

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 MAR 30 AM 11:19

In the Matter of the Application)
For Release from Personal Restraint)
of:)
)
GAIL GABRIEL)
Petitioner)

63235-3
Personal Restraint Petition
Pursuant to (RAP 16.3)
99-1-02573-0

Doc # 802674

If there is not enough room on this form, use the back of these pages, or other paper. Fill out all of this form and other papers you are attaching before you sign this form in front of a Notary.

A. Status of Petitioner

I, Gail Gabriel, Petitioner Pro Se, is confined at the Washington Dept of Corrections, located at 191 Constantine Way in Aberdeen, WA

(Full name and address)

Apply for relief from confinement. I am am not now in custody serving a sentence upon conviction of a crime. (If not serving a sentence upon conviction of a crime) I am now in custody because of the following type of court order:

N/A

4-14-09

PETITIONER MAY FILE PETITION WITHOUT PAYMENT OF FILING FEE

(Identify type of order)

COURT ADMINISTRATOR/CLERK

1. The Court in which I was sentenced is: King County Superior Court.
516 3rd Avenue, Seattle, WA 98104.

2. I was convicted of the crime(s) of: Rape of a child in the first degree,
one count, and three counts of rape of child in the second degree.

3. I was sentenced after trial , after plea of guilty on 12-6, 1999,
(Date of sentence) (Year)

4. The judge who imposed the sentence was Joan Dubuque
(Name of trial court judge)

5. My lawyer at trial court was: Douglas Stratemeyer, 1001 Fourth
Avenue Plaza, Suite 3290, Seattle, WA 98154
(Name and address if known; if none, write "none")

6. I did did not appeal from the decision of the trial court (if the answer is that I
did), I appealed to: This Court.

(Name of court or courts to which appeal was taken)

7. My lawyer on appeal was: Oliver Davis, Washington Appellate Project.
(Name and address if known, if none, than write "none")

8. The decision of the appellate court was was not published. If the answer is that
it was published, and I have this information), the decision is published in: _____

N/A

(Volume number, Washington Appellate Reports or)

(Washington Reports and page number)

9. Since my conviction I have have not asked a court for some relief from my sentence other than I have already written above. (If the answer is that I have asked)

The court I asked was: this Court.

(Name of court or courts in which relief was sought)

Relief was denied granted 4-23-2001

All dates not known

(Date of decision, if more than one, dates of all decisions)

10. (If I have answered in question 6 that I have asked for relief), the name of my lawyer in the proceedings mentioned in question 6 was: Myself, Pro Se.

(Name and address if known; if none, write "none")

11. If the answers to the above questions do not really tell about the proceedings and the court, judges and attorneys involved in your case, tell about it here: This petition is timely filed under RCW 10.73.100(3)(claim of double jeopardy is not subject to the one-year limitations period of RCW 10.73.090), and the issue presented has not been previously heard and determined. My restraint is unlawful as RAP 16.4(b) defines that term, and my restraint is unlawful for one or more of the reasons set forth in RAP 16.4(c).

B. Grounds for Relief

(If I claim more than one reason for relief from confinement, I attach sheets for each reason separately, in the same way as the first one. The attached sheets should be numbered "First Ground," "Second Ground," "Third Ground," Etc.), I claim that I have (number) one reason(s) for this court to grant me relief from the conviction described in part A.

First Ground

(First, Second, etc.)

1. I should be given a new trial or released from confinement because [Here state legal reasons why you think that there was some sort of error made in your case which gives you right to a new trial or release from confinement.]:
My convictions in Counts IV and V violate double jeopardy. My contention is that one of the two convictions for second degree rape of a child must be vacated because the trial court's instructions allowed the jury to find me guilty of both counts based on a single act, violating my constitutional right to be free from double jeopardy. This Court found in State v. Berg, infra, and State v. Borsheim, infra, that the trial court did not give a "separate and distinct" act instruction or otherwise require that the jury base each charged count on a "separate and distinct" underlying event, and as in both Berg and Borsheim, the missing language potentially exposed them to multiple punishments for a single offense. The same double jeopardy violation occurred in my case.
2. The following facts are important when considering my case [After each fact statement, put the name of the person or persons who know the facts and will support your statement of the fact. If the fact is already in the record of your case, indicate that also.]: That the jury was confused in Counts IV and V and the Judge's response was to "Please reread all of your jury instructions." See Appendix B, Clerk's Papers # 73A. None of the instructions specifically state that a conviction on each charged count must be based on a "separate and distinct" underlying incident and that

proof of any one incident cannot support a finding of guilt on more than one count. As a result, the instructions allowed the jurors to base a conviction on Counts IV and V on a finding that a single underlying event occurred.

3. The following reported court decisions [include citations if possible] in cases similar to mine show the error I believe happened in my case [if none are known, state "None Known"]:

State v. Berg, COA # 60729-4-I (2008);

State v. Borsheim, 140 Wn. App. 357, 165 P.3d

417 (2007).

4. The following statutes and constitutional provisions should be considered by the court [if none are known, state "None Known"]:

RCW 10.73.100(3): "The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution." Double Jeopardy Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, section 9 of the Washington State Constitution.

5. This petition is the best way to get the relief I want and no other way will work as well because:

There are no other remedies available to me other than this petition. The facts and grounds for relief

are set forth more fully in my Brief in Support of
Personal Restraint Petition filed herewith.

Statement of Finances

If you cannot afford to pay the filing fee or cannot afford to pay an attorney to help you, fill this out. If you have enough money for these things, do not fill out this part of the form

1. I do do not ask the court to file this without making me pay the filing fee because I am so poor I cannot pay the fee.
2. I have \$ 0 in my prison or institution account.
3. I do do not ask the court to appoint a lawyer for me because I am so poor I cannot afford to pay a lawyer.
4. I am am not employed. My salary or wages amount to \$ 0 a month.
My employer is:

None

(Name and address)

5. During the past 12 months I did did not get any money from a business, profession, or other form of self-employment. If I did, it was:

(Kind of self employment)

The total income I got was \$ 0.

6. During the past 12 months, I:

DID

DID NOT

Get any rent payment. If so,
the total amount I got was

\$ 0

Get any interest. If so,

The total amount I got was \$ 0
 Get any dividends. If so, the total amount I got was \$ 0
 Get any other money. If so, the amount of money I got was \$ 0

7. During the past 12 months, I:

DID	DID NOT		
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Have any cash except as said in answer 2. If so, the amount of cash I have is	\$ <u>0</u>
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Have any savings accounts or checking accounts. If so the amount in all is	\$ <u>0</u>
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Own Stocks, Bonds, or Notes. If so, there total value is	\$ <u>0</u>

8. List all Real Estate and other property and things of value, which belong to you or in which you have an interest. Tell what each item of property is worth and how much you owe on it. Do not list household furniture, furnishings, and clothing which you or your family need.

Item: None Value: \$ 0
Item: None Value: \$ 0
Item: None Value: \$ 0

9. I am am not married. If I am married, my spouses name and address is:

N/A

10. All of the persons who need me to support them are listed here:

Name	Address	Age	Relationship
<u>N/A</u>			

All the bills I owe are listed here:

Creditor	Address	Amount
<u>N/A</u>	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____

C. Request for Relief

I want this court to:

- Vacate my conviction and grant me a new trial.
- Vacate my conviction and dismiss the criminal charges against me without a new trial.

Other

[Specify]: My conviction on Counts IV or V should be vacated because as this Court held in State v. Berg, supra and State v. Borsheim, supra, the remedy for the double jeopardy violation is to vacate the additional identical count. Berg supra (citing Borsheim, 140 wa.App. at 371).

D. Oath of Petitioner

THE STATE OF WASHINGTON)

) SS

COUNTY OF Grays Harbor)

After being first duly sworn, on oath, I dispose and say, That I am the petitioner, that I have read the petition. I know it's contents, and believe that the petition is true.

March 26, 2009
Date

April Gabriel
Signature of petitioner

SUBSCRIBED AND SWORN to me this 26 day of March, 2009.



John L. Thompson
NOTARY PUBLIC in and for the State of Washington
Residing at Shelton

My commission expires: 6 | 6 | 10

If a Notary is not available, explain why none is available and indicate who can be contacted to help you find a Notary:

N/A

Then sign below:

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

Dated at _____ on this _____ day of _____,

(City and State)

Signature of Petitioner

Print Name

3. That the issue raised in this Court's recent decision in State v. Berg, COA #60729-4-I (2008), is similar to my issue, which is good cause to file this petition.

4. That my double jeopardy claim has not been previously "heard and determined" on the merits because if it had, the court would have vacated one of the additional identical counts, in violation of double jeopardy, as held in State v. Berg, supra, and State v. Borsheim, 140 Wn.App. 357, 165 P.3d 417 (2007).

5. That, because my issue has not been previously heard and determined on the merits, I am not abusing the writ process by filing this petition, and RCW 10.73.140 does not apply to me because I was not represented by counsel throughout postconviction proceedings. However, I am asking this Court to transfer my petition to the Supreme Court where that rule does not apply, if it determines that RAP 16.4(d) or RCW 10.73.140 applies. Under law, this Court has jurisdiction to decide jurisdiction.

6. That the ends of justice would be served by considering my issue in light of this Court's decisions in State v. Berg, supra, and State v. Borsheim, supra.

7. My petition is not subject to the one-year limitation period of RCW 10.73.090 for filing a petition for collateral relief because it is based on one of the grounds itemized

in RCW 10.73.100. RCW 10.73.100(3)(The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution).

8. That the facts and argument in which my petition is based are set forth in my Brief in Support of my personal restraint petition.

9. That the evidence relied upon are designated in Appendicies A, B, and C, attached thereto.

10. That the jury instructions in my case were inadequate in that they exposed me to multiple punishments for the same offense, in violation of my right to be free from double jeopardy.

11. That I bring this action in good faith.

12. That I, Gail Gabriel, do certify that the documents and Appendicies are authentic copies of the originals.

13. That I, Gail Gabriel, do certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and,

STATEMENT OF CERTIFICATION OF APPENDICIES AND DOCUMENTS

The documents submitted in the Appendicies in this action are authenticated as follows:

AFFIDAVIT OF GAIL GABRIEL-3

1. Appendix A: Court's Instructions to the jury.
2. Appendix B: Supplemental Instructions of jury's Inquiries.
3. Appendix C: Judgment and Sentence (pages relevant to issue).

Gail Gabriel

Gail Gabriel
Petitioner Pro Se
SCCC-191 Constantine Way
Aberdeen, WA 98520

Executed on this 26 day of March, 2009, at Aberdeen,
County of Grays Harbor, State of Washington.

Affidavit sworn as true and correct to the best of my
knowledge under penalty of perjury and has full force of law.

DATED this 26 day of March, 2009.

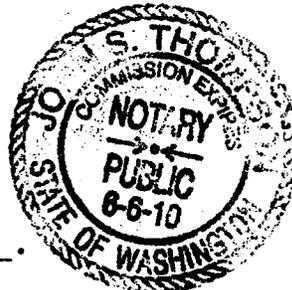
Gail Gabriel

Gail Gabriel
Petitioner Pro Se

SUBSCRIBED AND SWORN to before me this 26 day of March, 2009.

John L. Thomas
NOTARY PUBLIC in and for the
State of Washington
residing at: Shelton

My Commission Expires: 6-6-10



INDEX OF APPENDICIES

- APPENDIX A: Court's Instructions to the Jury
- APPENDIX B: Supplemental Instructions of Jury's
Inquiries
- APPENDIX C: Judgment and Sentence
(pages relevant to issue)

Appendix A

Court's Instructions to the Jury

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.

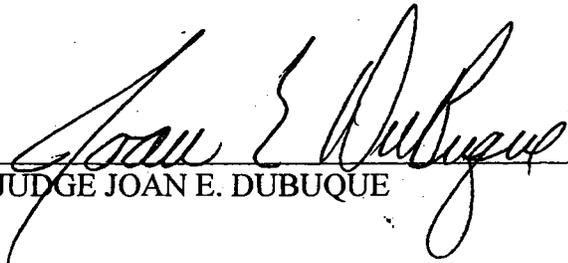
GAIL GABRIEL

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. H

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.

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

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.

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.

00098

No. 13

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.

00099

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.

00100

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.

00102

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 B

Supplemental Instructions of Jury's Inquiries

Appendix B

FILED
KING COUNTY, WASHINGTON

NOV 16 1999

State of Washington
v.
Gail Gabriel, 99-1-02573-0SEA

SUPERIOR COURT CLERK
BY DAVID J. ROBERTS
DEPUTY

Supplement to Trial Record Regarding Jury Inquiries Submitted on October 27 and 28, 1999

Appendix 26

73A

10-21-17

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THE COURT: You know, in this particular case I think the appropriate -- given the limited purposes for which the Court allowed the entire tape to be played, and given my concern that the jury not unduly rely upon that, and given the fact that we let them take notes during this trial, I think the only appropriate response is that they are to rely on their individual and collective memories of the testimony of the witnesses.

Is that acceptable to you?

MR. STRATEMEYER: It is.

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

MR. DERNBACH: Sure.

THE COURT: The other question, which is, "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 two of each count, page 12 and 13."

COURT'S RESPONSE: "Please reread all of your jury instructions."

I'll hand it down so you can both see what I have written here and we'll return it to the jury.

October 28, 1999

1
2 THE COURT: I think the only appropriate
3 response, and I can either answer two ways: "No".

4 Or, "As with any other witness, you must rely
5 on your individual and collective memory of
6 testimony in this case."

7 MR. DERNBACH: That would be my preference.

8 MR. STRATEMEYER: That's mine, also.
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Appendix C

Judgment and Sentence
(pages relevant to issue)

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 Monique Brooks mother AA CAS.

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. 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):

- A special verdict/finding for being armed with a **Firearm** was rendered on Count(s): _____
- A special verdict/finding for being armed with a **Deadly Weapon** other than a **Firearm** was rendered on Count(s): _____
- A special verdict/finding was rendered that the defendant committed the crimes(s) with a **sexual motivation** in Count(s): _____
- A special verdict/finding was rendered for **Violation of the Uniform Controlled Substances Act** offense taking place
 - in a school zone in a school on a school bus in a school bus route stop zone in a public park in public transit vehicle in a public transit stop shelter in Count(s): _____
- Vehicular Homicide** Violent Offense (D.W.I. and/or reckless) or Nonviolent (disregard safety of others)
- Current offenses **encompassing** the same criminal conduct and counting as one crime in determining the offender score (RCW 9.94A.400(1)(a)) are: _____

99 9 17882 9
JUDGMENT NUMBER
C/PROC
CUST
CASH
JUDGE
DISC
CRIM
ACCTG
EXH

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

Handwritten signature 'Fl' and a circled stamp.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON

Plaintiff,

v.

ANDY GAIL GABRIEL

Defendant.

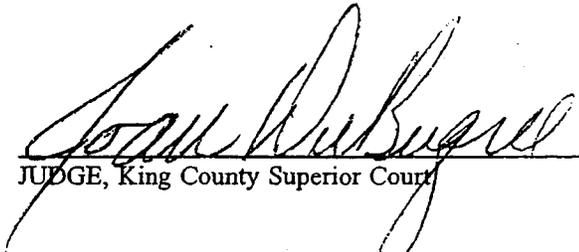
No. 99-1-02573-0 SEA

(FELONY) - APPENDIX A
ADDITIONAL CURRENT OFFENSES

2.1 The defendant is also convicted of these additional current offenses:

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

Date: 12/10/99



JUDGE, King County Superior Court

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 MAR 30 AM 11:19

COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION ONE

In the Matter of the)	No. _____
Personal Restraint of:)	MOTION OF ORDER OF
)	INDIGENCY-
<u>GAIL GABRIEL</u> ,)	(Criminal Case)
Petitioner,)	
)	
)	
)	

Gail Gabriel, Petitioner Pro Se,
files this appeal in the above-referenced criminal
case, and moves the court for an Order of Indigency
authorizing the expenditure of public funds to
prosecute this action wholly at public expense.

The following certificate is made in support
of this motion.

Gail Gabriel
Gail Gabriel

Stafford Creek Corr. Ctr.
191 Constantine Way (H4-Unit)
Aberdeen, Wa 98520

CERTIFICATE

I, Gail Gabriel, certify as follows:

1. That I am the (defendant) (respondent) (petitioner) and I wish to appeal the judgement that was entered in the above -entitled cause.

2. That I own:

a. No real property.

b. Real property valued at \$ 0.

3. That I own:

a. No personal property other than my personal effects.

b. Personal property (automobile, money, inmate account, motors, tools, etc.) valued at \$ 0.

4. That I have the following income:

a. No income from any source.

b. Income from employment, disability payments, SSI, insurance, annuities, stocks, bonds, interests, etc. in the amount of \$ 0 on an average monthly basis. I receive \$ 0 after taxes over the past year.

5. That I have:

a. Undischarged debts in the amount of \$ unlimited.

b. No debts.

6. That I am without other means to prosecute said appeal and desire that public funds be expended for this purpose.

7. That I can contribute the following amount toward the expense of review:

\$ 0.

8. The following is a brief statement of the nature of the case and the issues sought to be reviewed: The jury instructions were inadequate in that they exposed me to multiple punishments for the same offense, in violation of my right to be free from double jeopardy.

This petition is filed in light of this Court's recent decisions in State v. Berg, COA # 60729-4-I (2008), and State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007).

9. I ask the court to provide the following at public expense: all filing fees, ~~attorney fees, preparation, reproduction, and distribution of briefs, preparation of verbatim report of proceedings, and~~ preparation of necessary clerk's papers.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 MAR 30 AM 11:19

COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION I

In the Matter of the Personal Restraint Petition of:

GAIL GABRIEL
Petitioner.

Case No.: _____

AFFIDAVIT OF GAIL GABRIEL

I, Gail Gabriel, On oath says:
(Name)

- 1) That I am the Petitioner, and Pro Se in this action, over the age of 18-years and competent to testify;
- 2) That I am an indigent Petitioner and is without funds to pay the filing fee in this action;
- 3) That I ask this Court, in good faith, to allow this action to proceed in forma pauperis;
- 4) That I bring this action and file this petition in good faith;
- 5) That this is a double jeopardy issue and is exempt from RCW 10.73.090's one-year statute of limitations under RCW 10.73.100(3);
- 6) That my issue is similar to the issue in this Court's recent decision in State v. Berg, COA #60729-

4-I (2008) where this Court found that the jury instructions were inadequate in that they exposed Berg to multiple punishments for the same offense, in violation of his right to be free from double jeopardy;

7) That this Court should waive the filing fee in this case so the ends of justice could be served by reaching the merits of this petition.

8) That my Statement of Finances are attached.

SWORN to this 26 day of March, 2009.

Gail Gabriel
Signature

Gail Gabriel
Printed Name DOC# 802674

Stafford Creek Corrections Center
191 Constantine Way, Unit # H4
Aberdeen, WA. 98520

NOTARY or WITNESS

Subscribed and Sworn to before me,
this 26 day of March, 2009.



John L. Thompson
Notary Public in and for the State of
Washington, residing at Shelton.
My Commission expires: 6/6/10.

02/25/2009
GLHARP

DEPARTMENT OF CORRECTIONS
STAFFORD CREEK CORRECTIONS CENTER

Page 1 of 1
OIRPLRAR
6.03.1.0.1.2

PLRA IN FORMA PAUPERIS STATUS REPORT
FOR DEFINED PERIOD : 08/01/2008 TO 01/31/2009

DOC : 0000802674 NAME : GABRIEL ANDY ADMIT DATE :01/11/2000
DOB : 01/19/1969 ADMIT TIME :00:00

AVERAGE MONTHLY RECEIPTS	20% OF RECEIPTS	AVERAGE SPENDABLE BALANCE	20% OF SPENDABLE
5.83	1.17	0.00	0.00

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
OFFICE OF CORRECTIONAL OPERATIONS
STAFFORD CREEK CORRECTION CENTER
CERTIFIED BY: S. Harp

GLHARP

STAFFORD CREEK CORRECTIONS CENTER

OTRTASTA

TRUST ACCOUNT STATEMENT

6.03.1.0.1.2

DOC: 0000802674 Name: GABRIEL, ANDY M
 LOCATION: S01-317-H4081U

DOB: 01/19/1969

ACCOUNT BALANCES Total: 35.13 CURRENT: 35.13 HOLD: 0.00
 08/01/2008 01/31/2009

SUB ACCOUNT	START BALANCE	END BALANCE
SPENDABLE BAL	0.00	0.00
SAVINGS BALANCE	32.50	32.50
WORK RELEASE SAVINGS	0.00	0.00
EDUCATION ACCOUNT	0.00	0.00
MEDICAL ACCOUNT	0.00	0.00
POSTAGE ACCOUNT	0.00	6.31
COMM SERV REV FUND ACCOUNT	0.00	0.00

STATE OF WASHINGTON
 DEPARTMENT OF CORRECTIONS
 OFFICE OF CORRECTIONAL OPERATIONS
 STAFFORD CREEK CORRECTION CENTER
 CERTIFIED BY: *G. Harp*

DEBTS AND OBLIGATIONS

TYPE	PAYABLE	INFO NUMBER	AMOUNT OWING	AMOUNT PAID	WRITE OFF	AMT.
CVCS	CRIME VICTIM COMPENSATION/07112000	01112000	UNLIMITED	26.88		0.00
COIS	COST OF INCARCERATION /07112000	01112000	UNLIMITED	107.50		0.00
COPD	COPY COSTS DEBT	02132003	340.33	0.00		0.00
COPD	COPY COSTS DEBT	09212000	1302.50	3.51		0.00
DEND	DENTAL COPAY DEBT	12162003	0.00	6.00		0.00
COI	COST OF INCARCERATION	01112000	UNLIMITED	0.00		0.00
CVC	CRIME VICTIM COMPENSATION	01112000	UNLIMITED	84.20		0.00
SPHD	STORES PERSONAL HYGIENE DEBT	05172007	0.00	1.12		0.00
TVD	TV CABLE FEE DEBT	02082003	5.08	15.54		0.00
TVD	TV CABLE FEE DEBT	07082000	0.00	11.71		0.00
LFO	LEGAL FINANCIAL OBLIGATIONS	20000713	UNLIMITED			0.00
LFO	LEGAL FINANCIAL OBLIGATIONS	20000124	UNLIMITED	149.17		0.00
POSD	POSTAGE DEBT	02052003	20.36	8.28		0.00
POSD	POSTAGE DEBT	07122000	70.45	3.52		0.00
TVRTD	TV RENTAL FEE DEBT	02192003	6.00	0.00		0.00
HYGA	INMATE STORE DEBT	02062003	167.77	66.18		0.00
HYGA	INMATE STORE DEBT	01222001	0.00	328.91		0.00
HYGA	INMATE STORE DEBT	01242000	0.00	6.25		0.00
LMD	LEGAL MAIL DEBT	02182003	169.00	0.00		0.00
LMD	LEGAL MAIL DEBT	10022000	54.87	2.35		0.00
UPSD	PERSONAL PROPERTY POSTAGE DEBT	03252003	9.14	0.00		0.00

TRANSACTION DESCRIPTIONS --

SPENDABLE BAL SUB-ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
08/04/2008	HYGA	INMATE STORE DEBT (AUTO)	4.52	4.52
08/04/2008	CRS	CRS SAL ORD #4701477STR	(4.52)	0.00
08/09/2008	TVD	TV CABLE FEE DEBT	0.50	0.50

GLHARP

STAR RD CREEK CORRECTIONS CENTER

OTRTASTA

TRUST ACCOUNT STATEMENT

6.03.1.0.1.2

DOC: 0000802674 Name: GABRIEL, ANDY M
LOCATION: S01-317-H4081U

DOB: 01/19/1969

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
		mailroom		
12/02/2008	UPSPOS	UPS - correction per mailroom	(4.96)	15.51
12/30/2008	SAPOS	SAPOS SAL ORD #4933446STR	(9.20)	6.31

TRANSACTION DESCRIPTIONS --

COMM SERV REV SUB-ACCOUNT
FUND ACCOUNT

DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
------	------	-------------------------	-----------------	---------

DECLARATION OF SERVICE BY MAIL

GR 3.1

I, Gail Gabriel, declare and say:

That on the 26 day of March, 2009, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. _____:

- (1) Motion/Certificate For Order of Indigency/Statement Finances ;
- (2) Personal Restraint Petition of Gail Gabriel ;
- (3) Brief In Support of Petition ;
- (4) Affidavit of Gail Gabriel ;
- (5) Appendix Index / Appendicies A through C .

addressed to the following:

Washington Court of Appeals
Division One
One Union Square
600 University Street
Seattle, WA 98101-4170

King County Prosecutor's Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

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

DATED THIS 26 day of March, 2009, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Gail Gabriel
 Signature
Gail Gabriel
 Printed Name

DOC 802674 . Unit H4
 Stafford Creek Corrections Center
 191 Constantine Way
 Aberdeen. WA 98520-9504

FILED
 COURT OF APPEALS DIV. #1
 STATE OF WASHINGTON
 2009 MAR 30 AM 11:19