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Court of Appeals
Division III
State of Washington

34174-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES KUNEKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY

The Honorable Randall Krog
The Honorable Brian Altman

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Charles Kuneki's trial in Klickitat County on charges of first degree rape and harassment-threat to kill, the jury was not instructed on the crucial "true threat" component of harassment, contravening the First Amendment and reducing the State's burden to prove the crime, in violation of the Due Process guarantee of the Fourteenth Amendment.¹

2. The trial court erroneously overruled Mr. Kuneki's hearsay objection to the testimony of WSPCL forensic scientist Heather Pyles.

3. Mr. Kuneki's confrontation clause rights under the Sixth Amendment² were violated when Pyles testified to expert determinations reached by the non-testifying analyst.

4. The sentencing court violated Mr. Kuneki's Fifth Amendment right to be free from double jeopardy by entering judgment on the conviction for harassment and also the rape count.³

¹ The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech[.]" The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law[.]"

² The Sixth Amendment provides, "the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"

5. Trial counsel provided ineffective assistance of counsel in violation of the Sixth Amendment by failing to argue to the sentencing court that the rape and harassment convictions should be counted as the “same criminal conduct,” for purposes of Mr. Kuneki’s offender score.⁴

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the jury was not instructed on the “true threat” requirement as a crucial component of the crime of harassment, and any evidence that could have supported a true threat was highly controverted, is reversal required?

2. Did the trial court erroneously overrule Mr. Kuneki’s hearsay objection to the testimony of Washington State Patrol Crime Laboratory forensic scientist Heather Pyles regarding the presence of semen, and DNA results, requiring reversal because of the inflammatory, prejudicial nature of the evidence?

³ The Fifth Amendment provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const., amend. 5.

⁴ The Sixth Amendment also provides that Mr. Kuneki has the right to the assistance of counsel in his defense. U.S. Const., amend. 6.

3. Were Mr. Kuneki's confrontation clause rights violated when Pyles testified to the presence of semen and the DNA profile results reached by a non-testifying analyst, requiring reversal of the convictions because of the inflammatory, prejudicial nature of the evidence, and the lack of overwhelming proof?

4. Did the sentencing court violate Mr. Kuneki's Fifth Amendment right to be free from double jeopardy by entering judgment on harassment in addition to rape, where, as charged and proved the threat to kill was the forcible compulsion for the rape, and the rape was forcibly compelled by the threat to kill?

5. Where the crimes were contemporaneously committed and the threat furthered the rape, did Mr. Kuneki's counsel provide ineffective assistance of counsel by failing to argue that the rape and harassment convictions were the "same criminal conduct" for purposes of the offender score?

C. STATEMENT OF THE CASE

1. Charges. According to Deputy Douglas Farris, 25 year old Richard Maine, an inmate at the Klickitat County Jail, approached

him in early August of 2014, wanting to be cellmates with the defendant, Mr. Charles Kuneki. RP 403; RP 458-59.

Less than a week later, Maine alleged that Mr. Kuneki had raped him in their cell, forcing intercourse twice by threatening to kill Maine with a pencil if he resisted. CP 6; RP 326-28, 356-57, 365-66. Mr. Kuneki was charged with first degree rape (sexual intercourse by forcible compulsion with threat to use a deadly weapon) and harassment-threat to kill; and a further set of first degree rape and harassment charges for the second set of allegations, based on the affidavit of probable cause. CP 0-2, 3-7; RCW 9A.44.040; RCW 9A.46.020(1)(b).

Mr. Kuneki refused to take a plea offer “[o]f any kind” and proceeded to trial, testifying, over his admitted embarrassment, that there was one instance of intercourse and it was consensual. RP 23; RP 462-67. The jury, which unsuccessfully asked the court if it could see Mr. Maine’s written statements during deliberations, acquitted Mr. Kuneki of the first set of charges. CP 106-07 (judgments of acquittal on rape count and harassment); CP 5. However, the jury found Mr. Kuneki guilty of the second set of

harassment and rape counts, although failing to reach any verdict on a deadly weapon enhancement. CP 90, 92, 93.

2. Facts. Charles Kuneki developed a relationship with Richard Maine, a fellow inmate at the Klickitat County Jail. After a period of time, Mr. Kuneki felt that Maine had a good background, and so he promised him employment and a place to live after their upcoming release. RP 459-60. Mr. Maine had previously made fishing nets on the Columbia River, and he had a small business and several dogs that he needed help with. RP 455, 460-61. Although it was embarrassing for him to say in front of the jury, Mr. Kuneki did become close with Mr. Maine. RP 462. At some point, Maine asked Kuneki to have sex with him, and this happened once. RP 465-66. There was no rape and no threat; at one point, Mr. Kuneki said, over continued embarrassment, that Mr. Maine said to “go slower.” RP 494. In addition, because of their relationship and the way Maine acted with other inmates, “the whole pod kind of knew about it.” RP 464-66.

However, Mr. Kuneki later felt that Mr. Maine had been lying and dishonest, and they had arguments, although Mr. Kuneki at the

same time tried to stick up for Mr. Maine when other inmates felt he had started causing problems. RP 467-68. Mr. Kuneki also learned that Maine might have drug issues, the relationship soured, and after an AA (Alcoholics Anonymous) meeting and an argument, he told Mr. Maine that he could not go through with his offer of a place for Maine to live. Soon after, Maine accused him of rape. RP 467-68; RP 482-89.

Maine stated to guards that he was raped by Kuneki in two sequential incidents that arose out of a heated argument in the early a.m. hours between the cellmates about the use of toothpaste. RP 234-38. Maine, who had previously been convicted of crimes of theft, forgery, and domestic violence, told the jury that Kuneki had placed a pencil to his neck and said he would kill him unless he shut up and did what he said, and to not tell anybody and be quiet. RP 229-30, 234-37, 251 (count 1). In the next alleged intercourse, Mr. Maine alleged that he woke up and “Charley” was on top of him. RP 242. Maine said that he said to not do this again, but Mr. Kuneki threatened to kill him with a pencil if he said anything or pushed the inmate panic button. RP 241-243. The intercourse

lasted half an hour to 45 minutes. RP 244-45. Maine could not recall the exact dates or times of the incidents but that they occurred around midnight or after lockdown. RP 258, 265-66.

A day later, after communicating to jail personnel that he was raped, Maine was questioned and later taken to the hospital, where it was stated by Dr. Mary Klingner that he had signs of physical trauma of anal intercourse. RP 244-249; State's exhibit 10; RP 288-89. Maine stated he did not consent. RP 250.

Another inmate, Andrew Kahklamat, testified that he spoke with Maine about the incident afterwards and Maine was laughing and joking about it. RP 412-15. Mr. Kuneki testified in some detail that Mr. Maine had frequently acted sexually toward not only himself, but other inmates. RP 339-45.

3. Sentencing. The trial court determined that Mr. Kuneki's conviction for rape had an offender score of "9," resulting in an indeterminate sentencing range of a minimum 240 to 318 months to Life. The court sentenced Mr. Kuneki to a 318 month minimum. CP 94-96; RP 566.

Mr. Kuneki timely appealed. CP 108.

D. ARGUMENT

(1). THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING HEARSAY EVIDENCE OF SEMEN AND A DNA PROFILE MATCH, WHICH ALSO VIOLATED MR. KUNEKI'S CONFRONTATION RIGHTS, REQUIRING REVERSAL IN A CLOSE CASE.

In this close case where Mr. Kuneki who testified in his own defense, and the jury found him guilty on only two of the five criminal allegations, the hearsay and confrontation clause errors, infra, were not harmless, even though the defense was consensual intercourse. CP 5, 89-93.

a. The State insisted on the need for testimony regarding "semen" and testimony regarding DNA.

Prior to trial, the defense made clear that it would be arguing that there was a single instance of consensual intercourse between Mr. Kuneki and Mr. Maine, with no threat involved. RP 73-74, 105-06 (pre-trial hearings). The trial court, given this defense, inquired of the prosecutor as to "why we need all the forensic evidence" of DNA and of "Mr. Kuneki's semen in the rectum of the alleged victim." RP 217. When the court suggested a stipulation to the fact of intercourse, and the defense offered to stipulate, the prosecutor

refused, stating the evidence was necessary for victim corroboration and credibility. RP 217-18.

In opening statement, the State told the jury that swabs taken from Mr. Maine at the hospital contained “the defendant’s semen from the anus of Mr. Maine,” according to an analysis conducted by the Washington State Patrol Crime Laboratory. RP 198 (opening statement); RP 306, 314-15. The prosecutor also told the jury that WSPCL had determined that Mr. Kuneki’s DNA was present on the swabs. RP 198-99; RP 316.

b. The trial court abused its discretion in overruling Mr. Kuneki’s hearsay objections, and violated his 6th Amendment confrontation clause rights, by permitting Heather Pyles to testify about the absent forensic scientist’s semen, sperm and DNA determinations.

The witness who testified was not the originally announced witness. Prior to trial, the prosecutor told the court and counsel that he would produce Wendy Cashawbara, of the Washington State Patrol Crime Laboratory, who would testify regarding the results of the DNA testing that she had conducted. RP 65 (prosecutor,

referring to witness list). The court confirmed with defense counsel that he was informed of Cashawbara's expected forensic testimony. RP 66, 99. However, at trial, the prosecutor orally indicated that the witness instead was one Heather Pyles; Pyles stated that Cashawbara had taken a better forensics job on the east coast. RP 101-02, 304, 309-10.

(i) Continuing objection. Over multiple objections, the trial court permitted Heather Pyles to testify about Cashawbara's (1) semen and sperm identification in Mr. Maine's anus, and (2) Cashawbara's DNA profile match conclusions.

Pyles first stated that the laboratory had received physical evidence in this case. RP 309. Pyles then began testifying about what Cashawbara, who she described as "the analyst that performed the DNA analysis in this case," had determined from that evidence. RP 304, 309.

In aid of an objection, defense counsel questioned Pyles several times on *voir dire* and then raised hearsay objections and multiple objections that this witness "didn't do the testing" and was simply testifying to *Cashawbara's* report. RP 310-12.

When overruling the fourth of defense counsel's five objections that Pyles "didn't do the testing" and "didn't do" the DNA profiling, the court noted that counsel was making a proper record for appeal, effectively granting defense counsel a standing objection. RP 310-312. The court later allowed further defense *voir dire* questioning in which counsel continued to make a record, and in which Pyles admitted, "I did not do the testing." RP 314.

In overruling the defense objections, the trial court found that witness Pyles had not conducted the forensic testing, but her testimony was admissible nonetheless:

She agrees she did not do the testing so she's responding as an expert in this field to a report [a] colleague of hers produced.

RP 312. Pyles then stated that she had "reviewed the data and independently came to the same conclusion as Wendy did," but counsel again objected, because it clearly remained the case that Pyles had not any of the testing. RP 312.

(ii) Appealability. Mr. Kuneki objected to the admission of Ms. Pyles' testimony. In the context of the *voir dire* questioning, the argument on the objections, and the court's ruling, it is clear that

the court understood the objections to be based not just on the hearsay rule, but also the right to confront the WSPCL analyst who did do the testing. See State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) (objection must be specific enough to place the issue before the trial court and preserve the issue for appeal), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). An appellate court may consider the propriety of a court's ruling where the specific basis for the objection is "apparent from the context." State v. Braham, 67 Wn. App. 930, 934–35, 841 P.2d 785 (1992); ER 103(a)(1).

Further, a violation of the right to confront witnesses is constitutional error which, if manifest, the reviewing court may consider for the first time on appeal. RAP 2.5(a)(3); State v. Bates, ___ Wn. App. ___, 383 P.3d 529, 533 (Division III, September 22, 2016). Here, it is clear and identifiable within the record that Mr. Kuneki was deprived of his ability to cross-examine the forensic scientist, Cashawbara, who determined the presence of semen, and who concluded there was a DNA profile match, which the record shows was evidence the State determined it needed in order to

convict. See State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007); RP 217-18.⁵

(iii) Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted, and it is not admissible. ER 801(c); ER 802; ER 803. Following Mr. Kuneki’s hearsay objection below, the prosecutor offered no hearsay exception that might apply, but the trial court overruled the objection. The trial court ruled that Pyles was “responding” to a report a colleague of hers produced. RP 312. This is not a hearsay exception, much less one allowing admission of a matter for the purpose of establishing its truth. See, e.g., In re Detention of Marshall, 122 Wn. App. 132, 144-46, 90 P.3d 1081 (2004) (discussing expert witness *reliance* on hearsay admitted solely for that purpose, under ER 703 and 705). And in any event, Pyles did not testify to

⁵ The standard of review for a hearsay challenge is an abuse of discretion, and a confrontation clause challenge to the admission of evidence is reviewed *de novo*. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007) (citing State v. Price, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006) (whether State’s admission of hearsay statements violated defendant’s confrontation rights is a constitutional question subject to *de novo* review), cert. denied, 553 U.S. 1035, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008); see also State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

Cashawbara's conclusions as matters on which she relied for expert testimony by her.

As shown by the entirety of Pyles' testimony in the case and the manner in which the presence of semen, and the DNA profile match, was employed by the prosecutor in closing argument, this testimony was erroneously offered and admitted for the truth of the matter asserted. The trial court abused its discretion. State v. Brown, 145 Wn. App. 62, 73-75, 184 P.3d 1284 (2008) (expert could not "relay" the opinion of another nontestifying expert without running afoul of the hearsay rule) (citing State v. Nation, 110 Wn. App. 651, 662, 41 P.3d 1204 (2002)).

(iv) Pyles improperly communicated the non-testifying Cashawbara's testimonial, scientific conclusions. Pyles' testimony was inadmissible under the Sixth Amendment's confrontation clause, pursuant to Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In confrontation analysis, the State bears the burden of proving that challenged statements are non-testimonial. State v. Lui, 179 Wn.2d 457, 476,

315 P.3d 493 (2014); State v. Koslowski, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009).

The Sixth Amendment confrontation clause provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. U.S. Const., amend. 6. The confrontation clause prohibits the admission of testimonial statements against a defendant unless the witness making the statements appears at trial or the defendant has a prior opportunity for cross-examination. Melendez–Diaz v. Massachusetts, 557 U.S. 305, 309, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). A witness is a declarant who makes a factual statement to a tribunal. State v. Lui, 179 Wn.2d at 482. And, if the witness’s statements help to identify “or inculcate the defendant,” then the witness is a “witness against” him. Lui, at 482.

Thus in Melendez–Diaz, the Supreme Court found a confrontation violation in the admission of a document containing statements that a substance was “cocaine,” where the laboratory analyst did not testify. Melendez–Diaz, 557 U.S. at 308, 310-11.

Here, similarly, Pyles simply relayed to the jury that Wendy

Cashawbara had analyzed the swabs from Mr. Maine's anus and determined that semen and sperm was present, and then related Cashawbara's further determination that there was a DNA profile match between matter on the anal swabs and Mr. Kuneki's reference sample. RP 312-16. Although the documentary report prepared by Cashawbara was not admitted, its assertions, through Pyles, were an affidavit-like, formal attestation to facts for the criminal trial; Pyles simply related its contents to the jury by testifying. See Melendez-Diaz, 557 U.S. at 329-30 (concurring opinion of Thomas, J.) (agreeing with decision of confrontation violation because documentary statement that matter was cocaine was a formal attestation in a pending criminal case).

This case contrasts sharply with Williams v. Illinois, ___ U.S. ___, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), wherein a DNA analyst testified to her own expert comparison of DNA profiles to testify that there was a match between DNA found on the victim and the defendant's DNA. Williams, 132 S. Ct. at 2229-30. Here, Heather Pyles' testimony was clear – it was Cashawbara who matched the DNA profiles. RP 316. Pyles testified that it was Cashawbara who

“did identify sperm cells in the anal swabs” and who concluded that “[t]he profile from the sperm fraction of the anal swabs matched the DNA profile from Charles Kuneki.” RP 316-317. The trial court's factual finding was correct -- “she [Ms. Pyles] did not do the testing.” RP 313. Rather, she was testifying to the presence of semen and sperm, and a DNA match, that were inculcating determinations made by Cashawbara. RP 312, RP 313-16.

In a portion of Pyles' testimony, given after the trial court overruled Mr. Kuneki's first objection that Ms. Pyles did not do the testing, Pyles stated that she “reviewed the data and independently came to the same conclusions as Wendy did.” RP 312. However, her testimony as a whole made clear that Pyles merely did a technical review of the testing process to make sure that Ms. Cashawbara followed standard operating procedure at WSPCL. RP 311-12. Cashawbara was the person who came to the DNA match result from the anal swabs in comparison to the reference sample; in contrast, Pyles did no expert work, and testified to none.⁶ RP 316.

⁶ In fact, Pyles admitted that the only independent determination she made in the matter was a later January, 2016 re-assessment of the numerical probability that “an unrelated individual [selected] at random from the U.S.

Because Pyles admitted that she only reviewed that analyst's work for whether it followed the Crime Laboratory's standard operating procedure, her testimony does not fall within the reasoning of Lui's admission of DNA, but in fact should have been excluded for the reason Lui rejected the admissibility of toxicology reports in that case. Lui, supra, 179 Wn.2d at 466 (DNA evidence), 464-65 (toxicology evidence); see also Commonwealth v. Bizanowicz, 459 Mass. 400, 410-11, 945 N.E.2d 356 (2011) (testimony by state police chemist concerning non-testifying chemist who conducted tests for presence of semen constituted testimonial hearsay).

Unlike Lui, which involved an expert witness presenting an independent DNA analysis premised on interpreting basic information generated by the work of others in the DNA testing process, this case involves admission, through Pyles, of the ultimate inculpatory statements made by the actual human analyst who used

population” would have the same DNA “sperm fraction profile” as the one located on Mr. Maine’s anal swabs. RP 317-18. This statistical re-determination was based on a recent DNA database correction by the FBI, and was the only work done by Pyles. RP 318 (“what I did as my part was is [sic] I recalculated the match estimate using the data that Wendy generated with the corrected database numbers”).

her expertise. Lui, at 489. The confrontation clause is not satisfied by a single self-serving elicitation of a generic statement that Pyles independently came to the same “conclusion” as the analyst did. Cashawbara was not a laboratory technician whose base data merely “facilitated [Pyles’] role as an expert witness.” Lui, at 486. Pyles’ witness testimony never brought to bear her expertise, nor offered any original analysis, such as making any comparison of the allele tables of the DNA samples, or giving an interpretation of the DNA gene sequences that allows a match to be deciphered. See Lui, at 488-89. It was Cashawbara who was the inculpatory expert witness, and Cashawbara who should have been produced. Compare Lui, at 493-94 and note 11 (toxicology results inadmissible where testifier simply communicated the conclusions and offered no true expert interpretation). It does not matter that Pyles deemed Cashawbara’s process to meet standard WSPCL protocols, or that Pyles was qualified to give the jury rudimentary information about semen detection and DNA profiling generally. “[T]he [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about

another's testimonial statements provides a fair enough opportunity for cross-examination." Melendez-Diaz, at 2716. Counsel objected vigorously, the trial court's factual finding that Pyles did not do the testing is a fact that supports only exclusion, the court's ruling that Pyles was responding to another expert's report is not a basis for admission, for hearsay purposes or the Sixth Amendment, and this witness did not substantively testify as the expert making a determination of semen, or a profile match. Confrontation was violated under Crawford and its progeny, and State v. Lui.

c. This evidence regarding the presence of DNA and semen discovered in the anus of male complainant Maine was so prejudicial to any lay jury that reversal is required not merely for the *Crawford* error, but even under a non-constitutional hearsay error standard.

Hearsay error, as non-constitutional evidentiary error, requires reversal if, within reasonable probabilities, the outcome would have been different without the error. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The improper admission of evidence constitutes harmless error only if the evidence is of minor significance in reference to the evidence as a whole. Bourgeois, 133

Wn.2d at 403. Heather Pyles’ testimony was the only evidence of DNA and the only evidence Mr. Kuneki’s “semen in the rectum of the alleged victim.” RP 217-18.⁷

To a lay jury, this inflammatory material was likely just as pertinent to the credibility of the claim of forced intercourse, and just as corroborative of the proof to convict, as the prosecutor asserted it would be. But it would not have been admitted at trial, because the evidence was hearsay and testimonial, and the actual analyst was unavailable for the trial. Erroneously admitting testimonial hearsay is harmless only if the appellate court is convinced beyond a reasonable doubt that a reasonable jury would have reached the same result in the absence of the error. Guloy, 104 Wn.2d at 425-26. The error is presumed to be prejudicial, and it is the State that bears the burden of proving that the outcome was not affected. State v. Stephens, 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980); Guloy, 104 Wn.2d at 425. Only “overwhelming untainted evidence” will render the error harmless. Guloy, 104 Wn.2d at 426.

⁷ Dr. Mary Klingner had earlier testified that she saw Mr. Maine at Klickitat Valley Health Care, and obtained swabs which were sent for laboratory analysis. RP 286-87, 303. However, Dr. Klingner provided no testimony regarding detection of any semen or sperm.

Although the defense was consent, the prosecutor in opening statement, recognizing the effect of this evidence on a jury, emphasized that the State “did a DNA analysis, and they discovered the defendant’s semen from the anus of Mr. Maine.” RP 198. And at the end of trial, the State again made sure to remind the jury that “the defendant’s semen was found in Mr. Maine’s anus.” RP 536.⁸

Of course, early in trial, the court carefully questioned the deputy prosecutor regarding the need for semen and DNA evidence in the present case, and the prosecutor responded on the record that the evidence went to corroboration and credibility, and was necessary to the State’s ability to persuade the jury. RP 217-18 (arguing that the evidence was necessary to showing that the

⁸ During *voir dire*, various remarks by potential jurors were made after the prosecutor described the case as that of intercourse between the defendant “and another man.” RP 157, 175. Some potential jurors expressed that they might have difficulty sitting fairly on the cause, for a range of reasons. The prosecutor observed that the reading of the charges had made juror 19 “blanch.” RP 139. Juror 13 volunteered that the charges “make me sick to my stomach.” RP 140, 165. After juror 12 stated that he would try to decide the case according to both legal and “moral requirements,” the prosecutor conscientiously attempted to explain that the law does not make moral judgments. RP 177-80. However, juror 51 remarked that anybody who committed a degrading crime should be punished, he described homosexuality as, “morally, most people don’t – don’t have that kind of life style. I know I certainly don’t.” RP 180-81.

defendant was the perpetrator and to “corroborate credibility-wise his -- [Maine’s] claim.” RP 217-18.

This difficult evidence was material, in a close case. Defense witness Andrew Kahklamat, who occupied a nearby cell to Mr. Maine and Mr. Kuneki, stated that two days after this claimed incident, Mr. Maine and another inmate named Marcos were walking around laughing and joking about what had happened. RP 412. Mr. Kahklamat also testified that Maine himself was laughing and joking to Mr. Kahklamat about it. RP 413-15. Mr. Kuneki testified that it was well known in the jail that Mr. Maine was homosexual, and he did not hide the fact. At one point Mr. Maine pushed himself up against Mr. Kuneki from behind while they and other inmates were playing basketball. 371-75. All of this foregoing defense testimony was in sharp contrast to the claims by Mr. Maine that he never acted sexually in the jail – which is why the trial court ruled that excluding it would be a denial of justice. RP 339-45.

Ultimately, the evidence, although inadmissible, was relevant to a lay jury, as the prosecutor argued. In all of the circumstances of this case, the erroneous admission of the semen and DNA evidence

was not harmless under any standard. See, e.g., State v. Escalona, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987) (reasoning that, despite a trial court admonition to disregard inflammatory character evidence, “it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact.”).

(2). ABSENT THE REQUIRED “TRUE THREAT” REQUIREMENT IN THE JURY INSTRUCTIONS, THE STATE WAS NOT HELD TO ITS BURDEN OF PROVING HARASSMENT, AND REVERSAL OF THE CONVICTION IS REQUIRED UNDER SCHALER BECAUSE THE EVIDENCE WAS CONTROVERTED.

a. The jury was not instructed on the requirement of a “true threat,” thus reducing the State’s burden of proof in violation of Due Process, and violating the First Amendment. In this case, Mr. Kuneki was convicted of harassment (count 4), for allegedly threatening Mr. Maine that he would kill him with a pencil if he said anything to protest the intercourse or pushed the inmate’s panic button. See RP 235, 243 (complainant’s testimony asserting rape by threat of force); CP 92 (count 4 verdict form); RCW 9A.46.020(1)(b).

However, the jury instructions as a whole did not meet the minimum standard of holding the State to the proper burden of proof on the crime. U.S. Const., amend. 14; State v. Brown, 147

Wn.2d 330, 340–41, 58 P.3d 889 (2002); cf. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (the general, strict rule is that the “to convict” instruction must contain all the elements essential to the conviction).

Where a statute criminalizes speech, the First Amendment allows only “true threats” to be prohibited. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); Virginia v. Black, 538 U.S. 343, 359-60, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); Watts v. United States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)); U.S. Const., amend. 1. A “true threat” is a statement that occurs

in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest, or idle talk.

State v. Allen, 176 Wn.2d 611, 626, 294 P.3d 679 (2013); see Kilburn, 151 Wn.2d at 43; Black, at 359-60; see also 11 Washington Practice: Jury Instructions - Criminal 2.24 (Third ed. 2008, at pp. 72-74). Only a defendant who makes a true threat, to kill, has the requisite mental state of knowingly causing someone to fear they will be killed, as the statute must require for criminality; only such

an actor can be punished for his speech. State v. Schaler, 169 Wn.2d 274, 287-88, 236 P.3d 858 (2010).

Although the Supreme Court has held that the “to-convict” instruction for purposes of felony harassment under RCW 9A.46.020 need not contain the true threat definition within it, the instructions as a whole must make clear that the jury is required find a true threat in order to convict. State v. Allen, 176 Wn.2d at 628-29.

Here, in Mr. Kuneki’s case, neither the definition of felony harassment, the “to-convict” instruction for the count of conviction on harassment (the August 8 charge, count 4), nor any other jury instruction, including the jury instruction defining “knowingly,” included any language making clear the constitutional requirement that the defendant must be proved to have uttered a “true threat.” CP 80, 82-83 (Instructions 13, 15-16).⁹

⁹ Mr. Kuneki may appeal – failing to require a true threat is manifest error under RAP 2.5(a)(3) and may be raised on appeal where it had identifiable consequences in the case. See Schaler, at 282-83 (citing State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). Under Schaler, if the appellate court places itself in the shoes of the trial court and concludes the instructions were contrary to constitutional requirements recognized at that time, the error may be raised. Schaler, at 287-88 and note 5. Further, in this case, the trial court record contains what is necessary to determine actual prejudice, because without the jury being properly instructed, Mr. Kuneki was convicted without a jury determining that there was evidence to show a

b. The instructional error was not harmless, requiring reversal of the harassment conviction. Reversal is required for the failure of the jury instructions to hold the prosecution to this central aspect of the State’s burden in a felony harassment case. See State v. Schaler, 169 Wn.2d at 287-88 (failing to instruct the jury on “true threat” is an error “analogous to one in which the jury instructions omit an element of the crime.”).¹⁰

Here, as in Schaler, the evidence that Mr. Kuneki uttered a true threat, rather than some angry outburst in connection with a fight over toothpaste, or broken promises or lying, or some other matter, was controverted, and the absence of the proper legal standard in the jury’s instructions was not harmless beyond a reasonable doubt. See Schaler, at 289 (reversing because although there was evidence that Schaler threatened to kill his neighbors and

true threat, or being able to do so. See O’Hara, at 99.

¹⁰ Instructional errors are reviewed *de novo*, as are constitutional questions, State v. Grande, 164 Wn.2d 135, 140, 187 P.3d 248 (2008), and the reviewing court engages in independent review of the record in First Amendment cases before it will determine an error to be harmless. State v. Kilburn, 151 Wn.2d at 49–50. See Schaler, at 282.

even planned to do so, there was also evidence supporting an impression of Schaler as mentally unstable and merely lashing out).

The State's theory from the beginning of the case had been that a fight where the participants were described as "arguing over toothpaste" had resulted in an angry threat and sequential counts of rape during the early a.m. hours and then that night, or on two nights around midnight. CP 6-7 (affidavit of probable cause); see also RP 197 (State's opening statement). Mr. Kuneki's defense was that there was one instance of intercourse during this time, and it was entirely consensual. RP 456-66. At trial, Maine testified that around midnight, Mr. Kuneki was angry about him using his toothpaste, threatened him with a pencil, pulled down his pants, and lay on top of him and had intercourse with him, and then did this again after lockdown. RP 234-41. Maine admitted that his August statement about the incident talked about a problem between them as inmates about using toothpaste, but not a threat to kill by stabbing with a pencil. RP 259. Properly, the defense cross-examination of Mr. Maine challenged him as to whether he was confusing, or aggregating together, the multiple assertions he had

made over time about various different fights, threat, and rape allegations. RP 254-58. Mr. Maine said he could not recall whether he told officers and defense counsel that the dispute had actually resulted in multiple instances of arguing, threat and intercourse during the a.m. hours of 12:00 to 3:00, stating that he didn't "have a watch." RP 253-54, 258.

Defense counsel further challenged Maine in cross-examination, eliciting that his initial claim of being threatened with a pencil had been described by him in the past as Mr. Kuneki acting "very angry," grabbing a pencil, and getting "red and clenching his fists." RP 259-62 (referring to complainant's August 9 statement).¹¹

Of course, in his testimony, Mr. Kuneki personally controverted the State's claim that he made any actual criminal threat, denying any intercourse by threat of a pencil or otherwise. RP 466-67. Mr. Kuneki described the incident as series of heated arguments regarding Mr. Maine's character, about agreements about offering a living situation, and other personal matters. RP

¹¹ Maine claimed that he had indeed previously written a statement that he was threatened with death by a pencil (regarding the count of conviction), but stated he gave it to a prosecutor named "Brian Aaron," and he did not know "if they still have it or not." RP 259-60.

466-68.

All of this properly allowed defense counsel to emphasize in closing argument that the evidence of Mr. Kuneki making any threat to hurt, much less kill, as harassment, as a means of accomplishing rape, or as a threat of using the pencil as a weapon for the first degree crime, was so inconsistent as to leave great doubt. RP 544-45. This included the multiple inconsistencies in Mr. Maine's past claims about whether he was threatened to be killed with the pencil, in his statement of August 9, 2014, his defense interview of September 17, 2015, and his trial testimony. RP 544 (closing argument), RP 254-61 (cross-examination of Maine). Supp. CP ____, Sub # 99 (Exhibit 10, Exhibit 12;¹² Exhibit 14).

Even the State's own closing argument showed how controverted any claim of true threat would have been, even if the jury had been properly instructed. The prosecutor urged the jury to find that a rape was accomplished by a threat to kill in which the

¹² At one point the court referred to a writing by Mr. Maine as exhibit 12. See RP 257.

defendant held a pencil to Mr. Maine's neck to make him submit to intercourse, because Maine had been "lippy." RP 540. But at trial, Mr. Kuneki had described how he had simply called Mr. Maine "lippy" during one heated argument, in which Mr. Kuneki in fact was partly trying to stick up for Maine, because other inmates felt he was a problem causer. RP 467.

The controverted accounts in the case differed as to whether there had been a true threat to kill. Because the absence of a true threat requirement is constitutional error, the error must be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Johnston, 156 Wn.2d 355, 366, 127 P.3d 707 (2006). Further, the First Amendment prohibits the State from criminalizing statements that are mere angry hyperbole. Schaler, 169 Wn.2d at 283 (citing Kilburn, 151 Wn.2d at 43). The State cannot meet its burden to show that it is beyond a reasonable doubt that a properly instructed jury would have issued the same guilty verdict. Schaler, at 288 (instructional error is harmless only when it is clear that the

omission did not contribute to the verdict) (citing State v. Brown, 147 Wn.2d at 340–41). Reversal is required.

(3). THE FELONY HARASSMENT CONVICTION MUST BE VACATED AS A VIOLATION OF MR. KUNEKI'S DOUBLE JEOPARDY PROTECTIONS.

a. Double Jeopardy prohibits multiple statutory convictions for a constitutional same offense. Mr. Kuneki was convicted of rape in the first degree, and felony harassment. The counts were predicated on the defendant's alleged second instance of sexual intercourse forcibly compelled by a threat to kill Mr. Maine with a pencil. Maine asserted that he awoke in his cell to find Mr. Kuneki on top of him, with Kuneki holding a pencil to his neck "again." RP 242-43. Maine had testified that Kuneki previously had "told me if I didn't do what he said that he would stab me to death with the pencil." RP 235. In the second claimed occurrence, Maine stated, he told Mr. Kuneki to not have intercourse with him again, but Kuneki allegedly said he would kill him with the pencil "if I said anything or pushed the [inmate panic button]." RP 243.

Under these facts, the twin convictions violate the double jeopardy clause of the federal constitution's Fifth Amendment,

which provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); U.S. Const., amend. 5; U.S. Const., amend. 14.

The courts may not enter multiple convictions or impose punishment for conduct supporting two statutory convictions that amount to a single constitutional offense; doing so violates the defendant’s double jeopardy protections. Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932)

Pursuant to Blockburger, where the same conduct constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two constitutional offenses or only one, is whether both provisions required proof of a fact which the other did not, in which case there is no violation. In re Pers. Restraint of Orange, 152 Wn.2d 795, 817-18, 100 P.3d 291 (2004). However, rather than comparing the statutory elements at their abstract level, the issue is whether, as charged and proved, both offenses required proof of a fact which the other did not, and what evidence was required as necessary to convict. Orange, at 818.

The question in a case like Orange, therefore, was whether the evidence required to support the conviction for either the attempted murder or the assault would have been sufficient to warrant a conviction upon the other. Orange, 152 Wn.2d at 820. Given the way Orange was charged and proved, the answer was yes because the two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of assault. Orange, 152 Wn.2d at 820. This was the proper application of Blockburger's "same evidence" test, and showed that the defendant had been convicted twice for the same constitutional offense. See State v. Nysta, 168 Wn. App. 30, 46-48, 275 P.3d 1162 (2012) (citing Orange, and State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)). See also Orange, at 820 (citing State v. Potter, 31 Wn. App. 883, 888, 645 P.2d 60 (1982) (violation of double jeopardy because "proof of reckless endangerment through use of an automobile will always establish reckless driving"), and In re Personal Restraint of Burchfield, 111 Wn. App. 892, 46 P.3d 840 (2002) (first degree

manslaughter and first degree assault arising out of the same gunshot).

Here, under the Blockburger inquiry as informed by these cases, the proof of first degree rape by forcible compulsion also contained the required proof for felony harassment under RCW 9A.46.020(1)(b). Further, in fact, the threat to kill was the required proof not only of forcible compulsion, but also the deadly weapon element of rape in the first degree.

b. The evidence and State’s argument at trial show that Double Jeopardy was violated. As charged and proved in this case, these two offenses were the same for Double Jeopardy purposes.

In closing argument, relying on the trial evidence, and the jury instructions, the prosecutor first told the jurors that in order to convict Mr. Kuneki of the first degree rape, they needed to find that some device or instrument was “threatened to be used” in circumstances where it was capable of causing death or substantial bodily harm. RP 533; see CP 77 (Instruction 10) and RP 523-24). After reciting the deadly weapon definition for first degree rape, the prosecutor then gave the example that one could

take on a guy on with box cutters. Or, I can threaten your life with a pencil. Forcible compulsion. Force used to overcome resistance, or a threat of force to overcome resistance. The threat of a deadly weapon going into your brain, into your arteries, your throat, forcible compulsion.

RP 533. Thus, the threat to use the pencil to kill was the same threat that proved rape by forcible compulsion, while also proving a deadly weapon. The State's next discussion of the pertinent elements of first degree rape and harassment was similarly all-encompassing – the prosecutor explicitly urged the jury to find that the defendant's conduct proved each critical facet of the criminal episode necessary for all the criminal counts:

Now, did the defendant use forcible compulsion, and use or threaten – deadly weapon. That's – question for the rape, for the felony harassment. Did he knowingly threaten? Was the fear that he induced reasonable?

RP 535. The prosecutor also made clear that first degree rape was proved by evidence of the pencil's use as a *de facto* “deadly weapon held at his [Maine's] neck” unless he submitted to the intercourse.

RP 537 (arguing that victim did not resist intercourse because of threat to kill him with the pencil that was jammed at his throat);

RP 539-40 (arguing that victim was forced to submit to intercourse by deadly weapon held at his neck).

As charged and proved, the rape and the harassment were the same crime. In fact, the prosecutor's argument that the defendant forced intercourse by inducing reasonable fear (the threat to use the pencil) properly described the elements of the crimes. Both rape by "forcible compulsion," as an element, and the crime of harassment, include considerations of reasonableness. Rape in the first degree's element of forcible compulsion was defined for the jury as physical force or, a threat express "or implied" that places a person in fear of death or physical injury, and felony harassment was defined as a threat to kill that places the person in reasonable fear. See CP 74-75, 78 (Instructions 7-8, 11) and RP 524; see CP 80-82 (Instructions 13-15) and RP 524.

As explained in State v. McKnight, rape's definition, including forcible compulsion under RCW 9A.44.010, does not require a categorical showing that the complainant tried to physically resist, because "different victims respond differently to [sexual] assault," and proof requires only a showing of any resistance

that is reasonable under the circumstances. State v. McKnight, 54 Wn. App. 521, 525-26, 774 P.2d 532 (1989); see also State v. Gower, 172 Wn. App. 31, 43, 288 P.3d 665 (2012) (affirming conviction for indecent liberties, by forcible compulsion as defined by RCW 9A.44.010(6), where victim's relationship with defendant showed that her fear of physical injury was reasonable), reversed on other grounds by State v. Gower, 179 Wn.2d 851, 321 P.3d 1178 (2014).¹³

Consistent with these principles, the prosecutor in closing argued that the alleged victim certainly did not fight back or yell out, given that he had a pencil at his throat and he was told that he better not say anything, because as a “young kid, you’re in jail, -- older, experienced, strong man told you that.” RP 535-36. The rape and the harassment count were proffered to the jury by arguing that

¹³ The McKnight Court suggested that notions of forcible compulsion which do not consider the reasonable effect of the perpetrator's conduct on a person in the victim's circumstances would be archaic, or at least contrary to the modern trend. McKnight, 54 Wn. App. at 525-26; see also Lani Ann Remick, Comment, Read Her Lips: An Argument for a Verbal Consent Standard in Rape, 141 U. Pa. L. Rev. 1103, 1103-04 and note 4 (1993) (stating that forcible compulsion by threat necessarily means threat that dissuade a reasonable person from resisting). Cf. State v. Nysta, 168 Wn. App. at 46 (reasoning that under an elements comparison per Blockburger, harassment contains an element that the victim's reaction to the defendant's actions must be reasonable, which forcible compulsion does not).

the complainant understandably believed he had to submit to rape,
or else be killed:

What happened, what the evidence shows beyond reasonable doubt, -- (inaudible) doubt, this defendant threatened Mr. Maine's life, and Mr. Maine believed him. He thought he was going to be killed, or at least have a pencil driven up into his neck. And he submitted to the horror of being anally raped.

RP 540. The entire case against Mr. Kuneki was legally and factually infused with notions of reasonableness on the part of the forcibly compelled rape complainant. See also State v. Barragan, 102 Wn. App. 754, 761, 9 P.3d 942 (2000) (State proved that a pencil was a *de facto* deadly weapon based on how it was threatened or attempted to be used, for purposes of elevating crime to the first degree, because "a reasonable person could infer that Mr. Barragan intended to commit great bodily harm or death with the pencil.").

As charged and proved, the twin convictions were the same offense and double jeopardy was violated.

c. The felony harassment conviction must be vacated. The appropriate remedy in Mr. Kuneki's case is remand for resentencing and vacation of the harassment conviction. State v. Weber, 127 Wn. App. 879, 885, 112 P.3d 1287 (2005) ("The remedy for

convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense”), affirmed, 159 Wn.2d 252, 149 P.3d 646 (2006); cert. denied, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).

(4). DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HE DID NOT ARGUE THAT THE RAPE AND HARASSMENT WERE THE “SAME CRIMINAL CONDUCT.”

a. Scoring. Mr. Kuneki was assigned an offender score of 9 on the first degree rape count, based on six prior adult, non-sex offense, class B and class C felonies, and two prior juvenile convictions. CP 20; CP 94-95. One of these convictions, a second degree assault committed as an adult, was a violent offense, which was therefore scored as 2 points. See RCW 9.94A.030(54) (“violent offense” includes second degree assault). Because Mr. Kuneki’s two juvenile convictions were properly scored as 1/2 point apiece, his offender score of 9 necessarily included a point for his other current offense of harassment. Similarly, his offender score of 8 on the harassment count, which under RCW 9.94A.525 scores all adult felonies as one point, necessarily included a point for the current offense of rape.

b. Ineffective assistance. Mr. Kuneki’s counsel was ineffective for failing to have the second degree rape and the harassment convictions scored as the “same criminal conduct,” where they both involved the same victim, and were committed with the same intent at the same time and place. A determination of “same criminal conduct” at sentencing affects the standard range sentence by altering the offender score, in which other current offenses are generally counted as prior convictions. RCW 9.94A.589(1)(a). However, “if . . . some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.” RCW 9.94A.589(1)(a). See State v. Graciano, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013).

To sustain an ineffective assistance claim, a defendant must establish that counsel's performance was objectively unreasonable and that there is a reasonable probability that the result of the proceeding would have been different absent the deficiency. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Here, had defense counsel raised the claim, the sentencing

court would have counted Mr. Kuneki's convictions for rape and harassment as the same criminal conduct, resulting in an offender score of 8 on the rape conviction, and a standard minimum sentencing range of 209 to 277 months, rather than 240 to 318 months, and a score of 7 on the harassment for a similarly lower range of 33 to 43 months rather than 43 to 47 months. RCW 9.94A.525.

Same criminal conduct generally. Crimes constitute the same criminal conduct if they involve each of three elements: "(1) the same criminal intent, (2) the same time and place, and (3) the same victim." State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994); RCW 9.94A.589(1)(a).

Same victim. The victim of rape is the person with whom the defendant had unwanted sexual intercourse. See State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The victim of felony harassment is the person to whom the threat to kill is communicated and who is placed in fear that the threat will be carried out. State v. Leming, 133 Wn. App. 875, 889, 138 P.3d 1095 (2006). Based on the verdicts, these were Mr. Maine.

Same time and place. The testimony of Mr. Maine indicates that the rape was accomplished by means of the threat to kill, which was uttered simultaneously with the intercourse. RP 243. In any event, the “same time” element does not require that the two crimes occur simultaneously. State v. Porter, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996). Even sequential crimes may be considered the same criminal conduct if they occur during a single uninterrupted incident. Porter, 133 Wn.2d at 185-86; Dolen, 83 Wn. App. at 365. The offenses were also committed in the same place, i.e., the jail cell in Klickitat County where the rape by threat to kill was carried out.

Same intent. The “same criminal intent” element is determined by looking at whether the defendant’s objective intent changed from one crime to the next. Dolen, 83 Wn. App. at 364-65; State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997); see State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (standard for determining the same intent prong is the extent to which the

criminal intent, viewed objectively, changed from one crime to the next).

In this case, as the State argued in closing, the defendant used a threat to kill to forcibly compel Maine to not resist sexual intercourse. RP 533, 535, 537, 539-40. The fact that one crime furthered commission of the other may, and in this case does, indicate the presence of the same intent. Vike, 125 Wn.2d at 411; State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). This was not a case where some passage of time existed during which the defendant formed a new or different intent to commit an “additional” crime. Compare State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (where defendant completed assault and then formed new intent to threaten victim, crimes of assault and harassment had different objective intents and were not same criminal conduct); Nysta, supra, 168 Wn. App. at 52-53 (rape and harassment not same conduct where physical punching compelled the intercourse, and threats to kill were made to punish victim for seeing another man) (“There is no reason to believe Nysta intended the threat to compel S.F.’s submission to sexual intercourse.”).

Counsel should have requested that these counts be scored as the same criminal conduct, and Mr. Kuneki was prejudiced because the issue would have been decided in the defendant's favor.

Strickland v. Washington, 466 U.S. at 694.

Therefore, in the alternative to his argument for reversal and his double jeopardy argument seeking vacation of the harassment count, Mr. Kuneki asks that this Court remand the case for recalculation of the offender scores and resentencing.

E. CONCLUSION AND PRAYER FOR RELIEF AS TO APPELLATE COSTS

1. Conclusion - reversal of conviction and sentence. For the reasons argued herein, Charles Kuneki respectfully requests that this Court reverse his convictions and the judgment and sentence of the trial court.

2. Appellate Costs –Statement of Continued Indigency to be filed.¹⁴ If Mr. Kuneki does not substantially prevail in the appeal, he asks this Court to exercise its discretion under the Court of Appeals

¹⁴ Pursuant to the General Order of June 10, 2016 Mr. Kuneki, through counsel, will file his Statement of Continued Indigency, within 60 days of the filing of this Appellant's Opening Brief.

decision in State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016), and considering the policy imperatives regarding costs generally expressed in State v. Blazina, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015), to deny any award of appellate costs under RCW 10.73.160(1).

The record to date shows that Mr. Kuneki was indigent for trial and is indigent for appeal, and it is presumed he remains so. State v. Grant, ___ Wn. App. ___, 2016 WL 6649269, Slip Op. at *3 (Nov. 10, 2016) (under GR 34 and RAP 13.4, once indigency is established there is a presumption of continued indigency throughout review.). Mr. Kuneki has no ability to pay future costs in the form of appellate costs, as strongly attested to by the trial court’s refusal to accept the prosecutor’s argument that Mr. Kuneki should pay the attorney’s fees in the case.¹⁵ RP 571.

As to trial level costs, the court imposed solely the mandatory Legal Financial Obligations of the DNA fee and the victim assessment fee, although the court stated, “you won’t perhaps be

¹⁵ The prosecutor had contended that the defendant was “a tribal member and he gets [inaudible].” RP 571.

able to pay that. But something will be sent from DOC.” RP 574.
The court below recognized that Mr. Kuneki’s ability to pay even those financial costs was likely nonexistent. Mr. Kuneki asks that this Court of Appeals, for these reasons and in conjunction with those in his Statement of Continued Indigency, to exercise its discretion to deny any award of appellate costs under RCW 10.73.160(1).

Respectfully submitted this 15TH day of December, 2016.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

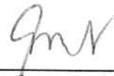
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 34174-7-III
)	
CHARLES KUNEKI,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF DECEMBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID QUESNEL, DPA KLICKITAT COUNTY PROSECUTOR'S OFFICE 205 S COLUMBUS AVE. STOP 18 GOLDENDALE, WA 98620	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] CHARLES KUNEKI 793655 MMC-WSR PO BOX 777 MONROE, WA 98272	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF DECEMBER, 2016.

X _____ 

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