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STATE OF WASHINGTON

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CASE NO. _____

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
AT DIVISION II

IN RE THE PERSONAL RESTRAINT
OF AARON M. DAVIS

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STATE OF WASHINGTON
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PERSONAL RESTRAINT PETITION

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Personal Restraint Petition-

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CASE NO. 35706-2

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

AT DIVISION II

Aaron Micheal Davis,)	
)	PERSONAL RESTRAINT
Petitioner)	PETITION PURSUANT TO
)	RAP 16
)	

A. Status of Petitioner

Aaron M. Davis is applying for relief from confinement. He is now in the custody of D.O.C. and is currently housed at a privately ran prison called CCA at 1100 Bowling Road in Florence, Arizona 85232. The State amended the information 4 times over a couple month period on the charges against Mr. Davis. The 4th charging document against Mr. Davis was the following: 1st degree kidnapping RCW 9A.40.020(1)(d) a domestic violence incident as defined in RCW 10.99.020, and in the commission of the crime defendant was armed with a firearm RCW 9.41.010 and invoking the provisions of RCW 9.94A.310/9.94A.510 and adding additional time to the presumptive sentence by RCW 9.94A.370/9.94 .530. Assault in the first degree intentional assault,

with intent to inflict great bodily harm with a firearm or deadly weapon RCW 9A.36.011(1)(a) and a knife a deadly weapon as in RCW 9.94A.125/9.94A.602 and invoking RCW 9.94A.310/9.94A.510 and adding additional time by RCW 9.94A.370/9.94A.530 a domestic violence incident by RCW 10.99.020 armed with a firearm RCW 9.41.010 and invoking RCW 9.94A.310/9.94A.510 and adding time as in RCW 9.94A.370.9.94A.530. Violation of Protection order RCW 26.50.110(1). Unlawful possession of a firearm in the first degree contrary to RCW 9.41.040 (1)(a). Petitioner was convicted by a jury in the Superior Court of Pierce County of unlawful imprisonment, assault 1 with a firearm enhancement and a deadly weapon enhancement, unlawful possession of a firearm in the first degree and a violation of a no contact order. Petitioner was sentenced by the Honorable Judge John McCarthy to 300 months of prison and 33-66 community custody months on May 13, 2004 after trial. Petitioner's lawyer at trial was Mr. Thomas Dinwiddie at 902 S. 10th St. Tacoma, WA 98405. Petitioner did appeal from the decision of the trial court to the Court of Appeals Division II. Mary Kay High of 917 Pacific Avenue, Suite 406 Tacoma, WA 98402, was counsel for petitioner on appeal. The decision of the Appellate Court was not published. Mr. Davis was denied a "Motion for an extension of time" in filing a Petition For Review on November 21, 2005 through the Supreme Court of Washington. Since Petitioner's conviction he has not asked a court for relief other than already written above. Denying relief by the Court of Appeals was on October 18, 2005. **Mandate was issued on March 13, 2006.**

B. Why Restraint is Unlawful

Mr. Davis is requesting relief from restraint based upon RAP 16.4(c)(2)

(ii)

(conviction obtained in violation of Federal and State Constitutions)
Material facts exist which have not been previously heard and presented which in the interests of justice require vacation of the conviction, sentence of other order entered in a criminal proceeding or civil proceeding instituted by the State or local government.RAP 16.4(c)(3) Other grounds exist for a collateral attack upon a judgement in a criminal proceeding or civil proceeding instituted by the State or local government.RAP 16.4(c)(5)

The condition or manner of the restraint of petitioner is in violation of the Constitution of the United States and/or the State of Washington.RAP 16.4(c)(6) Other grounds exist to challenge the legality of the restraint of petitioner.RAP 16.4(c)(7) Mr. Davis raises Constitutional issues, and the facts presented herein are of evidentiary value and therefore warrant a full hearing on the merits in this Court, or a reference hearing in the Superior Court, pursuant to RAP 16.11;see also In re Rice,118 Wn.2d 876, 886-87, 828 P.2d 1086(1992);alsoIn re Hews,99 Wn.2d 80,87-88, 660 P.2d 263 (1983) A Personal Restraint Petition may not raise an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of the issue;see PRP of Brown143 Wash.2d 431,445 21 P.3d 687 (2001) The interests of justice allow relitigation of an issue raised on direct appeal if there had been an intervening change in the law or some other justification for not raising a crucial point or argument on direct appeal;see State v. Gentry,137 Wash.2d at 388, 972 P.2d 1250

Points to Consider

The Petitioner respectfully asks this Court to consider "Pro Se litigants

are to be construed liberally and held to a less stringent standard than formal proceedings drafted by lawyers; if court can reasonably read pleadings to state valid claim on which litigant could prevail, it should do so despite failure to cite proper authority, opinion of legal authorities, poor syntax and sentence construction, or litigants unfamiliarity with pleading requirements. "Haines v. Kerner, 404 U.S. 519 and see also Zickhov v. Idaho, 247 F.3d 1015,1020 (9th Cir.2001)

The petitioner also respectfully asks this Court of Appeals to consider the equal protection clauses of the Fourteenth Amendment and Constitution Art. 1, & 12 guarantee like treatment under the law to similarity situated individuals. In raising each ground of this Personal Restraint Petition Mr. Davis was similarly situated to others that were incarcerated and pursuing final disposition on our criminal charges, yet; the treatment Mr. Davis received at the hands of correctional officers (law enforcement) and also by his attorney Thomas Dinwiddie -the treatment Mr. Davis received was clearly distinguishable from those incarcerated with him.

THANK YOU FOR YOUR CONSIDERATION ON THESE GROUNDS

C. Statement of the Case

Lana McCorrister had a protection order against Aaron Davis, but they lived together in Spanaway. RP 32-42. Lana tried to have the protection order removed but the judge denied the motion. RP 37. Lana still loves Aaron and wants to spend the rest of her live with him. RP 81 Lana was with Aaron 3

[The Verbatim Report of Proceedings for this case was numbered sequentially except for Volume VII from May 28, 2004 and the Sentencing Volume from June 11, 2004. Appellant uses the identification scheme " RP " will refer to the consecutively paginated versions of the Verbatim Report of Proceedings, RP VII will refer to the volume from May 28, 2004 and " RP X-X (6-11-04) " will refer to the Verbatim Report of Proceedings for the sentencing.]

to 4 days prior to the incident of September 28th of 2003. The toxicology urine screen test on Lana done on the day of the incident came up positive for methamphetamines and opiates in her system. RP 25. Dr Pace testified that the effects on a person shortly after smoking or injecting methamphetamine can be severe, including heart attacks, severe hypertension, behavioral abnormalities, confusion, delirium, and paranoia. RP 511. One examiner reported that McCorrister had used methamphetamine within the last 24 hours. RP 514. According to McCorrister, on the morning of September 23, 2003, she and Davis were together at his mother's home when they got into an argument because Davis wanted her to take him to get his 1984 Corvette. RP 37-39. Although her testimony is unclear, it appears that McCorrister had taken the Corvette to a friend's house. RP 39. She told Davis that she would go get the car but he could not come with her because the friend did not want Davis at their house. RP 39. McCorrister testified that Davis pointed a gun at her head and told her to get into his truck and they would both go. RP 39-40. As they were driving apparently they just happened to go by some people that she knew, they were sitting out on the steps of their house, so she told Davis " that's where the car was. " RP 47. He turned around and he pulled back in front of their house, and was yelling at Rick. He stabbed her in the same arm that she had the pepper spray in at the same time that she sprayed him he got her with the knife. RP 49-50. After that she fell out of the truck RP 50,114.

McCorrister sustained injuries when she fell from the truck, and as for current symptoms, " My hand don't work like it used to. RP 56-57. According to the examining doctor, Dr. Steven Pace, McCorrister told him she jumped from a moving car. RP 226. And that could result in some serious injuries, and probably merits a hospitalization, which it did in her case. " RP 227

McCorrister had injuries to her head, ankle, and hands from the fall from the truck. RP 228-229; 248-249. She had caught herself with her hands when she fell out. RP 229. The stab wound to her arm was about 2 centimeters in depth. RP 251 Which is about 3/4 of an inch in depth.

Foot hurt worse than arm and she thinks she refused surgery on arm. RP 51,54. She testified that her hand don't work, yet the nerve test came back normal. RP 57-58. Officer McNicol responded to the Elbe service station in Pierce County to a call of a victim who had been stabbed. RP 143. Lana was being treated by fire fighters in a Camaro car. The driver of that car was Rick Lovitt, who the officer immediately recognized. RP 145. Rick Lovitt told the officer that he had seen Lana being thrown out of Aaron Davis's truck. And he said that he was driving Lana to he hospital in Morton. RP 149. Sgt. McNicol testified he has arrested Rick Lovitt probably 4 to 5 times. RP 150.

Rick Lovitt never testified at Davis's trial. RP 156-157. The officers testified to what Rick said. RP 157. Davis's counsel did object. RP 151-156. The terminology that the victim was " thrown out of the truck " used by Rick Lovitt to officer Rex McNicol is not the terminology that the victim herself used. RP 157. The trial court ruled although Lovitt did not testify ,his statements to Sergeant McNicol were admissible as excited utterances. RP 158. In the Unpublished Opinion filed by the Court of Appeals Division II it was presumed that Lovitt's were testimonial and therefore inadmissible.

The State contended and this Court of Appeals agreed that error, if any, was harmless because Lovitt's statements were cumulative of other testimony. Lovitt's statements to Sergeant McNicol contained two assertions: that he personally knew Davis and McCorrister, and he had not taken McCorrister to a hospital because he was afraid that they would be intercepted by Davis.

The first assertion was content neutral and both McCorrister and Davis testified that they knew Lovitt. As to the second assertion, McCorrister testified without objection that Lovitt " was taking me to the hospital, and when we pulled out, I didn't want to go in the same direction that Aaron went because I was scared. And so he went the opposite direction. " RP 52. Because Lovitt's statements were cumulative of other testimony, any error in admitting those statements was harmless beyond a reasonable doubt, according to this Court of Appeals.

Sgt. McNicol did not make a record of what was said to him by Rick Lovitt. RP 154. Just from memory this officer testified as to what Rick Lovitt said. RP 172-173.

On October 2, 2003, deputies went to Aaron Davis's sister's house in Lawndale to look for Aaron Davis. RP 184-185,202. The officers recovered a gun in the backyard under crawl space cover. RP 188-89,196. Both Tara Davis and her husband Everett testified that they never seen the defendant with the gun recovered at their house. RP 286,387. The gun was not found on Aaron, nor did the police have any reason to believe that Aaron lived there or stayed there. No clothing of Aaron's was found there at his sister's. RP 204-205.

Davis testified that after his dad died, his mother left town, so he and McCorrister were living at his mom's house. RP 431. They spent several days boxing up his dad's belongings and cleaning the place. RP 432. In the process, Davis found a little hunting knife that was his dad's and McCorrister made a little case for it, and hung it on the stereo knob of his truck. RP 432. On the morning of the incident, Davis and McCorrister went out for breakfast, and after they got back home, he asked Lana about his Corvette.

, his tow truck, and his dad's watch. RP 433. She did not want to tell him where they were so the argument began. RP 433. After lunch, he told her they were going to get his tow truck and things. RP 434. She told him the tow truck was at Rick Lovitt's house. RP 439. Davis was aware that Lana sold his 1988 Oldsmobile to Rick for \$800 and that she told him that Rick also had his dad's watch and the Corvette. RP 439-440. Davis testified that Lana was not forced to go and he did not put a gun to her head, he did not have a gun with him. RP 441. They began arguing again because she would not answer his questions as to how Rick got his belongings. RP 444. When they arrived at Rick's place, Davis saw his tow truck, the Corvette and he started to yell for Rick to come outside. RP 444-445. He looked over at Lana, and she was removing the knife from the case so he put his hand over the blade, told her to let go, and she did. RP 446. When Rick came out of the house, " all of a sudden this stuff is spraying me in the back of my head. He saw a can of mace in Lana's hand so he swung at the can and felt something go in. RP 447. When Lana stopped " macing " Davis, he put the truck in gear, and she went out the passenger side. RP 448. Davis had not intended to stab Lana or to hurt her; " It happened so quick. It was all an accident. " RP 448. Davis was acting in self-defense. RP 528.

After staying with friends for a couple days after this incident, Davis and a friend, Andy Jones, went to the home of his sister, Tarah. RP 451-452. Tarah, her husband, Everett, and her brother-in-law, Lonnie were there. Davis was took to a friends house. RP 452,455. Davis did not turn himself in because he was scared; " every cop in town was looking for him. He didn't know what to do. RP 529.

Tarah testified that after Davis left her house, Andy removed a gun from his pocket and asked for a towel to wipe it down, went around the back of

the house, buried it and left. RP 277. Andy told Tarah that he had a felony warrant and he did not want to take the gun with him or to have his fingerprints on it. RP 277. When the police came to Tarah's house, they found the gun. RP 279. Everett heard Andy say that he had a gun and needed to get rid of it. RP 374.

Davis was later arrested. RP 342-347,350.

Mr. Davis was found guilty of the lesser of Count 1 the conviction Unlawful Imprisonment with an offender score of 5. RP X-X page 12. Davis was sentenced to the high end of 22. Due to the error in the special verdict form for Count 1, the court struck the firearm enhancement from Count 1. RP X-X page 27-28. Davis was found guilty of Assault 1 and sentenced to to 216 months because of an offender score of 6 on that Count. RP X-X page 28-29. Plus a firearm enhancement of 60 months and a deadly weapon of 24 months imposed to the Assault 1 count. RP X-X 28-29. Davis was also sentenced to the high end of 54 months on the count 5 for Unlawful Possession of a Firearm in the 1st degree. RP X-X 28-29. The defendant was also sentenced to 365 days to run concurrently for his violation of a protection order in Count 6. RP X-X 28-29. The actual sentences on the Counts run concurrent, sentences on enhancements run consecutive to each other and consecutive to the underlying time.

As to the prior Assault 2 that added to the offender score Mr. Davis explained what happened there two guys came to his house, cut the phone lines. One was Lana McCorrister's ex-boyfriend. They woke them up with guns in their faces. The phone lines were already cut. They tried to call 911. They had two little girls there. Mr. Davis did 50 days in jail, he plead out. It was his first time in jail. He should never of plead out to it because he had the case beat. RP X-X 24.

Lana McCorrister asked the sentencing court for a fair sentence and not a long sentence. RP X-X 16.

ASSIGNMENT OF ERRORS

ASSIGNMENT OF ERROR NO.1-ISSUE NO.1

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL FOR REQUESTING A FAULTY JURY INSTRUCTION THAT NEGATED DAVIS'S CLAIM OF SELF-DEFENSE.

ASSIGNMENT OF ERROR NO.2-ISSUE NO.1

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO THE FIRST-AGGRESSOR JURY INSTRUCTION THAT EASED THE STATE'S BURDEN TO DISPROVE MR. DAVIS ACTED IN LAWFUL SELF-DEFENSE.

ASSIGNMENT OF ERROR NO.3-ISSUE NO.1

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO HAVE THE FIREARM THAT WAS ADMITTED INTO EVIDENCE AT TRIAL SUPPRESSED.

ASSIGNMENT OF ERROR NO.4-ISSUE NO.1

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ASK SENTENCING COURT FOR A SENTENCE BELOW THE STANDARD RANGE, WHERE THERE WAS EVIDENCE OF VICTIM BEING AGGRESSOR OR PROVOKER OF INCIDENT.

ASSIGNMENT OF ERROR NO 5-ISSUE NO.1

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DID NOT MOVE TO DISMISS THE UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE CHARGE FOR INSUFFICIENT EVIDENCE AT THE END OF THE STATE'S CASE IN CHIEF.

ASSIGNMENT OF ERROR NO.6-ISSUE NO.1

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO INVESTIGATE THE ACTUAL SIZE OF KNIFE THAT WAS USED.

ASSIGNMENT OF ERROR NO.7-ISSUE NO.1

TRIAL COUNSEL'S NUMEROUS ERRORS THAT DENIED PETITIONER EFFECTIVE ASSISTANCE DENIED MR. DAVIS OF HIS RIGHT TO DUE PROCESS, HIS RIGHT TO PRESENT A DEFENSE, AND HIS RIGHT TO A FAIR TRIAL.

ASSIGNMENT OF ERROR NO.8-ISSUE NO.2

THE SENTENCING COURT ERRED IN ITS MISAPPLICATION OF THE LAW REGARDING SAME CRIMINAL CONDUCT FOR SENTENCING MR. DAVIS WITH INCORRECT OFFENDER SCORE.

ASSIGNMENT OF ERROR NO.9-ISSUE NO.2

THE SENTENCING COURT ERRED BY IMPOSING A SENTENCE ON MR. DAVIS WHICH EXCEEDS THE STATUTORY MAXIMUM.

ASSIGNMENT OF ERROR NO.10-ISSUE NO.3

APPELLANT COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING SUFFICIENCY OF EVIDENCE IN CHARGES CONVICTED.

ASSIGNMENT OF ERROR NO.11-ISSUES NO.1,2,and 3

THE CUMULATIVE EFFECT OF ERRORS RAISED ABOVE DENIED PETITIONER- MR. AARON DAVIS A FAIR TRIAL.

ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

- (1) WAS PETITIONER DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND THEREFORE ENTITLED TO A NEW TRIAL WHERE THERE WAS NO LEGITIMATE STRATEGY OR TACTIC FOR TRIAL COUNSEL'S REQUEST FOR A FAULTY SELF-DEFENSE JURY INSTRUCTION AND FAILURE TO OBJECT TO THE FIRST-AGGRESSOR JURY INSTRUCTION AND FAILURE TO HAVE FIREARM THAT WAS ADMITTED INTO EVIDENCE AT TRIAL SUPPRESSED AND FAILURE TO ASK SENTENCING COURT FOR A SENTENCE BELOW THE STANDARD RANGE AND NOT MOVING TO DISMISS THE UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE CHARGE FOR INSUFFICIENT EVIDENCE AT THE END OF THE STATE'S CASE IN CHIEF AND FAILURE TO INVESTIGATE THE ACTUAL SIZE OF KNIFE THAT DENIED PETITIONER OF HIS RIGHT TO DUE PROCESS, HIS RIGHT TO PRESENT A DEFENSE, HIS RIGHT TO A FAIR TRIAL ?

- (2) WHERE THE SENTENCING COURT MISAPPLIED THE LAW REGARDING SAME CRIMINAL CONDUCT AS TO SENTENCING WITH OFFENDER SCORE AND WHERE THE SENTENCING COURT IMPOSED A SENTENCE THAT EXCEEDS THE STATUTORY MAXIMUM AND THEREFORE ENTITLED TO BE RESENTENCED ?

- (3) WHERE THERE IS INSUFFICIENT EVIDENCE ON CHARGES CONVICTED OF SHOULD CONVICTION STAND?

WHY RELIEF SHOULD BE GRANTED ACCORDING TO ERRORS

ERROR NO.1 MR. DAVIS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY PROPOSED A FAULTY SELF-DEFENSE JURY INSTRUCTION.

Evidence of self-defense negates criminal intent. Accordingly, when faced with such a claim, Due Process requires the State to prove the absence of reasonable defensive force beyond a reasonable doubt. State v. McCullum 98 Wn. 2d 484,489-96, 656 P.2d 1064 (1983)

Davis's attorney requested a faulty jury instruction that eased the State's burden to disprove he acted in lawful self-defense when he swung the knife at Lana McCorrister in his truck.

Instruction No. 29 required the State to prove beyond a reasonable doubt that Davis did not reasonably believe Lana McCorrister intended to inflict " injury " to him. see Exhibit marked INSTRUCTION NO. 29 This is a correct statement of the law and formed the foundation of Davis's trial defense.

Unfortunately, INSTRUCTION NO.31, (the act on appearances instruction) employed a very different term-" great bodily harm ". see Exhibit marked INSTRUCTION NO.31 There is a large distinction. The definition of injury is common knowledge. " Great Bodily Harm," however requires a much greater showing; it is " injury " that creates a probability of death, or which causes significant serious permanent disfigurement, or that creates significant permanent loss or impairment of the function of any bodily part or organ. see Exhibit marked INSTRUCTION NO.20; RCW 9A.04.110 (4)(c); see also Rodriguez,121 Wn.App. at 185-86; State v. Freeburg,105 Wn.App.492,504, 20 P.3d 984 (2001).

Almost 7-years before Davis's trial in State v. Walden,131 Wn.2d 469, 932 P.2d 1237(1997), the Supreme Court made it clear that the " act on appearances

instruction should not use the term " Great Bodily Harm " even though it is found in WPIC 17.04 of the pattern instructions. Walden,131 Wn. 2d at 475n.3; see also Freeburg,105 Wn,App. at 507 (calling it imperative that trial courts use the correct language).

Rodriguez is right on with Davis's case. There the defendant was convicted of First Degree Assault with a deadly weapon.Rodriguez,121 Wn.App. at 183. Counsel likewise proposed the same faulty " act on appearances instruction ", and the trial court defined " Great Bodily Harm " using the same language as that was used here in Davis's case.Rodriguez,121 Wn.App. at 185-86. The Court identified the precise problem raised here: Based on the definition of " Great Bodily Harm ", the jury could easily (indeed may have been required to) find that in order to act in self-defense, Mr. Rodriguez had to believe he was in actual danger of probable death, or serious permanent disfigurement, or loss of a body part or function." And this is precisely the problem the Supreme Court warned against in State v. Walden,Rodriguez,121 Wn.App. at 186.

Given Walden,Rodriguez, and Freeburg it is difficult to fathom how the Court, the prosecutor and defense counsel failed to recognize the error in INSTRUCTION NO.31. By requesting rather than objecting to INSTRUCTION NO.31, defense counsel denied Davis his constitutional right to effective representation and a fair trial.

Both Federal and State constitutions guarantee the right to effective representation, U.S. Const.Amend.VI; Wash.Const.art 1 Section 22. A defendant is denied this right when his or her attorney's conduct " (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's

conduct. " State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984), cert.denied 510 U.S. 944 (1993) (emphasis in original). Both requirements are met here.

Reasonable attorney conduct includes a duty to investigate the facts and the relevant law. State v. Jury, 19 Wn.App. 256, 263, 576 P.2d 1302 (1978); Strickland, 466 U.S. at 690-91. Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel. see State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (counsel ineffective for offering instruction that allowed client to be convicted under a statute that did not apply to his conduct).

There is simply no excuse for counsel's failure to object to the use of " Great Bodily Harm " in light of Walden, Rodriguez, and Freeburg. His failure to investigate the law falls below what can be considered reasonable and competent. Additionally there can be no tactical reason to propose the instruction, since " the net effect was to decrease the State's burden to disprove self-defense." Rodriguez, 121 Wn.App. at 187.

Further, Davis was prejudiced because there is a reasonable probability that but for counsel's errors, the result of the trial would have been different. " A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 694).

" Jury instructions must more than adequately convey the law of self-defense. The instructions read as a whole, must make the

relevant legal standard ' manifestly apparent to the average juror." LeFaber, 128 Wn.2d at 900 (quoting Allery, 101 Wn.2d at 595).

Davis was legally entitled to defend himself based merely on his reasonable fear of " injury ". But under INSTRUCTION NO.31, jurors could not find for Davis on this claim unless it concluded that he reasonably feared " Great Bodily Harm ", meaning injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that creates significant permanent loss or impairment of the function of any bodily part or organ." see Exhibit marked INSTRUCTION NO.31 This is an ~~an~~ inaccurate statement of the law that improperly raised the bar for lawful self-defense. Davis's only defense at trial.

The faulty instruction " struck " at the heart of Davis's defense. Rodriguez, 121 Wn.App. at 187. In Rodriguez, the court found counsel's deficient performance prejudicial because " as instructed the jury was required to find that he was scared to death or at least permanent injury. And this is not the test. " Rodriguez, 121 Wn.App. at 187.

Jury instruction misstating law of self-defense amounts to error of Constitutional magnitude and is presumed prejudicial. State v. Walden, 131 Wn.2d 469, P.2d 1237 (Wash.1997)

By proposing , rather than objecting to instruction 31, defense counsel deprived Davis of his right to effective representation, due process, right to present a defense and a fair trial.

This Court should reverse Davis's conviction and remand for a new trial without the use of the " act on appearances " jury instruction

ERROR NO.2 MR.DAVIS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL FOR FAILING TO OBJECT TO THE FIRST - AGGRESSOR JURY INSTRUCTION THAT EASED THE STATE'S BURDEN TO DISPROVE MR.DAVIS ACTED IN LAWFUL SELF-DEFENSE.

Generally jury instructions are reviewed to determine whether they permit each party to argue his theory of the case and properly inform the jury of the applicable law.State v. Bowerman,115 Wn.2d 794,809, 802 P.2d 116(1990)

Davis testified that Lana McCorrister had the knife first. And after he got it away from her using it on him, she sprayed him with mace and that is when he swung the knife that caused the 3/4 of an inch(2 centimeters) wound in her arm. He acted in self-defense. This First-Aggressor jury instruction however was a crucial blow to Davis's defense.see Exhibit marked INSTRUCTION NO 32 and compare it to the SELF-DEFENSE INSTRUCTION NO.29 It effectively and improperly removed Davis's self-defense claim from the jury's consideration.

A first-aggressor jury instruction is only appropriate when there is " credible evidence " that the defendant provoked the use of force, including provoking an attack that necessitates the defendant's use of force in self-defense.see State v. Douglas,128 Wn.App. 555, 116 P.3d 1012 (Div II 2005)(quotations added)

According to our State Supreme Court First-Aggressor instructions should be used " sparingly " "[f]ew situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction. " This Aggressor Instruction impacts a defendant's claim of self-defense which the

State has the burden of disproving beyond a reasonable doubt.see State v. Douglas,128 Wn.App. 555, 116 P.3d 1012(Div.II 2005)also State v. Riley,137 Wash.2d 904, 976 P.2d 624 (1999)

There was no legitimate strategy or competent tactic for counsel not objecting and resisting the giving of the First-Aggressor Jury Instruction. There is definitely a probability that the outcome of Mr.Davis's trial would have been different but for his counsel's conduct.see State v.Benn,120 Wn.2d 631,663, 845 P.2d 289(citing Strickland v.Washington,466 U.S. 668,687-88 104 S.Ct. 2052,2064-65, 80 L.Ed 2d 674 (1984)Both requirements are met here in Davis's case.

In this Division II Court of Appeals held in State v. Wingate, 123 Wn.App.415, 98 P.3d 111(Div II 2004): that giving unwarranted First=Aggressor Jury Instruction deprived defendant of fair trial and that case was reversed and remanded for a new trial. As Mr. Davis properly asks this Court to do the same reverse his conviction and give him a new trial without the use of this First-Aggressor Instruction.

ERROR NO.3 MR. DAVIS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR NOT SUPPRESSING THE GUN.

Voluntariness of a consent to search is a question of fact to be determined by considering the totality of the circumstances of the consent. Schneckloth v. Bustamonte,412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); state v. Shoemaker,85 Wash.2d 207, 533 P.2d 123 (1975)

The only reason consent was given by Tarah and Everett Colvin to search their house for Aaron Davis was because the police coerced them into consent by saying " Aaron's not going to get in trouble we're just trying to get him

help with his drug habit."see AFFIDAVIT OF TARAH COLVIN. They would had never given consent had it not been for these threats of " if you don't help us find him he won't get the help he needs."

Tarah and Everett Colvin gave consent to look through the house to see if the person of Aaron Davis was in their house(which he was not), not for them to go digging around back and find a gun that didn't belong to them, nor Aaron but in fact belonged to Andy Jones.RP 276,374,453, and AFFIDAVIT OF TARAH COLVIN.

Tarah Colvin, her husband Everett, and brother Lonnie Colvin all testified that Aaron never had possession of that firearm.RP 371,386-387,403

Consent to enter a home to make an arrest must be given voluntary under Amendment 4 of the United States Constitution.

The voluntariness of the consent is definitely disputed in this case. The illegal methods used by the deputies was the only reason consent at the time was given.

When they went digging around in the dirt behind the house.RP 193-194,203 It is undisputed that there was Probable Cause for Davis's arrest. But the police used trickery into going around Tarah and Everett's house and digging around in the dirt. This exceeded the scope of consent to look for Aaron. And again that consent wasn't even voluntary consent.

The state has the burden of demonstrating that the consent to search is voluntary.Bumper v. North Carolina,391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797 (1968);State v. Shoemaker,*supra*.

Through CrR 3.6 trial counsel should of made a " Motion to Suppress " backed up with Affidavits of the Colvins. Defense counsel was deficient in not

moving for suppression when there was no reasonable basis or strategic reason for failure to move for suppression. State v. Rainey, 107 Wn.App. 129, 28 P.3d 10 (Div III 2001) citing State v. Klinger, 96 Wash.App. 619, 623, 980 P.2d 282 (1999)

Mr. Davis also points to the reliability of the standing of the trial. Would have the outcome been different? Mr. Davis carries a strong presumption that he would of received a more app^lauable verdict had not the gun been admitted into evidence.

Therefore both prongs of Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) have been established.

May be this court finds that the admittance of this evidence should have been excluded through and by ER 404(b) too.

This court should reverse Mr. Davis's conviction and remand for a new trial with the conductance of a suppression hearing before the trial.

ERROR NO. 4 MR DAVIS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ASK THE SENTENCING COURT FOR A SENTENCE BELOW THE STANDARD RANGE WHERE THERE WAS EVIDENCE OF VICTIM BEING AGGRESSOR OR PROVOKER OF INCIDENT.

Under RCW 9.94A.535 an illustrative factor which the court may consider in the exercise of its discretion to impose an exceptional sentence below the standard range in section(1)(a): to a significant degree the victim was an initiator, willing participant, aggressor, or provoker of the incident.

Lana McCorrister took the knife out of its case in an attempt to use it in an offensive manner. RP 49-50, 447

This is evidence that trial counsel could of presented in support of a sentence below the standard range. Defendant also submitted a list of witness that would have testified at sentencing about Lana's previous outlandish acts of aggressiveness. Yet counsel failed to call them.

Mr. Davis's trial counsel's failure to advance mitigating evidence at penalty phase was deficient and prejudicial when counsel requested the low end of the standard range. see Ramseyer v. Blodgett, 853 F.Supp. 1239, 1269 (W.D. Wash 1994)

In State v. Cloud, 95 Wash.App. 606, 976 P.2d 649 (1999), the court did properly consider mitigating factors that would normally " justify consideration of the exercise of exceptional downward " and chose to sentence Cloud to the minimum of 20 years. State v. Cloud, 95 Wash.App 606, 611, 976 P.2d 649 (1999) Here in Mr. Davis's case the court could not consider any because counsel failed to advance it at sentencing. " Defense counsel's failure to cite to relevant precedent and argue in support of a sentence below the standard range constitutes ineffective assistance of counsel. State v. McGill, 112 Wash.App. 95, 47 P.3d 173 (2002)

A trial court cannot make an informed decision if it does not know the parameters of its decision making authority. State v. McGill, 112 Wash.App. 95 102, 47 P.3d 173(2002) Failure to cite controlling case law may be grounds for finding ineffective assistance of counsel. State v. Hernandez-Hernandez, 104 Wash.App. 263, 15 P.3d 719(2001)(citing State v. Emert, 94 Wn. 2d 839, 850, 621 P.2d 121(1980)

Mr. Davis's sentence cannot stand legally in light of facts stated herein that support the fact that counsel was deficient and there is reasonable probability the outcome of sentencing would have been different had it not been for counsel's mistakes.

Mr. Davis asks this Court to remand for resentencing.

ERROR NO. 5 MR. DAVIS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DID NOT MOVE TO DISMISS THE UNLAWFUL POSSESSION OF A FIREARM CHARGE IN THE FIRST DEGREE FOR INSUFFICIENT EVIDENCE AT THE END OF THE STATES CASE IN CHIEF.

Unlawful Possession of a Firearm RCW 9.41.040 requires a constitutionally valid predicate conviction. State v. Reed, 84 Wash.App. 379, 384, 928 P.2d 469 (1997) (citing State v. Gore, 101 Wn.2d 481, 486, 681 P.2d 227, 39 A.L.R. 4th 975 (1984) (cited by Lopez, 107 Wash.App. 270, 27 P.3d 237 (Div III 2001)) The existence of a constitutionally valid prior conviction is an essential element of the offense. One the State must prove beyond a reasonable doubt. Reed, 84 Wash.App. at 384, 928 P.2d 469 citing State v. Swindell, 93 Wash. 2d 192, 196-197, 607 P.2d 852 (1980); see also State v. Tully, 198 Wash. 605, 608, 89 P.2d 517 (1939) (holding State must allege and prove previous conviction.)

Here the State presented no evidence showing Mr. Davis had been convicted of a serious offense prior to the charges he faced in this trial. The sole evidence of a previous conviction was after trial, at sentencing when Mr. Davis pleaded for a low sentence. There was no evidence provided for the jurors to condumplate that Mr. Davis had any prior convictions. see RP X-X 24.

" In a criminal case a defendant may challenge the sufficiency of evidence (a) before trial, (b) at the end of the State's case in chief, (c) at the end of all the evidence, (d) after verdict, (e) on appeal. State v. Jackson 82 Wash.App. 594, 607-608, 918 P.2d 945 (1996).

Here defense counsel should have moved for a dismissal of the Unlawful Possession of a Firearm charge at the close of the State's case in chief. Because the State neglected to prove an essential element of Unlawful Possession of a Firearm against Mr. Davis. The trial court would have necessarily granted the motion.

Therefore this Court should dismiss this charge for insufficient evidence.

ERROR NO.6 MR. DAVIS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO INVESTIGATE THE ACTUAL SIZE OF THE KNIFE USED.

Under deadly weapon statute RCW 9.94A.602 a knife is deadly as a matter of law only if it's blade is over three inches in length. A knife is used for cutting.see State v. Leatherman,100 Wash.App. 318, 997 P.2d 929 (2000)

Had trial counsel made Mr. Davis aware of the significance of the length of the blade of the knife used, Mr. Davis would have relinquished the knife to counsel so it could be admitted into evidence and proved that the knife was not a deadly weapon according to the statute. The blade of the knife was under 3 inches. see AFFIDAVIT OF TERI SALLY

The statute prescribes that only a knife having a blade longer than three inches are included within the general category of deadly weapons, and thus in effect precludes any knife with a shorter blade from being a deadly weapon. see State v. Williams,3 Wash.App.336,475 P.2d 131 (Div II 1970)

Knife with blade under three inches long must be found to have capacity to cause death, not mererly serious bodily injury, for purposes of enhanced sentence applicable when defendant is convicted of a numerated crime and found to be armed.State v. Cook,69 Wash.App. 412, 848 P.2d 1325 (1993)

The State never proved that the two centimeters deep knife wound of Lana McCorrister was life threatening. The nerve test on her arm came back normal.RP 57-58 Two centimeters is under an inch, approxitimately 3/4 of an inch.

Whether knife shorter than three inches is a deadly weapon is a question of fact to be determined by it's capacity to inflict death in manner in which it was used, based on consideration of factors including defendant's

intent and present ability, degree of force used, part of body to which weapon was applied and what were injuries inflicted.State v. Zumwalt,79 Wash. App. 124,901 P.2d 319(1995)

Trial counsel failed to investigate into status of knife and communicate with Mr. Davis so Mr. Davis could also call witnesses in regards to this matter.Counsel's performance in failing to investigate the actual length of knife was deficient. see State v. Maurice, 79 Wn.App. 544, 903 P.2d 514 (Div III 1995);see also State v. Jury,19 Wash.App.256,576 P.2d 1302(Div II 1978)

The outcome of the trial is unreliable because there is a strong presumption that the defendant would not of been found guilty of being armed with a deadly weapon(knife is precluded from being considered a deadly weapon as a matter of law) Mr. Davis received ineffective assistance of counsel.

Mr. Davis respectfully asks this Court to reverse Mr. Davis's enhanced sentence of 24 months by a deadly weapon finding.

ERROR NO.7 TRIAL COUNSEL'S NUMEROUS ERRORS THAT DENIED PETITIONER EFFECTIVE ASSISTANCE OF COUNSEL ALSO INEFFECT DENIED MR. DAVIS OF HIS RIGHT TO DUE PROCESS, HIS RIGHT TO PRESENT A DEFENSE, AND HIS RIGHT TO A FAIR TRIAL.

In support of [his] claim of a due process violation Mr. Davis cites In re Winship,397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970) that the due process clause requires " proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged " see Middleton v. McNeil,541 U.S. 433, 124 S.Ct. 1830,1832, 158 L.Ed. 2d 701 (2004)(per curiam)(In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give

effect to that requirement.")Carella v. California,491 U.S. 263,265, 109 S.Ct. 2419, 105 L.Ed. 2d 218 (1989)(Jury instructions relieving states of [the burden of proving every element of an offense beyond a reasonable doubt] violates a defendant's due process rights.")Sandstrom v. Montana,442 U.S. 510,519, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979)(stating that Winship " provides the appropriate mode of constitutional analysis " for due process challenges, alleging that jury instructions impermissibly shift burdens of proof.")

Trial counsel's failure to object and contest these jury instructions raised herein not only deprived Mr. Davis effective assistance of counsel, but also relieved the State of it's burden of proof beyond a reasonable doubt. Mr. Davis acted in lawful self-defense. Yet he was denied his right to present that defense(his only defense), when these jury instructions were allowed in.

The 6th and 14th Amendments of the United States Constitution guarantees a defendant the right to defend against the State's allegations and present a defense.Chambers v. Mississippi,410 U.S. 284(1973);Washington v. Texas,338 U.S 14(1967);The implication of the 5th Amendment was also violated.see State v. Austin,59 Wash.App. 186,194, 796 P.2d 746 (1990)

Mr. Davis's only defense was self-defense. And that was took out by these faulty jury instructions.

The essential element of a prior conviction was not proved beyond a reasonable doubt.

And Mr. Davis could not defend himself against the deadly weapon enhancement because of Counsel's failure to investigate the actual size of the knife.

A fair trial is a basic requirement of due process...[E]very procedure which would offer a possible temptation to the average man as a judge [to forget the burden of proof required to convict the defendant, or which might lead him] not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927)

Mr. Davis could not present his theory of the case which denied him a fair trial.

Mr. Davis respectfully asks this Court to reverse his conviction and remand for a new trial.

ERROR NO. 8 THE SENTENCING COURT ERRED IN IT'S MISAPPLICATION OF THE LAW REGARDING SAME CRIMINAL CONDUCT FOR SENTENCING MR. DAVIS WITH THE INCORRECT OFFENDER SCORE.

Generally, the trial court determines the sentencing range for each current offense by adding together the offender score from all other current offenses, and prior convictions. RCW 9.94A.589

Mr. Davis was sentenced with an offender score of 5 on the Unlawful Imprisonment charge, an offender score of 6 on the Assault 1 and offender score of 5 on the Unlawful Possession of a Firearm charge.

Sentencing Court " with regard to the violation of the protection order, the Unlawful Imprisonment, the Assault in the First Degree charge, I also agree with Mr. Nelson's analysis. They are not the same criminal conduct. They likewise, even though they involve the same victim in some respects, they are not at the same time and place. And probably the most significant thing is that they involve proof of different intent, which the jury was instructed and they so found." RP X-X 26-27

This claim can be viewed by the misapplication of the law standard. State v. Walden, 69 Wash.App. 183,188, 847 P.2d 956 (1993)

Under State v. Grantham, 84 Wash.App. 854, 932 P.2d 657 (Div II 1997) cites " to determine if two crimes share a criminal intent, the court focuses on whether the defendant's intent , viewed objectively changed from one crime to the next. State v. Dunaway, 109 Wn. 2d. 207,215, 743 P.2d 1237, 749 P.2d 160 (1987) also consider whether one crime furthered the other. State v. Lessley, 118 Wn. 2d 773,778, 827 P.2d 996 (1992)

Sentencing court rules that the crimes didn't happen at the same time and same place. Yet the State stipulated to the fact that they had no evidence regarding the time frame. RP 153

Walden, 69 Wash.App. 183,188, 847 P.2d 956(1993) argued that the conduct charged in counts 1 and 2 constituted the same criminal conduct because the acts occurred at the same place and nearly at the same time, the same victim and each count involved the same criminal objective. Court agreed. Accordingly the two crimes of rape in the 2nd degree and attempted rape in the Second degree furthered a single criminal purpose, sexual intercourse.

Under the right circumstances sexual intercourse is legal. Just like under the right circumstances Mr. Davis's objective was to get his car.(the Corvette Anything that happened amongst this objective was furthering Mr. Davis's objective, to get the car. Mr. Davis's intent never changed and therefore the Sentencing Court should of applied the law correctly according to the circumstances and should of sentenced Mr. Davis under the same criminal conduct.

Its amazing how the State changed positions when it came time for sentencing, in looking at the Fourth Amended Information exhibit the prosecuting

attorney Gerald Horne claimed that these crimes were of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan and/or 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 others. Therefore the State admitted same criminal conduct in Mr. Davis's case.

This Court could consider Mr. Davis's case closely with as in State v. Taylor, 90 Wash.App. 312, 950 P.2d 526 (Div II 1998)

The evidence there established that Taylor's objective intent in committing the Kidnapping was to abduct Murphy by the use or threatened use of the gun and that his objective intent in participating in the 2nd degree Assault was to persuade Murphy, by the use of fear, to not resist the abduction, when Taylor and Nicholson entered the car. It ended when the kidnapers exited the car and the abduction was over. And there is no evidence that Taylor or Nicholson engaged in any assaultive behavior during the kidnapping that did anything beyond facilitating and furthering the abduction.

Here in Mr. Davis's case the jury was instructed on the self-defense instruction. Yet the jury did not return a verdict that Mr. Davis acted in self-defense. Well now how does this Assault fit into this case against Mr. Davis ? The only reasonable explanation for the Assault through the eyes of a fact finder has to be that the use of the knife was Mr. Davis's way of trying to keep Lana in the truck so he could accomplish his objective which was to get his car that she was harboring. Mr. Davis does not want to mislead the court, he still holds to the fact that he acted in self-defense, and he

hopes this honorable Court will see that now Mr. Davis is left with no other explanation than what he describes herein. And using this analogy is in no way of an admittance of unlawful Imprisonment, nor Unlawful Possession of a Firearm, because Mr. Davis did not commit those offenses. But because something did happen where someone did get hurt, and the jury so found that he was guilty of these other offenses, Mr. Davis has to contest the sentencing analysis.

Mr. Davis's case is distinguishable from that of State v. Grantham, 84 Wash. App. 854, 932 P.2d 657 (Div II 1997) there the trial court accepted and this Court of Appeals upheld the States second argument that the evidence was sufficient to show that the second rape was accompanied by a new objective " intent ". Thus the trial court acted reasonable in determining that Grantham completed one crime before he commenced the Second. That after the first and before the 2nd he had presence of mind to threaten L.S. not to tell.

Here in Mr. Davis's case if this is what the evidence portrays that there was a restraint against Ms. McCorrister then it must of been a continuous act in the truck with the objective to get the car and injuries occurred. Mr. Davis's state of mind never changed, his mental resolution was to get back the Corvette that she sold for drugs while Mr. Davis was away. Lana McCorrister had no right to sell that Corvette.

The Supreme Court in State v. Dunaway, 109 Wn. 2d 207, 214-15, 743 P.2d 1237 (1987) the court went further on to say that part of the same criminal analysis will often include the related issues it the time and the place of the crimes remained the same

Mr. Davis's case is all in support of a finding that the sentencing court find that the offenses convicted of should be " same criminal conduct "

A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. A sentence that is based upon an incorrect offender score, is a fundamental defect that inherently results in a miscarriage of justice. In re Goodwin, 146 Wn. 2d 861, 50 P.3d 618 (2002)

As in Walden, Taylor and Collins, 110 Wn. 2d 253, 751 P.2d 837 (1988), this Court should reverse Mr. Davis's sentence, and remand for resentencing in accordance with finding same criminal conduct.

The correct sentencing, as finding " same criminal conduct " as to the standing of charges right now against Mr. Davis should be with an offender score of 3 on the Unlawful Imprisonment, a 4 on the First Degree Assault, and a 3 on the Unlawful Possession of a Firearm charge.

ERROR NO. 9 THE SENTENCING COURT ERRED BY IMPOSING A SENTENCE ON MR. DAVIS WHICH EXCEEDS THE STATUTORY MAXIMUM.

When a sentencing court incorrectly calculates an offender's standard sentence range, under the Sentencing Reform Act(SRA), remand is required unless the record clearly shows that the sentencing court would have imposed the same sentence absent the error. State v. Barker, 132 Wn. 2d 182, 189, 937 P.2d 575 (1991); In re Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001); State v. Jackson, 129 Wash.app. 95, 117 P.3d 1182, 1186 (2005)

Furthermore, when a sentencing court bases a sentence on an incorrect standard range it acts without statutory authority under the SRA. State v. Roche, 75 Wash.App. 500, 513, 878 P.3d 497 (1994); In re Goodwin, 146 Wn.2d 861, 50 P.3d 618, 622 (2002); State v. Rowland, 97 Wash.App. 301, 304, 983 P.2d 696 (1999)

In this case, the trial court miscalculated Petitioner's applicable standard range sentence. For instance, first the trial court sentenced Mr. Davis to the " high end " of the standard range " 216 " months on the First Degree Assault. The sentencing court then imposed a firearm enhancement of 60 months, a deadly weapon enhancement of 24 months and 24-48 months of community custody. Mr. Davis was also sentenced to the " high end " of the standard range on the Unlawful Imprisonment charge " 22 months " and 9-18 months of community custody. The total exceeds the top of the standard range.³ This requires resentencing.

The total sentence including enhancements remains presumptively limited by the statutory maximum for the underlying offense unless the offender is a persistent offender; if the total sentence exceeds the maximum sentence, the underlying sentence, not the enhancement must be reduced.State v. Desantiago, 149 Wn. 2d 402, 68 P.3d 1065 (2003).

Under RCW 9.94A.505(5); " except as [otherwise] provided ... a court may not impose a sentence providing for a term of confinement or community custody which exceeds the statutory Maximum. for the crime as provided in Chapter 9A.. 20 RCW. " (emphasis added). Since the sentencing court imposed a sentence exceeded Mr. Zavala-Reynosos statutory Maximum, we vacate his sentence and remand for resentencing in a manner consistent with this opinion.State v. Zavala-Reynoso, 127 Wash.App. 119, 110 P.3d 827,830 (2000)

Additionally, since Mr. Davis's sentence is not authorized by statute, failure to correct the defect could result in a denial of Mr. Davis's due process rights.see Hill v. Estelle, 653 F.2d 202,204(5th Cir.1981),cert.denied,

³see Blakely v. Washington, 124 S.Ct. 2531,2537(2004)(The statutory maximum term is the standard range; State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005) State v. Evans, 114 P.3d 629 (2005).

454 U.S. 1036, 102 S.Ct. 577, 70 L.Ed 2d 481(1981)(citing Hicks v. Oklahoma,
447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed. 2d 175(1980)

ERROR NO.10 APPELLANT COUNSEL WAS INEFFECTIVE FOR NOT
CHALLENGING THE SUFFICIENCY OF EVIDENCE IN
CHARGES CONVICTED.

There was insufficient evidence to legally convict Aaron Davis of Unlawful Imprisonment, and First Degree Assault with finding of being armed with a firearm.

Lana McCorrister testified that her friends had requested that she not bring Aaron to their house.RP 110. This is the house she was keeping his car at. Lana got in the truck with Aaron and told him to drive. She testified that she never gave Aaron an address to drive to. RP 105-06,110. And it just so happened that they ended up at the exact location of where the car(Corvette) was stored by her.RP 105-06. How coincidental that they would end up there ? Aaron testified that Lana told him that Rick Lovitt had his Corvette.RP 439-40. As also he told the jury he did not force Lana to go, he did not put a gun to her head, nor did he have a gun with him.RP 441.

In regards to this Unlawful Imprisonment charge Mr. Davis is not guilty of it at the most he is guilty of being disrespectful for going somewhere he was not wanted. That is a long ways away from being unlawful. Lana never said that she was restrained in any way. The doors to the truck were unlocked, she was not tied, or handcuffed, or any restraint of any means.RP 107-08.

Mr. Davis agrees with the law that the credibility of the witnesses is up to the jury to decide. Yet would like to point out to the court that he went to pick up Lana up at her friend's house that she was visiting at. She didn't want to leave with him yet she went with him.RP 87. She didn't say to her friends help me. stop him, nor did she say I don't want to go with him. She went with him.RP 87.

And later on Lana says " he put a gun to my head " because she didn't want any blam put upon her, for pulling knife out in an offensive manner, then spraying him with mace.

Under State v. Warfield,103 Wash.App. 152, 5 P.3d 1280 (Div II 2000) this court held that requirement under Unlawful Imprisonment that defendant act " knowingly " modifies all elements of offense, under which defendant must knowingly restrict another's movements without that person's consent, without legal authority and in a manner that substantially interferes with that person's liberty.

Here in Mr. Davis's trial jury instruction NO.17 it says nothing of restraint without consent or in a manner that substantially interferes with that person's liberty. see EXHIBIT MARKED JURY INSTRUCTION NO.17

The State has failed to prove the charge of Unlawful Imprisonment against Mr. Davis. Mr. Davis had no knowledge that by his actions of going to a house where he wasn't liked was anywhere near unlawful.

Mr. Davis's conviction cannot stand legally and should be reversed as in Warfield.

In regards to the First Degree Assault Mr. Davis had no intent of stabbing Lana nor her end up getting hurt. He lawfully defended himself against Lana's aggressive actions.RP 448,528.

The injury sustained by Lana McCorrister was not so severe to warrant a First Degree Assault. The knife wound was 2 centimeters thats approximatly 3/4 of an inch. It doesn't take much force to cause a wound of that depth, especially with a knife that is sharp. And this wound was in the arm. No where near life threatening. No threats were made at the time of the knife wound. He was sitting down in the driver's seat of the truck at the time of the wound. He must of had only so much ability to strick in a position as that.

The circumstances of a weapon's use include the intent and ability of the user, the degree of force, the part of the body to which it was applied and the actual injuries that were inflicted.State v. Shilling,77 Wash.App. at 171-72, 889 P.2d 948

This is not a First Degree Assault case. In State v. Huddleston,80 Wash.App. 916, 912 P.2d 1068 (Div II 1996) he was convicted of 5 counts of First Degree Assault, the stab wounds were in the back, chest or stomach and liver. Several of the resulting wounds were thought to be life threatening.

In State v. Rodriguez,121 Wash.App. 180, 87 P.3d 1201 (Div III 2004) the stab wound was 6 inches in depth and organ parts were

protruding from the wound.

Because Mr. Davis's only defense of self-defense was taken out by a faulty jury instruction, it could now be said that without the defense there is only enough evidence for a finding of a conviction of Second Degree Assault.

As in State v. Walther, 114 Wash.App. 189, 56 P.3d 1001 (Div II 2002) defendant shot 4 times at the victim and injured victim and was found guilty of 2nd Degree Assault.

Mr. Davis challenges the Firearm Enhancement on the First Degree Assault. Mr. Davis didn't have possession of that gun. And a person is "armed" if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes and there must be a nexus between the defendant and the crime and the weapon. State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005)

According to Ms. McCorrister the gun was stashed up in the dash of the truck. RP 42 And this first degree assault is based on the knife wound sustained by Lana that happened in the truck.

This is not enough evidence to prove that the gun was "easily accessible" and "readily available for use." Mr. Davis was not armed with gun at the time of the crime convicted of First Degree Assault. The Washington State Supreme Court held that in State v. Gurske, 155 Wn. 2d 134, 118 P.3d 333 (2005) that the evidence was insufficient to show that pistol in backpack behind driver's seat was readily accessible. This case is

similar in respects that the State failed to show beyond a reasonable doubt that Mr. Davis was armed with a Firearm at the time of the Assault.

If the defendant was really out with intent to harm Ms. McCorrister then wouldn't he use a gun?

In re Winship, 397 U.S. 363 specifically tells [u]se of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty.

Mr. Davis respectfully asks this court to drop the Firearm Enhancement.

Both prongs of Strickland, 466 U.S. 668, 687-88, 104 S.ct. 2052, 80 L.Ed. 2d 674 (1984) have been established. Appellant counsel's decision in not raising insufficient evidence was not reasonable professional judgement. And the unreasonableness of the error prejudiced Mr. Davis for if this error would have been raised on the direct appeal it's believed that the court would of reversed Mr. Davis's conviction.

ERROR NO.11 THE CUMULATIVE EFFECT OF ALL THE ERRORS REQUIRES REVERSAL OF MR. DAVIS'S CONVICTION.

The cumulative error doctrine applies only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial. State v. Greiff, 141 Wn. 2d 910, 929 10 P.3d 390 (2000); State v. Coe, 101 Wn. 2d 772, 789, 684 P.2d 668 (1984)

State v. Whalon, 1 Wash.App. 785, 804, 464 P.2d 730 (1970)
(three errors amounted to cumulative error and required reversal

Mr. Davis shows that there was an accumulation of prejudicial errors. Petitioner is entitled to a new trial under the cumulative error doctrine.

ADDITIONAL POINTS FOR THE COURT TO CONSIDER ON THIS PETITION

Mr. Davis is left without being able to go into full detail on some of the errors raised herein. He would have other corroborative evidence to support errors but the trial court would not give Mr. Davis the other half of his transcripts, nor police reports or witness statements. Mr. Davis filed a Public Disclosure Motion with Pierce County's Prosecuting Attorney and Pierce County's Superior Court Reporter to no avail. Mr. Davis is indigent and cannot afford \$300⁰⁰ (price court set for Mr. Davis to be allowed his transcripts) And Mr. Davis should not have to pay because he's indigent and he never got them.

Honorable Judge John McCarthy told Mr. Davis if he could not

afford the cost of an appeal, he has the right to have a lawyer appointed to represent him on appeal and to have such parts of the trial record as are necessary for review of errors assigned transcribed for him, both at public expense.RP X-X 33.

Mr. Davis cites State v. Giles,148 Wn. 2d 449, 60 P.3d 1208 (2003) for guidance. The Supreme Court granted discretionary review and held that denfendant was not required to make particularized factual showing in order to establish colorable need for requested transcript. Supreme court remanded to the Superior Court with directions to order transcription of the jury voir dire at public expense.

CONCLUSION

This Petition is the best way for Mr. Davis to get the relief he wants, and no other way will work as well because it allows Mr. Davis to present material outside the record and raise the errors that have not been heard before.

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

In re the Personal Restraint of:)
) Court of Appeals
) No. 31910-1-II
) From Pierce County
) Cause No. 03-1-04572-3
)
) **AFFIDAVIT OF:**
) **TERI SALLY**
)

STATE OF WASHINGTON)
) ss.
County of Pierce)
)

TERI SALLY, being first duly sworn upon oath, deposes and says under penalty of perjury of the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge and belief.

1. I seen the hunting knife that Aaron Davis used prior to the incident that happened on or about the month of September of 2003.
2. This Buck knife was wooden handled and the blade was under 3 inches.
3. Aaron Davis' dad Terry Davis use to carry this very knife on his side of his waist the entire time that I knew the Davis family.
4. I have known the Davis family for 10 years.
5. The wound that was caused by this knife by Aaron's use towards Lana McCorrister was 2 centimeters.
6. 2 Centimeters is under an inch, approxitimately 3/4 of an inch.



My commission expires: Aug 2, 2009

28th day of September, 2006.
Teri Sally
Notary Public for Washington.

SUBSCRIBED AND SWORN TO before me, the undersigned Notary Public, on this

Teri Sally
TERI SALLY

DATED this 28 day of September, 2006.

Apt. 109 Olympia, WA 98501

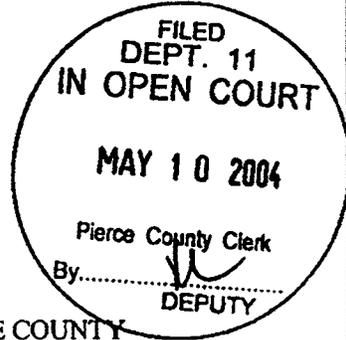
8. I Teri Sally live at the following address: 1810 Ashwood Down Ln.

if needed by any parties.

7. I am available to testify to these facts in open court at any time



03-1-04572-3 21000303 AMINF4 05-14-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-04572-3

MAY 14 2004

vs.

AARON MICHAEL DAVIS,

FOURTH AMENDED INFORMATION

Defendant.

DOB: 2/3/1975
PCN#: 537939761

SEX : MALE
SID#: 19538592

RACE: WHITE
DOL#: WA DAVISAM257CC

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse AARON MICHAEL DAVIS of the crime of KIDNAPPING IN THE FIRST DEGREE, committed as follows:

That AARON MICHAEL DAVIS, in the State of Washington, on or about the 28th day of September, 2003, did unlawfully and feloniously, with intent to inflict extreme mental distress on Lana McCorrister, intentionally abduct Lana McCorrister, contrary to RCW 9A.40.020(1)(d), a domestic violence incident as defined in RCW 10.99.020, and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a handgun, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310/9.94A.510, and adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the peace and dignity of the State of Washington.

COUNT III

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse AARON MICHAEL DAVIS of the crime of ASSAULT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or

FOURTH AMENDED INFORMATION- 1

ORIGINAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
2 one charge from proof of the others, committed as follows:

3 That AARON MICHAEL DAVIS, in the State of Washington, on or about the 28th day of
4 September, 2003, did unlawfully and feloniously, with intent to inflict great bodily harm, intentionally
5 assault Lana McCorrister with a firearm or deadly weapon or by any force or means likely to produce
6 great bodily harm or death, contrary to RCW 9A.36.011(1)(a) and in the commission thereof the
7 defendant, or an accomplice, was armed with a deadly weapon, other than a firearm to-wit: a knife, that
8 being a deadly weapon as defined in RCW 9.94A.125/9.94A.602, and invoking the provisions of RCW
9 9.94A.310/9.94A.510 and adding additional time to the presumptive sentence as provided in RCW
10 9.94A.370/9.94A.530, a domestic violence incident as defined in RCW 10.99.020, and in the commission
11 thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a handgun, that being a firearm
12 as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310/9.94A.510, and adding
13 additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the
14 peace and dignity of the State of Washington.

COUNT IV

11 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
12 authority of the State of Washington, do accuse AARON MICHAEL DAVIS of the crime of
13 VIOLATION OF A PROTECTION ORDER, a crime of the same or similar character, and/or a crime
14 based on the same conduct or on a series of acts connected together or constituting parts of a single
15 scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be
16 difficult to separate proof of one charge from proof of the others, committed as follows:

17 That AARON MICHAEL DAVIS, in the State of Washington, on or about the 28th day of
18 September, 2003, with knowledge that the Superior Court had previously issued a foreign protection
19 order, protection order, restraining order, no contact order, or vulnerable adult order pursuant to state or
20 tribal law in Cause No. 02-2-01280-4, did unlawfully violate said order by knowingly violating the
21 restraint provisions therein, and/or by knowingly violating a provision excluding him other from a
22 residence, a workplace, a school or a daycare, and/or by knowingly coming within, or knowingly
23 remaining within, a specified distance of a location, and/or by knowingly violating a provision of a
24 foreign protection order for which a violation is specially indicated to be a crime;, contrary to RCW
26.50.110(1), and against the peace and dignity of the State of Washington.

COUNT V

22 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
23 authority of the State of Washington, do accuse AARON MICHAEL DAVIS of the crime of
24 UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, a crime of the same or similar
character, and/or a crime based on the same conduct or on a series of acts connected together or

FOURTH AMENDED INFORMATION- 2

1 constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and
2 occasion that it would be difficult to separate proof of one charge from proof of the others, committed as
follows:

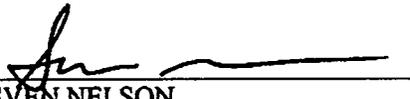
3 That AARON MICHAEL DAVIS, in the State of Washington, on or about the 28th day of
4 September, 2003, did unlawfully, feloniously, and knowingly own, have in his possession, or under his
5 control a firearm, he having been previously convicted in the State of Washington or elsewhere of a
6 serious offense, to wit: Assault 2nd Degree (2000), contrary to RCW 9.41.040(1)(a), and against the
peace and dignity of the State of Washington.

7 DATED this 7th day of May, 2004.

8 PIERCE COUNTY SHERIFF
WA02700

GERALD A. HORNE
Pierce County Prosecuting Attorney

9
10 skn

By: 
SVEN NELSON
Deputy Prosecuting Attorney
WSB#: 24235

INSTRUCTION NO. 32

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

INSTRUCTION NO. 31

A person is entitled to act on appearances in defending himself if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

INSTRUCTION NO. 20

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 17

To convict the defendant of the crime of unlawful imprisonment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 28th day of September, 2003, the defendant knowingly restrained Lana McCorrister;
- (2) That such restraint was accomplished by physical force, intimidation or deception;
- (3) That such restraint was without legal authority; 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.

On the other hand, if after weighing all of 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.

IN THE SUPREME COURT
OF THE STATE OF
WASHINGTON

In re the Personal Restraint of) CASE NO. _____

Aaron M. Davis,)

Petitioner)

v.)

State of Washington,)

Respondent)

AFFIDAVIT OF MAILING

STATE OF ARIZONA)
) ss.
COUNTY OF PINAL)

I, Aaron Davis, by and through pro-se, do hereby state under the laws of the State of Arizona under the penalty of perjury that I placed in the United States Mail from the CCA/FCC Facility in Florence, Arizona the original Personal Restraint Petition and mailed it to the following.

**CLERK: C.J. Merritt, Supreme Court Clerk
Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, Washington 98504-0929**

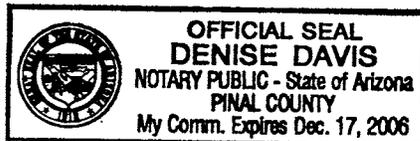
I, Aaron Davis, swear under the penalty of perjury that all of the above is true and correct to the best of my knowledge.

Dated this 20th day of Nov., 2006.

Aaron Davis
Aaron Davis

SUBSCRIBED AND SWORN TO before me, the undersigned notary public, on this 20 day of Nov., 2006.

Denise Davis 11, 20, 06
Notary Public for Arizona.



Pinal Co. AZ
Exp 12, 17, 06

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

In re the Personal Restraint of:)
) Court of Appeals
) NO. 31910-1-II
) From Pierce County
) Cause NO. 03-1-04572-3
)
) **AFFIDAVIT OF:**
) **TARAH COLVIN**
)

STATE OF WASHINGTON)
) ss.
County of Pierce)
)

TARAH COLVIN, being first duly sworn upon oath, deposes and says under penalty of perjury of the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge and belief.

1. Andy Jones had been pulled over as a traffic stop by the Lakewood police amongst them was Deputy Smith and Deputy Honeycutt, this was at the same time that they had me pulled over.

2. The officers excuse to pull me and my husband Everett Colvin over given by these officers was that they thought that Aaron Davis was in the car with us.

3. Aaron Davis was not with us in the car.

4. They pulled us over and thouroughly questioned us about Aaron's whereabouts and let us know of the situation that happened between Aaron and Lana.

5. The deputies put on this line of defense saying " we are just trying to find him so we can get him help with his drug problem, specifically drug treatment program " and the likes.

6. They coerced me and my husband into searching our house looking for him.

7. We would never have given consent to the depouties to look in our house for Aaron, had not the deputies used the illegal methods they did into pressuring us into allowing them to come in and look for Aaron.

8. Aaron has never resided at our house, nor has he kept any of his belongings at our house.

9. Aaron has only been to our house twice in our lives.

10. Me and my husband had seen Andy Jones with the gun,the one that he asked for a towel to wipe his fingerprints off of, because he had a felony warrant, he buried the gun out back.

11. The officers found the gun that was not any where in plain view, they used our consent to look in and around our house for Aaron as a way to dig around for the gun.

12. Aaron has no control over our premises, nor any dominion of our house.

13. The firearm that was admitted into evidence at Aaron's trial was never in Aaron's possession.

14. The firearm that Andy had should of been suppressed.

15. Me and my husband Everett would have been available had Aaron's attorney made a MOTION TO SUPPRESS and called us to testify at the hearing.

16. Me and my husband are still available to testify at any further proceedings that may arise in reference to this issue of the gun that was recovered at our house.

17. I Tarah Colvin live at the following address: 8522 Lawndale Ave SW Lakewood, WA 98498.

DATED this 17 day of nov, 2006.

Tarah Colvin
TARAH COLVIN

SUBSCRIBED AND SWORN TO before me, the undersignn Notary

Public, on this day 17th of November, 2006

Marjorie Earlene Fantz
Notary Public for Washington
Marjorie Earlene Fantz

My commision expires: 4-19-2010

