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King County Prosecutor
Appellate Unit

NO. 67616-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

PERNELL FINLEY,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Hollis R. Hill, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Pernell Finley was deprived of his constitutional right to represent himself.

2. The court should have excluded the no contact order Finley allegedly violated as inapplicable to the charged violation.

3. Finley received ineffective assistance of counsel when his attorney did not argue against admission of the inapplicable no contact order.

4. Finley's conviction for felony harassment violates double jeopardy.

5. The court erred in calculating Finley's offender score.

6. The court erred in finding Finley's 1991, 1993 and 1996 Florida convictions for robbery are comparable to Washington State felonies.

7. The court erred in finding Finley's 1991 Florida conviction for burglary is comparable to a Washington state felony.

8. The court erred in finding Finley's 1993 and 1996 Florida convictions for escape are comparable to Washington State felonies.

9. Finley received ineffective assistance of counsel at sentencing when his attorney failed to argue the 1991 Florida convictions for robbery and burglary constituted the same criminal conduct.

10. Finley received ineffective assistance of counsel at sentencing when his attorney failed to argue his conviction for felony harassment constituted the same criminal conduct as his rape conviction.

11. Finley received ineffective assistance of counsel at sentencing when his attorney failed to argue his conviction for felony violation of a no contact order (FVNCO) constituted the same criminal conduct as his rape conviction.

Issues Pertaining to Assignments of Error

1. Whether the court abused its discretion in denying Finley's request to represent himself where the denial was based on the court's mistaken impression the request was equivocal?

2. Whether the court erred in admitting the no contact order Finley allegedly violated where the charged violation occurred after one of two conflicting expiration dates on the order?

3. Whether Finley received ineffective assistance of counsel where defense counsel failed to challenge the applicability of the no contact order?

4. Where the threat to kill was the forcible compulsion relied on to prove first degree rape, does Finley's separate conviction for felony harassment violate the prohibition against double jeopardy?

5. Did the court err in including Finley's prior Florida robbery convictions, where Washington's robbery statute requires the force or fear used to be immediate, whereas Florida does not?

6. Did the court err in including Finley's prior Florida burglary conviction, where Washington's burglary statute requires intent to commit a crime against person or property therein, whereas Florida has no such limitation on the crime intended?

7. Did the court err in including Finley's prior Florida escape convictions, where Washington's escape statute requires confinement pursuant to a felony conviction at the time of the escape, whereas Florida requires only confinement?

8. Did Finley receive ineffective assistance of counsel at sentencing where his attorney failed to argue the 1991 convictions for robbery of Judy Lee and burglary of her home on the same day constituted the same criminal conduct?

9. Did Finley receive ineffective assistance of counsel where his attorney failed to argue the current felony harassment conviction constituted the same criminal conduct as the current rape convictions, where the prosecutor relied on the threat to kill to prove the forcible compulsion element of rape?

10. Did Finley receive ineffective assistance of counsel where his attorney failed to argue the current FVNCO conviction constituted the same criminal conduct as the current rape convictions, where the prosecutor argued the assaultive conduct elevating the violation to a felony was the rape itself?

B. STATEMENT OF THE CASE

1. The Charges

Appellant Pernell Finley is appealing his convictions for: (1) first degree rape while armed with a deadly weapon; (2) first degree rape while armed with a deadly weapon (an additional count); (3) felony harassment while armed with a deadly weapon; (4) felony violation of a no contact order (FVNCO) while armed with a deadly weapon; and (5) witness tampering. CP 1-4, 23-26, 167-75; RP 2.

The state alleged Finley committed counts 1-4 against his fiancée and roommate Monique Lock on March 5, 2010. CP 1-4, 23-26, 443, 446. The state alleged Finley committed count 5 during telephone conversations with Lock thereafter, while awaiting trial. CP 23-26; RP 951-52, 979.¹

¹ “RP” refers to the January 2011 trial transcripts, contained in multiple bound volumes and consecutively paginated.

Finley had been living with Lock for approximately two years preceding the morning of March 5, 2010. RP 364. He had moved to Washington from Florida after he and Lock spent several months getting to know each other over the telephone; they initially met through Finley's work as a telemarketer. RP 354-55, 357-60, 442, 1047. In 2008, Finley moved into Lock's Kent apartment, and the two began what Lock described as a fulfilling and adventurous sexual relationship. RP 362, 364, 446-47, 1050.

Lock admitted that she would sometimes manipulate Finley. RP 365, 381, 455. Specifically, when Finley wanted to spend time with friends, Lock would threaten to report him for violating a no contact order that had issued in 2009 and prohibited Finley from in-person contact with Lock. RP 365, 369, 381, 1095, 1098; Ex 2.

The order was issued after the two got into an argument while Lock was cooking ribs. RP 365-66. Lock had a knife in her hand and was haranguing Finley. RP 365. Finley became angry and told Lock that if she didn't leave, he would hurt her; Lock had been planning to go to the store anyway. RP 366. Lock testified she called the police after Finley angrily knocked over a printer. RP 366.

While Lock denied that Finley threatened her with a knife during the argument, she told the police otherwise. RP 371-72, 458. Later,

however, Lock went to court and admitted she lied to police. RP 377, 458. Finley subsequently pled guilty to fourth degree assault. RP 377, 1056-57. Although Lock also told the judge she wanted contact with Finley, the judge issued the no contact order, prohibiting all but telephonic contact.² RP 377-78, 1098. Regardless, the two resumed their relationship. RP 379, 1057.

Shortly before the March 5 charging date, Finley purchased a plane ticket to return to Florida. RP 379, 382. To Lock's disappointment, she had realized the two would not be getting married. While they had discussed it, the wedding date kept getting postponed. The relationship was not developing as Lock pictured, and she asked Finley to leave – although she hoped they might reunite in the future. RP 383-384.

The morning of March 5, 2010, Lock woke up around 5:00 a.m. and realized Finley had not come to bed; the two were still sleeping together. RP 384-85. She found him at the computer, where he had been all night. RP 384. Lock admitted she started “going off on him” and was “[j]ust calling him names you know kind of like belittling him.” RP 385.

² The no contact order indicated an expiration date of May 29, 2009 (the date it was issued). RP 378, 1102, 1154, 1185; Ex 2. But it also indicated an expiration date of May 29, 2011, at the bottom of the order. RP 1102-1103, 1154. Finley testified that as a result, he was not sure whether the order was valid or whether his contact with Lock was a violation of the order. RP 1102, 1104.

She told him: “You should have been gone, why are you still here. I want you out.” RP 385.

Lock went back to bed. As she was trying to sleep, she could hear Finley muttering under his breath. RP 386. Lock testified she rolled over, but upon turning back, found Finley sitting in the chair by the bed holding a butcher knife. RP 386. Lock thought he said, “Who’s in control now?” RP 389.

According to Lock, Finley said he was going to kill Lock and then himself. RP 390. “He just was talking about you know his life was over and mine was too and we were going to be in the newspapers side by side stuff like that.” RP 392. According to Lock, “at that point then I kind of tried to calm him down so he could get in the bed and I did do that and then we had sex.” RP 390.

According to Lock:

Well I initiated and then he just got in the mood and I thought everything was working you know because we made love like we always do. And we did have anal sex but I didn’t know at the time that that’s what that was called because we did it a couple of times so. And it hurt you know but afterwards it was okay.^[3]

RP 393.

³ Lock testified she and Finley had anal sex on prior occasions but that she was not relaxed on this occasion. RP 394, 462.

Lock testified that after the first time, they went to the bathroom to clean up. She claimed Finley was still threatening to kill them both, so she initiated sex a second time. RP 404-05. But when Finley went to open the window afterward, Lock “took off running[.]” RP 404. Lock testified she was upset because of the threats, not the sexual contact. RP 471.

Lock testified that upon leaving the apartment, she accidentally fell down the stairs. Initially, Lock thought Finley pushed her. 410, 461-62. However, she later realized he was trying to get her to come back inside, because she was not clothed. RP 410.

Upstairs neighbors Susan and Shawn Emerson heard Lock yelling for help, and Mr. Emerson ran to her aid. Mr. Emerson testified that when he encountered Lock, she was yelling that she had been raped.⁴ RP 725. Mr. Emerson ran back toward his apartment and directed his wife to bring down a blanket and call 911. RP 730, 854.

Mr. Emerson brought Lock back to the apartment, and Mrs. Emerson – who was on the phone with 911 – handed the phone to Lock. RP 731, 856-57. Lock told the operator Finley was trying to kill her, that

⁴ In contrast, Mrs. Emerson remembered hearing Lock call for help, not yell that she had been raped. RP 862-63. Lock confirmed she never used that word. On the contrary, Lock did not consider her sexual encounter with Finley to be rape. RP 451. Rather, that was what the emergency medical technician (EMT) and doctor told her. RP 452. Lock testified they jumped to that conclusion, because she said she was scared. RP 453.

he “had a knife and he was making me have all kinds of sex with him[.]”⁵

RP 413. Lock exclaimed that Finley was escaping on his bicycle. RP 413.

Emergency medical technician Justin Schauer was one of the first responders. 490. The call had been dispatched as a domestic assault. RP 493. According to Schauer, Lock reported an assault only. RP 493. Schauer and his crew left after determining Lock did not need to go to the emergency room. RP 493.

Meanwhile, officer Amanda Quinonez spoke with Lock. RP 965. According to Quinonez, Lock said she was forced to have anal sex. RP 967. Lock reportedly claimed that Finley used a knife and threats to force her. RP 967. Lock’s reported statements were admitted solely for the purpose of assessing her credibility. RP 970.

Officer Paul Peter took a statement from Lock. Lock reportedly told him Finley forced her to have anal sex at knife point, twice. RP 646-47, 650. The first time, Lock lost control of her bowels. After washing,

⁵ In closing argument, defense counsel argued the recording was not clear regarding this alleged statement:

If you just read the transcript you will find that she says he has a knife, and he’s making unintelligible, dot, dot, dot, dot, dot. And then all kinds of sex with dot, dot, dot, dot. You can listen to that 911 call and see if you can get anything more out of that. But I can tell you the 911 officer, the dispatcher did not. Because she didn’t put out a dispatch of a rape.

RP 1186.

Finley reportedly forced anal sex a second time. As with the statement to Quinonez, Lock's statement to Peter was admitted solely for credibility purposes. RP 645, 648.

Schauer and his crew returned to the Kent apartment complex after dispatch informed them of the new allegations. RP 494. Schauer could not remember if he spoke to Lock again, or merely overheard her statement to police. RP 499. In his report, however, Schauer wrote: "the suspect [sic] states that she was raped as well and that in my assessment I added that she had injuries from a sexual assault possibly[.]" RP 494. He also wrote that the suspect possibly raped her multiple times. RP 494.

Anna Hulse was the emergency room nurse who treated Lock at the hospital. According to Hulse, Lock alleged the following:

Around 5:30 this morning I got up to get a glass of water he was on the computer. I asked him when he was going to leave he did not answer. I went back to bed. He went in the kitchen and got a knife and came into my bedroom. He sat on a chair next to my bed and was looking at me. He was telling me I am not a kid I ruined his life I brought the other person out of me. I am going to kill you this is a rap. You need to shut your mouth. He told me to lay on my face I turned around and he tried to put his thing in me. He spit on it and he went ahead and had sex in my behind. Afterwards I washed myself with a wet towel I got back in bed and he did it again with Vaseline and he came. I washed my hands and my behind again. I got back in bed and he kept telling me I ruined his life and that I was going to die. He got up and walked toward the patio door and I took off running. He pushed me and I fell down about 13 stairs I was screaming and pounding on my neighbor's

doors. A neighbor gave me a blanket and his wife called the police. And then he also he also said he was going to kill himself and that we were both going to be in the papers.

RP 563.

Regarding the morning of March 5, Finley testified similarly to Lock. RP 1072-1074. Finley admitted that after Lock berated him, he decided he was going to scare her, to teach her a lesson. RP 1074. Finley testified he “blew a fuse,” grabbed a knife from the kitchen and went into the bedroom. RP 1075. He sat down and tried to explain to Lock she should not treat him so poorly. RP 1075. Finley did not remember if he was yelling, but he admitted he “made those big ugly faces because [he] wanted her to be scared.” RP 1075.

Finley testified that during the course of his explanation, Lock grabbed him and started kissing him. She reportedly said, “let’s make love and everything will be okay.” RP 1076. Finley testified he put the knife down and forgot all about being angry. RP 1076. He acknowledged having anal sex on two occasions, and that the two used the restroom in between. RP 1077-78.

Afterward, however, Finley still had something to say about Lock’s treatment of him earlier. RP 1080. He admitted he grabbed the knife from under the bed and resumed his explanation. RP 1081. When

Finley went outside to smoke a cigarette thereafter, Lock ran out the front door. RP 1081. Finley tried to pull Lock back inside, but she fell down the stairs. RP 1081.

Finley tried to assist Lock, but she pushed him away. RP 1083. Ultimately, Finley panicked and ran away once he saw Mr. Emerson approaching. RP 1083. Finley denied ever sexually assaulting Lock. RP 1092.

2. Motion to Proceed Pro Se

Finley expressed distrust of his attorneys before trial began. During a pre-trial hearing in which the defense sought a continuance, Finley stated he did not believe his attorneys were working on his case, that the case had been continued too many times, and that he did not understand why his attorneys needed an additional continuance to transcribe jail calls. 1RP⁶ 18. The defense had previously requested a continuance in order to transcribe some of the jail calls. 1RP 13, 16.

The court explained the reason for the request was not to transcribe jail calls but because of lead counsel Lois Trickey's vacation. 1RP 17-19. Trickey previously had been sent out on another case, but it was recessed for a week during her vacation. 1RP 16. Finley lamented his case should have taken precedence over the other case and that his attorneys "used the

transcript stuff just to do something different, and (inaudible – crying).”

1RP 20. The court granted the request continuance, as well as a subsequent request, due to the prosecutor’s illness and defense counsels’ vacations.⁷ 1RP 20, 23.

During trial, Finley’s frustration became evident. During the state’s case-in-chief when the attorneys were addressing the jail recordings, the following occurred:

THE COURT: Do you want to talk to your client before we go on?

MS. TRICKEY: Uh. Huh.

MR. WAGNILD [the prosecutor]: Do you want us, are we all stepping outside or how we.

MS. TRICKEY: However we can do it.

MR. WAGNILD: All right whatever makes him comfortable I just want to make sure that the record’s clear here the Mr. Finley who has stood up in the middle of us going through the jail phone calls has announced that he can’t listen to this anymore and stood up and is now being cuffed. We will all step outside of the courtroom, turn the record off, let defense counsel talk to their client and we’ll decide how to proceed.

RP 784.

While the remainder of the day was without incident (RP 785),

Finley moved to proceed pro se the next day:

⁶ 1RP refers to the consecutively paginated transcript of pre-trial hearings held 10/5/10, 11/15/10, 11/22/10, 12/6/10, and 12/16/10.

MS. TRICKEY: Mr. Finley apparently Your Honor would like to ask the Court to permit him to represent himself in this case. Mr. Finley would you like to rise and tell the Court your issues?

MR. FINLEY: I, I feel that my counsel and the State, well not necessarily the State but that my counsel is sabotaging my case and they are not acting in my best interest. They have been withholding evidence from me. A lot of things that I've been asking them for I haven't even been able to see or hear until, after this trial started and you know I made those requests months ago and you know they're, they're, they're telling me, they come and tell me that oh we offered it to you and I tell them no you didn't. I am just going, I am going to start from the beginning because, okay this started, this started the first time I met Ms. Trickey our first meeting didn't go really well. It was me, her and former counsel and you know she told me that whatever me and my former counsel had a problem. The told me that whatever the problem was between them you know she was siding with counsel not even knowing what the facts were. Told me I was a liar to my face which I wasn't a liar. I wasn't lying about what happened between me and the former counsel. And the former counsel was right there and he never denied anything. Told me that if, if I had a problem to just let her know and she would resign from the case. Well, I am letting her know now I do have a problem. And that's not the first time that she made that statement to me. She just made that same statement last week during the trial proceeding that after the EMT witness was up there and you know I had something to say about you know his testimony being hearsay and why it wasn't challenged that he made statements that is nowhere in the information and I was told that that's a part of the strategy. You know how is hearsay testimony a part of this is, is strategic approach to my defense. You know I don't understand that and how is accusations that is nowhere in the information left unchallenged is a strategic approach to my defense you know. I am not a lawyer so there's a lot of things that I don't understand but those things can't be explained to me

⁷ Finley was also represented by Ron Heiman.

the way that they're being explained. And it's not making any sense. Also I received some, some the witness discovery information with the witness recordings from my attorneys and that, that discovery, well not the discovery but the recordings itself, the police officers did, that interview that the police officers did, did not, did not match with the same original it did not match with the original, the original transcription that the State's did.

RP 824-25.

In response, the court indicated Finley could add documents to the record "if should you know at some point need to appeal." RP 825. When Finley responded he did not have any documents, the court indicated that from its perspective: "they are doing an excellent job representing you. You know I can tell you that because I've seen what they've done in this case." RP 826. Finley retorted: "What you haven't seen is what they haven't done." RP 826.

The court indicated it would give Finley an opportunity to speak to his attorneys to allow them explain how disadvantageous it is to go without representation. The court also cautioned, "We're not going to appoint a new attorney to you." RP 826 (emphasis added). Finley reiterated: "You don't have to appoint an attorney to me." RP 827.

Moreover, Finley asked the court: "you heard Lois say to me that she didn't, she didn't have time to come to, to come to the jail and play 9 hours of phone recordings for me, did you not?" RP 828.

At this point, Trickey interjected that she would be “glad to contribute if Mr. Finley would like me to at this point.” RP 829. Before Finley could answer, however, Trickey interjected the following and concluded by asking for either a mistrial or to be permitted to withdraw so that Finley could represent himself:

MS. TRICKEY: Well I will agree that I told Mr. Finley I don't have time to go to the jail and play 9 hours of phone recordings for him. We have a paralegal Denille Crow who actually went to the jail with phone recordings. Mr. Finley according [to] Denille told her he didn't want to listen to all of that. He was done. She then just recently took over another recording that he had told her he did want to hear and that was the recording of our interview with Ms. Lock and she only got part way through with that when he said I'm done. Your Honor I absolutely agree with Mr. Finley that there are communication problems between the defense team and Mr. Finley. So much so that before I was on the case, when Mr. Schmidt and Mr. Heiman were on the case they actually had an evaluation done to see whether Mr. Finley was competent. The evaluator deemed that he was so we went ahead to trial. It's been very difficult working with Mr. Finley because he appears not to understand the reasons we're trying to explain to him for our strategy or when we try to explain to him you know what we're doing and he keeps insisting that we haven't allowed him to review evidence which we've sent a paralegal over to sit and spend however much time and according to the paralegal he just didn't have you know the emotional strength to sit thought that.

MR. FINLEY: Wow.

MS. TRICKEY: Or he told her that he didn't want to do that. So, and that may be absolutely correct. But Mr. Finley has told us after we started trial that we told him he would hear this for the first time in trial. I mean he's told

us things that absolutely indicate he's had a misunderstanding of what we've been telling him. So I think there really has been a lack of communication. Mr. Finley is not going to be happy with how we're representing him. I move at this time either for a mistrial or to withdraw and allow Mr. Finley to represent himself.

RP 830.

Finley adamantly disagreed that the paralegal brought the jail recordings. RP 830-33. Rather, he asserted she brought recordings of police interviews and the 911 recording. RP 830-31.

Following a recess, the court re-characterized Finley's request to proceed pro se as two, alternate requests:

All right Mr. Finley I've been considering your request to discharge counsel and proceed pro se and I want to finish hearing you out. I know there were other things that you wanted to say and we took a recess. I want to start with your request to, to discharge your attorneys and you can remain seated while you're, while you're talking. I'd like to ask you to tell me everything that you think I should know about that particular part of your request and I know you're also asking to proceed without counsel and I want to set that one aside right now and just focus on the request to discharge your attorneys.

RP 831 (emphasis).

Finley's confusion at the court's re-characterization of his request became evident as the colloquy continued:

THE COURT: Okay do you want to move on to the request to represent yourself pro se?

MR. FINLEY: I thought you wanted me to explain why.

THE COURT: No, okay, go, if there's more that you want to say go ahead I thought, okay.

MR. FINLEY: The, the withholding the information . . .

THE COURT: Uh huh.

MR. FINLEY: I, I, I can't trust them. I can no longer trust these people, especially after she stood up and lied in my face to you.

THE COURT: Okay. All right so with respect to representing yourself is there anything you want to say to the Court about that request?

MR. FINLEY: In respect to representing myself and pro se?

THE COURT: And, and, or are you asking for a substitution of counsel?

MR. FINLEY: Can you do a substitution?

THE COURT: Are you asking for that?

MR. FINLEY: I can do either one.

. . .

THE COURT: Well I'm just asking if that's your request or are you asking.

MR. FINLEY: Well you told

THE COURT: Or are you asking to represent yourself?

MR. FINLEY: Ma'am?

THE COURT: I just want to clarify your request at this point.

MR. FINLEY: Okay, when, when I first said okay I wanted to represent, wanted to go pro se I was of the understanding that, that there, there, there was no other method that I could use. As far as not having this counsel. That I had to go pro se.

THE COURT: Uh huh.

MR. FINLEY: So, as far as, that was my understanding and that's far as I know other than when you, when you, when you said to me that well I am not going to assign you new counsel or okay, so that's, I guess that's still my understanding so yes, and, and I don't know anything different and from what you told me there isn't anything different. So yes, that's what I am going with.

RP 835-36.

The court denied Finley's request to proceed pro se, in part, reasoning that the request was equivocal:

[H]ere's my decision Mr. Finley with respect to your request to discharge counsel the law requires that there be good cause shown either a conflict of interest an irreconcilable conflict of some kind, a complete breakdown of communication that in effect is resulting in a complete denial of counsel, I have observed, I am finding that the representation in this case has been not only adequate but actually very competent. There's no basic conflict of interest that's been shown here and no showing of prejudice. I have observed communication between counsel and, and, and Mr. Finley yourself throughout the trial and I represent, and I have observed counsel providing adequate representation. So the request to discharge counsel at this point is denied. With respect to the request to represent yourself I am not sure that's an unequivocal request. I don't find that it is. But in addition it's not, it is not an absolute right to represent oneself. The request must be made in a timely manner or it can be relinquished, it is

untimely to make a request to represent oneself in the middle of trial. It will hinder the administration of justice. We've had a jury sitting now for days hearing the evidence in this case. The request to some extent I'm finding is to gain tactical advantage at this point in the trial. And I am denying the request to represent yourself.

RP 836-37 (emphasis added).

Ironically, the court later granted defense counsels' motion to withdraw and for substitution of counsel, based on a breakdown in communication, in advance of sentencing. 2RP (4/13/11) 2, 12.

3. Jury Note Regarding the No Contact Order and Court's Instruction

As indicated in note 2, the no contact order Finley was alleged to have violated on March 5, 2010, indicated an expiration date of May 29, 2009 (the date it was issued). RP 378, 1102, 1154, 1185; Ex 2. But it also indicated an expiration date of May 29, 2011, at the bottom of the order. RP 1102-1103, 1154.

During deliberations, the jury sent the following inquiry to the Court: "Does the first date on the No Contact Order void the whole document? Line 12 versus line 14, Exhibit 2." CP 165.

Before responding, the court heard argument from the parties on how it should respond:

MS. TRICKEY: Your Honor I think they have to be instructed to re-read their instructions. They can be told they are the finders of fact. But, if it were the other way

around then he would have brought him another no contact order and charged him on another count. That's why we didn't raise it.

THE COURT: Well, my concern is this is a legal question. This is not a factual question. This should have been raised before trial. It should have been raised.

MS. TRICKEY: Well if we had raised it before trial Your Honor the State would have amended to add a valid no contact order. Because there were others.

RP 1211. As requested, the court instructed the jury to "please rely on the instructions of law as they've been given to you." RP 1212.

4. Sentencing

The defense objected to the existence of any out-of-state prior convictions. CP 276, 278. Assuming the state could prove the existence of any, however, the defense objected to its comparability. CP 276, 278.

The state submitted evidence of several prior Florida convictions. RP 1217. First, the state submitted documentation indicating that under Cause No. **91-000-331 (91-440)**, Finley was convicted of: one count of first degree robbery, allegedly committed against Judy Lee on February 8, 1991; and one count of first degree burglary, also allegedly committed against Judy Lee on February 8, 1991.⁸ CP 288-89.

⁸ The documentation indicated Finley was a juvenile at the time. CP 294-97.

Second, the state submitted documentation indicating that under Cause No. **91-309**, Finley was convicted (also as a juvenile) of second degree robbery, allegedly committed against Margaret Larkin. CP 290-92.

Third, the state submitted documentation indicating that under No. **93-02512**, Finley was convicted of: one count of possessing cocaine, allegedly committed on October 15, 1993; and one count of second degree escape, also allegedly committed on October 15, 1993. CP 353-54.

Fourth, the state submitted documentation indicating that under No. **96-01136**, Finley was convicted of one count of first degree robbery, allegedly committed against Christopher Rivera and/or Tamika Walker on April 12, 1996. CP 332.

Fifth, the state submitted documentation indicating that under No. **96-0293**, Finley was convicted of second degree escape, allegedly committed on September 24, 1996. CP 352.

For count I of the current charges (first degree rape), the state calculated Finley's offender score as 14 points. RP 1262. While the state's briefing did not indicate how it arrived at that score, it appears the state scored: 2 points for the 1991 robbery against Judy Lee; 2 points for the 1991 burglary of the home of Judy Lee; 2 points for the second degree

robbery against Margaret Larkin;⁹ 2 points for the 1996 robbery against Christopher Rivera and/or Tamika Walker; 1 point for the 1993 cocaine possession; 1 point each for the 1993 and 1996 escapes; and 3 points for the other current offenses (felony harassment, FVNCO and tampering). See RCW 9.94A.589(1)(b); RCW 9.94A.525(9).

As indicated, the defense disputed the comparability of all Florida convictions. CP 276, 278; RP 1224-1229. Regarding the robberies, the defense also offered a specific objection in that Florida does not require the use or threatened use of *immediate* force or fear, whereas Washington does. CP 222, 278.

The defense also made a specific objection to the comparability of the Florida burglary on grounds there is no limitation on the crime intended to be committed therein, whereas Washington requires it to be a crime against person or property. CP 279.

⁹ Initially, it does not appear the state included this robbery in its calculation of Finley's offender score, which it first asserted was 12 points. Supp. CP __ (sub. no. 100, State's Sentencing Recommendation, 7/22/11), page 2. Later, however, the state asserted Finley's score was 14 points. RP 1262. In any event, it appears the court included the second degree robbery in its offender score calculation, as the state offered identification evidence about it at sentencing, and the court adopted the state's latter calculation of 14 points on the judgment and sentence. CP 368; RP 1252, 1262.

The court concluded the Florida offenses were comparable. RP 1222-1229. Although the defense argued the felony harassment was inherent in the rape as the forcible compulsion element, the court denied the motion to merge the two offenses. RP 1258-1260.

The court followed the state's recommendation in all respects and imposed a cumulative sentence of 471 months (318 months on count I + 93 months on count II + 24 months (enhancement count I) + 24 months (enhancement count II) + 6 months (enhancement count III) + 6 months enhancement (count IV)). CP 372. This appeal follows. CP 380-392.

C. ARGUMENT

1. THE COURT ABUSED ITS DISCRETION IN DENYING FINLEY'S UNEQUIVOCAL REQUEST TO REPRESENT HIMSELF.

Contrary to the trial court, Finley did not make an equivocal request to represent himself. Rather, the only confusion about Finley's request was engendered by the court itself when it re-characterized Finley's request as a request for substitution of counsel, and *in the alternative*, to proceed pro se. That was not the nature of Finley's request. Because the court's denial of the request rested on a faulty foundation, the court manifestly abused its discretion in denying the motion to proceed pro se.

A trial court's denial of a request for self-representation is reviewed for abuse of discretion. State v. Breedlove, 79 Wn.App. 101, 106, 900 P.2d 586 (1995). Discretion is abused if the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State v. Woods, 143 Wn.2d 561, 626, 23 P.3d 1046 (2001).

“Criminal defendants have a constitutional right to waive assistance of counsel and represent themselves.” State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (citing Faretta v. California, 422 U.S. 806, 813, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Defendants are afforded this right even though exercising it “will almost surely result in detriment to both the defendant and the administration of justice.” State v. Vermillion, 112 Wn.App. 844, 851, 51 P.3d 188 (2002). But this right is not absolute or self-executing. Woods, 143 Wn.2d 561, 585-86, 23 P.3d 1046 (2001). The defendant's request must be timely and unequivocal. Vermillion, 112 Wn.App. at 851.

The trial court's discretion to grant or deny a motion to proceed pro se lies along a continuum based upon the timing of the request.

If the demand for self-representation is made (1) well before the trial or hearing and unaccompanied by a motion for a continuance, the right of self-representation exists as a matter of law; (2) as the trial or hearing is about to commence, or shortly before, the existence of the right

depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter; and (3) during the trial or hearing, the right to proceed pro se rests largely in the informed discretion of the trial court.

State v. Barker, 75 Wn.App. 236, 241, 881 P.2d 1051 (1994).

Factors to be considered in assessing a motion to proceed pro se made during trial include:

[T]he quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.

State v. Jordan, 39 Wn.App. 530, 541, 694 P.3d 47 (1985) (quoting State v. Fritz, 21 Wn.App. 354, 363, 585 P.2d 173 (1978)).

Because the request here was made during trial, the court had a large measure of discretion in ruling on it. And while the court found granting the request would “hinder the administration of justice (RP 836-37),” Finley never stated he would need a continuance, nor did the court ask about the need for one. The record is therefore silent as to the disruption or delay that might reasonably be expected to follow the granting of Finley’s motion.

Additionally, there is no evidence supporting the court’s finding that Finley’s request was somehow motivated by a desire to gain tactical advantage. On the contrary, case law is clear that the exercise of the right

to represent oneself will almost surely result in one's disadvantage. Vermillion, 112 Wn. App. at 851. Instead, the record shows Finley's request was motivated by distrust of his attorneys, particularly Trickey, whom Finley claimed: "she's sitting here, she's actually lying on me to you [the court.]" RP 833. As a result, the court's exercise of discretion was not informed.

Moreover, and perhaps most importantly, the court's denial of Finley's request to proceed pro se was based on its faulty conclusion the request was equivocal. Finley's request could not have been clearer. Finley was told up front the court would not appoint another attorney for him. Finley remained undeterred, remarking: "You don't have to appoint an attorney to me." RP 827. It was the court that interjected confusion into the colloquy by re-characterizing Finley's request as one to discharge his attorneys, and alternatively, to represent himself. Even so, however, Finley reminded the court of what it stated earlier and stuck to his request to represent himself. RP 835-36.

While a request to proceed pro se *in lieu of* substitution of new counsel may indicate that the request is not unequivocal, that was not the nature of Finley's request. See e.g. Stenson, 132 Wn.2d at 740-41. Because the court's ruling was based on a faulty premise, the court abused

its discretion in denying Finley's request to proceed pro se. This Court should reverse and remand for a new trial.

2. THE NO CONTACT ORDER WAS INAPPLICABLE TO THE CHARGED OFFENSE AND THEREFORE INADMISSIBLE.

A charge of violation of a no contact order must be based on an "applicable" order. City v. May, 171 Wn.2d 847, 256 P.3d 1161 (2011); State v. Miller, 156 Wn.2d 23, 31-32, 123 P.3d 827 (2005). The Court in May recently clarified the trial court's gate-keeping function in this regard:

Today, we clarify that, in a proceeding for violation of a court order, the trial court's gate-keeping role includes excluding orders that are void, orders that are inapplicable to the crime charged (i.e., the order either does not apply to the defendant or does not apply to the charged conduct), and orders that cannot be constitutionally applied to the charged conduct (e.g., orders that fail to give the restrained party fair warning of the relevant prohibited conduct).

May, 171 Wn.2d at 855.

An order is inapplicable to the charged offense where its ambiguous expiration date could be construed as pre-dating the charged violation. See May, 117 Wn.2d at 854; State v. Miller, 156 Wn.2d 23, 30-31, 123 P.3d 827 (2005); City of Seattle v. Edwards, 87 Wn. App. 305, 941 P.2d 697 (1997), overruled in part, State v. Miller, 156 Wn.2d 23, 30-

31 (2005). As Edwards, Miller and May demonstrate, the order at issue here was inapplicable and should have been excluded.

The problem with the order entered against Edwards was that its term was ambiguous. Edwards, 87 Wn. App. at 308. The order was a standard pre-printed form, which stated that it would be effective for one year, but then provided two other options for setting alternative termination dates. The first option provided for a fixed termination date, while the second provided that the order was effective until further court order. The order was formatted as set forth below, with the second option selected:

THIS ORDER FOR PROTECTION WILL BE
EFFECTIVE UNTIL ONE YEAR FROM TODAY.

OR

until _____ (date) or

until further order of the court.

Edwards, 87 Wn. App. at 308.

This Court concluded that because the term reasonably could be interpreted in more than one fashion, it was ambiguous. Edwards, 87 Wn. App. at 308-09. Relying on the rule of lenity, which dictates that

ambiguities are to be resolved in favor of the accused,¹⁰ this Court interpreted the expiration date to be one year from the date of the order:

We therefore construe the order as being effective for one year, with the possibility that the duration could be changed by further court order. No such order was entered, so the duration was one year. Because the act complained of occurred more than one year since the entry of the order, the alleged incident could not have constituted a crime.

Edwards, 87 Wn. App. at 309. This Court also held it could not “allow a conviction to stand where the State has not given fair notice of the proscribed conduct.” Id.

The part of Edwards that was reversed in Miller was that the validity of the order is an element of the offense the state must prove beyond a reasonable doubt. Edwards, 87 Wn. App. at 308; Miller, 156 Wn.2d at 31. The Court nonetheless concluded the Edwards Court arrived at the correct conclusion:

In Edwards, Division One reversed a felony conviction for violation of a no-contact order on the grounds that the duration of the order was not clear on its face and therefore the defendant could have reasonably believed it had expired at the time of the alleged violation. See City of Seattle v. Edwards, 87 Wn. App. 305, 307, 311, 941 P.2d 697 (1997). Finding that the defendant was essentially deprived of notice of the duration of the order, the court concluded that the State had not established the validity of the underlying order and vacated the conviction for failure to prove this “implicit element” of the crime. Id. at 308, 941 P.2d 697. We agree to some extent. In Edwards, the order was vague and was inadequate to give the defendant notice of what

¹⁰ State v. McGee, 122 Wn.2d 783, 787-790, 864 P.2d 912 (1993).

conduct was criminal and what conduct was innocent. The court was rightly loath to allow a person to be convicted under such circumstances.

Miller, 156 Wn.2d at 29.

The Court concluded, however, that the validity of the order was not an element of the offense but rather an issue of “applicability” to be determined by the trial court:

While we are inclined to believe that the Court of Appeals reached appropriate results in . . . Edwards, issues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court. Collectively, we will refer to these issues as applying the “applicability” of the order to the crime charged. An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order. The court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged.⁴ Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed.

FN4. We do not suggest that orders may be collaterally attacked after the alleged violation of the orders. Such challenges should go to the issuing court, not some other judge.

Miller, 156 Wn.2d at 31.

In May, the Court held the collateral bar rule prohibited May from challenging the validity of a protection order in a prosecution for violation

of the order. May, 171 Wn.2d at 855. May argued his order was invalid because the issuing court allegedly failed to find that May was likely to resume acts of domestic violence. May, at 853. The court distinguished between void orders, i.e. where the court lacked authority to issue the type of order, and those which are merely erroneous, i.e. where there is error in issuing the order by the court with authority, the latter of which may not be challenged collaterally. May, 171 Wn.2d at 852-53. Because the court had authority to issue the order in May's case, he could not collaterally attack it. May, 171 Wn.2d at 855.

At first blush, the result in May would seem to close the door to Finley's challenge here. Importantly, however, the Court indicated its decision in Miller – which upheld the result in Edwards – was consistent with the collateral bar rule. May, 171 Wn.2d at 853. As the May Court explained:

Our discussion of the applicability of orders in Miller was an effort to harmonize that case with the results in City of Seattle v. Edwards, 87 Wn. App. 305, 941 P.2d 697 (1997) and State v. Marking, 100 Wn. App. 506, 997 P.2d 461 (2000), both of which were overruled in part by Miller. Miller, 156 Wn.2d at 30-31, 123 P.3d 827. In Edwards, the language in a no contact order regarding its date of expiration was ambiguous, and the Court of Appeals construed it to mean that the order expired one year after its issuance unless the trial court extended the order. 87 Wash. App. at 309, 941 P.2d 697. Because Edwards's charged violation occurred more than one year after issuance of the no-contact order and no further order

extending the order's duration had been issued, id. at 307, 309, 941 P.2d 697, Miller holds that the trial court should have excluded the order as inapplicable to the charged violation.

May, 171 Wn.2d at 854. The Court went on to “clarify” the applicability of the order was still a determination to be made by the trial court as part of its gate-keeping function. Id. at 854-55.

Based on Edwards, as interpreted by Miller and May, the court here should have excluded the order Finley was alleged to have violated as inapplicable to the charged offense. Finley was charged with violating the order on March 5, 2010. CP 25. However, the order – as in Edwards – had an expiration date nearly one year preceding the alleged violation, in this case, May 29, 2009. Ex 2. Although the order here also indicated a second expiration date of May 29, 2011, the disparate dates rendered the order ambiguous. As in Edwards, and as discussed in Miller, Finley was not given fair notice of what conduct was prescribed. As a result, the court should have excluded the order as inapplicable to the charged offense.

In response, the state may argue Finley's challenge to the applicability of the order is waived due to defense counsel's request merely to refer jurors to their jury instructions in response to the jury's

inquiry about the validity of the order. But admissibility is a threshold question for the court as part of its gate-keeping function.

However, to the extent counsel contributed to the error by virtue of her request, defense counsel provided ineffective assistance of counsel. Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Generally matters of trial tactics are not subject to ineffective assistance claims. State v. Aho, 137 Wn.2d 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Here, defense counsel asserted her reason for not challenging the applicability of the order was tactical:

MS. TRICKEY: Well if we had raised it before trial Your Honor the State would have amended to add a valid no contact order. Because there were others.

RP 1211. Defense counsel also argued in closing there was reason to doubt the FVNCO charge because the order was invalid. RP 1185.

Granted, defense counsel's reasons for not challenging the order appear tactical. It appears counsel anticipated that if the order was challenged and excluded, the state would have amended to charge Finley with violating the no contact order issued as part of the ongoing prosecution, which prohibited contact of all kind, even telephonic contact. Supp. CP __ (sub. no. 7, Order Prohibiting Contact, 3/19/10); RP 1099. Presumably, counsel would not, in that instance, have the same reasonable doubt argument to make in closing.

However, any violation of the pre-trial no contact order could not have been charged as a felony. Significantly, the FVNCO was not based on prior violations, but the allegation that the current violation involved an assault. CP 25; RCW 26.50.110(4); see also CP 2 (no prior violations of a protection order listed in criminal history). Moreover, Finley would not have been subject to a deadly weapon enhancement for violating the pre-trial order, as he was incarcerated. Accordingly, counsel's decision not to challenge the applicability of the order actually increased Finley's offender score and gave him six months of hard time. CP 25; RCW 9.94A.602; 9.94A.533(4).

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). Whether counsel's decision not to challenge the admissibility of the order

was tactical, it was not legitimate in light of the discrepancy between the punishment Finley would have faced as a *misdemeanant* as opposed to the cumulative punishment Finley faced with the addition of the point for the FVNCO and consecutive hard time. Because of the discrepancy in punishment, Finley was prejudiced by counsel's deficient performance. See e.g. State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

3. FINLEY'S CONVICTION FOR FELONY HARASSMENT VIOLATES THE PROHIBITION AGAINST DOUBLE JEOPARDY.

Case law is clear that assault used to overcome resistance to rape merges with the completed offense of first degree rape. See e.g. State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979), overruled on other grounds, State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999). Here, the prosecutor argued the felony harassment (threat to kill) was the force that overcame Lock's resistance to the alleged rapes. Therefore, under the circumstances of this case – where the felony harassment had no independent purpose other than to effectuate the rape – it should have merged with the completed offense.

The double jeopardy clauses of the State and Federal constitutions prevent the imposition of multiple punishments for the same offense. U.S. Const. Amend. 5; Const. art. 1, § 9; State v. Calle, 125 Wn.2d 769, 772, 776, 888 P.2d 155 (1995). The protection is constitutional, but because

the legislature is free to define crimes and fix punishments, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Merger is a "doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." State v. Vladovic, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983). Crimes merge when proof of one is necessary to prove an *element* or the degree of another crime. Id. at 419-21; State v. Parmelee, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001), review denied, 146 Wn.2d 1009 (2002).

Finley was convicted of two counts of first degree rape, under RCW 9A.44.040(1)(a), the uses-or-threatens-to-use a deadly weapon provision of that statute. CP 62, 104. First degree rape also has a forcible compulsion element, which means: "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another will be kidnapped." RCW 9A.44.010(6) (emphasis added).

Similar to the second definition of “forcible compulsion,” felony harassment also involves a threat to kill, which places the person in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a), (b), (c). In other words, it likewise involves a threat, express or implied, that places a person in fear of death or physical injury to herself.

Indeed, the prosecutor argued the felony harassment was the forcible compulsion used to overcome Lock’s resistance:

Forcible, uh the coercible compulsion component and that is the threat of death or physical injury. And I think it’s important to remember that it’s, the forcible compulsion there’s literally two parts to that charge. One of them is forced [sic] used to overcome resistance. And the other is a threat uh, either actual or implied, of physical injury or death. All right there’s no question this is going on right? I mean the defendant has walked in there with a knife, sitting by her bed, and he’s threatening to kill her. Well she thinks he’s going to kill her. She’s doing whatever she can at that point to survive. And that’s really what she said on the stand. And I want to talk about this because it’s far different than what she said at the beginning. In other words what she said to 911 operator and what she was saying to other people. That’s changed. Of course it’s changed after all these jail phone calls but the important thing is is [sic] that he’s got this knife and he’s threatening to kill her. And at this point she’s doing whatever she can to survive. There’s no question that that’s forcible compulsion.

RP 1156.

In that same vein, the prosecutor argued – assuming the truth of Lock’s trial testimony – the threat to kill coupled with the knife constituted the force used to overcome her resistance:

What she said essentially was the defendant threatened to kill her, he’s holding a knife, she had sex with him to try and calm him down and prevent him from killing her. . . . I mean it’s sort of the equivalent of someone coming up and pointing a gun at somebody and saying I’m going to kill you and that person saying please don’t kill me here’s my wallet, my cell phone, take whatever you want. Just please don’t kill me. And the person is like, I’ll take your wallet and cell phone and walks away and then says what are you talking about. I didn’t rob this person, they gave me their stuff. That’s crazy right? That’s crazy. Ms[.] Lock was trying to save her life.

RP 1170.

The facts of this case are remarkably similar to those in Johnson. Johnson was convicted of two counts each of first degree rape, first degree kidnapping, and first degree assault. Johnson, 92 Wn.2d at 672. The jury made special findings that he was armed with a deadly weapon when committing the assaults and kidnappings. Id.

Johnson invited two girls to his home then threatened to kill them while holding a knife and restrained them while he had sexual intercourse with each girl. Johnson, 92 Wn.2d 672-73.

The Supreme Court held that the kidnapping and assault convictions merged with the rape convictions because “the legislature

intended that punishment for first degree rape should suffice as punishment for crimes proven in aid of the conviction, which are incidental to and elements of the central crime.” Johnson, 92 Wn.2d at 678, 681. Proof of assault or kidnapping were necessary elements of the crime of first degree rape. Therefore, the appropriate remedy was to strike the kidnapping and assault convictions. Johnson, 92 Wn.2d at 682.

As in Johnson, the threat to kill coupled with the knife here constituted the “forcible compulsion” element necessary to prove the central crime of rape. The harassment had no independent purpose and effect from the rape and therefore merged. Johnson, 92 Wn.2d at 681; Vladovic, 99 Wn.2d at 4.

In response, the state may cite this Court’s opinion in State v. Eaton, 82 Wn. App. 723, 919 P.2d 116 (1996), overruled on other grounds, State v. Frohs, 83 Wn. App. 803, 924 P.2d 384 (1996). There, this Court disagreed that felony harassment merged with the completed crime of rape, on grounds it was “not an additional element required to elevate the crime to the higher degree.” Eaton, 82 Wn. App. at 731.

However, there was an alternate basis for this Court’s holding in Eaton that is not present here:

Even if we agreed with Eaton that the merger doctrine applied, we would nonetheless reject his argument. The trial court explicitly found that the first degree rape and

the felony harassment were distinct criminal acts because Eaton continued to threaten to kill G even after he completed the rape. It therefore refused to merge the harassment with the rape on a factual basis.

Eaton, 82 Wn. App. at 731-32.

In contrast, the felony harassment as charged and prosecuted in this case was part and parcel of the rape. Accordingly, this case is more like Johnson than Eaton. Although Johnson was charged with assault based on a threat to kill, as opposed to harassment, the prosecutor acknowledged the conduct at issue for the harassment charge here was tantamount to assault:

MR. WAGNILD: You said that you had a knife, that you were threatening her so you felt like you were guilty of assaulting her.

MR. FINLEY: That's correct.

RP 1101.

The state should not be able to skirt double jeopardy protections by virtue of changing the name of the charge to felony harassment, where the underlying assaultive conduct would otherwise merge with the central crime of rape.

4. THE COURT ERRED BY INCLUDING PRIOR FLORIDA CONVICTIONS THAT WERE NOT COMPARABLE TO WASHINGTON STATE FELONIES IN FINLEY'S OFFENDER SCORE.

The trial court miscalculated Finley's offender score when it included several prior Florida convictions the state failed to prove were comparable to Washington State felonies. Under the Sentencing Reform Act of 1981 (SRA), a defendant's offender score establishes the range a sentencing court may use in determining a sentence. RCW 9.94A.712(3); RCW 9.94A.530. Regarding prior out-of-state convictions, RCW 9.94A.525(3) provides:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

The goal is to ensure that defendants with prior convictions are treated similarly, regardless of where the prior convictions occurred. State v. Morley, 134 Wn.2d 588, 602, 952 P.2d 167 (1998).

The State bears the burden of proving both the existence and the comparability of an out-of-state conviction. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). A defendant may raise an objection to the

inclusion of such a conviction for the first time on appeal. Ford, 137 Wn.2d at 477; see also State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999).

The Supreme Court has adopted a two-part test for determining whether an out-of-state conviction is comparable to a Washington crime which, with one exception, must rise to the level of a felony to be included in a defendant's offender score under the SRA.¹¹ First, a sentencing court compares the legal elements of the out-of-state crime with the comparable Washington crime and, if comparable, the court counts the defendant's out-of-state conviction as an equivalent Washington conviction. Morley, 134 Wn.2d 588; Ford, 137 Wn.2d 472.

If the elements of the out-of-state crime are different, then the court must examine the undisputed facts from the record in order to determine whether that conviction was for conduct that would satisfy the elements of the comparable Washington felony. Morley, 134 Wn.2d at 606.

¹¹ Where the current conviction is for a felony traffic offense, under the SRA, a sentencing court may include serious misdemeanor traffic offenses in the offender score. RCW 9.94A.525(11).

(i) Robbery in Florida Is Not Legally Comparable to a Washington Felony.

The court included two 1991 Florida robbery convictions in Finley's offender score. CP 288-89 (No. 91-000-331 (91-440), first degree robbery of Judy Lee on February 8, 1991); CP 290-92 (No. 91-309, second degree robbery of Margaret Larkin). The then-applicable statute provided:

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3)(a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the

act of taking constitute a continuous series of acts or events.

FLA. STAT. § 812.13 (emphasis added); Laws of 1987, c. 87-315, § 1.

The court also included a 1996 Florida robbery conviction in Finley's offender score. CP 332 (No. 96-01136, first degree robbery of Christopher Rivera and/or Tamika Walker). In 1992, subsection (1) of FLA. STAT. § 812.13 was amended and the underlined language added:

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in the fear.

FLA. STAT. § 812.13 (emphasis added); Laws of 1992, c. 92-155, § 1.

The statute otherwise remained the same. Id.

Most significant here is the 1987 amendment to the statute, which predated all three of Finley's robbery convictions. Before 1987, Florida courts had interpreted "in the course of the taking" to mean that the use of force or putting in fear (intimidation) must occur prior to or while the taking is in progress. Royal v. State, 490 S. 2d 44, 46 (Fla. 1986), superseded by statute, Laws of 1987, c. 87-315, § 1. After Royal, however, the Florida Legislature amended § 812.13 to include circumstances where the force or intimidation is used "prior to, or contemporaneous with, or subsequent to the taking of the property and if

the force or intimidation and the act of taking constitute a continuous series of acts or events. Robinson v. State, 692 S.2d 883, n.9 (Fla. 1997). Thus, the force used or intimidation necessary to constitute robbery in Florida need not be *immediate*. See e.g. Messina v. Florida, 728 So.2d 818 (Fla. Dist. Ct. 1999) (evidence was sufficient to support robbery conviction arising from purse snatching incident in which victim chased defendant, sat on hood of defendant's car and fell off when defendant turned and drove away).

In contrast, Washington has an immediacy element to the use of force or fear. In 1991, Washington defined robbery as:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190 (emphasis added); Laws of 1975 1st ex.s. c 260, amended by Laws 2011 c 336 § 379.

While both the Florida and Washington statutes require a taking by force or fear, only the Washington statute requires that the force or fear be *immediate*. The required “force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the

taking[.]” RCW 9A.56.190. This suggests that the force or fear is immediate only if it takes place before or during the taking, rather than after the taking has been completed.

Indeed, in State v. Gallaher, this Court stated that “immediate” means “while the robbery is taking place” and ruled that a robbery jury instruction which includes threats of harm taking place after the robbery is error. State v. Gallaher, 24 Wn. App. 819, 822, 604 P.2d 185 (1979). Florida law, on the other hand, does not make this distinction, as its robbery statute includes a definition for “in the course of the taking,” which includes force or fear used after-the-fact.

Because the elements of the out-of-state crimes are different, the next question is whether the undisputed facts in the record establish the Florida convictions were for conduct that would be comparable to robbery in Washington. Morley, 134 Wn.2d at 606.

The only factual information provided by the state for the 1991 robbery of Judy Lee was the complaint, which alleged:

PERNELL FINLEY

Of the County of Pasco and State of Florida, on the 8th day of February, in the year of our Lord, one thousand nine hundred ninety-one, in the County and State aforesaid by force, violence, assault or putting Judy Lee in fear, willfully and unlawfully against the will of Judy Lee, did take from the person or lawful custody of Judy Lee money or other property, to-wit: purse and contents, with intent to

permanently deprive Judy Lee of said money or property, and in the course of committing said robbery the said PERNELL FINLEY did carry a deadly weapon, to-wit: a piece of lumber, and the value of said property being greater than \$300; contrary to Chapter 812.13(2)(a), Florida Statutes and against the peace and dignity of the State of Florida.

CP 288.

For the 1991 second degree robbery, the state submitted no information other than the fact it was committed against Margaret Larkin.

CP 291-92.

Finally, for the 1996 robbery, the state submitted the complaint, which alleged:

PERNELL LAMONT FINLEY

In the County of Pasco and State of Florida, on the 12th day of April, in the year of our Lord, one thousand nine hundred ninety-six, in the County and State aforesaid by force, violence, assault or putting Christopher Rivera and/or Tamika Walker in fear, willfully and against the will of Christopher Rivera and/or Tamika Walker, did take from the person or lawful custody of the said Christopher Rivera and/or Tamika Walker, money or other property the subject of larceny, to-wit: U.S. currency, with intent to permanently or temporarily deprive Christopher Rivera and/or Tamika Walker of said money or property, and in the course of committing said Robbery, the said PERNELL LAMONT FINLEY did carry a deadly weapon, to-wit: a firearm; contrary to Chapter 812.13(2)(a), Florida Statutes, and against the peace and dignity of the State of Florida.

CP 332.

None of this paperwork includes an allegation that the force or intimidation used was of an immediate nature. Accordingly, it cannot be determined from the undisputed facts in the record that Finley's prior Florida robbery convictions were for conduct that would satisfy the elements of the comparable Washington felony. Because the state failed to satisfy its burden of proof, the court erred in including these convictions in Finley's offender score. See e.g. State v. Larkins, 147 Wn. App. 858, 866, 199 P.3d 441 (2008) ("Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic") (quoting In re Personal Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005)).

(ii) Burglary in Florida Is Not Legally Comparable to a Washington Felony.

In 1991, Florida defined burglary as follows:

(1) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

(2) Burglary is a felony of the first degree, . . . , if, in the course of committing the offense, the offender:

. . .

(b) is armed, or arms himself within such structure or conveyance, with explosives or a dangerous weapon.

FLA. STAT. § 810.02 (emphasis added); Laws of 1983, c. 83-63, § 1, amended by Laws of 1995, c. 95-184, § 8.

In 1991, Washington defined burglary as:

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against person or property therein, he enters or remains unlawfully in a dwelling and if, in entering or while in the dwelling or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon.

RCW 9A.52.020 (emphasis added); Laws of 1975 1st ex.s c 260.

As the emphasized language indicates, Washington requires the intent to commit a crime against person or property, whereas Florida does not. As the defense argued in its sentencing brief, a person intending to commit a drug crime would be guilty of burglary in Florida but not Washington. CP 279.

The only information offered by the state about the burglary was the charging document for **No. 91-000-331 (91-440)**, which included two counts – robbery of Judy Lee on February 8, 1991 (set forth above) – and burglary of Judy Lee’s dwelling, also on February 8, 1991:

COUNT 2

And the State Attorney aforesaid, under oath as aforesaid, further information makes that **PERNELL FINLEY** of the County of Pasco and State of Florida, on the 8th day of February in the year of our Lord, one thousand nine hundred ninety-one in the County and State aforesaid, unlawfully and without invitation or license did enter or

remain in that certain structure, the dwelling of Judy Lee, located at 314 W. Church Avenue, Dade City, in the County and State aforesaid, the property of Judy Lee, with the intent to commit an offense therein, and during the course thereof and within said structure was armed with a dangerous weapon, to-wit: a piece of lumber, the said structure at the time not open to the public; contrary to Chapter 810.02 Florida Statutes, and against the peace and dignity of the State of Florida.

CP 288 (emphasis added).

Although the complaint did not allege the offense was committed against a person or property, the prosecutor asked the court to infer – by virtue of the two-count information – that the offense committed “therein” was robbery against Judy Lee, as Finley was charged with that offense in count 1. RP 1220. Over defense counsel’s objection (RP 1219), that is the inference the court made. RP 1220-1223.

But that is precisely the type of judicial fact-finding this Court held to be unauthorized in State v. Larkins, 147 Wn. App. 858 (2008). At issue there was Larkins’ 1992 Ohio conviction for burglary. The Ohio burglary conviction rested on Larkins’ intent to commit a misdemeanor. Because the misdemeanor category included crimes other than those against a person or property, the Ohio conviction was not legally equivalent to burglary in Washington. Larkins, 147 Wn. App. at 861.

Nonetheless, the sentencing court included the conviction in Larkins’ offender score, reasoning that because Larkins was charged with

burglary of the home of Unnie B. Lipscomb, as well as assault of Unnie B. Lipscomb, in the same indictment, he must have assaulted Lipscomb in his home. Larkins, 147 Wn. App. at 865. This Court held the inference violated Larkins' right to a jury trial and proof beyond a reasonable doubt. Larkins, 147 Wn. App. at 855-56 (citing In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005); Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)).

Similarly, there is no indication in the information here that the robbery charged in count 1 occurred within Judy Lee's home. Accordingly, in order to determine that Finley committed a crime against a person or property, the court necessarily had to draw that inference. As in Larkins, the court was without authority to do so without violating Finley's right to a jury trial and proof beyond a reasonable doubt. Larkins, 147 Wn. App. at 866. The court therefore erred in including this offense in Finley's offender score.

(iii) Escape in Florida is Not Legally Comparable to a Washington Felony.

The court also included two Florida escape convictions in Finley's offender score. CP 353-54 (No. 93-02512); CP 336, 352 (No. 96-02931).

The then-existing Florida escape statute provided:

Any prisoner confined in any prison, jail, road camp, or other penal institution, state, county, or municipal, working upon the public roads, or being transported to or from a place of confinement who escapes or attempts to escape from such confinement shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. The punishment shall run consecutive to any former sentence imposed upon any prisoner.

FLA. STAT. § 944.40; Laws 1957, c. 57-121, § 38; Laws 1965, c. 65-224, § 1; Laws 1969, c. 69-332, § 1; Laws 1971, c. 71-136, § 1170.¹²

In contrast, the comparable Washington felony requires escape from confinement pursuant to a felony conviction:

A person is guilty of escape in the first degree if, being detained pursuant to a conviction of a felony or an equivalent juvenile offense, he escapes from custody or a detention facility.

RCW 9A.76.110(1); Laws of 1982 1st ex.s c 47 § 23, amended by Laws of 2001 c 264 § 1.

Because the elements of the Florida offense are broader than its Washington counterpart, the undisputed facts in the record must be

¹² The statute was not amended again until 1999. See Laws 1999, c. 99-271, § 5.

examined to determine whether the underlying conduct would meet the elements of the comparable Washington felony.

The only factual information in the record is contained in the complaints. The 1993 escape was charged as count 2 in a two-count information that also charged Finley with possessing cocaine.

Count 2

And the State Attorney aforesaid, under oath as aforesaid, further information makes that PERNELL LAMONT FINLEY, in the County of Pasco, State of Florida, on the 15th day of October, in the year of our Lord, one thousand nine hundred ninety-three, in the county and state aforesaid while a prisoner in the custody of Ptl. Lynn Tabb, a law enforcement official, and during the process of being transported to or from a place of confinement did escape or attempt to escape from custody; contrary to Chapter 944.40, Florida Statutes, and against the peace and dignity of the State of Florida.

CP 353 (No. 93-02512).

The 1996 escape was charged by itself:

PERNELL LAMONT FINLEY

In the County of Pasco and State of Florida, on the 24th day of September, in the year of our Lord, one thousand nine hundred ninety-six, in the County and State aforesaid while a prisoner in the custody of Harry Lindenfeld, a law enforcement official, and during the process of being transported to or from a place of confinement did escape or attempt to escape from custody; contrary to Chapter 944.40, Florida Statutes, and against the peace and dignity of the State of Florida

CP 344 (No. 96-02931).

Significantly, neither information contains an allegation that Finley was confined pursuant to a felony conviction at the time of the escape. Instead, the state asked the court to make this inference:

Both felony informations state that the defendant was in the custody of a law enforcement officer at the time of the escape. FI 33-1676 [CP 353]; FI 20-0069 [CP 344]. The felony informations further establish that the defendant was in custody pursuant to his convictions for robbery, burglary, possession and armed robbery. FI 06-1376 [CP 288, 1991 Information for robbery and burglary]; FI 33-1676 [CP 353, 1993 Information for cocaine possession and escape]; FI 20-0069 [CP 344, 1996 Information for escape]. All of these crimes were felonies in Florida at the time they were committed. FSA § 810.02(2), FSA § 812.13(2)(a), FSA 893.13(1)(a)(1). Therefore, the uncontested facts of these cases show the defendant would be punishable for escape under Washington law.

Supp. CP __ (sub. no. 100, State's Sentencing Recommendation); RP 1228.

Contrary to the state's assertion, however, not one of the referenced documents alleges that Finley was in custody pursuant to a felony conviction at the time of either escape. Rather, the state asked the court draw that inference based on the fact Finley had prior convictions. Again, that is the same kind of judicial fact-finding this Court disapproved in Larkins.

Moreover, with respect to the 1996 Florida escape, the record indicates Finley most likely was not in custody pursuant to a felony

conviction, as he was given two-year concurrent sentences for the 1993 offenses (CP 359-62), and pled guilty to the 1996 robbery the same day he pled guilty to the 1996 escape, which strangely, was also charged that same date. CP 344, 335-336.

In any event, it does not inevitably flow from the undisputed facts that Finley was in custody pursuant to a felony conviction at the time of the escapes. Accordingly, the trial court erred in including these offenses in his offender score. State v. Larkins, 147 Wn. App. at 866.

5. FINLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

The determination of whether two crimes constitute the same criminal conduct involves both determinations of fact and the exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-20, 997 P.2d 1000, review denied, 141 Wn.2d 1030, 11 P.3d 827 (2000). Defense counsel waives a direct challenge to the same criminal conduct determination by not raising the argument below. Nitsch, 100 Wn. App. at 519-20.

A claim of ineffective assistance of counsel, however, is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Every criminal defendant is guaranteed the right to the effective assistance of

counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. at 685-86; State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. A failure to argue same criminal conduct when such an argument is warranted constitutes ineffective assistance. State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004).

Assuming arguendo the court correctly found the 1991 Florida robbery and burglary involving Judy Lee comparable to Washington felonies, the offenses constituted the same criminal conduct. They were committed against the same person – Judy Lee – at the same time and place, as argued by the prosecutor at sentencing:

The defendant is charged with robbery on the same day as the burglary. The information explicitly lists the home burglarized was Judy Lee's home. Judy Lee is indisputably the victim of the robbery that the defendant committed using a piece of lumber as his weapon which

increased the charge from Florida's second degree burglary (a weaponless burglary, the equivalent to Washington's residential burglary) to a burglary first degree. Clearly, the defendant committed a burglary intending to and successfully committing a robbery against the owner of the home, Judy Lee, by depriving her of her purse and its contents – a crime against a person. Therefore, Florida's 1991 burglary statute is comparable to the Washington Burglary First Degree statute.

Supp. CP __ (sub. no. 100).

Moreover, they involved the same criminal intent. Criminal intent is the same for two or more crimes when the defendant's intent, viewed objectively, does not change from one crime to the next. "This analysis may include, but is not limited to, the extent to which one crime furthered the other, whether they were part of the same scheme or plan and whether the criminal objectives changed." State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995).

Under the state's theory, the burglary necessarily furthered the robbery, and thus, the crimes were committed with the same intent. The offenses therefore qualified as same criminal conduct. Because a court has discretion to treat a crime committed during the course of a burglary as the same criminal conduct (despite the burglary anti-merger statute),¹³ counsel performed deficiently in failing to make this argument to the court.

¹³ See e.g. State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992).

In that same vein, defense counsel should have argued, once the court found no double jeopardy violation, that the felony harassment counted as same criminal conduct as the rapes. As set forth in the double jeopardy argument section, the prosecutor argued the threat to kill coupled with the knife was the forcible compulsion used to overcome Lock's resistance. Clearly, under the state's theory, the harassment furthered the rape and was committed at the same time and place and against the same victim. There was no legitimate reason not to argue same criminal conduct.

Finally, defense counsel should have argued that the FVNCO likewise constituted the same criminal conduct as the rape. The date of the charged violation was March 5, 2010, the same date as the rape. And significantly, the FVNCO was not based on prior violations, but the allegation that the current violation involved an assault. CP 25; RCW 26.50.110(4). Indeed, the prosecutor argued the jury should convict Finley of felony VNCO, predicated on assault, based on the alleged rape:

And did he assault her? Of course he assaulted her. Rape is clearly a type of assault. Uh he pulled a knife on her, threatened her, numerous ways he assaulted her that morning while he was violating the no contact order.

RP 1155.

An ambiguous verdict is interpreted in favor of the accused. State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), aff'd, 149 Wn.2d 906, 73 P.3d 1000 (2003); U.S. v. Baker, 16 F.3d 854, 857-58 (8th Cir.1994) (When a defendant is convicted by an ambiguous verdict that is susceptible of two interpretations for sentencing purposes, he may not be sentenced based upon the alternative producing the higher sentencing range); State v. Taylor, 90 Wn.App. 312, 317, 950 P.2d 526 (1998) (interpreting ambiguous verdict in defendant's favor).

Because the jury could have based its conviction for FVNCO on the rape as the assaultive conduct, the FVNCO was committed at the same time and place, against the same victim and with the same intent as the rapes. Defense counsel performed deficiently in failing to make this argument.

Finley was prejudiced by his attorney's failure to make these same criminal conduct arguments. Had defense counsel made these arguments, counsel could have reduced Finley's offender score by 4 points, which likely would have resulted in a lower standard range sentence, as Finley received the top of the range for count 1. CP 372. See State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (the remedy when court miscalculates the defendant's offender score before imposing an exceptional sentence is remand for a correct calculation and re-

sentencing). Moreover, assuming this Court agrees the state failed to prove comparability of some or all of Finley's out-of-state convictions, his offender score could be as low as 2 points (1 point for the 1993 Florida cocaine possession conviction and 1 point for the current tampering conviction), resulting in a greatly reduced standard range sentence of 111-147 months. RCW 9.94A.510; RCW 9.94A.515 (rape 1 has seriousness level of 12).

D. CONCLUSION

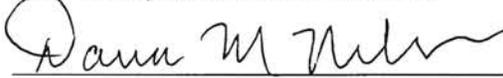
Finley should receive a new trial because the trial court abused its discretion in denying Finley's request to proceed pro se. Finley's conviction for FVNCO should be reversed and dismissed, because it was based on an inapplicable order. Defense counsel performed deficiently in failing to so argue. Finley's felony harassment conviction should also be dismissed as it was entered in violation of his right to be free from double jeopardy.

If this Court finds Finley is not entitled to a new trial, this Court should remand for resentencing because the court included out-of-state convictions that aren't comparable to Washington felonies in Finley's offender score, and because Finley's attorney provided ineffective assistance in failing to argue several prior and current offenses should be scored as same criminal conduct.

Dated this 21st day of May, 2012

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239

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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67616-4-1
)	
PERNELL FINLEY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] PERNELL FINLEY
 DOC NO. 331302
 AIRWAY HEIGHTS CORRECTIONS CENTER
 P.O. BOX 2049
 AIRWAY HEIGHTS, WA 99001

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAY 21 PM 4:57

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF MAY 2012.

x *Patrick Mayovsky*