

No. 63235-3-I

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

GAIL GABRIEL,

Petitioner.

BRIEF OF PETITIONER

Restraint from King County Superior Court,
No. 99-1-02573-0 Sea
The Hon. Joan Dubuque, Presiding

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A. ASSIGNMENTS OF ERROR

1. Petitioner Gail Gabriel assigns error to the entry of the Judgment and Sentence in King County Superior Court. No. 99-1-02573-0 Sea. App. E.

2. Entry of judgment to Counts IV and V violated Mr. Gabriel's constitutional right to be free from double jeopardy, protected by U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 9.

3. Entry of judgment to Counts I & II also violated Mr. Gabriel's right to be free from double jeopardy because the sentences on those counts were increased because of the double jeopardy violation from Counts IV & V.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the State concedes that the jury was given identical instructions in Counts IV and V, was double jeopardy violated by entry of judgment on those two counts?

2. Did this Court in *State v. Borsheim*, 140 Wn. App. 357, 165 P.3d 417 (2007), create a new rule of criminal procedure regarding double jeopardy?

3. Does *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality), bar relief in this case?

C. STATEMENT OF FACTS

Mr. Gabriel lived alone in West Seattle. He had worked in a restaurant for years and met M.B. through his friend, Sandra Burquest. RP (10/26/99) 85-87.¹ M.B. was a troubled youth, who had gang involvement and lived on the streets. She would come by Mr. Gabriel's apartment every now and then and talk about life with him. RP (10/26/99) 88-90. In March 1999, M.B. and another girl, C.H., ran away from a rehabilitation center, and ended up staying at Mr. Gabriel's apartment for a few days. RP (10/20/99) 70-76, (10/25/99) 16, RP (10/26/99) 90-92.

C.H. claimed that Mr. Gabriel had sex with her and that she saw Mr. Gabriel have oral sex with M.B. on a multiple occasions. RP (10/20/99) 76-86, 91-97. Although M.B. told the police otherwise, RP (10/26/99) 48-49, M.B. testified that she did not have sex with Mr. Gabriel, RP (10/25/99) 17, and Mr. Gabriel, who testified in his own behalf, denied having sex with either M.B. or C.H. RP (10/26/99) 95-96.

¹ By separate motion, Mr. Gabriel is moving that the Court transfer the verbatim report of proceedings from the direct appeal, No. 45779-9-I, for consideration with this PRP.

By amended information, the State charged Mr. Gabriel with one count of first degree rape of child (C.H. – Count I), and three counts of second degree rape of a child. (M.B. – Counts II, IV & V). Counts IV and V were identically worded charges, covering the same time period of March 24 through March 26, 1999. The State also charged Mr. Gabriel with one count of sexual exploitation of a minor (Count III). App. A.

For Counts IV and V, the jury was given identical “to convict” instructions, with the same charging period (March 24-26, 1999), and the same alleged complainant (M.B.). App. B (Instructions No. 12 & 13). The verdict forms for Counts IV and V were also identical. App. C. During deliberations, the jurors sent a question to the court, stating: “In reading Count IV and Count V, we do not see a difference in the wording or dates other than the count number in line 2 of each count, page 12 and 13.” RP (10/27/99) 94 (App. D). The court instructed the jurors to reread the instructions. *Id.* The jury convicted Mr. Gabriel on Counts I, II, IV & V, but hung on Count III. App. C.

Mr. Gabriel was sentenced on December 6, 1999. His offender score for each of the four counts was “9” because each of the other counts were given “3” offender score points. The standard range for Count I was

240 to 318 months, while the standard range for Counts II, IV and V was 210 to 280 months. If either Count IV or V were not counted, Mr. Gabriel's offender score would have been "6" on each count, with standard ranges of 162 to 216 months or 146 to 194 months. The court imposed 318 months on Count I, and 280 months on Counts II, IV and V, the sentences to run concurrently. App. E.

Mr. Gabriel appealed his convictions and this Court affirmed in an unpublished opinion issued on April 23, 2001. No. 45779-9-I. After the Supreme Court denied Mr. Gabriel's pro se petition for review, the Mandate issued on April 17, 2002. Mr. Gabriel subsequently filed a pro se PRP, arguing that imposition of sentence in Counts IV and V violated double jeopardy. No. 54713-5-I. Without citing any particular line of cases, and without analyzing the jury instructions and verdict forms, the Acting Chief Judge ruled that there was more than one "unit of prosecution" because there was evidence to support convictions based upon multiple acts of sexual intercourse on separate occasions. The Acting Chief Judge held that the PRP was "untimely and must be dismissed. See RCW 10.73.090." The matter was therefore never sent to a panel of judges for determination on the merits.

In 2009, Mr. Gabriel filed another pro se PRP arguing that this Court's relatively recent decisions in *State v. Borsheim, supra*, and *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008), should lead to vacation of one of the convictions in Counts IV and V, and resentencing on all counts. The State has responded by conceding that consideration of the merits of Mr. Gabriel's petition was not barred by RCW 10.73.090, RCW 10.73.140 or RAP 16.4(d). Moreover, the State did not dispute the merits of Mr. Gabriel's claim – that his double jeopardy rights were violated, under *Borsheim*. However, the State has argued that *Borsheim* represents a “change in the law” and announced a “new rule” of double jeopardy. Thus, according to the State, applying *Teague v. Lane, supra*, this Court should not apply this new rule to cases like Mr. Gabriel's that were final before *Borsheim* was announced. State's Response to Personal Restraint Petition.

D. ARGUMENT

1. Summary

The State agrees that under *Borsheim* Mr. Gabriel's right to be free from double jeopardy was violated. The State does not dispute that the instructions and verdict forms for Counts IV and V were identical and

allowed the jury to return a verdict of guilty for identical conduct, thereby leading to an increase in Mr. Gabriel's sentences on all counts. The State's only argument is that *Borsheim* announced a "new rule" of criminal procedure and that this new rule should not apply retroactively to Mr. Gabriel's case.

The State's argument is meritless and should be rejected.

Borsheim explicitly was based upon case law in this State that preexisted Mr. Gabriel's charges and trial. This Court in *Borsheim* did not announce new law, but merely applied well-settled principles of double jeopardy analysis. While the Acting Chief Judge in 2004 did not properly apply the law when deciding Mr. Gabriel's prior petition, this failure to apply settled principles of double jeopardy should not act as a bar to relief.

2. Double Jeopardy Was Violated in This Case

The constitutional prohibitions against double jeopardy, U.S. Const. amend. 5,² Wash. Const. art. 1, § 9,³ protect generally against

² The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Due Process Clause of U.S. Const. amend. 14, provides:

[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

³ Wash. Const. art. 1, § 9, provides:

(continued...)

“prosecution oppression” and, specifically, against multiple punishments for the same offense. *State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). In *State v. Borsheim*, the Court of Appeals held that where multiple counts of sexual abuse are alleged to have occurred within the same charging period, an instruction that the jury must find “separate and distinct” acts for convictions on each count was required. 140 Wn. App. at 367.

Where there are identical “to convict” instructions for multiple counts that do not require the jury to find each count to be supported by a “separate and distinct” act, the general instructions regarding “a separate crime is charged in each count,” is not sufficient to avoid a double jeopardy violation. *Borsheim*, 140 Wn. App. at 367, 369-70. Similarly, a general unanimity instruction is not sufficient unless it too requires agreement that “at least one particular act has been proved beyond a

³(...continued)

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

reasonable doubt *for each count.*” *Id.* at 369 (emphasis in original), quoting *State v. Ellis*, 71 Wn. App. 400, 402, 859 P.2d 632 (1993).⁴

In *Borsheim*, the trial court gave one “to convict” instruction for all four counts. However, this Court recently reversed a child molestation conviction on double jeopardy grounds where there were separate “to convict” instructions for each count. *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008). As in *Borsheim*, the standard instruction about deciding each count separately did not cure the double jeopardy problem that resulted where there was no instruction that “require[d] that the jury base each charged count on a ‘separate and distinct’ underlying event.” 147 Wn. App. at 935. Moreover, the Court rejected the State’s argument that evidence of multiple acts and its own argument protected against a double jeopardy violation:

But the double jeopardy violation at issue here results from omitted language in the instructions, not the State’s proof or the prosecutor’s arguments. The State offers no authority for the proposition that evidence or argument presented at trial may remedy a double jeopardy violation caused by deficient instructions. And our courts have recognized that “[the] jury should not have to obtain its instruction on the law from arguments of counsel.”

⁴ The State did not file a petition for review in *Borsheim*.

147 Wn. App. at 935.⁵

Borsheim and *Berg* lead to the conclusion that Mr. Gabriel's right to be protected against double jeopardy, under U.S. Const. amend. 5 (incorporated by U.S. Const. amend. 14) and Wash. Const. art. 1, § 9, was violated. As in *Berg*, Counts IV and V had identical "to convict" instructions (Instructions 12 and 13) with the exact same elements, same charging period and same complainant. App. B. The verdict forms for these two counts were identical. App. C. As the jury itself noted, there was no difference between the instructions for these two counts. App. D. Moreover, as in *Borsheim*, the jury unanimity instruction here, No. 15, did not even contain the language in the instruction in *Berg* that "[t]o convict the defendant on *any count* of child molestation in the third degree, one particular act of child molestation in the third degree must be proved beyond a reasonable doubt." 147 Wn. App. at 936 (emphasis in original). While the Court in *Berg* held this language was insufficient to cure the double jeopardy violation arising from identical "to convict" instructions, Instruction No. 15 in Mr. Gabriel's case did not even contain this language.

⁵ The State did not file a petition for review in *Berg*.

Under *Berg* and *Borsheim*, Mr. Gabriel's right to be free from double jeopardy was violated by convictions in both Counts IV and V. Moreover, this double jeopardy violation caused Mr. Gabriel's offender score and standard ranges for Counts I & II to be increased, leading to the imposition of sentences for Counts I & II that are beyond the standard ranges. Accordingly, once the conviction in either Count IV or Count V is vacated, Mr. Gabriel should be resentenced for Counts I, II and either Count IV or V.

3. ***Borsheim Did Not Announce a New Rule of Law***

The only argument the State has to avoid *Borsheim* and *Berg* is to take refuge in the argument that *Borsheim* announced a new rule of procedure and that therefore this "new rule" cannot be retroactively applied to cases on collateral review under *Teague*. While creative, the State's argument misses the mark.

Nothing about *Borsheim* (or *Berg*) changed the law, overruled prior cases, or set a path into previously uncharted waters.⁶ Never once did

⁶ The State argues that prior to *Borsheim* "no Washington case had held that the standard instructions regarding multiple counts, WPIC 3.01 [footnote omitted], and jury unanimity, WPIC 4.25 [footnote omitted] were not sufficient to protect against a double jeopardy violation where the same crime is charged more than once based on multiple acts." State's Response at 10-11. The State, though, cites to no published case which upheld convictions with instructions as deficient as the ones given in *Borsheim*, *Berg* and
(continued...)

this Court disavow the principles of law announced in earlier decisions, but rather this Court merely applied settled principles that were announced in prior cases. In fact, this Court explicitly based its ruling on the “rule” set out in a 1996 published decision, a decision that came out more than three years before Mr. Gabriel’s trial:

In keeping with these principles, we made clear more than a decade ago that in sexual abuse cases where multiple identical counts are alleged to have occurred within the same charging period, the trial court must instruct the jury "that they are to find 'separate and distinct acts' for each count." *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996) (quoting *Noltie*, 116 Wn.2d at 846). Here, multiple counts of sexual abuse were alleged to have occurred within the same charging period. Thus, pursuant to the rule articulated in *Hayes*, an instruction that the jury must find "separate and distinct" acts for convictions on each count was required. However, no such instruction was proposed by the State and none was given by the trial court.

140 Wn. App. at 367.

⁶(...continued)
Mr. Gabriel’s case.

In any case, WPIC instructions are not the law, are merely “persuasive authority” and are not “pre-approved” by the Supreme Court. *In re Domingo*, 155 Wn.2d 356, 368, 119 P.3d 816 (2005); *State v. Joshua Lee Hayward*, ___ Wn. App. ___, ___ P.3d ___ (No. 37770-5-II, published 10/2/09), Slip Op. at 14. As such, WPIC instructions are often rejected by the courts. *See, e.g., State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (disapproving of WPIC instruction on accomplice liability); *State v. Hayward, supra* (disapproving of former WPIC 10.03). But, the State’s argument is really besides the point since the issue is not whether the jury unanimity instruction or the multiple counts instruction were sufficient, but whether some other instruction needed to be given to make sure that the jury found that each count was based on a separate and distinct act from the other counts.

But, even the “rule articulated in *Hayes*,” was not new, and was based on principles set out in still earlier cases such as *State v. Ellis, supra*, and *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991). For instance, the *Borsheim* Court relied on the Supreme Court’s decision in *Noltie*:

Accordingly, if it is not manifestly apparent to a criminal trial jury that the State is not seeking to impose multiple punishments for the same offense, the defendant's right to be free from double jeopardy may be violated. *See Noltie*, 116 Wn.2d at 848-49.

140 Wn. App. at 367. This citation accurately reflects the Supreme Court’s conclusion that Mr. Noltie’s right to be free from double jeopardy was not violated because the jury in his case was told that to convict the defendant of the second of two counts of first degree statutory rape it needed to find that “the defendant engaged in sexual intercourse with [M] *in an incident separate from and in addition to any incident that may have been proved in count I.*” 116 Wn.2d at 849 (emphasis in original). No such instruction requiring the jury to conclude that one count was based on a separate incident from the other count was given in Mr. Borsheim’s (or Mr. Gabriel’s) case.

As for *Ellis*, the *Borsheim* Court did not disagree with any of the principles of law applied in that case. Rather, the Court distinguished the case based on the very different instructions:

The court rejected the defendant's argument under the particular facts of that case, stating, "It is our view that the ordinary juror would understand that when two counts charge the very same type of crime, each count requires proof of a different act." *Ellis*, 71 Wn. App. at 406. However, that conclusion was based on consideration of instructions that differed in significant respects from those given in this case.

Borsheim, 140 Wn. App. at 368. Of significance was the fact that the jury in *Ellis* received a jury unanimity instruction that required the jurors to "unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count." *Ellis*, 71 Wn. App. at 402, quoted in *Borsheim*, 140 Wn. App. at 369 (emphasis added by *Borsheim* Court). Such an unanimity instruction was lacking not only in *Borsheim* but also in the instant case:

The unanimity instruction given in this case, in contrast, did not contain the "for each count" language. Thus, although it adequately instructed the jury with regard to the concern for jury unanimity, it did not adequately instruct the jury with regard to the concern of double jeopardy.

140 Wn. App. at 369. See also Instruction No. 15, App. B.

The double jeopardy principles announced collectively by *Ellis*, *Noltie*, *Hayes*, *Borsheim*, and *Berg* have never changed. There were different jury instructions given in each case – in some cases, the jury instructions were constitutionally sufficient, but in other cases the instructions were not constitutionally sufficient and caused double jeopardy violations.⁷ In *Ellis*, *Noltie* and *Hayes*, the courts had not confronted instructions that were really constitutionally deficient, but held out the possibility of reversal when such instructions would actually be

⁷ That *Borsheim* was not the first case to find double jeopardy violations where multiple acts are introduced, but the instructions do not make clear which acts are connected to which counts. Two years before *Borsheim*, this Court addressed a related issue in *State v. Heaven*, 127 Wn. App. 156, 110 P.3d 835 (2005). In that case, the defendant was tried for three counts of child molestation, with the State having introduced numerous acts of molestation. The jury acquitted Heaven of two counts, but hung on the third. The instructions and verdict forms did not make it clear which alleged acts were tied to which counts. This Court held that retrial on the third, hung, count was barred by double jeopardy because it was impossible to know whether retrial would lead to a conviction for an act for which the jury had already acquitted the defendant:

There is simply no way for a defendant to establish what issues the jury determined. And to impose such a requirement under these circumstances would work an injustice and run afoul of the double jeopardy clause . . .

. . .

To avoid the possibility of future double jeopardy in cases such as this, the State can decide after testimony to elect particular incidents it is relying on for consideration by the jury and it can request the trial court to submit special verdicts requiring the jury to identify the act or acts upon which it relies for each verdict.

127 Wn. App. at 164-65.

present. When such deficient instructions did finally come to the attention of the appellate courts, no new rule was needed to decide the case, but only the same principles applied in the earlier cases. *See In re Pers. Restraint of Turay*, 150 Wn.2d 71, 83, 74 P.3d 1194 (2003) (an appellate decision that merely settles a point of law without overturning precedent, or applies settled law to new facts, does not constitute a significant change in the law).

4. **Teague Does Not Bar Relief**

In *Teague v. Lane*, *supra*, a plurality of the United States Supreme Court held that, except for certain limited circumstances, new rules of criminal procedure should not be retroactively applied in federal habeas proceedings filed under 28 U.S.C. § 2254. The Supreme Court has later explained that the rule of *Teague* was based on concerns of comity and the respect federal courts should have for state court criminal convictions, and that the rule “was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions.” *Danforth v. Minnesota*, 552 U.S. 264, 128 S. Ct. 1029, 1040, 169 L. Ed. 2d 859 (2008). *Teague* should be seen merely as an exercise of the prudential and equitable authority “to achieve the goals of federal habeas while

minimizing federal intrusion into state criminal proceedings." *Danforth*, 128 S. Ct. at 1041. In fact, as the Supreme Court noted, "[i]f anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*." *Id.*

In light of this, the Washington Supreme Court, while following generally the principles of *Teague* in some cases, has recognized that state law is not as rigid as federal habeas law when addressing retroactivity issues in collateral attack, *see State v. Evans*, 154 Wn.2d 438, 448-49, 114 P.3d 627 (2005).

Even under the strictness of *Teague*, relief is not barred in this case. To begin with, *Teague* does not apply to substantive rules of law as opposed to procedural rules. *See Schriro v. Summerlin*, 542 U.S. 348, 352-53, 124 S. Ct. 2519, 159 L.Ed.2d 442 (2005). New substantive rules of law "apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 352 (internal quotations omitted). Constitutional rules regarding double jeopardy prototypically fit into the category of substantive, rather than

procedural, rules, since they govern whether an accused person can be convicted or punished multiple times for the same act. Thus, rules related to double jeopardy have been retroactively applied in Washington. See *In re Farney*, 91 Wn.2d 72, 75-76, 583 P.2d 1210 (1978) (citing to and adopting the holding of *Robinson v. Neil*, 409 U.S. 505, 93 S. Ct. 876, 35 L. Ed. 2d 29 (1973) that double jeopardy rules are to be applied retroactively).⁸

Even if *Teague* applies, though, there is no problem with applying the principles set out in *Borsheim* and *Berg* to Mr. Gabriel's case. Under *Teague*:

the determination whether a constitutional rule of criminal procedure applies to a case on collateral review involves a three-step process First, the court must determine when the defendant's conviction became final. Second, it

⁸ It is correct that *Farney* and *Robinson* are pre-*Teague* cases. The State cites *Caspari v. Bohlen*, 510 U.S. 383, 114 S. Ct. 948, 127 L.Ed.2d 236 (1994), for the proposition that *Teague* bars retroactive application of double jeopardy rules. In *Bohlen*, the Supreme Court held that it was error for a federal court on habeas review to hold that double jeopardy barred subjecting a defendant to a non-capital sentence enhancement proceeding multiple times.

The State cites to no Washington Supreme Court case that abrogates the holding of *Farney*, and, since rules regarding retroactivity in PRPs are state, not federal, law, *Danforth v. Minnesota*, *supra*, this Court is bound to follow *Farney*, not *Bohlen*. *State v. Hairston*, 133 Wn.2d 534, 539, 946 P.2d 397 (1997). In any case, *Bohlen* did not purport to overrule the Supreme Court's earlier decision in *Robinson*, and did not even cite to the decision. The actual holding of *Bohlen* is also not as expansive as suggested by the State, as the Supreme Court actually held that past precedent pointed in the direction opposite urged by the defendant. 510 U.S. at 395.

must ascertain the legal landscape as it then existed . . . , and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. . . . That is, the court must decide whether the rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity

Beard v. Banks, 542 U.S. 406, 411, 124 S. Ct. 2504, 159 L.Ed.2d 494 (2004) (internal quotations and citations omitted).

Here, regarding the first step, the State is correct that Mr. Gabriel's conviction became final when the mandate issued on April 11, 2002.

Turning to the next step, assessing the "legal landscape" as of April 11, 2002, it is apparent that the constitutional protections against double jeopardy, as interpreted by the precedent then existing, compelled the result reached in *Borsheim* and *Berg*, cases that explicitly did not announce any new rules and which specifically relied on pre-existing precedent – i.e., citing to *Hayes*, a decision that issued "*more than a decade ago*," *Borsheim*, 140 Wn. App. at 367 (emphasis added), and citing to and distinguishing on their facts, cases such as *Ellis* and *Noltie*. "*Teague* does not . . . require a habeas petitioner to show that the Supreme Court ha[s] decided a case involving identical facts, circumstances, and legal issues. [citation omitted] Rather, when a general rule must be applied

in a new situation, it can hardly be thought to have created a new principle of constitutional law.” *Butler v. Curry*, 528 F.3d 624, 634 (9th Cir. 2008) (internal quotations and citations omitted).

The State places great reliance on the Acting Chief Judge’s summary dismissal order of Mr. Gabriel’s pro se PRP in 2004, arguing that “it is clear that this Court did not feel compelled by the legal landscape to find that Counts IV and V violated double jeopardy because that very claim was rejected in Gabriel’s 2004 personal restraint petition.” State’s Response to Personal Restraint Petition at 10. Of course, with all due respect, the Acting Chief Judge’s analysis was flawed precisely because it did not take into the account the “legal landscape,” particularly cases such as *Hayes* and *Ellis*.

Indeed, the ease with which this Court in *Borsheim* and *Berg* reached its conclusions, without pointing to any “new” cases, demonstrate that the “legal landscape,” as it existed in 2002, when Mr. Gabriel’s case became final, was not materially different than the “legal landscape” in 2007 and 2008. Notably, there were no dissenting opinions filed in either *Borsheim* or *Berg*, nor did the State file a petition for review with the

Supreme Court pointing out a conflict between *Borsheim* and *Berg* with any prior decision of the Supreme Court or the Court of Appeals.

The Acting Chief Judge made a mistake and did not conduct the proper analysis, which required looking at the instructions and the verdict forms in Mr. Gabriel's case. This Court need not perpetuate error, and is fully entitled to refuse to apply prior rulings where the result would be a manifest injustice. *Greene v. Rothschild*, 68 Wn.2d 1, 8, 414 P.2d 1013 (1966). Here, there is no prejudice, identified by the State, as to why a correct analysis of the law of double jeopardy would cause it any prejudice at all. Yet, to deny Mr. Gabriel's petition and incarcerate him for years beyond what he should be incarcerated, would be a manifest injustice.

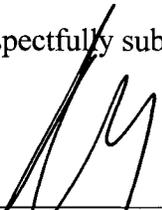
The legal system needs to be flexible enough to recognize when mistakes were made. Here, in 2004, the Acting Chief Judge should not have dismissed Mr. Gabriel's PRP as procedurally barred under RCW 10.73.090. The ACJ should have applied existing law to find that Counts IV and V were identical and that convictions and sentences on both counts violated the right to be free from double jeopardy as guaranteed by U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 9.

E. CONCLUSION

For the foregoing reasons, this Court should grant Mr. Gabriel's PRP and order that either Count IV or Count V be vacated. The petition is not time-barred, under RCW 10.73.100(3). The King County Superior Court should then resentence Mr. Gabriel for Counts I, II and either IV or V, with a lower standard range.

DATED THIS 16 day of October, 2009

Respectfully submitted,



NEIL M. FOX, WSBA NO. 15277
Attorney for Petitioner

APPENDIX A

F L E D

KING COUNTY WASHINGTON

OCT 21 1999

SUPERIOR COURT CLERK

BY DARLA S. DOWELL

DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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THE STATE OF WASHINGTON,)	
)	
Plaintiff,)	No. 99-1-02573-0 SEA
)	
v.)	
)	AMENDED INFORMATION
GAIL MARIUS GABRIEL)	
)	
)	
Defendant.)	

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse GAIL MARIUS GABRIEL of the crime of **Rape of a Child in the First Degree**, committed as follows:

That the defendant GAIL MARIUS GABRIEL in King County, Washington, during a period of time intervening between March 27, 1999, through March 28, 1999, being at least 24 months older than Christina Henry, had sexual intercourse with Christina Henry, who was less than 12 years old and was not married to the defendant;

Contrary to RCW 9A.44.073, and against the peace and dignity of the State of Washington.

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse GAIL MARIUS GABRIEL of the crime of **Rape of a Child in the Second Degree**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

57A

1 That the defendant GAIL MARIUS GABRIEL in King County,
2 Washington, during a period of time intervening between March 27,
3 1999, through March 28, 1999, being at least 36 months older than
4 Monique Brooks, had sexual intercourse with Monique Brooks, who was
5 12 years old and was not married to the defendant;

6 Contrary to RCW 9A.44.076, and against the peace and dignity of
7 the State of Washington.

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COUNT III

And I, Norm Maleng, Prosecuting Attorney aforesaid further do
accuse GAIL MARIUS GABRIEL of the crime of **Sexual Exploitation of a
Minor**, a crime of the same or similar character and based on the
same conduct as another crime charged herein, which crimes were part
of a common scheme or plan and which crimes were so closely
connected in respect to time, place and occasion that it would be
difficult to separate proof of one charge from proof of the other,
committed as follows:

That the defendant GAIL MARIUS GABRIEL in King County,
Washington, during a period of time intervening between March 27,
1999, through March 29, 1999, did compel, invite or cause Monique
Brooks, a person under 18 years of age, to engage in sexually
explicit conduct, knowing that such conduct would be photographed or
part of a live performance;

Contrary to RCW 9.68A.040(1)(a)(b) and (2), and against the
peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the
name and by the authority of the State of Washington further do
accuse the defendant GAIL MARIUS GABRIEL of commission of this crime
with sexual motivation, that is: that one of the purposes for which
the defendant committed this crime was for the purpose of his sexual
gratification, under the authority of RCW 9.94A.127.

COUNT IV

And I, Norm Maleng, Prosecuting Attorney aforesaid further do
accuse GAIL MARIUS GABRIEL of the crime of **Rape of a Child in the
Second Degree**, a crime of the same or similar character and based on
the same conduct as another crime charged herein, which crimes were
part of a common scheme or plan and which crimes were so closely
connected in respect to time, place and occasion that it would be
difficult to separate proof of one charge from proof of the other,
committed as follows:

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

1 That the defendant GAIL MARIUS GABRIEL in King County,
2 Washington, during a period of time intervening between March 24,
3 1999, through March 26, 1999, being at least 36 months older than
4 Monique Brooks had sexual intercourse with Monique Brooks who was 12
5 years old and was not married to the defendant;

6 Contrary to RCW 9A.44.076, and against the peace and dignity of
7 the State of Washington.

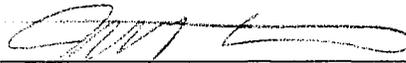
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COUNT V

And I, Norm Maleng, Prosecuting Attorney aforesaid further do
accuse GAIL MARIUS GABRIEL of the crime of **Rape of a Child in the
Second Degree**, a crime of the same or similar character and based on
the same conduct as another crime charged herein, which crimes were
part of a common scheme or plan and which crimes were so closely
connected in respect to time, place and occasion that it would be
difficult to separate proof of one charge from proof of the other,
committed as follows:

That the defendant GAIL MARIUS GABRIEL in King County,
Washington, during a period of time intervening between March 24,
1999, through March 26, 1999, being at least 36 months older than
Monique Brooks had sexual intercourse with Monique Brooks who was 12
years old and was not married to the defendant;

Contrary to RCW 9A.44.076, and against the peace and dignity of
the State of Washington.

NORM MALENG
Prosecuting Attorney

By: 
Jeffrey C. Dernbach, WSBA #27208
Deputy Prosecuting Attorney

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

APPENDIX B

FILED

KING COUNTY WASHINGTON

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

OCT 28 1999

SUPERIOR COURT CLERK
BY DARLA S. DOWELL
DEPUTY

STATE OF WASHINGTON,

Plaintiff,

vs.

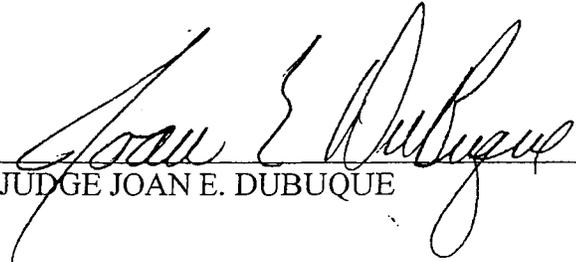
GAIL GABRIEL

Defendant.

NO. 99-1-02573-0SEA

COURT'S INSTRUCTIONS TO THE JURY

October 27, 1999



JUDGE JOAN E. DUBUQUE

00084

62

No. 1

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

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

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

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

00085

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

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

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

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

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence.

Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

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

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

No. 2

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

00088

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

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

No. 4

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

00090

No. 5

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

00091

No. 6

A person commits the crime of rape of a child in the first degree when that person has sexual intercourse with another person who is less than twelve years old and who is not married to the perpetrator. and the perpetrator is at least twenty-four months older than the victim.

00092

No. 7

A person commits the crime of rape of a child in the second degree when that person has sexual intercourse with another person who is at least twelve years old but less than fourteen years old and who is not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

00093

No. 8

A person commits the crime of sexual exploitation of a minor when that person compels, invites, or causes another person, under eighteen years of age, to engage in sexually explicit conduct knowing such conduct would be photographed.

00094

No. 9

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

(1) That between March 27, and March 28, 1999, the defendant had sexual intercourse with Christina Henry;

(2) That Christina Henry was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than Christina Henry; and

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

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

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

00095

No. 10

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

(1) That between March 27 through March 28, 1999, the defendant had sexual intercourse with Monique Brooks;

(2) That Monique Brooks was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least thirty-six months older than Monique Brooks; and

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

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

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

00096

No. 11

To convict the defendant of the crime of sexual exploitation of a minor, as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between March 27 through March 29, 1999, the defendant compelled, invited, or caused Monique Brooks to engage in sexually explicit conduct;

(2) That Monique Brooks was less than eighteen years old;

(3) That the defendant had knowledge that such conduct would be photographed;

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

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

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

00097

No. 12

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

(1) That on or about between March 24 through March 26, 1999, the defendant had sexual intercourse with Monique Brooks;

(2) That Monique Brooks was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least thirty-six months older than Monique Brooks; and

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

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

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

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

(1) That on or about between March 24 through March 26, 1999, the defendant had sexual intercourse with Monique Brooks;

(2) That Monique Brooks was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least thirty-six months older than Monique Brooks; and

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

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

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

No. 14

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight or any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

JURY INSTRUCTION NO. 15

There are allegations that the defendant committed acts of sexual intercourse against Monique Brooks on multiple occasions, as charged in counts II, IV, and V. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

No. 16

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

No. 17

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

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

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

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

00103

No. 18

You will also be furnished with a special verdict form for count III. If you find the defendant not guilty of count III do not use the special verdict form. If you find the defendant guilty of count III, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

00104

JURY INSTRUCTION NO. 19

Sexual motivation means that one of the purposes for commission of the crime was for the purpose of the perpetrator of the crime's sexual gratification.

APPENDIX C

FILED

KING COUNTY WASHINGTON

OCT 28 1999

SUPERIOR COURT CLERK

BY DARLAS. DOWELL

DEPUTY

NOV 1 1999

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

STATE OF WASHINGTON)	
)	No. 99-1-02573-0 SEA
Plaintiff,)	
)	VERDICT FORM A
vs.)	
)	
GAIL M. GABREIL)	
)	
Defendant.)	

We, the jury, find the defendant GAIL M. GABREIL
Guilty (write in not guilty or guilty) of the crime
of rape of a child in the first degree as charged in Count I.

Billy David Bravers
Foreperson

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FILED

KING COUNTY WASHINGTON

OCT 28 1999

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

SUPERIOR COURT CLERK
BY DARLA S. DOWELL

DEPUTY

NOV 1 1999
NOV 1 1999

STATE OF WASHINGTON)
)
 Plaintiff,)
)
 vs.)
)
 GAIL M. GABRIEL)
)
 Defendant.)

No. 99-1-02573-0 SEA

VERDICT FORM A

We, the jury, find the defendant GAIL M. GABRIEL

Guilty (write in not guilty or guilty) of the crime
of rape of a child in the second degree as charged in Count II.

Billy David Brown
Foreman

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OCT 28 1999

SUPERIOR COURT CLERK
BY DARLAS. DOWELL
DEPUTY

NOV 1 1999
NOV 1 1999

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

STATE OF WASHINGTON)
)
 Plaintiff,)
)
 vs.)
)
 GAIL M. GABRIEL)
)
 Defendant.)

No. 99-1-02573-0 SEA

VERDICT FORM A

We, the jury, find the defendant GAIL M. GABRIEL
Guilty (write in not guilty or guilty) of the crime
of rape of a child in the second degree as charged in Count IV.

Billy David Snow
Foreman

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FILED

KING COUNTY WASHINGTON

OCT 28 1999

SUPERIOR COURT CLERK
BY DARLA S. DOWELL
DEPUTY

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

STATE OF WASHINGTON)
)
 Plaintiff,)
)
 vs.)
)
 GAIL M. GABRIEL)
)
 Defendant.)

No. 99-1-02573-0 SEA

VERDICT FORM A

NOV 11 1999

We, the jury, find the defendant GAIL M. GABRIEL
Guilty (write in not guilty or guilty) of the crime
of rape of a child in the second degree as charged in Count V.

Billy David Brower
Foreman

00142

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OCT 28 1999

SUPERIOR COURT CLERK
BY DARLA S. DOWELL

No. 99-1-02573-058A DEPUTY

INQUIRY FROM THE JURY
AND COURT'S RESPONSE



SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

State of Washington
Plaintiff,

vs.

Gail Gabriel
Defendant.

JURY INQUIRY:

We cannot, after numerous votes & long discussion, come to an ~~unanimous~~ unanimous agreement to count III.

Belh P. Brown
FOREMAN

10/28/99
DATE AND TIME

1455 hrs

DATE AND TIME RECEIVED: 2:58 10/28/99

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

JUDGE

DATE AND TIME RETURNED TO JURY: _____

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..DO NOT DESTROY..

APPENDIX D

SUPERIOR COURT OF KING COUNTY, WASHINGTON

1			
2	STATE OF WASHINGTON,)	NO. 99-1-02573-0 SEA
3)	COA NO. 45779-9
4	Plaintiff,)	
5	v.)	OCTOBER 27, 1999
6	GAIL M. GABRIEL,)	9:15 a.m.
7)	
8	Defendant.)	

VERBATIM REPORT OF PROCEEDINGS, taken before the HONORABLE JOAN DUBUQUE, at the King County Courthouse.

APPEARANCES

FOR THE PLAINTIFF:

Jeffrey Dernbach

RECEIVED KING COUNTY, WASHINGTON

APR 04 2000

FOR THE DEFENDANT:

Douglas A. Stratemeyer

DEPARTMENT OF JUDICIAL ADMINISTRATION

2000 APR - 6 AM 9:55

COURT OF APPEALS DIV. #1 STATE OF WASHINGTON

FILED

STEPHEN W. BROSCHEID OFFICIAL COURT REPORTER KING COUNTY COURTHOUSE SEATTLE, WASHINGTON

Stephen W. Broscheid, RMR, Official Court Reporter C-912 King County Courthouse, (206) 296-9181 Seattle, Washington 98104

ENTD.

1 the fact that we let them take notes during this
2 trial, I think the only appropriate response is
3 that they are to rely on their individual and
4 collective memories of the testimony of the
5 witnesses. Is that acceptable to you?

6 MR. STRATEMEYER: It is.

7 THE COURT: Is that acceptable to the
8 State, taking into account you asked me to --

9 MR. DERNBACH: Sure.

10 THE COURT: The other question, which is,
11 "In reading Count IV and Count V, we do not see a
12 difference in the wording or dates other than the
13 count number in line 2 of each count, page 12 and
14 13."

15 MR. DERNBACH: On that particular
16 instruction, it sounds to me like obviously we
17 have five counts charged. The final two counts
18 that we amended the information to add the rape
19 of a child for Monique Brooks were for the same
20 charging period, and it sounds like what they are
21 asking about is, in essence, the Petrich
22 instruction.

23 THE COURT: Right.

24 MR. DERNBACH: We talked a little bit with
25 counsel about responding, you know, in that they

99-1-02513-0500

Cause No.

Date: Oct 27, 1999 Page 2 of 2

Caption: State VS Gabriel

DEPT. #27

Minute Entry

At 11:40 A.M., the jury retires to commence deliberations.

At 12:00 PM, the jury is released until 1:30 for lunch.

At 1:35 PM, the jury resumes deliberations.

At 1:40 PM, the jury submits a written inquiry: May we have a cassette recorder to hear the tape, exhibit #3.

At 1:58 PM, the jury submits a ^{written} inquiry: (In reading counts IV & V, we don't see any difference in the wording or dates other than the count in line 2 of each count) (pp 12 & 13)

At 2:30 PM, the court responds in writing, as to the first question: You are to rely on your individual and collective memories of the testimony of the witnesses.

As to the second question, the court responds in writing: please reread all of your jury instructions.

At 4 PM, the jury is excused, until 9 AM Oct 28, 1999, to resume deliberations.

APPENDIX E

DWA/HIV

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)
)
 Plaintiff,)
)
 v.)
)
 ANDY GAIL GABRIEL)
)
 Defendant.)

No. 99-1-02573-0 SEA
 JUDGMENT AND SENTENCE

I. HEARING

1.1 The defendant, the defendant's lawyer, DOUGLAS STRATEMEYER and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Victim Marique Brooks mother GA

1.2 The state has moved for dismissal of count(s) III

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

1.1 CURRENT OFFENSE(S): The defendant was found guilty on (date): 10-27-99 by jury verdict of:

Count No.: I Crime: RAPE OF A CHILD IN THE FIRST DEGREE
 RCW 9A.44.073 Crime Code 01064
 Date of Crime 03-28-99 Incident No. _____

Count No.: II Crime: RAPE OF A CHILD IN THE SECOND DEGREE
 RCW 9A.44.076 Crime Code 01066
 Date of Crime 03-28-99 Incident No. _____

Count No.: IV Crime: RAPE OF A CHILD IN THE SECOND DEGREE
 RCW 9A.44.076 Crime Code 01066
 Date of Crime 03-26-99 Incident No. _____

Additional current offenses are attached in **Appendix A**.

SPECIAL VERDICT/FINDING(S):

C/PAD	<input type="checkbox"/>	A special verdict/finding for being armed with a Firearm was rendered on Count(s): _____
	(b) <input type="checkbox"/>	A special verdict/finding for being armed with a Deadly Weapon other than a Firearm was rendered on Count(s): _____
CUST	(c) <input type="checkbox"/>	A special verdict/finding was rendered that the defendant committed the crimes(s) with a sexual motivation in Count(s): _____
CASH	(d) <input type="checkbox"/>	A special verdict/finding was rendered for Violation of the Uniform Controlled Substances Act offense taking place <input type="checkbox"/> in a school zone <input type="checkbox"/> in a school <input type="checkbox"/> on a school bus <input type="checkbox"/> in a school bus route stop zone <input type="checkbox"/> in a public park <input type="checkbox"/> in public transit vehicle <input type="checkbox"/> in a public transit stop shelter in Count(s): _____
DIS	(e) <input type="checkbox"/>	Vehicular Homicide <input type="checkbox"/> Violent Offense (D.W.I. and/or reckless) or <input type="checkbox"/> Nonviolent (disregard safety of others)
CRIM	(f) <input type="checkbox"/>	Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score (RCW 9.94A.400(1)(a)) are: _____
ACCTG	22	OTHER CURRENT CONVICTION(S) : Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____
EXH		

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JUL 11 1999

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2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
(a)				
(b)				
(c)				
(d)				

- Additional criminal history is attached in **Appendix B**.
- Prior convictions (offenses committed before July 1, 1986) served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(6)(c)): _____
- One point added for offense(s) committed while under community placement for count(s) _____

2.4 **SENTENCING DATA:**

SENTENCING DATA	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE	ENHANCEMENT	TOTAL STANDARD RANGE	MAXIMUM TERM
Count I	9	XII			240 - 318 MONTHS	LIFE AND/OR \$50,000
Count II	9	XI			210 - 280 MONTHS	LIFE AND/OR \$50,000
Count IV	9	XI			210 - 280 MONTHS	LIFE AND/OR \$50,000

Additional current offense sentencing data is attached in **Appendix C**.

2.5 **EXCEPTIONAL SENTENCE:**

- Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____ Findings of Fact and Conclusions of Law are attached in Appendix D. The State did did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

The Court **DISMISSES** Count(s) III

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 **RESTITUTION AND VICTIM ASSESSMENT:**

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached **Appendix E**.
- Defendant shall **not** pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.142(2), sets forth those circumstances in attached **Appendix E**.
- Restitution to be determined at future hearing on (Date) Feb 16 2000 at 6:45 a.m. Date to be set.
- Defendant waives presence at future restitution hearing(s).
- Defendant shall pay Victim Penalty Assessments pursuant to RCW 7.68.035 in the amount of \$100 if all crime(s) date prior to 6-6-96 and \$500 if any crime date in the Judgment is after 6-5-96.
- Restitution is not ordered.

4.2 **OTHER FINANCIAL OBLIGATIONS:** Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs; Court costs are waived;
- (b) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs, 2015 Smith Tower, Seattle, WA 98104; Recoupment is waived (RCW 10.01.160);
- (c) \$ _____, Fine; \$1,000, Fine for VUCSA; \$2,000, Fine for subsequent VUCSA; VUCSA fine waived (RCW 69.50.430);
- (d) \$ _____, King County Interlocal Drug Fund; Drug Fund payment is waived;
- (e) \$ _____, State Crime Laboratory Fee; Laboratory fee waived (RCW 43.43.690);
- (f) \$ _____, Incarceration costs; Incarceration costs waived (9.94A.145(2));
- (g) \$ _____, Other cost for: _____

4.3 **PAYMENT SCHEDULE:** Defendant's **TOTAL FINANCIAL OBLIGATION** is: \$ 500.00. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:

- Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer. : _____
- The Defendant shall remain under the Court's jurisdiction and the supervision of the Department of Corrections for up to ten years from date of sentence or release from confinement to assure payment of financial obligations.

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: Immediately; (Date): _____ by _____ m.
318 months on Count I 280 ~~IV~~ months on Count IV _____ months on Count _____
280 months on Count II 270 ~~IV~~ months on Count V _____ months on Count _____

ENHANCEMENT time due to special deadly weapon/firearm finding of _____ months is included for Counts _____

The terms in Count(s) I + II + IV + V are concurrent consecutive.
The sentence herein shall run concurrently/consecutively with the sentence in cause number(s) _____

Credit is given for 40 days served or as calculated by the jail for CCN #3 - 1731964 + 12898.
_____ but consecutive to any other cause not referred to in this Judgment.
_____ days as determined by the King County Jail solely for conviction under this cause number pursuant to RCW 9.94A.120(15).

4.5 NO CONTACT: For the maximum term of 1/10 years, defendant shall have no contact with Christine Henry, + Monique Brooks
Violation of this no contact order is a criminal offense under chapter 10.99 RCW and will subject a violator to arrest; any assault or reckless endangerment that is a violation of this order is a felony.

4.6 BLOOD TESTING: (sex offense, violent offense, prostitution offense, drug offense associated with the use of hypodermic needles) Appendix G is a blood testing and counseling order that is part of and incorporated by reference into this Judgment and Sentence.

Community Custody
COMMUNITY PLACEMENT, RCW 9.94A.120(9): Community Placement is ordered for any of the following eligible offenses: any "sex offense", any "serious violent offense", second degree assault, any offense with a deadly weapon finding, any CH. 69.50 or 69.52 RCW offense, for the maximum period of time authorized by law. All standard and mandatory statutory conditions of community placement are ordered.

Appendix H (for additional nonmandatory conditions) is attached and incorporated herein. *which is 3/10*

4.8 WORK ETHIC CAMP: The court finds that the defendant is eligible for work ethic camp and is likely to qualify under RCW 9.94A.137 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the Department shall convert the period of work ethic camp confinement at a rate of one day of work ethic camp to three days of total standard confinement and the defendant shall be released to community custody for any remaining time of total confinement. The defendant shall comply with all mandatory statutory requirements of community custody set forth in RCW 9.94A.120(9)(b).

Appendix K for additional special conditions, RCW 9.94A.120(9)(c), is attached and incorporated herein.

4.9 SEX OFFENDER REGISTRATION (sex offender crime conviction): Appendix J is attached and incorporated by reference into this Judgment and Sentence.

4.10 ARMED CRIME COMPLIANCE, RCW 9.94A.103,105. The state's plea/sentencing agreement is attached as follows:

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: December 6, 1999

Judge: Jean Dubuque

Print Name: Jean Dubuque

Presented by:

Approved as to form:

Jerry C. Vernick
Deputy Prosecuting Attorney, Office WSBA, ID #91002

Print Name: Jerry C. Vernick

Douglas A. Stratmeyer
Attorney for Defendant, WSBA # 21638
Print Name: Douglas A. Stratmeyer

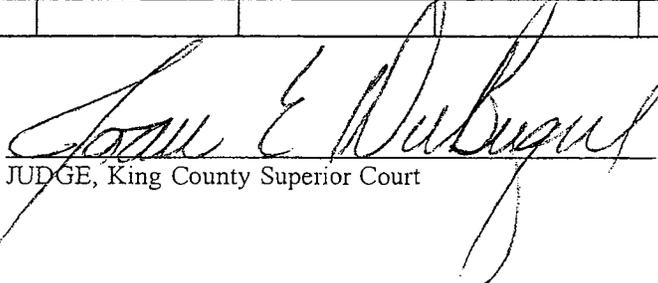
SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)	
)	No. 99-1-02573-0 SEA
Plaintiff,)	
)	(FELONY) - APPENDIX C
v.)	ADDITIONAL CURRENT OFF
)	SENTENCING DATA
ANDY GAIL GABRIEL)	
)	
Defendant.)	

2.4 SENTENCING DATA: Additional current offense(s) sentencing information is as follows:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	Plus Enhancement for Firearm (F), or other deadly weapon finding (1) or VURSA (V) in a zone	Total STANDARD RANGE (including enhancements)	MAXIMUM TERM
V	9	XI			210 - 280 MONTHS	LIFE AND/OR \$50,000

Date: 12/6/99



 JUDGE, King County Superior Court

DNA/HIV

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)

Plaintiff,)

v.)

ANDY GAIL GABRIEL)

Defendant.)

No. 99-1-02573-0 SEA

APPENDIX G
ORDER FOR BLOOD TESTING
AND COUNSELING

(1) HIV TESTING AND COUNSELING:

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense committed after March 23, 1988. RCW 70.24.340):

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 296-4848 to make arrangements for the test to be conducted **within 30 days**.

(2) DNA IDENTIFICATION:

(Required for defendant convicted of sexual offense or violent offense. RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention and/or the State Department of Corrections in providing a blood sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangement for the test to be conducted **within 15 days**.

If both (1) and (2) are checked, two independent blood samples shall be taken.

Date:

12/6/99

Joseph E. Rubenstein
JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON

Plaintiff)

v.

GABRIEL, Gail Marius (Andy)

Defendant)

No. 99-1-02573-0 SEA (all counts)

**JUDGMENT AND SENTENCE
(FELONY) – APPENDIX H
COMMUNITY PLACEMENT/CUSTODY**

14. Have no contact with the victim or any minor-age children without the approval of your Community Corrections Officer.

15. Hold no position of authority or trust involving children.

16. Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

17. Do not change residence without the approval of your Community Corrections Officer.

18. Pay for counseling costs for victims and their families.

19. Within 30 days of sentencing, submit to DNA and HIV testing as required by law.

20. Obey all laws.

[Handwritten signature]
[Handwritten signature]

Date:

December 6, 1999

[Handwritten signature]
JUDGE, KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON

Plaintiff,

v.

ANDY GAIL GABRIEL

Defendant.

No. 99-1-02573-0 SEA

APPENDIX J
JUDGMENT AND SENTENCE -
SEX OFFENDER NOTICE OF
REGISTRATION REQUIREMENTS

The defendant having been convicted of a sex offense ((a) Violation of Chapter 9A.44 RCW or RCW 9A.64.020 or RCW 9.68A.090 or that is, under Chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes or (b) a felony with a finding of sexual motivation under RCW 9.94A.127, the defendant is hereby notified of sex offender registration requirements of RCW 9A.44.130-.140 and is ordered to register with the county sheriff in accordance with the following registration requirements.

REGISTRATION REQUIREMENTS

- 1. The defendant must register with the Sheriff of the county in Washington state where he resides. When registering, the defendant shall provide the county sheriff with the following: (a) name; (b) address; (c) date and place of birth; (d) place of employment; (e) crime for which convicted; (f) date and place of conviction; (g) aliases used; (h) social security number; (i) photograph; and (j) fingerprints. The defendant must register immediately upon completion of being sentenced if not sentenced to begin serving a term of confinement immediately upon completion of being sentenced. Otherwise, he must register within 24 hours of the time of his release if sentenced to the custody of the Department of Corrections, Department of Social and Health Services, a local division of youth services, a local jail, or a juvenile detention facility.
2. If defendant does not now reside in Washington, but subsequently moves to this state, he must register within 24 hours of the time he begins to reside in this state, if at the time of the move he is under the jurisdiction of the Department of Corrections, the Indeterminate Sentence Review Board, or the Department of Social and Health Services. If at the time of defendant's move to this state he is not under the jurisdiction of one of those agencies, then he must register within 30 days of the time defendant begins to reside in this state.
3. If defendant subsequently changes residences within a county in this state, he must notify the county sheriff of that change of residence in writing within 14 days prior to the change of residence. If defendant subsequently moves to a new county within this state, he must register all over again with the sheriff of the new county and must notify the former county sheriff (i.e. the county sheriff of his former residence) of that change of residence in writing, and defendant must complete both acts within 14 days prior to the change of residence.
4. It is a crime to knowingly fail to register in accordance with the above registration requirements.

I have read and understand these sex offender registration requirements.

andy gail gabriel
Defendant

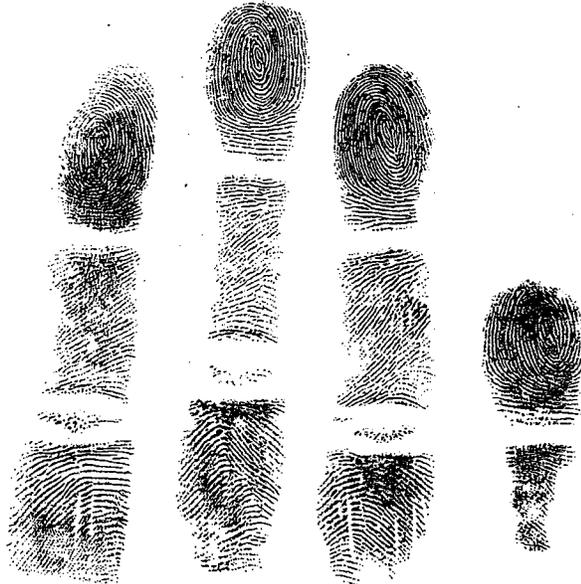
Date: December 6, 1999

Presented by:
Deputy Prosecuting Attorney

Jane [Signature]
JUDGE, KING COUNTY SUPERIOR COURT

Approved as to form:
Douglas A. [Signature]
Defense Attorney

FINGERPRINTS



Defendant's Signature: Gail Gabriel

Right Hand
Fingerprints of:

D.O.C.

Attested by:

M. Janice Michels, Superior Court Clerk

By: Sara Bowen
Deputy Clerk

Dated: DEC 06 1999

James E. Rubenstein
Judge, King County Superior Court

King County Cause # 99-1-025B-1
SFA

CERTIFICATE

This is the original certified fingerprint page of
Mr. Gail Gabriel

OFFENDER IDENTIFICATION

CCN 1731964
CCN 1289851
S.I.D. No. 1289851

I, _____,
Clerk of this Court, certify that the above is a true copy
of the Judgment and Sentence in this action on record in
my office.

Date of Birth January 19, 1969
Sex M
Race B

Dated: _____

Clerk

By: _____
Deputy Clerk

FINGERPRINT



RIGHT HAND
FINGERPRINTS OF:

ANDY GABE GABRIEL

DATED: DEC 06 1999

DEFENDANT'S SIGNATURE: *Andy Gabe Gabriel*
DEFENDANT'S ADDRESS: KCJ

JUDGE, KING COUNTY SUPERIOR COURT
JOAN E. DUBUQUE

ATTESTED BY:
PAUL L. SHERFEY, SUPERIOR COURT CLERK
BY: _____
DEPUTY CLERK

CERTIFICATE

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

CLERK

BY: _____
DEPUTY CLERK

OFFENDER IDENTIFICATION

S.I.D. NO. 1731964
1289851
DATE OF BIRTH: JANUARY 19, 1969
SEX: M
RACE: B

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

In re the Personal Restraint of:

GAIL GABRIEL,
Petitioner.

} CAUSE NO. 63235-3-I
} CERTIFICATE OF SERVICE

I, Bre Caldwell do hereby certify that on the 16th day of October 2009, I served the attached Brief of Petitioner by depositing copies into the United States Mail, with proper first class postage attached, in envelopes addressed to:

Gail Gabriel
DOC No. 802674
McNeil Island Corrections Center
P.O. Box 881000
Steilacoom WA 98388-1000

Ann Summers
King Count Prosecutor's Office
516 3rd Ave. Suite W554
Seattle WA 98104-2362

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

10/16/09 Seattle, WA
DATE AND PLACE


BRE CALDWELL