminal law, the nonretroactivity presumption does not apply. *See Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

The holdings and analysis in *Lynch*, *Coristine* and *Smith* may be applied retroactively based on the first *Teague* exception allowing for review where the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe. Indeed, the consent instruction in Colbert's case is constitutionally infirm because it created two classes of defendants – one class which may be properly convicted based on proof beyond a reasonable doubt of all the elements of second degree rape, including forcible compulsion; and another class of defendants who may be convicted for same conduct based on evidence falling short of proof beyond a reasonable doubt.

Significantly, the majority in *Lynch* recognized that the improper consent instruction was not harmless because:

> The consent instruction imposed a burden on Lynch that was greater than the burden necessary to create a reasonable doubt about forcible compulsion. *See Martin v. Ohio*, 480 U.S. 228, 234, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (noting that evidence creating a reasonable doubt about an element of a crime "could easily fall far short" of proving a defense by a preponderance of the evidence).

State v. Lynch, 309 P.3d 482, 486 (Wash. Sup. Ct. 2013). As the Washington Supreme Court in *Lynch* recognized in citing *Martin v. Ohio*, there may be cases in which the evidence creates a reasonable doubt about an element of the crime, yet "falls far short" of establishing the affirmative defense. Under these circumstances, an impermissible class of defendants is created in rape cases. Specifically, the consent instruction creates a class of defendants whereby there is sufficient evidence to create doubt about the element of forcible compulsion, but insufficient evidence to prove the affirmative defense of consent. This distinction, created by the affirmative defense instruction impermissibly places "certain kinds of primary, private individual conduct beyond the power of the state to proscribe." *See St. Pierre*, 118 Wash.2d at 324, 823 P.2d at 495.

Because *Lynch*, *Coristine* and *Smith* create a substantive rule, rather than merely a procedural rule, their holdings are retroactive. Indeed, these cases establish that imposing an affirmative defense which negates an element of a crime is improper because it criminalizes conduct which is beyond the power of the State to proscribe. The affirmative defense instruction for consent creates a fatal gap between the levels of proof required to establish guilt. In Colbert's case, the jury may have determined that the evidence established reasonable doubt as to the element of forcible compulsion, but that Colbert fell short of establishing the affirmative defense of consent.

In a "he said, she said" case such as the prosecution's case against Colbert, the affirmative defense instruction creates a significant risk that the defendant may be convicted based on evidence falling short of proof beyond a reasonable doubt. Accordingly, Colbert's claims should be reviewed in state court because the consent instruction allows for conviction of a non-existent crime. *See In re Hinton*, 152 Wash. 2d 853, 857-58, 100 P.3d 801, 803 (2004). Because Colbert may show that he was convicted of a non-existent crime, he may show a fundamental constitutional error that actually and substantially prejudiced him. *See Hinton*, 152 Wash.2d at 859-60, 100 P.3d at 804.

Exhibit #1

"Instructions of the Court"

KAGIT COUNTY, WASH
FILED

FEB 8 - 2005

NANCY K. SCOTT, CO. CLERK
By: Deputy

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

STATE OF WASHINGTON	)	
Plaintiff,	)	
vs:	)	No. 04-1-00497-6
BOBBY D. COLBERT	)	
Defendants,	)	

INSTRUCTIONS OF THE COURT

Submitted to the jury this 8 day of February, 2005.

Susan K. Cook
JUDGE

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instructions or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness'

memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement, or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and duty to make any objections which they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit me to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The state is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the 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. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based upon your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

You may give such weight and credibility to any alleged out-of-court statement of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 7

A person commits the crime of rape in the third degree when that person engages in sexual intercourse with another person not married to the perpetrator where the victim did not consent to sexual intercourse with the perpetrator, and such lack of consent was clearly expressed by the victim's words or conduct.

INSTRUCTION NO. 8

To convict the defendant of the crime of rape in the third degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 29th day of November, 2003, the defendant engaged in sexual intercourse with Brandi L. Jones;

(2) That Brandi L. Jones was not married to the defendant;

(3) That Brandi L. Jones did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 9

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight.

INSTRUCTION NO. 10

Married means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in court for legal separation or for dissolution of the marriage.

INSTRUCTION NO. 11

Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

INSTRUCTION NO. 12

A person commits the crime of rape in the second degree when that person engages in sexual intercourse with another person by forcible compulsion.

INSTRUCTION NO. 13

To convict the defendant of the crime of rape in the second degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 18th day of March, 2004, the defendant engaged in sexual intercourse with Kelly L. Peterson; and

(2) That the sexual intercourse occurred by forcible compulsion; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

Forcible compulsion means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped.

INSTRUCTION NO. 15

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

INSTRUCTION NO. 16

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Rape in the Second Degree necessarily includes the lesser crime of Rape in the Third Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 17

To convict the defendant of the crime of Rape in the Third Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 18th day of March, 2004, the defendant engaged in sexual intercourse with Kelly Peterson;

(2) That Kelly Peterson was not married to the defendant;

(3) That Kelly Peterson did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 19

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreperson. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and three Verdict Forms, A, B and C.

When completing the Verdict Forms, you will first consider the crime of Rape in the Third Degree as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form A the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

You will next consider the crime of Rape in the Second Degree as charged in Count II. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

If you find the defendant guilty on Verdict Form B, do not use Verdict Form C. If you find the defendant not guilty of the crime of Rape in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Rape in the Third Degree. If you unanimously agree on a verdict, write in Verdict Form C the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form C.

If you find the defendant guilty of the crime of Rape but have a reasonable doubt as to which of two degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on Verdict Form B and to find the defendant guilty of the lesser included crime of Rape in the Third Degree on Verdict Form C.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The foreperson will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

Exhibit # 2

"State's Proposed Instructions"

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2005 FEB -2 PM 1:58

SUPERIOR COURT OF WASHINGTON COUNTY OF SKAGIT	
STATE OF WASHINGTON, Plaintiff, vs. BOBBY D. COLBERT, Defendant.	NO: 04-1-00497-6 STATE'S PROPOSED INSTRUCTIONS TO THE JURY (WITH CITATIONS)

COMES NOW the State of Washington by and through the Skagit County Prosecuting Attorney and presents the attached instructions to the jury.

DATED: January 26, 2005.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: Dona Bracke
DONA BRACKE, WSBA#29753
Chief Criminal Deputy Prosecuting Attorney

ORIGINAL

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

INSTRUCTIONS OF THE COURT

Submitted to the jury this _____ day of January, 2005.

_____
JUDGE

INSTRUCTION NO. _____

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instructions or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness'

memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement, or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and duty to make any objections which they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit me to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

WPIC 1.02 (2nd ed.)

INSTRUCTION NO.____

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The state is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the 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. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based upon your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

WPIC 4.01A

INSTRUCTION NO. _____

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

WPIC 1.04 (2nd ed.)

INSTRUCTION NO. _____

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

WPIC 5.01 (2nd ed.)

INSTRUCTION NO. _____

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

WPIC 6.51 (2nd ed.)

INSTRUCTION NO._____

A person commits the crime of rape in the third degree when that person engages in sexual intercourse with another person not married to the perpetrator where the victim did not consent to sexual intercourse with the perpetrator, and such lack of consent was clearly expressed by the victim's words or conduct.

WPIC 42.01

INSTRUCTION NO._____

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

WPIC 10.01

INSTRUCTION No. _____

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

WPIC 10.02

INSTRUCTION NO. ____

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight, or

any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, or

any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

WPIC 45.01

INSTRUCTION NO. ____

Married means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in court for legal separation or for dissolution of the marriage.

WPIC 45.06

INSTRUCTION NO. _____

Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

WPIC 45.04

||

INSTRUCTION NO. _____

To convict the defendant of the crime of rape in the third degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 29th day of November, 2003, the defendant engaged in sexual intercourse with Brandi L. Jones;

(2) That Brandi L. Jones was not married to the defendant;

(3) That Brandi L. Jones did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 42.02

INSTRUCTION NO. ____

A person commits the crime of rape in the second degree when that person engages in sexual intercourse with another person by forcible compulsion.

WPIC 41.01

INSTRUCTION NO. ____

Forcible compulsion means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped.

WPIC 45.03

INSTRUCTION NO. ____

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

WPIC 45.04

INSTRUCTION NO. _____

To convict the defendant of the crime of rape in the second degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 18th day of March, 2004, the defendant engaged in sexual intercourse with Kelly L. Peterson; and

(2) That the sexual intercourse occurred by forcible compulsion; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 41.02

INSTRUCTION NO. _____

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

WPIC 3.01

INSTRUCTION NO. _____

Upon retiring to the jury room for your deliberations of this case, your first duty is to select a foreperson. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence; these instructions, and a verdict form for each count.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The foreperson will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

WPIC 151.00 (2nd ed.)

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

We, the jury, find the defendant, BOBBY D. COLBERT, _____ (write in guilty or not guilty) of the crime of RAPE IN THE THIRD DEGREE, as charged in Count I.

DATED this _____ day of _____, 20____.

_____
FOREPERSON

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

We, the jury, find the defendant, BOBBY D. COLBERT, _____(write in guilty or not guilty) of the crime of RAPE IN THE SECOND DEGREE, as charged in Count II.

DATED this _____ day of _____, 20_____.

_____
FOREPERSON

Exhibit # 3

"Defendant's Proposed Instructions"

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2005 FEB -3 PM 12:02

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

STATE OF WASHINGTON Plaintiff, vs. BOBBY D. COLBERT, Defendant.	NO. 04-1-00497-6 DEFENDANT'S PROPOSED JURY INSTRUCTIONS

COMES NOW the Defendant, BOBBY D. COLBERT, by and through counsel, GLEN C. HOFF, Chief Deputy Public Defender and proposes the attached Jury Instructions in the above-captioned cause.

DATED this 2 day of February 2005.

SKAGIT COUNTY PUBLIC DEFENDER

GLEN C. HOFF, WSBA #24645

ORIGINAL

SKAGIT COUNTY PUBLIC DEFENDER
121 BROADWAY
MOUNT VERNON, WA 98273
(360) 336-9405

INSTRUCTION NO.

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the 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. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

WPIC 4.01 A

INSTRUCTION NO.

As jurors, you have the duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

WPIC 1.04

INSTRUCTION NO.

You may give such weight and credibility to any alleged out-of-court statement of the defendant as you see fit, taking into consideration the surrounding circumstances.

WPIC 6.41

INSTRUCTION NO.

You are the sole judges of the credibility of the witness and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

WPIC 6.01

INSTRUCTION NO.

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Rape in the Second Degree necessarily includes the lesser crime of Rape in the Third Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

WPIC 4.11

INSTRUCTION NO.

To convict the defendant of the crime of Rape in the Third Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 18th day of March, 2004, the defendant engaged in sexual intercourse with Kelly Peterson;

(2) That Kelly Peterson was not married to the defendant;

(3) That Kelly Peterson did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

wpic 42.02

INSTRUCTION NO.

Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

INSTRUCTION NO.

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

WPIC 3.01

INSTRUCTION NO.

Forcible compulsion means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person in fear of being kidnapped or that another person will be kidnapped.

wpic 45.03

INSTRUCTION NO.

Married means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in court for legal separation or for dissolution of the marriage.

wpic 45.06

INSTRUCTION NO.

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreperson. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and three Verdict Forms, A, B and C.

When completing the Verdict Forms, you will first consider the crime of Rape in the Third Degree as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form A the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

You will next consider the crime of Rape in the Second Degree as charged in Count II. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

If you find the defendant guilty on Verdict Form B, do not use Verdict Form C. If you find the defendant not guilty of the crime of Rape in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Rape in the Third Degree. If you unanimously agree on a verdict, write in Verdict Form C the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form C.

WPIC 155.00

If you find the defendant guilty of the crime of Rape but have a reasonable doubt as to which of two degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on Verdict Form B and to find the defendant guilty of the lesser included crime of Rape in the Third Degree on Verdict Form C.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The foreperson will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

WPIC 155.00

INSTRUCTION NO.

Consent is a defense to a charge of Rape in the Second Degree. This defense must be established by a preponderance of the evidence.

STATE V. CAMARA, 113Wn.2d 631, 781 p.2d 483 (1989)

INSTRUCTION NO.

Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

* NOTE TO COURT *

89707-7

THIS COURT in In re W.R. granted review of a similar issue (the due process — negating an element issue) that Colbert presents for review.

13 DEC 26 AM 8:16
BY RONALD R. CARPENTER

Bobby Colbert

12-23-13

2014 JAN 27 PM 1:13

COURT OF APPEALS OF THE

STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, V. BOBBY COLBERT, Petitioner.	CASE NO. 71388-4-1 AMENDMENT TO PRP

1. IDENTITY

I, Bobby Darrell Colbert, pro se, MOVES this Court to amend the before-mentioned Personal Restraint Petition filed 12-26-13.

2. GROUNDS

Petitioner Colbert amends his PRP with Verbatim Report of Proceedings specifically referenced in Section B (3) of the PRP.

* NOTE TO COURT *

This excerpt of record was filed in this Court of Appeals Division One on November 14, 2005.

3. ARGUMENT

Petitioner Colbert submits these documents because they are directly relevant to the issue of whether his trial counsel objected to the challenged jury instructions.

Without reviewing these documents, it is impossible to properly determine Colbert's PRP issue. Due dilligence obtaining and presenting these certified documents as material evidence has been exercised concerning proof that this issue was preserved for appeal.

While the State has the resources and easy access to the courts to obtain relevant portions of the state court record, Petitioner Colbert does not want to be faulted, nor incorrectly concluded, as presenting an issue too vague and conclusory to merit this Court's consideration.

4. CONCLUSION

Petitioner Colbert amends his PRP to ensure an adequate record for review.

Bobby Colbert
1-23-14

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR SKAGIT COUNTY

FIL
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SKAGIT CO
2005 NOV -9

State of Washington,	) Skagit County Cause
	) No. 04-1-00497-6
Plaintiff,	)
	)
	) Court of Appeals
vs.	) No. 56298-3-I
	)
	) 61160-7
Bobby Colbert,	)
	)
	)
Defendant.	)

FILED
COURT OF APPEALS DIV #1
2005 NOV 14 PM 2:04

VERBATIM REPORT OF PROCEEDINGS

The Honorable Susan K. Cook
Department III
Skagit County Courthouse
Mount Vernon, Washington 98273

APPEARANCES:

For the Plaintiff: DONA BRACKE
Chief Criminal Deputy
Skagit County Prosecuting Attorney
605 South 3rd - Courthouse Annex
Mount Vernon, WA 98273

For the Defendant: GLEN C. HOFF
Skagit County Public Defender
121 West Broadway
Mount Vernon, WA 98273

ALSO PRESENT: DETECTIVE JOEL McCLOUD

DATE: February 8, 2005

REPORTED BY: Jennifer Schroeder, RPR, CCR #2221

EXHIBIT 26

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9:30 a.m.

--oo0oo--

THE COURT: Welcome back, ladies and gentlemen. Be seated.

All right you're still under oath, Detective.

MS. BRACKE: I have no further questions for Detective McCloud.

THE COURT: All right. Mr. Hoff?

MR. HOFF: Thank you, Your Honor.

RECROSS EXAMINATION

BY MR. HOFF:

Q. Good morning, Detective.

A. Good morning.

Q. You mentioned that you examined the doorknob or a door over at Kelly Peterson's house?

A. Yes.

Q. That was in the month of February 2005?

A. Correct.

Q. During this trial?

A. Yes.

Q. And that particular doorknob did you test the knob itself?

A. I do not believe I turned the knob, no.

Q. So you don't know whether there's metal on metal clicking that would take place if you turned the knob back and forth?

A. No, I don't.

1 MR. HOFF: No further questions. Thank you.
2 THE COURT: Ms. Bracke?
3 MS. BRACKE: Nothing further.
4 THE COURT: Thank you.
5 MS. BRACKE: The State has no further witnesses
6 on rebuttal, Your Honor.
7 THE COURT: Mr. Hoff?
8 MR. HOFF: Your Honor, the defense has no further
9 witnesses.
10 THE COURT: All right. Ladies and gentlemen,
11 that concludes the testimony portion of the case. We're
12 going to take a sort recess because it kind of took me by
13 surprise here. We're going to need to make copies of jury
14 instructions here so when we go through these you have your
15 own copy. Like I told you, our copy machine is the kind
16 that runs by the little dinosaur; so it takes a little while
17 to do that run to the deliberation room. We'll get that
18 done quickly.
19 (Jury not present).
20 We have here the Court's instructions 1 through
21 19. I think even in light of the comments made by Mr. Hoff
22 I'm satisfied these are adequate to allow the two of you to
23 argue your cases, and that they are a correct statement of
24 the law. So at this point we need to do exceptions and
25 objections.

1 Ms. Bracke.
2 MS. BRACKE: The State has no exceptions or
3 objections.
4 THE COURT: Mr. Hoff?
5 MR. HOFF: The defense objects to the States
6 inclusion of 4.01(a). For the record defense offers 4.01(a)
7 as well. If you see the defense's proposed instruction.
8 It's the one in the text. I believe rather than the one
9 that's the amended part. And I would state that the third
10 sentence in the third paragraph of 4.01(a) as amended quote.
11 There are very few things in this world that we know with
12 absolute certainty. And in criminal cases the law does not
13 require proof that overcomes every doubt. I submit that that
14 is a misstatement of the law and not an appropriate
15 instruction. My reasoning for that is that that's a
16 statement; not the only statement sitting by itself, but
17 also that statement read in context of the instructions,
18 instructs the jury that it can toss out reasonable doubt
19 because that phrase every doubt includes both reasonable and
20 unreasonable doubts. And, therefore, I believe that it is a
21 misstatement of the law and object to it.
22 The other objection the defense has is that, is
23 the inclusion of the State's 45.04. And my objection is
24 based upon, with exception to the last statement, I think
25 it's, while inconsistent, the second sentence preponderance

1 of the evidence means you must be persuaded. I think that's
2 appropriately September 4th in another instruction. But
3 that is kind of a structural objection. And I don't think
4 that that is a misstatement of the law at all. But then it
5 says if you find that the defendant has established this
6 defense it will be your duty to return a verdict of not
7 guilty. I think that that's inappropriate because -- I guess
8 I'll cite State v. Camara for this proposition. I think that
9 that decision was in artful. And it didn't quite -- it
10 dealt confusingly with the burdens as to consent and whether
11 the State has a burden and so forth or whether the defense
12 had the burden. I do believe it uses language to the effect
13 that the defendant had the burden, but I don't think that
14 the defendant has to establish the defense. When I think of
15 establishing defenses I think of putting on witnesses,
16 exhibits, and so forth and that this sentence is
17 inappropriate because it can confuse the jury. They could
18 go back into the deliberation room and think well, what did
19 the defendant do? What did his attorney do? What exhibits
20 did he admit? What testimony did he put on that established
21 this defense regardless of what the State did? And it's my
22 presumption that the defense doesn't have to do anything.
23 If the defense is established by the State's witnesses, by
24 the State's exhibits and so forth. Then, not only can the
25 defense argue it, but the defense can be establish it. So

1 it's unnecessarily confusing for the jury and I would object
2 to it.
3 THE COURT: All right. Thank you, Mr. Hoff.
4 Anything anymore, any others?
5 MR. HOFF: No, Your Honor.
6 THE COURT: All right. I think you're concerned
7 about the consent defense instruction is properly addressed
8 by paragraph 5 of Instruction Number 1. And if you're
9 concerned about that, that paragraph what you should focus
10 on, every party is entitled the benefit of the evidence
11 whether produced by that party or by another party.
12 So at this point I think we've got a package. And
13 I'll get the bailiff to copy those off. As soon as they are
14 ready we'll instruct and argue. How long do you think you'll
15 be with the first session?
16 MS. BRACKE: 25 minutes.
17 MR. HOFF: Your Honor, I think I will be about
18 40.
19 THE COURT: Should I leave an hour, hour and a
20 half?
21 MR. HOFF: Probably perhaps.
22 THE COURT: Maybe we can get done by noon.
23 MS. BRACKE: That's my goal.
24 MR. HOFF: I think we may be able to. The other
25 thing because, as you know, I probably brought a dozen