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No. 51354-4-II

Pierce County No. 14-1-04131-6  
and 14-1-04006-9

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

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STATE OF WASHINGTON,

Respondent,

v.

ANDRE JONES TAYLOR,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

The Honorable Garold Johnson, trial judge

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*APPELLANT'S OPENING BRIEF*

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KATHRYN A. RUSSELL SELK, No. 23879  
Counsel for Appellant

RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> Street, #176  
Seattle, Washington 98115  
(206) 782-3353

TABLE OF CONTENTS

A.	<u>ASSIGNMENTS OF ERROR</u> .....	1
B.	<u>QUESTIONS PRESENTED</u> .....	1
C.	<u>STATEMENT OF THE CASE</u> .....	2
	1. <u>Procedural Facts</u> .....	2
	2. <u>Trial proceedings</u> .....	3
	i. <u>Carla Atwood</u> .....	3
	ii. <u>Denise Mitchell</u> .....	5
	iii. <u>The DNA grant and testing</u> .....	9
D.	<u>ARGUMENT</u> .....	13
	1. THE ROBBERY CONVICTION MUST BE REVERSED AND DISMISSED WITH PREJUDICE BECAUSE IT WAS ABSOLUTELY BARRED BY THE STATUTE OF LIMITATIONS. ....	13
	2. THE LEGAL FINANCIAL OBLIGATIONS SHOULD BE STRICKEN UNDER THE CONTROLLING NEW PRECEDENT OF <u>RAMIREZ</u> . ....	17
E.	<u>CONCLUSION</u> .....	22

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

In re the Personal Restraint of Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000), disagreed with in part on other grounds by, In re the Personal Restraint of Turay, 153 Wn.2d 44, 101 P.3d 854 (2004). . . . . 14, 15

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). . . . . 2, 20

State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014). . . . . 13-15

State v. Ramirez, 191 Wn.2d 732, 436 P.3d 714 (2018). . . . . 1, 17, 19-22

State v. Hodgson, 108 Wn.2d 662, 740 P.2d 848 (1987), cert. denied sub nom Fied v. Washington, 485 U.S. 936, 108 S. Ct. 1117, 99 L. Ed.2d 277 (1988). . . . . 14

State v. Kyllo, 166 Wn.2d 856, 204 P.3d 916 (2009). . . . . 16

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 89 (2004). . . . . 16

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). . . . . 16

WASHINGTON COURT OF APPEALS

State v. Novotny, 76 Wn. App. 343, 884 P.2d 1336 (1994). . . . . 14

State v. Poltoff, 138 Wn. App. 343, 159 P.3d 955 (2007). . . . . 16

FEDERAL AND OTHER STATE CASELAW

Stogner v. California, 539 U.S. 607, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003). . . . . 13

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).. . . . . 16

Toussie v. United States, 397 U.S. 112, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970). . . . . 14

RULES, STATUTES, CONSTITUTION AND OTHER

RCW 9A.56.200..... 15

Article 1, §22 . . . . . 1

Engrossed Second Substitute House Bill (“Bill”) 1783..... 19

Fourteenth Amendment . . . . . 1

Laws of 2018, ch. 269.. . . . 19

RAP 12.7..... 20

RCW 10.01.160(3)..... 20, 21

RCW 9A.04.080..... 15

RCW 9A.04.080(1)(I)..... 15

RCW 9A.44.040(1). . . . . 3

RCW 9A.44.050(1). . . . . 3

RCW 9A.56.190 . . . . . 3

RCW 9A.56.200 . . . . . 3

Sixth Amendment. . . . . 1

A. ASSIGNMENTS OF ERROR

1. The prosecution for first-degree robbery was barred by the statute of limitations and the conviction and resulting sentence must be stricken.
2. Counsel was prejudicial ineffective in violation of Mr. Taylor's Sixth Amendment, Fourteenth Amendment and Article 1, §22 right to effective assistance of appointed counsel.
3. Under the recent state Supreme Court decision in State v. Ramirez, 191 Wn.2d 732, 436 P.3d 714 (2018), appellant Andre Taylor is entitled to relief from the \$200 criminal filing fee and \$100 DNA fee, as well as onerous interest and other conditions imposed regarding legal financial obligations.
4. Appellant assigns error to the following pre-printed finding on the judgment and sentence:

**2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay legal financial obligations imposed herein. RCW 9.94.A.753.

CP 59-60 (emphasis added).

B. QUESTIONS PRESENTED

1. The statute of limitations for first-degree robbery is three years from the commission of the crime. Where the robbery was alleged to have occurred in 2003 but was not charged or prosecuted until 11 years later, must the first-degree robbery conviction be stricken?

Further, was counsel prejudicially ineffective in failing to note that his client was charged with and convicted of an offense for which the statute of limitations served as an absolute bar?

2. Where the state's highest court has held in a published opinion that 2018 statutory changes apply to all cases

pending on direct review regardless when the sentencing occurred, is Mr Taylor entitled to application of those changes?

3. Is a trial court's signature on a judgment and sentence with a pre-printed "finding" of "ability to pay" insufficient and improper under State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), because it was unsupported by evidence and should the "finding" be stricken and the county cautioned to update its forms to eliminate the offensive language?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Andre J. Taylor was charged on October 8, 2014, under cause number 14-1-04006-9, in Pierce County superior court with second-degree rape and first-degree robbery of D.M. , alleged to have occurred on November 19, 2003. CP 84-85; RCW 9A.44.050(1), RCW 9A.56.190, RCW 9A.56.200. He was separately charged in the same court on October 15, 2014, under cause number 14-1-04131-6, with first-degree rape of C.A., alleged to have occurred on July 19, 2003. RCW 9A.44.040(1). CP 1.

On August 22, 2017, a suppression hearing was held before the Honorable Judge Garold Johnson on August 22, 2017, on both cause numbers. CP 15-27.<sup>1</sup> The court consolidated the two cause numbers

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<sup>1</sup>The verbatim report of proceedings consists of multiple volumes, not always chronologically paginated. They will be referred to herein as follows:

November 4, 2014, as "1RP;"  
December 12, 2014, as "2RP;"  
December 19, 2014, as "3RP;"  
March 13, 2015, as "4RP;"  
May 1, 2015, as "5RP;"  
May 15, 2015, as "6RP;"  
July 17, 2015, as "7RP;"  
September 25, 2015, as "8RP;"  
October 23, 2015, as "9RP;"  
December 4, 2015, as "10RP;"

under one, 14-1-04131-6. CP 24; 15RP 35-36.

An amended information was then filed alleging first-degree rape of C.A. as count I, second-degree rape of D.M. as count II and first-degree robbery of D.M. as count III. CP 28-29; RCW 9A.44.040(1), RCW 9A.44.050(1), RCW 9A.56.190, RCW 9A.56.200.

Mr. Taylor waived his rights to trial by jury and a bench trial was held before Judge Johnson on September 12, 2017. See CP 48-54, 118. On January 12, 2018, Judge Johnson entered written findings and conclusions in support of that ruling. CP 48-54. The judge also ordered Mr. Taylor to serve an indeterminate sentence with a minimum term of 318 months and a maximum term of life. CP 55-71. Mr. Taylor appealed and this pleading follows. See CP 74.

2. Trial proceedings

i. Carla Atwood

On July 19, 2003, at about 4 a.m., someone called police to tell them a woman had been raped near a park in Tacoma. 15RP 77-81. Debbie Carlone, who lived nearby, had heard someone crying for help and called police. 15RP 190-95. Officers arrived to find Carla Atwood lying on the ground, a few people milling around nearby. 15RP 81-86.

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March 8, 2016, as "11RP;"  
April 15, 2016, as "12RP;"  
April 29, 2016, as "13RP;"  
September 16, 2016, as "14RP;"  
the four chronologically paginated volumes containing the proceedings of  
January 13, March 24, April 7, 14, and 21, June 30, August 22 and 25, and September  
12, 2017 (pages 1-72), September 13, 2017 (pages 73-182), September 14, 2017  
(pages 182-282), September 26-27, 2017, and January 12, 2018 (pages 283-411) as  
"15RP."  
September 25, 2017, as 16RP."

Carlone tried to get close to see what was happening but thought she heard someone say, “give her privacy” or something similar. 15RP 196-98.

An officer noticed that Atwood smelled of intoxicants. 15RP 84-85. Medics were around her and she had a blanket draped over herself. 15RP 81-86. She was crying and wearing only a shirt and underwear. 15RP 84-85, 91-94.

Ms. Atwood testified at the later trial that she had been at a bar that night, drinking a fortified alcohol, until she ran out of money for more. 15RP 112-14. She was fairly drunk and recalled trying to sober up to go out of the bar and get some money. 15RP 114. At some point, she “blacked out” from drinking - something she used to do a lot. 15RP 115. As a result, her memory was spotty and the stream of events not rife with details. 15RP 109, 115-16. She remembered leaving the bar or going into the back, then blacking out, then coming to and being coaxed by someone out of sitting on fence, which she was trying to do for some reason, and also something about being encouraged to get into a car. 15RP 115-16.

The next time she was conscious, Atwood was brought to that condition by being punched in the face. 15RP 115-16. Atwood would testify at the later trial that she started fighting back but the assailant, who she did not know, said, “stop or I’m going to get my gun and shoot you.” 15RP 116. Atwood never, however, saw a gun. 15RP 129.

Ms. Atwood did not know where she was. 15RP 116-17. She did not know the assailant and admitted that she could not even say

whether he was black, white, or something else. 15RP 116-17. At trial, she testified that the next thing she remembered was that he “got off me,” and left. 15RP 117. She realized she had lost some of her clothes and she went towards a nearby house, banging on the door. 15RP 117-18. She also recalled telling the people inside the house she needed help because she was “being raped.” 15RP 121.

Ms. Atwood blacked out again until she was in the hospital with a nurse checking her out. 15RP 122. The sexual assault nurse examiner who saw her at the time, Gayle Deason, took “swabs” but saw no signs of injury in the external vagina area. 15RP 137, 140, 148, 173. The nurse thought Atwood seemed unsure what had happened to her. 15RP 158-59. When asked if there had been “penetration,” for example, Atwood was unsure. 15RP 170-71. Like police, the nurse saw signs of intoxication. 15RP 170-71.

The “rape kit” the nurse performed on Atwood in 2003 was not sent to the crime lab. 15RP 251-52. Instead, for more than ten years, the untested kit sat somewhere in the Tacoma Police Department. 15RP 251-53.

ii. Denise Mitchell

In November of 2013, Denise Mitchell was likely homeless, which usually meant she would stay at her daughter’s house or on the couch of a friend. 16RP 83-878. On the 19<sup>th</sup> of the month, she was at the home of her friend, “Greg,” when she decided to walk over to her daughter’s place about a mile away. 16RP 91-95. When she got there, however, she could not get through the security doors and could not

call her daughter, because she did not know which apartment was hers. 16RP 91, 95.

It was about 7 p.m. when Mitchell was almost back to Greg's place and passed a guy on the street. 16RP 93. Although she did not know him, they exchanged pleasantries of some kind, she said, after which she walked on by. 16RP 93-94. She went to a sort of alley behind Greg's home, where she thought he and another friend would be working around a truck. 16RP 84-85, 97. They were not there and when she was turning round to head to the front of the house, the man from the street was behind her. 16RP 84-85, 95-97.

At trial, an officer who spoke with Mitchell right after the incident testified that Mitchell said that, rather than pleasantries on the street, the man had actually propositioned her at that time, but she had ignored him and kept walking. 15RP 209-214. She also told the officer that she had been in the back alley and the man had grabbed her by the neck and mouth and told he would "choke her out" if she screamed. 15RP 214-15.

At trial, in contrast, Mitchell testified that it was only when he showed up in the alley that he propositioned her for sex. 16RP 95. When she refused, he said something in response that she could not recall. 16RP 95. Next thing Mitchell knew, he had her in a headlock and she could not breathe. 16RP 95, 97. She was so scared she urinated in her pants. 16RP 99.

Mitchell also recalled, however, that there was a conversation with him asking for money and her trying to get him to go into the

home where her friends likely were. 16RP 98. After that, she said, he pulled down her pants, had her on her hands and knees and raped her. 16RP 100. After about five minutes he stopped and she felt moisture between her legs, so she thought he had ejaculated inside her. 16RP 100.

At that point, Ms. Mitchell testified, the man “robbed” her of all her jewelry. 16RP 99-108. He told her to take her rings off and give them to him. 16RP 99, 101, 107-108. At trial, she recalled that all were inexpensive except one her daughter had given her. 16RP 107-108. She asked the man not to take that one but he “wanted that one, too,” so she handed them all over. 16RP 107-108.

Mitchell gave a different version to police, however. 15RP 214-15. Just after the incident, she told officers that she had assumed he would want her jewelry after the rape so she had taken it all off and given it to him. 15RP 214-15. Mitchell was confident at trial that she never told the officer anything like that, sure she told police the man had demanded the rings. 16RP 119.

The man left and Mitchell went to the front of the house and her friend, Kent, ultimately called police. 16RP 102-104, 111. At trial, Mitchell would explain she had just “wanted it swept under the rug,” because she had “a lot of bad experiences” when she was “real little with a brother.” 16RP 111. When they arrived, police spoke to her, then took her to a hospital to get a forensic exam. 15RP 215, 16RP 115-16.

Mitchell did not stay at the hospital, however. 16RP 115-16.

Instead, she left before the test could be done, explaining that she felt she had been waiting too long. 16RP 115-16. The nurse who saw Mitchell that night remembered that Mitchell was crying “uncontrollably” and shaking but also said that she had left Mitchell alone for about 10 minutes and returned to find Mitchell had fled. 16RP 128-34. Mitchell did not respond to “paging” so nothing further was done by the nurse. 16RP 133-34.

At trial, Mitchell maintained that, despite her difficult straits and living on the street, she was never involved in prostitution. 16RP 117. She conceded that she been approached by police multiple times and suspected of being engaged in prostitution, but thought that happened to every woman who walked along a particular street in that area. 16RP 117-20.

The officer who had driven Mitchell to the hospital had gone back to interview Mitchell’s friend and got the call, while there, that she had left the hospital. 15RP 216-19. He admitted that, based on the circumstances and location of the crime and Mitchell’s reluctance to participate in the investigation, he had suspected prostitution was involved. 15P 219. He did not find anything in the records indicating a prior conviction for Mitchell for prostitution, however. 15RP 219.

An officer went into the alley behind the home and saw what appeared to be semen on the ground, next to a pencil and ID card in Mitchell’s name. 15RP 230, 237. The suspected semen was collected on some cotton swabs. 15RP 290-97. An officer thought the evidence would have been immediately refrigerated but was not clear on its

storage in general. 15RP 290-97.

Those swabs collected in 2003 were not sent to the crime lab for DNA testing. 15RP 290-97.

iii. The DNA grant and testing

In about 2012, the Tacoma Police Department got grant money from the National Institute of Justice to pay for DNA testing to be done for “cold cases” involving certain crimes. 15RP 244-45. A detective who helped select cases with evidence to send under the grant explained that the money covered payment for private lab testing. 15RP 244-45. One type of case the detective selected were rape cases that involved “strangers.” 15RP 245-46.

One of the cases he decided to send for testing was Atwood’s. 15RP 251-52, 16RP 30. The officer testified that he sent the rape kit out on April 5, 2013, and the lab said it received the 2003 rape kit for testing on April 12, 2013. 15RP 252-58, 16RP 30-31. The report was received back on July 9, 2013, indicating a “profile” had been developed. 15RP 254.

Jennifer Smith, the scientist who worked at the lab, described the process and science at length. 16RP 10-14. She explained the basics of deoxyribonucleic acid, or “DNA,” and said she can develop a DNA profile from a “specimen” and conduct a comparison to determine whether the person who gave the specimen can be “excluded” or not as a contributor to evidence in a criminal case. 16RP 15.

Simplified, the process used is to take a specimen, use

chemicals to extract the DNA from it, use a measurement device to quantitate the level of DNA present, then used more chemicals to “amplify” the DNA, essentially making photocopies of the DNA to increase the sample size until it is sufficient to be analyzed. 16RP 15-16.

At that point, the DNA that has been created is put through an instrument which detects the “types” of DNA at relevant genetic markers for the type of sample. 16RP 16.

The rape kit Smith tested contained vaginal swabs, left and right labia swabs and internal anal swabs. 16RP 31. The DNA profile from a split portion which contained only the “sperm fraction” of the vaginal swab returned a “partial profile” of a mixture consistent with both Atwood and “an unknown individual.” 16RP 33. The same findings occurred for the left and right labia swabs. 16RP 33-34. The anal swabs appeared to have some sperm cells but no profile was able to be created. 16RP 34-35.

The detective also sent Smith the Mitchell case swabs, which had been collected from the scene but never submitted to the crime lab for DNA testing. 15RP 245-47. Those swabs were checked out of the property room by the officer on November 12, 2013. 15RP 244-48. The lab recorded receiving them on November 13, 2013. 16R18.

With those swabs, the report was received back on January 27, 2014. 15RP 248. Smith testified that she separated the sperm cells from all the other cellular material in order to create the male DNA profile present. 16RP 19-20. The information sent back to the

detective was also uploaded into a national database. 16RP 22.

On January 10, 2014, the detective received information that the state patrol crime lab, which had uploaded the profile information, had found a potential match to the DNA profile, with a man named Andre Taylor. 15RP 254. On April 15, 2014, the detective received a notice that there had been a “hit” on the DNA profile for Atwood’s rape kit, also potentially pointing to Mr. Taylor. 15RP 250-54.

Officers interviewed Taylor in custody and took his DNA. 15RP 255-29, 298-99. After reading him his rights, they interrogated him about both incidents. 15RP 259. Regarding the Atwood case, they established that Taylor was familiar with the area near where she was found but that he did not have a car. 15RP 260-62. He said he and his girlfriend would argue sometimes and he had been with a prostitute during one of those times, at the nearby park. 15RP 262-63. He said he did not usually go see prostitutes unless he was high on marijuana. 15RP 263-64.

Jones denied involvement in any rapes. 15RP 261-65. He remembered a prostitute giving him “head” after he had given her some drugs and that they were “partying.” 15RP 267. When told that Atwood said she had been attacked and choked, raped and her jewelry taken, Taylor said that not something he recalled, that he had only once had sex with a woman in an alley and it was after they smoked drugs together and with her consent. 15RP 268-70. Regarding the Mitchell case, Taylor did not recognize her when shown a photo of her and was not familiar with the scene when shown photos. 15RP 264-

65. When confronted with the fact that his DNA profile matched that of the semen found in the alley, an officer said, Taylor just said, “okay,” then “[j]ust put his head down, just looked down at the floor.” 15RP 266. Taylor said he did not know how someone said he had raped her and said he had only ever had consensual sex so, “[i]t has to be consent.” 15RP 266-68.

With Taylor’s collected DNA, the lab conducted more tests and Smith did a “comparison” analysis. 16RP 34-46. Although Jones is a mixed-race person, Smith conceded that there was no statistical database for calculating with mixed-race individuals; only “across the greater five populations found in the United States.” 16RP 70. She did not know how to calculate the statistics if someone was neither black nor white, but just said she thought “[y]ou would just expect that number to fall somewhere amongst” the statistics for other populations. 16RP 70-71. She maintained, however, that this did not affect the analysis. 16RP 71-72.

For the swabs taken from the suspected semen in the alley related to Mitchell, Smith concluded that Jones “could not be excluded as the donor.” 16RP 22-23. In the Caucasian population, the estimated frequency of occurrence of the genetic profile seen in the exhibit and Taylor’s DNA was one in 33.80 “quintillion unrelated individuals” and in the black population, “one in 402.1 quintillion.” 16RP 27.

For the “kit” from Atwood, because the DNA samples were a mixture of more than one person, the forensic scientist performed a

“combined probability of inclusion” or a “CPI stat.” 16RP 44. She concluded that neither Taylor nor Atwood could be excluded as possible contributors to the mixture of DNA based on partial profiles of DNA from labial and vaginal swabs. 16RP 35-37. She concluded that the odds of getting the same profile at random would be, in the black population, one in approximately 2,812 unrelated individuals would have the same result, as would one in every 546 for whites. 16RP 45, 69-70.

D. ARGUMENT

1. THE ROBBERY CONVICTION MUST BE REVERSED AND DISMISSED WITH PREJUDICE BECAUSE IT WAS ABSOLUTELY BARRED BY THE STATUTE OF LIMITATIONS

In addition to being charged with crimes relating to the DNA findings in 2013, Mr. Taylor was charged with and convicted of first-degree robbery for the jewelry Mitchell said he took. See CP 84-85. That conviction and all resulting impacts at sentencing must be reversed, because the statute of limitations ran on first-degree robbery well before the state sought to prosecute that crime.

A “statute of limitations “ establishes an absolute bar to prosecution, reflecting a legislative policy determination regarding the practical difficulties of prosecuting - and defending against - stale crimes. See Stogner v. California, 539 U.S. 607, 611-612, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003); State v. Peltier, 181 Wn.2d 290, 297, 332 P.3d 457 (2014). Such statutes represent the Legislature’s decision that, after the passage of a certain time, the state should no

longer seek to punish those who appear to have committed a criminal act. Toussie v. United States, 397 U.S. 112, 114-15, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970); see State v. Novotny, 76 Wn. App. 343, 345 n.1, 884 P.2d 1336 (1994).

In the past in our state, some courts had described the running of our state's criminal statute of limitations as "jurisdictional," suggesting that the trial court no longer had "jurisdiction" over an offense for which the statute of limitations had already run. See State v. Glover, 25 Wn. App. 58, 61, 604 P.2d 1015 (1979); Novotny, 76 Wn. App. at 345 n.1. Our Supreme Court has recently clarified, however, that, while the expiration of a statute of limitations is an absolute bar to entry of a sentence or judgment on a criminal offense, it is not "jurisdictional." Peltier, 181 Wn.2d at 297.

Instead, the Peltier Court held, the running of the statute of limitations is an absolute bar to prosecution because, with the statute, the Legislature divested the courts of the authority to act. Id. Any conviction gained after the statute of limitations has passed must therefore be stricken with prejudice. See State v. Hodgson, 108 Wn.2d 662, 667, 740 P.2d 848 (1987), cert. denied sub nom Fied v. Washington, 485 U.S. 936, 108 S. Ct. 1117, 99 L. Ed.2d 277 (1988). Further, because a court which enters a judgment and imposes a sentence on a barred offense has acted without statutory authority, the conviction may be challenged for the first time in this Court, even if counsel below fails to notice and object. See In re the Personal Restraint of Stoudmire, 141 Wn.2d 342, 355, 5 P.3d 1240 (2000),

disagreed with in part on other grounds by, In re the Personal Restraint of Turay, 153 Wn.2d 44, 101 P.3d 854 (2004).

Our state's statute of limitations for criminal cases is contained in RCW 9A.04.080. Stoudmire, 141 Wn.2d at 355. Under RCW 9A.04.080(1), no prosecution for a criminal offense shall be commenced after the periods set forth for the particular crime or type of crime. First-degree robbery is a class A felony, defined in RCW 9A.56.200. The statute of limitations for that crime is contained in the "catchall" provision of RCW 9A.04.080(1)(I), which provides, in relevant part, that "[n]o other felony may be prosecuted more than three years after its commission."

As a result, the statute of limitations for the robbery alleged to have been committed on November 19, 2003, was three years. The statute had run as of November 19, 2006.<sup>2</sup>

The charge, however, was first brought by the state (filed under cause number 14-1-04006-9), on October 8, 2014, 11 years after the alleged offense and 8 years after the statute of limitations had run. See CP 84-85.

Thus, the prosecution for first-degree robbery was time-barred by the statute of limitations. The conviction must thus be stricken. See Stoudmire, 141 Wn.2d at 355; see also, Peltier, 181 Wn.2d at 297. Further, because the conviction was counted in calculating the

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<sup>2</sup>This is in contrast with the statute for the other offenses. RCW 9A.04.080(4) provides a ten-year statute of limitations but also provides an exemption and an additional "one year from the date on which the identity of the suspect is conclusively established by deoxyriboneucleic acid testing[.]"

offender score and imposing sentence, resentencing should be ordered.

While not required to decide this issue, this Court should also hold that appointed counsel was prejudicially ineffective in failing to note the passage of the statute and the absolute bar to the first-degree robbery count below. Both the state and federal constitutions guarantee the right to effective assistance of appointed counsel. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Despite a strong presumption of ineffectiveness, counsel is ineffective if his performance is deficient and if that deficiency causes his client prejudice. See State v. Poltoff, 138 Wn. App. 343, 349, 159 P.3d 955 (2007).

To determine whether counsel's performance is deficient, the question is whether his conduct fell below an "objective standard of reasonableness." Id. An attorney's reasonable but ultimately unsuccessful tactical decision will not support a finding of ineffective assistance. See State v. Kylo, 166 Wn.2d 856, 870, 883, 204 P.3d 916 (2009). But where there is no conceivable legitimate strategy for counsel's unprofessional failures or acts below, even the strong presumption of effectiveness is rebutted. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 89 (2004). There could be no legitimate tactical reason to fail to raise an absolute bar to prosecution for your client. Any further trial proceedings in this case must be with new appointed counsel in order to ensure Mr. Taylor's state and federal constitutional rights to effective assistance.

2. THE LEGAL FINANCIAL OBLIGATIONS SHOULD BE STRICKEN UNDER THE CONTROLLING NEW PRECEDENT OF RAMIREZ

In addition to striking the time-barred conviction for first-degree robbery, the Court should also strike the bulk of the legal financial obligations and onerous repayment and other “LFO” terms, based on the controlling case of Ramirez, supra.

Below, at sentencing, the prosecutor told the court that Mr. Jones was already potentially in custody for the rest of his life under an indeterminate sentence imposed in a previous case. 15RP 401-402. The prosecutor urged that court to set as a new minimum sentence a high-end standard range sentence of concurrent 318 months for the first-degree rape, 280 months for the second-degree rape and 171 months for the robbery. 15RP 402-403. The prosecutor also asked for “legal financial obligations in the amount of \$500 crime victim penalty assessment, \$200 in court costs, \$100 in DNA, \$1,500 in DAC recoupment” and “[r]estitution by later order of the Court.” 15RP 403-405.

Counsel pointed out that Mr. Taylor had a history of drug and alcohol problems and other issues and had been in custody on the 2013 sentence of 126 months minimum imposed on another case. 15RP 404-405. He asked for a low-end sentence and further asked the court not to impose any “non mandatory LFOs” because of Mr. Taylor’s lack of likely ability to pay. 15RP 405. He cited the Supreme Court’s decision in Blazina and noted that Taylor had been in custody since 2012 and and would likely spend a long time in prison regardless what

sentence the court imposed. 15RP 405.

The judge asked Mr. Taylor about his financial situation, saying, “do you have any assets of any kind?” 15RP 405-406. The court confirmed that Taylor had no assets, car, bank account, “nothing.” 15RP 406. After imposing the sentence, the judge told Mr. Taylor that he would have another DNA test even though “[i]t seems we have plenty of those by now,” because “that’s what the law requires.” 15RP 406-407. The court went on:

Legal financial obligations. Counsel is correct, the discretionary will not be imposed. This is not someone that there’s any indication would have ability to pay, not now, not in the future. Court costs of \$200, \$100 for DNA, \$500 for crime victims. There will be no reimbursement for DAC.

15RP 407.

Preprinted on the judgment and sentence, was the following:

**2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.**

The court has considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. The court finds that the defendant has the ability or likely future ability to pay legal financial obligations imposed herein. RCW 9.94.A.753.

CP 59-60. The court also selected language as follows:

[x] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

Defendant indigent -

CP 59-60. Also on the judgment and sentence were provisions ordering the defendant to “pay the costs of services to collect unpaid legal obligations per contract or statute,” and that the financial

obligations bore interest from the day of the judgment and sentence. CP 60-61.

This Court should strike the DNA fee and court costs, as well as the interest and other onerous conditions imposed below, based on the controlling case of Ramirez, supra. In that case, the Supreme Court recently held that the changes to our state's legal financial obligation system made by the 2018 Legislature applied to all cases still pending on direct review, regardless when sentencing occurred. 191 Wn.2d at 735.

The amendments were made by the Legislature in Engrossed Second Substitute House Bill ("Bill") 1783, and include a total prohibition against "the imposition of certain LFOs on indigent defendants." See Laws of 2018, ch. 269. Further, the Bill eliminates the authority to impose a criminal filing fee of \$200 on an indigent defendant, eliminates "interest accrual" on all nonrestitution LFOs, establishes that the DNA database fee is no longer mandatory in some situations and provided new limits to remedies for failure to pay. Laws of 2018, ch. 269.

In Ramirez, the Bill was enacted not only after the defendant was sentenced but after the proceedings in the court of appeals had ended. 191 Wn.2d at 733-37. The Supreme Court nonetheless held that the 2018 amendments applied to Mr. Ramirez and he was entitled to relief. 191 Wn.2d at 735-36. The state's highest court examined the Bill's amendments and prior cases regarding application of similar statutory amendments, finding that application to all cases still

pending on direct review was required because the amendment concerned “the court’s ability to impose costs on a criminal defendant following conviction.” Id. Because Mr. Ramirez’s case was still pending on first direct appeal as a matter of right, his case was deemed “not yet final under RAP 12.7” when the Bill was enacted, and, as a result, the amendments applied. Id. As a result, even though the costs imposed had been deemed “mandatory” at the time of Mr. Ramirez’ sentencing and that sentencing occurred well before the 2018 legislative changes, the Supreme Court held that the statutory changes to the LFO scheme applied to Mr. Ramirez and all other cases still pending on direct review. Id.

Similarly, here, Mr. Taylor is entitled to relief, even though his sentencing occurred before the Bill was enacted. His case is still on direct review and thus not yet final under RAP 12.7. See RAP 12.7. This is his opening brief on appeal. Like Mr. Ramirez, Mr. Taylor was ordered to pay a \$200 filing fee, a \$100 DNA fee and to pay interest, which are no longer authorized under the Bill. Mr. Taylor is entitled to have these conditions and costs stricken under Ramirez. This Court should so hold.

In addition, this Court should fault the state for continuing to use improper “findings” preprinted on judgment and sentence forms even though the Supreme Court has condemned such findings. In Blazina, supra, issued in March of 2015, the Court explicitly rejected such “boilerplate” findings on ability to pay, holding that a trial court violates its duties under RCW 10.01.160(3) in entering such

unsupported findings and failing to conduct adequate inquiry:

[T]his imperative under RCW 10.01.160(3) means that the trial court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individual inquiry into the defendant's current and future ability pay. Within this inquiry, the court must also consider important factors. . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

182 Wn.2d at 838. The lower court form continues to have a pre-printed finding of ability to pay, as occurred here. Thus, despite the clear lack of evidence of any ability to pay, in this case, the boilerplate unsupported "finding" here technically entered by the court, that "[t]he court finds that the defendant has the ability or likely future ability to pay legal financial obligations imposed herein." CP 59-60. The Court should strike the unsupported, improper boilerplate finding.

E. CONCLUSION

For the reasons stated herein, the Court should strike the improper conviction for first-degree robbery and reverse and remand for resentencing in light of that change. It should also grant Mr. Taylor relief under Ramirez, as he was ordered to pay previously “mandatory” LFOs and terms no longer required and the changes to those requirements apply to his case.

DATED this 12th day of December, 2018.

Respectfully submitted,

/s/Kathryn A. Russell Selk  
KATHRYN RUSSELL SELK, No. 23879  
Appointed counsel for Appellant  
RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> Street, Box 176  
Seattle, Washington 98115  
(206) 782-3353

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that I served the attached document as follows: by this Court's portal upload I filed this document with (1) the Court of Appeals Division II; the Pierce County Prosecutor's Office, and by depositing a true and correct copy in first class mail, U.S.P.S, postage prepaid, at the following address: Andre Taylor, DOC 762928, Airway Heights CC, P.O. Box 2049, Airway Heights, WA. 99001-2049.

DATED this 12th day of December, 2018.

/s/ Kathryn A. Russell Selk  
KATHRYN A. RUSSELL SELK, WSBA 23879  
Attorney for appellant  
RUSSELL SELK LAW OFFICE  
1037 NE 65th Street, #176  
Seattle, Washington 98115  
(206) 782-3353

**RUSSELL SELK LAW OFFICE**

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