

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Whether there was substantial evidence to support the court's finding that the defendant used forcible compulsion when he raped C.S. as charged in Count IV? 1

 2. Whether the defendant's claim that he was unlawfully disenfranchised of his right to vote is not properly before this court on this case? 1

 3. Whether the authority the defendant relies upon for his claim that he was unlawfully disenfranchised of his right to vote is neither precedential nor persuasive authority? 1

B. STATEMENT OF THE CASE 1

 1. Procedure..... 1

 2. Facts 2

C. ARGUMENT..... 8

 1. SUFFICIENT EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING REGARDING FORCIBLE COMPULSION..... 8

 2. CLAY'S CLAIM THAT HE WAS IMPROPERLY DISENFRANCHISED OF HIS VOTING RIGHTS IS NOT PROPERLY RAISED UNDER THIS CAUSE NUMBER AND SHOULD BE FILED SEPARATELY AS AN INDEPENDENT CIVIL ACTION. 14

 3. CLAY'S CLAIM THAT HE WAS IMPROPERLY DISENFRANCHISED OF HIS VOTING RIGHTS IS WITHOUT SUBSTANTIVE MERIT. 15

D. CONCLUSION. 18

Table of Authorities

State Cases

<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	9
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <i>review denied</i> , 111 Wn.2d 1033 (1988)	9
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	9
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1008 (1987).....	9
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985)	10
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	9
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	9
<i>State v. Hovig</i> , 149 Wn. App. 1, 8, 202 P.3d 318 (2009).....	8
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	9
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	9
<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	8
<i>State v. McKnight</i> , 54 Wn. App. 521, 528, 774 P.2d 532 (1989).....	11
<i>State v. Ritola</i> , 63 Wn. App. 252, 817 P.2d 1390 (1991).....	11
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	9
<i>State v. Stevenson</i> , 128 Wn. App. 179, 193, 114 P.3d 699 (2005).....	8
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	9
<i>State v. Weisberg</i> , 65 Wn. App. 721, 725, 829 P.2d 525 (1992)	11

Federal and Other Jurisdictions

Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010) 15, 16, 17, 18

Farrakhan v. Gregoire, No. CV-96-076-RHW 2006
WL 1889273 (E.D. Wash. 2006)..... 16

Farrakhan v. Washington, 338 F.3d 109 (9th Cir. 2003), *cert. denied*,
543 U.S. 984, 125 S. Ct. 477, 160 L. Ed. 2d 365 (2004)..... 17

Constitutional Provisions

Article VI, § 3, Washington State Constitution..... 14

Statutes

Laws of Washington 2005 c. 325, sec. 1, effective June 4, 2009) 15

RCW 29A.04.079 14

RCW 29A.08.520(5)..... 15

Rules and Regulations

RAP 2.2(a)..... 14

RAP 2.2(a)(1) 14

RAP 2.3(a)..... 14

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether there was substantial evidence to support the court's finding that the defendant used forcible compulsion when he raped C.S. as charged in Count IV?
2. Whether the defendant's claim that he was unlawfully disenfranchised of his right to vote is not properly before this court on this case?
3. Whether the authority the defendant relies upon for his claim that he was unlawfully disenfranchised of his right to vote is neither precedential nor persuasive authority?

B. STATEMENT OF THE CASE.

1. Procedure

On December 12, 2008 the State charged the defendant, Avery Clay, with three counts of rape of a child in the second degree based on an incident that occurred on May 1, 2007 with regard to a single victim. CP 1-2. On March 31, 2009 the State filed an amended information that added a fourth count of rape in the second degree by forcible compulsion with minor victim enhancement. CP 5-6.

The case proceeded to a bench trial. CP 11. The court found the defendant guilty as to Counts I, II and IV and dismissed Count III. CP 36, 37-40; 4 RP 138-144. On August 14, 2009 the defendant was sentenced to

25 years to life in prison. CP 41-55. A notice of appeal was timely filed on August 17, 2009. CP 59.

2. Facts

C.S., a female, had known the defendant Avery Clay since she was nine years old by his middle name of Pierre. 4 RP 51, ln. 8 to p. 52, ln. 5. Clay was a friend of C.S.'s biological mother who would come around and talk to C.S.'s mother. 4 RP 51, ln. 12-21. Although she didn't know Clay that well, C.S. thought of him as something like a big brother. 4 RP 51, ln. 16-21.

When C.S. was thirteen it had been two years since C.S. had seen Clay. 4 RP 52, ln. 10-15. At that time, C.S. had been a runaway and was living with a foster mother for a year rather than her biological mother. 4 RP 52, ln. 16 to p. 53, ln. 3. Although C.S. and her foster mother were really close at the time of the trial, when she was thirteen C.S. was unhappy with her foster mother who would not let her do things like hang out with her friends. 4 RP 53, ln 10-21. As a result, C.S. ran away and stayed with her boyfriend's family for two weeks. 4 RP 53, ln. 25 to p. 54, ln. 16. While staying at that residence, police showed up with a warrant to search for C.S. because she was a runaway. 4 RP 54, ln. 17 to p. 55, ln. 3. So C.S. jumped out the back window and hid under a turned over couch in the backyard because she didn't want to go home. 4 RP 55, ln. 3-6.

After the police left, C.S. and a friend jumped over a fence and went through some apartments on the other side of it, and then jumped over a second fence. 4 RP 55, ln. 17. There, C.S. saw the defendant, Clay, sitting on the stairs of an apartment building. 4 RP 55, ln. 17 to p. 56, ln. 4; 4 RP 63, ln. 5 to p. 64, ln. 4. She didn't recognize Clay immediately because there was something like banisters on the stair railing that blocked her view. 4 RP 56, ln. 4-9. Clay called C.S. by name to come over. 4 RP 56, ln. 14-20. Clay was alone. 4 RP 56, ln. 24-25. C.S.'s friend claimed to recognize Clay and asked C.S. if she was going to stay with Clay. 4 RP 56, ln. 1-5. C.S. said "yes," at which point her friend went back home. 4 RP 57, ln. 5-6.

C. S. asked Clay for a ride to her friend's house, and Clay said that he had to wait for his sister, so they sat on the stairs for ten minutes. 4 RP 57, ln. 9-14. After that they instead went to Clay's other friend's house and went inside. 4 RP 57, ln. 16-17. Clay's friend had someone coming over, so they had to leave and went back out to sit on the stairs. 4 RP 57, ln. 16-19.

Clay asked C.S. if she wanted to go to the store with him to buy some beer and she said, "yeah." 4 RP 58, ln. 2-4. It took about five minutes to get there and Clay went into the store himself and came out with a 40-ounce Reserve 2/11 malt liquor beer. 4 RP 58, ln. 5-24. They went back to the stairs and each drank about half of the beer. 4 RP 59, ln. 2-12. Clay said he wanted another one and said they were going to the

store to get another one to drink so he would also try to get some more money to buy another one. 4 RP 59, ln. 15-18. He planned to get some more money by pan handling or hustling. 4 RP 59, ln. 20-21. So the two of them returned to the store. 4 RP 59, ln. 22-25. Clay apparently got some more money, went into the store and bought more of the same beer, although in a 20-ounce size the second time. 4 RP 60, 1-10. They returned to the apartment stairs and C.S. had two big gulps of the beer while Clay had the rest. 4 RP 60, 11-18.

It was still a little light out, and Clay's sister had not returned yet, so they walked down to Clay's friend's house by the creek. 4 RP 60, ln. 19-25. Clay went inside his friend's house while C.S. walked down and stood at the creek until he came out about five minutes later and told her it was time to go. 4 RP 61, ln. 1-14. They then returned to the stairs. 4 RP 61, ln. 17-18.

C.S. needed to use the restroom, so they went into the apartment of a friend of Clay's. 4 RP 61, ln. 19-23. C.S. had never been to the apartment before. 4 RP 61, ln. 24-25. The door was answered by a female in her late 30s who had short hair, was really dirty and kept looking out the door and asking if anybody was around. 4 RP 62, ln. 10-19. Clay introduced the female as Terri. 4 RP 72, ln. 9-15. As far as C.S. knew, only the three of them were in the apartment. 4 RP 62, ln. 24 to p. 63, ln.

C.S. went to the restroom and was shutting the door when Clay pushed the door open and said that he had to use the restroom too and came in. 4 RP 62, ln. 21-23; p. 5-9. Clay said that he would stay in there. 4 RP 64, ln. 9-11. C.S. used the restroom and then sat on the edge of the tub while Clay used the restroom. 4 RP 60, ln. 11-13. C.S. went to get up and Clay pushed her so that she fell into the bath tub, whereupon Clay then helped C.S. out. 4 RP 60, ln. 13-14.

C.S. was walking in front of Clay to go out the door when he grabbed her around the abdomen from behind and carried her into a bedroom that was not far away. 4 RP 64, ln. 15-22. C.S. was sitting on a chair and Clay walked to the door, locked the door and turned off the light. 4 RP 65, ln. 10-13. C.S. was scared of what he was going to do, because in her mind she knew what he was about to do. 4 RP 65, ln. 15-21.

Clay pushed C.S. to the floor, grabbed her pants, and pulled them down from the waist, then grabbed from the ankles and pulled them off with her underwear coming off with them. 4 RP 65, ln. 25 to p. 66, ln. 8. Clay then got on top of C.S. who told him to get off of her, but he didn't. 4 RP 66, ln. 10-16. When it started happening, C.S. told Clay she didn't want to have sex with him. 4 RP 67, ln. 13-21. Clay didn't say anything. 4 RP ; 11-12; p. 67, ln. 22-23.

When he got on top of C.S. Clay's pants were pulled down to his ankles and his shirt was off. 4 RP 66, ln. 17-24. C.S.'s shirt was on, and initially she was positioned on her back on the floor. 4 RP 66, ln. 25 to p.

67, ln. 3. Clay was on top of her in the front, on his knees, with his knees off to the side of her. 4 RP 67, ln. 8-11.

Clay's penis then entered C.S.'s vagina. 4 RP 68, ln. 10 to p. 14. This was done without C.S.'s consent and she had told him she didn't want to do that. 4 RP 68, ln. 15-16. C.S. did not physically fight with Clay because he was too big and she was scared. 4 RP 68, ln. 24 to p. 69, ln. 2. C.S. was scared because she thought she could trust Clay and didn't think he would do anything like that. 4 RP 67, ln. 3-5.

C.S. started crying. 4 RP 66, ln. 16. Clay threatened her and said that if she didn't shut up he would break the side of her face. 4 RP 67, ln. 24 to p. 68, ln. 3. Clay then pushed C.S. onto her stomach, pushed her left leg up to her chest and put his penis into her anus. 4 RP 69, ln. 12. This was also without C.S.'s consent. 4 RP 70, ln. 1-2. It went on for about 25 minutes. 4 RP 70, ln. 7-8. Clay then turned C.S. over again and put his penis into her vagina again. 4 RP 67, ln. 22-14.

Clay then sat back on his butt and ordered C.S. to perform oral sex on him. 4 RP 70, ln. 12-13. C.S. said she couldn't, that she was going to get sick and throw up. 4 RP 70, ln. 15-17. Clay said he didn't care, he wanted C.S. to, so she tried, his penis entered his mouth and she gagged. 4 RP 71, ln. 18-25.

Clay then sat back, threw C.S.'s clothes at her and said that they were leaving. 4 RP 72, ln. 5-7. Terri told Clay to leave her [C.S.] alone, don't make her do what she doesn't want to do. 4 RP 73, ln. 17-18. Clay

told Terri to shut up and mind her own business. 4 RP 73, ln. 20. Clay and C.S. left. 4 RP 73, ln. 24-25.

They walked away from the house toward Bridgeport. 4 RP 74, ln. 4. Clay said he was going to take C.S. to her friend's house like she asked in the beginning. 4 RP 74, ln. 8-9. C.S. did not feel comfortable continuing to be around him after what had just happened, but felt that she did not have any choice as to whether he was going to be with her at that point. 4 RP 74, ln. 10-15.

They got to the overpass on Bridgeport when C.S.'s foster mother pulled up behind them. 4 RP 74, ln. 16-23. As her foster mother pulled up, Clay told C.S. to keep her mouth shut and that she better not say anything. 4 RP 74, ln. 24 to p. 75, ln. 4. Her foster mother told C.S. to get in the car, but C.S. kept walking for a minute and then got in the car. 4 RP 75, ln. 6-8. C.S. kept walking for a minute before getting in the car because she was in shock and didn't want to go home. 4 RP 75, ln. 9-10. Clay did not get in the car. 4 RP 75, ln. 19-20.

C.S. told her foster mother what happened right when she got in the car. 4 RP 75, ln. 15-18. C.S. then went to the hospital, where a sexual assault exam was performed. 4 RP 75, ln. 21 to p. 76, ln. 1.

C. ARGUMENT.

1. SUFFICIENT EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING REGARDING FORCIBLE COMPULSION.

After a bench trial, the court of appeals determines whether substantial evidence supports those findings that are challenged by the defendant, and then determines whether the court's findings support the conclusions of law. See *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005); *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). Unchallenged findings are verities on appeal. *Stevenson*, 128 Wn. App. at 193. Substantial evidence exists to support challenged findings when the evidence is sufficient to persuade a fair-minded, rational person of the finding's truth. *Stevenson* 128 Wn. App. at 193. The trial court's conclusions of law are reviewed de novo. *Stevenson*, 128 Wn. App. at 193.

Although the defendant does not separately assign error to it, the necessary implication of his argument in section IV.A of the Brief of Appellant is that he also assigns error to the trial court's verdict of guilty. His argument for doing so is that there was insufficient evidence to support the court's verdict of guilt.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also *Seattle*

v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[...]great deference [. . .] is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted).

Here, the defendant challenges only the trial court's finding of fact V, regarding forcible compulsion. Br. App. 1 (Assignments of Error 1 and 2), 5-10. It provides:

V.

Once inside the bedroom, the defendant turned off the lights, threw C.S. to the ground and shortly thereafter forcibly removed C.S.'s clothing. C.S. told the defendant that she did not wish to have sex with him. The defendant forced C.S. to perform oral sex on him, placing his penis into her mouth. He additionally forced his penis inside C.S.'s vagina and then forced his penis inside C.S.'s anus. He told her that he would break her face if she did not submit to his demands for sex. The threats made by the defendant to harm C.S. and the physical force he used to restrain C.S. in the bathroom and to bring her to the bedroom and to throw her to the floor and to remove her clothes overcame her resistance to having sexual intercourse with the defendant.

Sufficient evidence supported the court's finding V, and its finding of guilt.

Forcible compulsion requires more than the force normally used to achieve sexual intercourse or sexual contact. *State v. Ritola*, 63 Wn. App. 252, 817 P.2d 1390 (1991)(citing *State v. McKnight*, 54 Wn. App. 521, 528, 774 P.2d 532 (1989)). But forcible compulsion does not necessarily require physical force. *McKnight*, 54 Wn. App. at 528. Forcible compulsion is force that is, "used or threatened to overcome or prevent resistance" by the victim. *Ritola*, 63 Wn. App. at 254-55 (quoting *McKnight*, 54 Wn. App. at 527.

The question of whether the victim showed resistance, (and thus whether the defendant used forcible compulsion) is a fact sensitive question determined "based on the totality of the circumstances, including the victim's words and conduct." *McKnight*, 54 Wn. App. at 526. However, a "finding of forcible compulsion cannot be based solely on a victim's subjective reaction to particular conduct. There must also be a 'threat' – a communication of an intention to cause bodily injury." *State v. Weisberg*, 65 Wn. App. 721, 725, 829 P.2d 525 (1992).

Here there is ample evidence that Clay acted by forcible compulsion. C.S. was walking in front of Clay to go out the door when he grabbed her around the abdomen from behind and carried her into a bedroom that was not far away. 4 RP 64, ln. 15-22. C.S. was sitting on a chair and Clay walked to the door, locked the door and turned off the light.

4 RP 65, ln. 10-13. C.S. was scared of what he was going to do, because in her mind she knew what he was about to do. 4 RP 65, ln. 15-21.

Clay pushed C.S. to the floor, grabbed her pants, and pulled them down from the waist, then grabbed from the ankles and pulled them off with her underwear coming off with them. 4 RP 65, ln. 25 to p. 66, ln. 8. Clay then got on top of C.S. who told him to get off of her, but he didn't. 4 RP 66, ln. 10-16. When it started happening, C.S. told Clay she didn't want to have sex with him. 4 RP 67, ln. 13-21. Clay didn't say anything. 4 RP ; 11-12; p. 67, ln. 22-23.

When he got on top of C.S. Clay's pants were pulled down to his ankles and his shirt was off. 4 RP 66, ln. 17-24. C.S.'s shirt was on, and initially she was positioned on her back on the floor. 4 RP 66, ln. 25 to p. 67, ln. 3. Clay was on top of her in the front, on his knees, with his knees off to the side of her. 4 RP 67, ln. 8-11.

Clay's penis then entered C.S.'s vagina. 4 RP 68, ln. 10 to p. 14. This was done without C.S.'s consent and she had told him she didn't want to do that. 4 RP 68, ln. 15-16. C.S. did not physically fight with Clay because he was too big and she was scared. 4 RP 68, ln. 24 to p. 69, ln. 2. C.S. was scared because she thought she could trust Clay and didn't think he would do anything like that. 4 RP 67, ln. 3-5.

C.S. started crying. 4 RP 66, ln. 16. Clay threatened her and said that if she didn't shut up he would break the side of her face. 4 RP 67, ln. 24 to p. 68, ln. 3. Clay then pushed C.S. onto her stomach, pushed her left

leg up to her chest and put his penis into her anus. 4 RP 69, ln. 12. This was also without C.S.'s consent. 4 RP 70, ln. 1-2. It went on for about 25 minutes. 4 RP 70, ln. 7-8. Clay then turned C.S. over again and put his penis into her vagina again. 4 RP 67, ln. 22-14.

Clay then sat back on his butt and ordered C.S. to perform oral sex on him. 4 RP 70, ln. 12-13. C.S. said she couldn't, that she was going to get sick and throw up. 4 RP 70, ln. 15-17. Clay said he didn't care, he wanted C.S. to, so she tried, his penis entered his mouth and she gagged. 4 RP 71, ln. 18-25.

These facts establish substantial and compelling evidence of forcible compulsion. Clay picked C.S. up and carried her to the bedroom. He then locked the door. He went over to C.S. and pushed her off the chair and onto the floor. Clay pulled C.S.'s pants off and sat on her. She told him, she didn't want to have sex with him. She told him to get off her, but he didn't say anything. Clay then vaginally raped C.S. even though she told him she didn't want to do that.

When C.S. started to cry, Clay told her to shut up or he would break the side of her face. Clay pushed C.S. onto her stomach and pushed her leg up to her chest. He then anally raped her. Clay then turned C.S. over and again vaginally raped her.

When he was done with that, Clay sat back on his butt and ordered C.S. to perform oral sex on him. She told him she couldn't because she

would throw up. He said he didn't care and told her to do it. So she tried, and when she did so she gagged.

Overwhelming evidence supported the Court's finding that Clay used forcible compulsion when he raped C.S.

2. CLAY'S CLAIM THAT HE WAS IMPROPERLY DISENFRANCHISED OF HIS VOTING RIGHTS IS NOT PROPERLY RAISED UNDER THIS CAUSE NUMBER AND SHOULD BE FILED SEPARATELY AS AN INDEPENDENT CIVIL ACTION.

On appeal (as opposed to discretionary review), a party may generally only challenge those things permitted in RAP 2.2(a). Of the items listed, only a final judgment is relevant to this case. *See* RAP 2.2(a)(1). Even on discretionary review, a party may seek review of any act of the Superior Court not appealable as a matter of right. RAP 2.3(a).

The defendant challenges his disenfranchisement via Article VI, § 3 of the Washington Constitution, which provides that:

All idiots, insane persons, and persons convicted of infamous crime unless restored to their civil rights are excluded from the elective franchise.

An "infamous crime" is defined by RCW 29A.04.079 as:

...a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility. Neither an adjudication in juvenile court pursuant to chapter 13.40 RCW, nor a conviction for a misdemeanor or gross misdemeanor, is an "infamous crime."

On a plain language reading, this appears to apply to felony offenses.

Chapter RCW 29A governs elections. It provides that:

If a registered voter is not eligible to vote as provided in this section [i.e. for being an ineligible felon], the secretary of state or county auditor shall confirm the match through a date of birth comparison and suspend the voter registration from the official state voter registration list.

RCW 29A.08.520(5)(as amended by Laws of Washington 2005 c. 325, sec. 1, effective June 4, 2009).

The voting rights restoration act, (as well as the law that preceded it), establishes that removal or suspension from the voter registration list is undertaken by the secretary of state or the county auditor. Here, nothing in the judgment and sentence addresses the right to vote, or purports to remove that right. Accordingly, there is no order or action by the superior court under this cause number that the defendant is entitled to challenge on appeal.

Where the defendant's claim does not pertain to any error by the court in this case, the defendant's challenge regarding his voting rights is not properly raised on this appeal. Accordingly, it should be denied.

3. CLAY'S CLAIM THAT HE WAS IMPROPERLY
DISENFRANCHISED OF HIS VOTING RIGHTS IS
WITHOUT SUBSTANTIVE MERIT.

The defendant relies on *Farrakhan v. Gregoire*, in support of his claim that he was unlawfully denied his voting rights. *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010). However, as of April 28, 2010,

the ninth circuit court of appeals issued an order granting *en banc* rehearing of that decision. *See* <http://www.ca9.uscourts.gov/datastore/opinions/2010/04/28/0635669ebo.pdf> (copy attached as Appendix A.). Pursuant to that order, as well as 9th Cir. R. 35-3(3), the case no longer may be cited as precedent in the Ninth Circuit or any [federal] district court therein except to the extent it may subsequently be adopted by the *en banc* court. In other words, the case has lost its status as a published opinion of the Ninth circuit.

Even if it were considered as a published opinion of the Ninth circuit, it of course has no precedential value in Washington. Moreover, because of the specific procedural posture of the case, the opinion also has no persuasive value.

The case involved a review of the district court's grant of a motion for summary judgment in favor of the State of Washington and denial of a cross motion for summary judgment on behalf of the plaintiffs.

Farrakhan, 590 F.3d at 994-996, 1001-1004. In *Farrakhan*, the district court had granted summary judgment in favor of the State of Washington, and denied summary judgment in favor of Farrakhan and his co-plaintiffs. *Farrakhan*, 590 F.3d at 995 (citing *Farrakhan v. Gregoire*, No. CV-96-076-RHW 2006 WL 1889273 (E.D. Wash. 2006)). The court in *Farrakhan* reversed both rulings of the district court. *Farrakhan*, 590 F.3d at 1011-1015, 1016. In doing so, the court held that the district court erred in its interpretation and application of the VRA in granting summary

judgment in favor of the State of Washington. *Farrakhan*, 590 F.3d at 1016. The court then went on to hold that summary judgment in favor of Farrakhan and the other plaintiffs was proper because they had put forth expert reports that the state did not factually dispute in its motion for summary judgment (presumably because to do so would have created a factual dispute that thwarted the motion) so that the court concluded that the claims of the plaintiffs were therefore uncontroverted. *Farrakhan*, 590 F.3d at 1014-15.

Moreover, the *Farrakhan* decision was based on a determination that a now disfavored legal interpretation was controlling as the law of the case. *Farrakhan*, 590 F.3d at 999-1000. Under that interpretation, vote denial claims are cognizable under the Voting Rights Act (VRA). *Farrakhan*, 590 F.3d at 999. The court held that this position had become the law of the case where the court had affirmed it in an earlier appeal. *Farrakhan*, 590 F.3d at 999 (citing *Farrakhan v. Washington*, 338 F.3d 109 (9th Cir. 2003), *cert. denied*, 543 U.S. 984, 125 S. Ct. 477, 160 L. Ed. 2d 365 (2004)) (“*Farrakhan I*”). The court in *Farrakhan* acknowledged that since the issuance of the opinion in *Farrakhan I* the second, sixth and eleventh circuits had subsequently rejected the position that vote denial claims were cognizable under the VRA. *Farrakhan*, 590 F.3d at 999-1000. The court in *Farrakhan* nonetheless held that the earlier ruling in *Farrakhan I* was the law of the case and therefore controlling on the issue. *Farrakhan*, 590 F.3d at 999-1000.

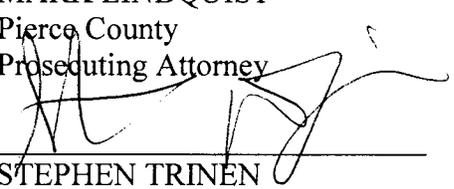
Where *Farrakhan* was limited to a review of cross motions for summary judgment, and because it was decided on a rule of law imposed on the case by the law of the case doctrine, its scope is too narrowly limited to the procedural posture of *Farrakhan* case to serve as persuasive authority to any other case regarding the issues raised therein. For this reason, it should not be followed.

D. CONCLUSION.

Ample evidence supported the court's finding of forcible compulsion as to Count IV. There is no basis to bring a challenge to the termination of the defendant's voting rights under this cause number where he has not been and will not be removed from the list of eligible voters by any order of the Superior Court. Any such action must be pursued as a separate civil claim.

DATED: May 7, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/7/10
Date

Johnson
Signature

APPENDIX “A”

Order

FILED

APR 28 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**MUHAMMAD SHABAZZ
FARRAKHAN, aka Ernest S. Walker;
AL-KAREEM SHADEED; MARCUS
X. PRICE; RAMON BARRIENTES;
TIMOTHY SCHAAF; CLIFTON
BRICENO,**

Plaintiffs - Appellants,

v.

**CHRISTINE O. GREGOIRE; SAM
REED; HAROLD W. CLARKE;
STATE OF WASHINGTON,**

Defendants - Appellees.

No. 06-35669

D.C. No. CV-96-00076-RHW

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.