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63235-3

NO. 63235-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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In re Personal Restraint Petition of

GAIL GABRIEL,

Petitioner.

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ANN SUMMERS  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

2008 FEB 17 PM 4:45  
COURT OF APPEALS  
DIVISION I  
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KIMBERLY J. HARRIS

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A. AUTHORITY FOR RESTRAINT OF PETITIONER.

Gail Gabriel is restrained pursuant to Judgment and Sentence in King County Superior Court No. 99-1-02573-0 SEA. See Appendix A.

B. ISSUES PRESENTED.

1. Whether this personal restraint petition should be dismissed where the new rule of criminal procedure set forth in State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007), does not apply retroactively to Gabriel's convictions.

2. Whether this personal restraint petition should be dismissed where the instructional error that petitioner now complains of was invited by the defendant's proposed instructions.

3. Whether this personal restraint petition should be dismissed where the petitioner has failed to establish constitutional error that resulted in actual and substantial prejudice because, as this Court previously held, the evidence that the jury found credible established multiple acts of sexual intercourse.

C. STATEMENT OF THE CASE.

Gail Gabriel was found guilty by jury verdict of one count of rape of a child in the first degree and three counts of rape of a child in the second degree in 1999. Appendix A.<sup>1</sup> He was sentenced to 318 months of total confinement. Appendix A. He appealed. His convictions were affirmed and mandate issued April 11, 2002.

Appendix B. Gabriel has filed at least two prior personal restraint petitions in this Court, Nos. 54713-5-I and 60682-4-I, both of which were dismissed. Appendix C, D. In Court of Appeals No. 54713-5-I, this Court rejected Gabriel's claim that his convictions on Counts IV and V constitute double jeopardy. Appendix C.

The facts of the crime were set forth in detail in the Statement of the Case from the Brief of Respondent filed in the direct appeal. Appendix E. In short, the 29-year-old Gabriel was convicted of having sexual contact with two runaway girls, ages 11 and 12, who stayed at his apartment over a period of four days, from Wednesday evening, March 24, 1999, to Sunday morning, March 28, 1999. RP 10/20/99 76; RP 10/21/99 86; RP 10/25/99 35, 54; RP 10/26/99 91, 107.

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<sup>1</sup> Appendices A - G referenced herein were attached to the State's Response to Personal Restraint Petition filed on July 16, 2009.

All but two of the five counts against Gabriel differed from each other as to the crime charged, the victim or the date of the crime, as follows:

<u>Count</u>	<u>Charge</u>	<u>Victim</u>	<u>Dates</u>
I	Rape of Child 1	C.H.	3/27 to 3/28/99
II	Rape of Child 2	M.B.	3/27 to 3/28/99
III	Sexual Exploitation of a Minor	M.B.	3/27 to 3/29/99
IV	Rape of Child 2	M.B.	3/24 to 3/26/99
V	Rape of Child 2	M.B.	3/24 to 3/26/99

Appendix F.

In regard to the evidence relating to the two identical counts, Counts IV and V (alleging sexual intercourse with M.B. between March 24 and March 26), the prosecutor outlined in opening statement that over the four days that the victims stayed at Gabriel's apartment, M.B. and Gabriel "had sex on a regular basis," both vaginal intercourse and oral sex, and "continued their sexual relationship on essentially a daily basis." RP 10/20/99 55-56. The prosecutor explained that "the defendant, during the course of the 24<sup>th</sup> through the 29<sup>th</sup>, was having a sexual relationship with a 12 year old girl, [M.], and that's why you have the multiple counts of the rape of a child in the second degree." RP 10/20/99 61.

C.H. testified that she and M.B. stayed at Gabriel's house for four days. RP 10/20/99 76. C.H. saw M.B. perform oral sex on Gabriel while M.B. was under a blanket on one occasion. RP 10/20/99 76-77. C.H. testified that, upon Gabriel's insistence, she videotaped M.B. performing oral sex on Gabriel on a separate occasion that occurred on the last day that she was at the apartment. RP 10/20/99 80-85. C.H. testified that she witnessed M.B. and Gabriel engaged in sexual activity during the day and at night, eight to ten times. RP 10/20/99 110-11.

In contrast, M.B. denied having any sexual relationship with Gabriel, and claimed they were only friends. RP 10/25/99 17. M.B. admitted that she had told Detective McLean that she and Gabriel had a sexual relationship. RP 10/25/09 23.

Gabriel testified, and denied having any sexual contact with M.B. or C.H. RP 10/26/99 95.

The defendant's proposed jury instructions as to Counts IV and V that set forth the elements of the crime as follows:

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

(1) That between March 24 through March 26, 1999, the defendant had sexual intercourse with [M.B.];

(2) That [M.B.] was twelve 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 [M.B.]; and

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

Appendix H, attached hereto, Instructions 8 and 9.

The Court's instructions to the jury as to Counts IV and V set forth the elements of the crime almost identically to the defendant's proposed instructions:

To convict the defendant of the crime of rape of a child in the second degree, as charged in Count IV [or 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 [M.B.];

(2) That [M.B.] 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 [M.B.]; and

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

Appendix F, Instructions 12 and 13.

In addition, the jury was instructed that:

There are allegations that the defendant committed acts of sexual intercourse against [M.B.] 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.

Appendix F, Instruction 15. The jury was also instructed that:

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.

Appendix F, Instruction 16.

In closing argument, the prosecutor explained, "for the counts of rape of a child, I have to prove he had sex with these girls for each count." RP 10/27/99 14. As to the evidence supporting each of the counts, the prosecutor explained:

. . . there is beyond a reasonable doubt evidence to prove the defendant committed the act of rape of a child with C.H. that night, the last night that he was there, that he committed the crime of sexual exploitation of M.B. by asking to videotape M when that last night they were there, as well as to sustain the counts -- the further counts of rape of a child in the second degree for M.B. for the fact that he was, in fact, sexually active with her throughout the time that he was at -- that they were staying at the defendant's apartment as she described the fact that she had sex on multiple occasions, providing you with descriptions of particularly the first occasion where she was giving him oral sex underneath the blankets.

RP 10/27/99 37-38. The prosecutor pointed out that C.H. had testified to witnessing eight to ten instances of sex.

RP 10/27/99 23.

During deliberations, the jury sent out a question to the judge regarding Counts IV and V. The jury asked, "In reading Counts IV and 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. The State suggested that the court direct the jury to Instruction 15. RP 10/27/99 95. The defense objected and proposed that the court simply tell the jury to reread the instructions. RP 10/27/99 95. The court followed the suggestion of the defense.

The jury found Gabriel guilty as to Counts I, II, IV and V, and was unable to reach a verdict as to Count III. Appendix G. In regard to Count III, C.H. testified to videotaping M.B. and Gabriel engaged in oral sex, but no videotape showing that incident was ever found in Gabriel's apartment. RP 10/27/99 66-68. Count III was dismissed at sentencing. Appendix A.

On appeal, Gabriel argued that there was insufficient evidence to support his convictions for Counts IV and V because there was insufficient testimony of two separate acts of sexual intercourse during the charging period. Appendix B, at 3. This Court disagreed, holding that "there was testimony showing that at least two acts of sexual intercourse occurred between Gabriel and

M.B. during the charging period of March 24 through March 26." Appendix B, at 4. This Court quoted C.H.'s testimony at length in its decision. Appendix B, at 4-6. This Court also stated, "We note that the court gave a Petrich<sup>2</sup> instruction, requiring the jury to find separate and distinct acts for each count." Appendix B, at 7. This Court explicitly relied on State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996), in concluding that the evidence was sufficient to support conviction for both Counts IV and V. Appendix B, at 7-9.

D. ARGUMENT.

1. CONSIDERATION OF THE MERITS OF THIS UNTIMELY, SUCCESSIVE PETITION IS NOT BARRED BY RCW 10.73.090, RCW 10.73.140 or RAP 16.4(d).

No petition collaterally attacking a judgment and sentence may be filed more than one year after the judgment becomes final, if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090(1); see In re Personal Restraint of Runyan, 121 Wn.2d 432, 444, 449, 853 P.2d 424 (1993). A judgment becomes final on the date that an appellate court issues its mandate disposing of a timely direct

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<sup>2</sup> State v. Petrich, 101 Wn.2d 566, 573, 683 P.2d 173 (1984), *overruled on other grounds by*, State v. Kitchen, 110 Wn.2d 403, 405, 756 P.2d 105 (1988).

appeal from the conviction. RCW 10.73.090(3)(b). Gabriel's conviction became final on April 11, 2002. Appendix B. This petition was filed more than six years after his conviction became final.

However, RCW 10.73.100(3) provides that the time bar specified in RCW 10.73.090 does not apply to a petition that is based solely on grounds that the conviction was barred by double jeopardy. Gabriel's petition raises a single claim: that one of his rape in the second degree convictions is barred by double jeopardy. Pursuant to RCW 10.73.100(3), this Court may consider the merits of this untimely claim, although, for reasons explained below, it should be rejected.

RCW 10.73.140 bars the Court of Appeals from considering a collateral attack when the petitioner has previously filed a personal restraint petition unless the petitioner shows good cause why the ground currently asserted was not raised earlier. Similarly, RAP 16.4(d) provides, in part, that "No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown." This prohibition applies to both this Court and the supreme court. A significant intervening change in the law constitutes good cause for advancing the same grounds in

a successive petition. In re Personal Restraint of Johnson, 131 Wn.2d 558, 567, 933 P.2d 1019 (1997); In re Personal Restraint of Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990).

Gabriel raised his double jeopardy claim in a prior personal restraint petition, No. 54713-5-I, that was dismissed by this Court on September 29, 2004. Appendix C. For the reasons explained below, State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007), is a significant intervening change in the law in regard to Gabriel's double jeopardy claim, and thus constitutes good cause for this Court to consider the merits of this successive petition, although, for the reasons explained below, the petition should ultimately be dismissed.

Gabriel argues in the Brief of Petitioner that Borsheim "did not announce new law" and "merely applied well-settled principles of double jeopardy analysis." If this were true, this petition would be barred by RAP 16.4(d), because Gabriel raised his double jeopardy claim in a prior petition. If the alleged double jeopardy violation was based on law that was well-established in 2004, then Gabriel is simply "'revising' a previously rejected legal argument" in this petition, which is not good cause to reconsider the prior claim. Jeffries, 114 Wn.2d at 488. Unless Borsheim constitutes an

intervening change in the law, Gabriel is barred by RAP 16.4(d) from relitigating his double jeopardy claim in this successive petition.

2. STATE V. BORSHEIM IS A NEW RULE OF CRIMINAL PROCEDURE THAT DOES NOT APPLY RETROACTIVELY TO CASES THAT WERE FINAL PRIOR TO AUGUST 27, 2007.

Gabriel argues that either Count IV or Count V must be vacated in light of this Court's decision in State v. Borsheim, supra. Gabriel is incorrect. Borsheim announced a new rule of criminal procedure. New rules of criminal procedure do not apply retroactively to cases that were final when the new rule was announced. Borsheim does not apply retroactively to Gabriel's case, which was final when that decision was announced.

In Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), the United States Supreme Court set forth a new formulation for determining the retroactive application of new rules. Washington courts have adopted the retroactivity standard set forth in Teague and its progeny. See State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005); State v. Markel, 154 Wn.2d 262, 268-69, 111 P.3d 249 (2005); In re Personal

Restraint of St. Pierre, 118 Wn.2d 321, 324-27, 823 P.2d 492

(1992) (noting that "we have attempted from the outset to stay in step with the federal retroactivity analysis.").

Pursuant to Teague, when a court's decision results in a new rule, that rule applies to all cases pending on direct review. Schriro v. Summerlin, 542 U.S. 348, 351, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). As to convictions that were already final when the new rule was announced, new substantive rules, such as interpretations of criminal statutes, generally apply retroactively. Id. In contrast, new rules of procedure do not apply retroactively unless the new rule constitutes a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Id. (citing Teague, 489 U.S. at 311). In order to fall within this narrow category, the rule must be one "without which the likelihood of an accurate conviction is *seriously* diminished." Id. (emphasis in original) (citing Teague, 489 U.S. at 313).

In State v. Borsheim, the defendant was charged and convicted of four counts of rape of a child in the first degree. 140 Wn. App. at 363. Each count involved the same victim and same time period. Id. at 364. Although the jury had been instructed with the standard pattern instruction that "a separate

crime is charged in each count," and that "the verdict on one count should not control your verdict on any other count," this Court held that the instructions nonetheless allowed the jury to convict Borsheim of multiple crimes for a single act, thus violating double jeopardy. Id. at 367. This Court found that the "to convict" jury instructions were inadequate because they failed to inform the jury that each crime must be based on a "separate and distinct act." Id. at 368. This Court noted that the omission was compounded by the fact that all four counts were encompassed in a single "to convict" instruction rather than set out in separate instructions. Id.<sup>3</sup>

The rule set forth in Borsheim is a new rule for purposes of the Teague analysis. As defined by the Supreme Court in Teague, a case announces a "new rule" when it:

imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

489 U.S. at 301 (emphasis in original). A rule is "dictated" by existing precedent when the application of that precedent is "apparent to all reasonable jurists." Lambrix v. Singletary, 520 U.S. 518, 527-28, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997).

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<sup>3</sup> In Gabriel's case, each crime was set forth in a separate instruction.

In making this determination, the court must survey the legal landscape as it existed at the time the petitioner's conviction became final and "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." Saffle v. Parks, 494 U.S. 484, 488, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990).

In the present case, 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. Appendix C. Prior to Borsheim, no Washington case had held that the standard jury instructions regarding multiple counts, WPIC 3.01<sup>4</sup>, and jury unanimity, WPIC 4.25<sup>5</sup>, were not sufficient to protect against a

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<sup>4</sup> WPIC 3.01 reads: "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." This instruction was given in this case as Instruction No. 16. Appendix E.

<sup>5</sup> WPIC 4.25 reads: "There are allegations that the defendant committed acts of \_\_\_ on multiple occasions. 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." This instruction was given in this case as Instruction No. 15. Appendix E.

double jeopardy violation where the same crime is charged more than once based on multiple acts.

Indeed, another case held otherwise. In State v. Ellis, 71 Wn. App. 400, 859 P.2d 632 (1993), the defendant was charged with two counts of child molestation and two counts of rape of a child in the first degree. Counts III and IV, the rape of a child charges, involved the same victim and overlapping time periods: Count III alleged sexual intercourse between January 1987 and December 1988, and Count IV alleged sexual intercourse between January 1988 and December 1989. Id. at 402. There was no language in the "to convict" instructions that the factual basis for the two crimes had to be separate and distinct. Id. On appeal, Ellis alleged a double jeopardy violation, arguing that the jury "might have used a single rape as the factual basis for counts III and IV." Id. at 406. Division II of this Court rejected Ellis's double jeopardy claim, 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. Additionally, the trial court affirmatively instructed, in Instruction 4, that a separate crime was charged in each count and, in Instruction 5, that the jury

was required to unanimously agree that at least one particular act had been proved for each count." Id.

To be sure, a few cases rejected double jeopardy claims in part because the jury was told in the instructions that each crime had to be based on a "separate and distinct act." State v. Noltie, 116 Wn.2d 831, 809 P.2d 190 (1991); State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996); State v. Newman, 63 Wn. App. 841, 822 P.2d 308 (1992). However, these cases rest their holdings on the totality of the circumstances, taking into consideration the evidence presented, the argument of counsel and the instructions as a whole, to find that no double jeopardy violation occurred.

For example, in Noltie, the defendant was charged with two counts of statutory rape in the first degree and one count of indecent liberties, but the jury was unable to return a verdict on one of the counts of statutory rape. 116 Wn.2d at 835. On appeal, Noltie argued that the two charges for statutory rape violated double jeopardy because identical language was used in each count, although the instruction for Count II included language that Count II involved "an incident separate from and in addition to Count I." Id. at 849. The supreme court looked at the entire record, including the information, instructions, testimony and jury argument

and concluded that it was clear that the State was charging two different instances of statutory rape. Id. at 848-49. The court did not state, or even imply, that a double jeopardy violation would have occurred if the "separate and distinct incident" language had not been included in the "to convict" instruction for Count II.

In Newman, the defendant was convicted of five counts of statutory rape in the first degree involving his two granddaughters. 63 Wn. App. at 843. Counts III and IV involved the same victim and same time period. Id. On appeal, Newman claimed that the trial court erred by not requiring the State to elect the specific acts it was relying on for each count. Id. at 849. Noting that the jury was given a unanimity instruction and that the counts were distinguished in the instructions, this Court rejected Newman's double jeopardy claim. In a footnote, this Court quoted the "to convict" instructions, which included language that stated "by a separate and distinct act from." Id. at 850 n. 6. In rejecting the double jeopardy claim, however, this Court did not even mention the instructions, but rather stated, "A defendant who is charged with a multiple act information is protected from the threat of double jeopardy when, as in this case, the evidence is sufficiently specific as to each of the various acts charged within the alleged time frames." Id. at 851

(emphasis added). It would be impossible to determine from the above language that a double jeopardy violation would have occurred in Newman without the "separate and distinct" language in the "to convict" instruction.

Finally, in Hayes, that opinion starts by summarizing its holding as follows: "We conclude that . . . Hayes was not placed in double jeopardy or deprived of his right to present a defense by the State's use of the same language in the charging document and the use of different evidence for each count." 81 Wn. App. at 427-28. Hayes was charged with four counts of rape of a child with the same victim during the same two-year period. Id. at 427. In rejecting Hayes' sufficiency claim, this Court stated:

In sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the State need not elect particular acts associated with each count so long as the evidence 'clearly delineates specific and distinct incidents of sexual abuse' during the charging periods. The trial court must also instruct the jury that they must be unanimous as to which act constitutes the count charged and that they are to find 'separate and distinct acts' for each count when the counts are identically charged.

Id. at 431. As to the double jeopardy claim, it is clear that Hayes' claim was limited to a challenge to the charging document. Id. at 439. In rejecting Hayes' double jeopardy claim, this Court stated,

The State need not elect specific acts that it will rely upon for each charge so long as the jury is instructed *as to unanimity on each count* and different evidence is introduced to support each count. No double jeopardy violation results when the information, instructions, testimony and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense. Here, the information alleged that Hayes had intercourse with K. on four separate and distinct occasions, and the court properly instructed the jury as to unanimity. Moreover, there was different evidence to support each count.

Id. at 439-40 (emphasis added). Nowhere in this Court's double jeopardy discussion is the "separate and distinct" language mentioned. To the contrary, this Court's holding explicitly states that a unanimity instruction is sufficient to guard against a double jeopardy violation where there is different evidence to support each count.

Notably, in Gabriel's direct appeal this Court relied heavily on Hayes in concluding that there was sufficient evidence to support both convictions for Counts IV and V. If Hayes so clearly mandated reversal on double jeopardy grounds in this case, it is hard to see how this Court failed to recognize that when analyzing Gabriel's case pursuant to Hayes.

In sum, prior to Borsheim, no Washington case had held that the failure to include the "separate and distinct" language would, in

itself, constitute a double jeopardy violation that requires reversal. The Borsheim decision, requiring reversal based solely on the trial court's failure to include "separate and distinct" language in the jury instructions, regardless of the evidence, arguments or other instructions, was not dictated by prior precedent such that its application was apparent to all reasonable jurists. It is a new rule.

The new rule set forth in Borsheim is procedural. A rule is substantive if it alters the range of conduct or the class of persons that the law punishes. Summerlin, 124 S. Ct. at 2523. A rule is procedural if it regulates the manner of determining the defendant's culpability. Id. Borsheim did not interpret a substantive criminal statute. It did not alter the definition of the crime of rape of a child in the second degree, or the class of persons or the type of acts to which that statute applies. To put it another way, Borsheim did not hold that a defendant could not constitutionally be punished for two counts of rape of a child in the second degree. Rather, it held that a defendant could not constitutionally be punished for two counts of rape of a child in the second degree unless the jury was instructed in a certain way. As such, the new rule announced in Borsheim is procedural.

In Caspari v. Bohlen, 510 U.S. 383, 396-97, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994), the United States Supreme Court found that the Eighth Circuit's application of double jeopardy principles to a non-capital sentencing proceeding was a new rule of criminal procedure that could not be applied to cases that were already final. See also Dawson v. United States, 77 F.3d 180, 184 (7<sup>th</sup> Cir. 1996) (claim of double jeopardy based on parallel actions for civil forfeiture and criminal sanctions was precluded by Teague); Garcia v. United States, 915 F.Supp. 168, 174 (N.D. Cal. 1996), affirmed, 95 F.3d 1159 (9<sup>th</sup> Cir. 1996) (same). Likewise, the holding of Borsheim--that convictions for multiple identical crimes violate the guarantee against double jeopardy if the jury is not explicitly instructed that separate crimes must be based on "separate and distinct" acts--is a procedural rule.

As a new rule of criminal procedure, the rule set forth in Borsheim will not be applied retroactively unless it constitutes a "watershed rule of criminal procedure implicating fundamental fairness and accuracy of the criminal proceeding." Summerlin, 124 S. Ct. at 2524. It is not enough that a new rule based on a constitutional right be important. Evans, 154 Wn.2d at 445. It must be "implicit in the concept of ordered liberty" and must "alter our

understanding of bedrock procedural elements." Id. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), United States Supreme Court cases that significantly altered the way in which sentencing and trials are conducted based on the constitutional rights to a jury trial and to confront witnesses, were found not to be watershed rules. Evans, 154 Wn.2d at 447; Markel, 154 Wn.2d at 273. Likewise, the new rule set forth in Borsheim is not a watershed rule.

In sum, Borsheim set forth a new rule of criminal procedure that does not constitute a watershed rule implicating the fundamental fairness and accuracy of the criminal proceeding. As such, Borsheim will not apply retroactively to cases that were already final when it was announced on August 27, 2007.

"Final" for purposes of retroactivity analysis means "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." In re St. Pierre, supra, 118 Wn.2d at 327 (quoting Griffith v. Kentucky, 479 U.S. 314, 321 n. 6, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)). Gabriel's case was final for purposes of retroactivity analysis in 2002, when

the period for filing a petition for certiorari elapsed. RAP 5.2(a). Because Gabriel's case became final before August 27, 2007, the new rule set forth in Borsheim does not apply retroactively to his case.

3. PETITIONER'S CLAIM OF ALLEGED ERROR IN THE "TO CONVICT" INSTRUCTIONS IS BARRED BY THE INVITED ERROR DOCTRINE.

At trial, Gabriel proposed instructions for Count IV and Count V that contain the same alleged error that he asserts in this petition: no requirement that the jury find "separate and distinct" conduct for each count. As such, his claim of error is barred by the doctrine of invited error.

Under the doctrine of invited error, a party may not request an instruction and later complain on appeal that the requested instruction was given. City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002); State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The invited error doctrine bars a party from raising an alleged error even if it is of constitutional magnitude. Patu, 147 Wn.2d at 720; State v. Henderson, 114 Wn.2d 867, 871, 792 P.2d 514 (1990). The doctrine applies when the trial court's instruction contains the same error as the defendant's proposed

instruction, even though the court does not instruct the jury in the exact language of the defense-proposed instruction. State v. Bradley, 96 Wn. App. 678, 681-82, 980 P.2d 235 (1999), affirmed, 141 Wn.2d 731, 10 P.3d 358 (2000); State v. Miller, 40 Wn. App. 483, 486, 698 P.2d 1123 (1985).

Gabriel's proposed "to convict" instructions did not include the "separate and distinct" language. The only difference between his proposed instructions and those given by the trial court is the wording of the age element. Both sets of instructions contain the error that Gabriel asserts in this petition. Moreover, when the jury requested clarification as to the instructions in question, the defense asked the court to give no further clarification and to tell the jury to reread the instructions. Accordingly, under the invited error doctrine, Gabriel is barred from raising a double jeopardy challenge based upon the absence of "separate and distinct" language in the jury instructions.

To hold that the invited error doctrine does not apply under these circumstances would provide defense counsel with a strong disincentive to propose jury instructions with the "separate and distinct" language in future cases. This Court has held that when the instructions contain the flaw identified in Borsheim, the remedy

is vacation of all but one of the identical convictions. State v. Berg, 147 Wn. App. 923, 937, 198 P.3d 529 (2009). The State cannot retry the defendant on the vacated convictions without running afoul of double jeopardy. State v. Heaven, 127 Wn. App. 156, 110 P.3d 835 (2005). Without the doctrine of invited error, a defendant stands to benefit greatly from his counsel's failure to propose "to convict" instructions with the "separate and distinct" language: he is virtually guaranteed to have all but one of his identical convictions vacated with prejudice on appeal. This Court should hold that Gabriel invited the error.

4. PETITIONER HAS FAILED TO ESTABLISH ACTUAL AND SUBSTANTIAL PREJUDICE.

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold showing of constitutional error from which he has suffered actual prejudice or nonconstitutional error that constitutes a fundamental defect that inherently resulted in a complete miscarriage of justice. In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). In a personal restraint petition, petitioner bears the burden of showing prejudicial error. State v. Brune, 45 Wn. App.

354, 363, 725 P.2d 454 (1986). A petitioner must prove actual and substantial prejudice. In re Personal Restraint of Hews, 99 Wn.2d 80, 93, 660 P.2d 263 (1982). Possible prejudice is not sufficient. Id. An error that would be per se prejudicial on direct review is not per se prejudicial on collateral review. In re St. Pierre, 118 Wn.2d at 330-31; In re Personal Restraint of Wiatt, 151 Wn. App. 22, 39-40, 211 P.3d 1030 (2009).

Gabriel cannot show that he was actually prejudiced by the jury instructions in this case. As this Court already determined on direct appeal, there was sufficient evidence to support two counts of rape of a child in regard to M.B. for Counts IV and V. As Division II stated in Ellis, "The ordinary juror would understand that when two counts charge the very same type of crime, each count requires proof of a different act." 71 Wn. App. at 406. The jury instructions, read as a whole and in a commonsense manner, made it manifestly clear to the jury that they had to rely upon separate acts to support convictions on identically charged crimes.

At most, Gabriel can speculate that there is a possibility that the jury based his convictions for Counts IV and V on the same act. But that possibility is remote where evidence was presented of multiple acts. A possibility of prejudice is not actual and substantial

prejudice. Gabriel has failed to establish constitutional error that resulted in actual and substantial prejudice.

Finally, the State respectfully submits that this Court's decision in Borsheim overstates the likelihood of a double jeopardy violation and understates the impact of the other jury instructions. In reviewing a challenge to jury instructions, the court reads the instructions in a straightforward, commonsense manner. State v. Pittman, 134 Wn. App. 376, 382, 166 P.3d 720 (2006). The trial court instructed that a separate crime was charged in each count and advised the jury that it must decide each count separately, and that its verdict on one count should not control its verdict on any other count. In light of these instructions, a juror would understand that when two counts charged the very same type of crime, each count requires proof of a different act. Ellis, 71 Wn. App. at 406.

In Borsheim, this Court failed to consider the impact of the jury instructions as a whole and how a commonsense juror would understand them. Courts in other jurisdictions have rejected similar challenges to "to convict" instructions, frequently noting that the jury was instructed that a separate crime was charged in each count. See State v. Burch, 740 S.W.2d 293, 295-96 (Mo. Ct. App. 1987) (concluding that the double jeopardy challenge to identical jury

instructions for two counts of sodomy was "specious"); State v. Salazar, 139 N.M. 603, 610-11, 136 P.3d 1013 (N.M. Ct. App. 2006) (rejecting double jeopardy challenge to nine identical jury instructions for nine counts of criminal sexual penetration).

In light of the evidence, instructions and argument in this case, and particularly in light of this Court's prior holdings on direct appeal and in the prior PRP, Gabriel has failed to establish constitutional error that resulted in actual and substantial prejudice.

E. CONCLUSION.

This petition should be dismissed.

DATED this 17<sup>th</sup> day of December, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
ANN SUMMERS, WSBA #21509  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

## APPENDIX H

**FILED**

KING COUNTY WASHINGTON

OCT 19 1999

SUPERIOR COURT CLERK  
BY DARLA S. DOWELL  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

GAIL GABRIEL,

Defendant.

No. 99-1-02573-0 SEA

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

DATED: October 18, 1999.

*Douglas A. Stratemeyer*  
DOUGLAS A. STRATEMEYER  
Attorney for Defendant  
WSBA #21638

56A

DEFENDANT'S PROPOSED INSTRUCTION NO. 1

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 opinions of your fellow jurors, or for the mere purpose of returning a verdict.

DEFENDANT'S PROPOSED INSTRUCTION NO. 2

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.

DEFENDANT'S PROPOSED INSTRUCTION NO. 3

Evidence may either be 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.

DEFENDANT'S PROPOSED INSTRUCTION NO. 4

You are the sole judges of the credibility of the witnesses and of what weight is to be given 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' memory and manner while testifying, and 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.

DEFENDANT'S PROPOSED INSTRUCTION NO. 5

A law enforcement officer's testimony should be considered by you just as any other evidence in the case; and in evaluating his or her credibility you should use the same guidelines that apply to the testimony of any witness. In no event should you give either greater or lesser credence to the testimony of any witness merely because he or she is a law enforcement officer.

*United States v. Baldwin*, 607 U.S. 129 (1979); Criminal Jury Instructions for the District of Columbia, 2.25 (3rd Ed. 1978)

*United States v. Rush*, 375 F.2d 602 N.6 (D.C. Cir. 1967)

*United States v. Reid*, 410 F.2d 1223, 1227-8 (7th Cir. 1969)

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DEFENDANT'S PROPOSED INSTRUCTION NO. 6

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.

DEFENDANT'S PROPOSED INSTRUCTION NO. 7

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 twelve 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.

DEFENDANT'S PROPOSED INSTRUCTION NO. 8

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 between March 24 through March 26, 1999, the defendant had sexual intercourse with Monique Brooks;

[2] That Monique Brooks was twelve 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.

DEFENDANT'S PROPOSED INSTRUCTION NO. 9

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 between March 24 through March 26, 1999, the defendant had sexual intercourse with Monique Brooks;

[2] That Monique Brooks was twelve 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.

CERTIFICATION OF SERVICE

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Neil Fox, at the following address: Cohen & Iaria, 1008 Western Avenue, Suite 302, Seattle, WA 98104, the attorney for the petitioner, containing a copy of the State's Response to Personal Restraint Petition in In re Gail Gabriel, No. 63235-3-I, in the Court of Appeals of the State of Washington.

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

U Brame  
Name  
Done in Seattle, Washington

12/17/09  
Date

FILED  
CLERK OF COURT  
STATE OF WASHINGTON  
2009 DEC 17 PM 4:46