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FILED
COURT OF APPEALS
DIVISION II

09 SEP -4 PM 12:27

STATE OF WASHINGTON
BY [Signature]
DEPUTY

Glen A. Livermore, DOC No. 241349
Airway Heights Corrections Center
P.O. Box 2049, Unit TB-02-L
Airway Heights, WA 99001-2049
Representing Himself

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

STATE OF WASHINGTON,)	
)	Cause No. 07-1-00543-1
Respondent,)	
)	STATEMENT OF ADDITIONAL
vs.)	GROUND FOR REVIEW
)	
GLEN ALLEN LIVERMORE,)	
)	
Appellant.)	
)	Ct. App. No. 38582-1-II

INTRODUCTION

Appellant, Glen A. Livermore (hereinafter "Livermore"), respectfully submits this Statement of Additional Grounds for Review as permitted by RAP 10.10(a). Livermore has omitted a recitation of the facts at the outset and would respectfully refer this Court to the discussion of facts incorporated in the arguments presented below.

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INTRODUCTION

Appellant, Glen A. Livermore (hereinafter "Livermore"), respectfully submits this Statement of Additional Grounds for Review as permitted by RAP 10.10(a). Livermore has omitted a recitation of the facts at the outset and would respectfully refer this Court to the discussion of facts incorporated in the arguments presented below.

1 ARGUMENT

2 A criminal defendant has the constitutionally-protected
3 right to appeal his conviction. Const. art. I, § 22. The
4 Washington Supreme Court has recognized the right encompasses
5 a right to file a meaningful appeal. State v. Rolax, 104
6 Wn.2d 129, 142, 702 P.2d 1185 (1985). Further, the Court has
7 acknowledged that a pro se litigant has the right to present
8 his issues on appeal to the appellate court. State v. Giles,
9 148 Wn.2d 449, 450-51, 60 P.3d 1208 (2003).

10 Recently-revised RAP 10.10 pertains to the right of a
11 criminal defendant on appeal to file a statement of additional
12 grounds the defendant wishes the court to review. The rule
13 was changed specifically to facilitate a criminal defendant's
14 pro se presentation of issues on appeal. In pertinent part,
15 RAP 10.10 provides:

16 (a) Statement Permitted. A defendant/
17 appellant in a review of a criminal case
18 may file a pro se statement of additional
19 grounds for review to identify and discuss
20 those matters which the defendant/
21 appellant believes have not been
22 adequately addressed by the brief filed by
23 the defendant/appellant's counsel.

24

25 (c) Citations; Identification of Errors.
26 Reference to the record and citation to
authorities are not necessary or required.

27 . . .

28 RAP 10.10(a) and (c).

29 Livermore respectfully submits that the trial court
30 miscalculated his offender score, when it concluded that the

1 six counts were not based on the same criminal conduct.

2 LIVERMORE'S OFFENDER SCORE WAS ERRONEOUSLY CALCULATED, BECAUSE
3 COUNTS I AND VI, III AND VIII, AND IV AND V CONSTITUTE THE
4 SAME CRIMINAL CONDUCT.

5 Under the Sentencing Reform Act of 1981 (SRA), a
6 defendant's presumptive sentence range is calculated from two
7 factors: the offense seriousness level and the offender score.
8 Former RCW 9.94A.370(1). As demonstrated below, by counting
9 the current offenses as criminal history, the trial court
10 erroneously calculated Livermore's offender score.

11 Generally, when a person is sentenced for multiple
12 offenses, the trial court includes all "current" offenses
13 within the criminal history. Former RCW 9.94A.400(1)(a). The
14 SRA, however, makes the following exception: if the offenses
15 encompass the same criminal conduct, they must be treated as
16 one crime. Former RCW 9.94A.400(1)(a); State v. Walden, 69
17 Wn.App. 183, 187, 847 P.2d 956 (1993); State v. Dunaway, 109
18 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987).

19 Former RCW 9.94A.400(1)(a) defines "same criminal
20 conduct" as follows: "two or more crimes that require the same
21 criminal intent, are committed at the same time and place, and
22 involve the same victim." Additionally, courts look to
23 whether one crime furthered the other, whether the two crimes
24 are intimately related or connected and whether the criminal
25 intent, viewed objectively, changed from one crime to the
26 next. State v. Walden, 69 Wn.App. at 188; State v. Dunaway,
109 Wn.2d at 215; see, State v. Collicott, 112 Wn.2d 399, 405,

1 771 P.2d 1137 (1989).

2 Here, these six counts constitute the same criminal
3 conduct. Each set of counts occurred at the same place and
4 nearly at the same time. The same victims were involved.
5 Additionally, all six of the first-degree child rapes and
6 first-degree child molestations had the same objective intent:
7 sexual gratification. Counting the six crimes as separate for
8 purposes of the offender score here, would be as unfair as
9 counting each entry into a building during a single burglary
10 incident as separate, distinct crimes. Such a result would be
11 absurd.

12 Because these six counts are the same criminal conduct,
13 Livermore's offender score for these offenses should not have
14 been calculated as six separate crimes. The time should run
15 concurrent. See Report of Proceedings (RP) (11/10/08) at 271-
16 273. Livermore should be sentenced in accordance with the
17 correct offender score and the correct standard sentence
18 ranges. Reversal of the exceptional minimum range sentence
19 and resentencing is therefore required.

20 Finally, should this Court find that counsel's failure to
21 object to the offender score calculation constitutes an
22 acknowledgment of the offender score, then Livermore was
23 deprived his state and federal constitutional right to
24 effective assistance of counsel when his attorney failed to
25 recognize that his offender score was miscalculated. See U.S.
26 Const., amend. VI; Const., art. I, § 22 (amend. 10). A

1 criminal defendant claiming ineffective assistance of counsel
2 must prove: (1) that the attorney's performance was deficient,
3 i.e., that the representation fell below an objective standard
4 of reasonableness under the prevailing professional norms, and
5 (2) prejudice resulted from the deficient performance, i.e.,
6 that there is a reasonable probability that, but for the
7 attorney's unprofessional error, the result of the proceedings
8 would have been different. State v. Early, 70 Wn.App. 452,
9 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004
10 (1994); State v. Graham, 78 Wn.App. 44, 56, 896 P.2d 704
11 (1995). Competency of counsel is determined based on the
12 entire record below. State v. White, 81 Wn.2d 223, 225, 500
13 P.2d 1242 (1972), citing State v. Gilmore, 76 Wn.2d 293, 456
14 P.2d 344 (1969). A reviewing court is not required to address
15 both prongs of the test if the defendant makes an insufficient
16 showing on one prong. State v. Tarica, 59 Wn.App. 368, 374,
17 798 P.2d 296 (1990).

18 Here, both prongs are met. Counsel's performance was
19 deficient, as argued above, and Livermore was prejudiced since
20 his offender score is lower than that which was used by the
21 trial court in sentencing him, with the result that his
22 standard range sentences would be substantially lower than the
23 term he is currently serving.

24 CONCLUSION

25 Based on the above, resentencing is required because the
26 trial court incorrectly calculated Livermore's standard range

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after determining that the two counts were not based on the same criminal conduct.

DATED this 10th day of September, 2009.



GLEN A. LIVERMORE, Appellant

PRO SE REPRESENTATION

Glen A. Livermore, #241349
Airway Heights Corrections Center
P.O. Box 2049, TB-02-L
Airway Heights, WA 99001-2049

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DECLARATION

I, Glen A. Livermore, declare that, on September 10, 2009, I deposited the foregoing Statement of Additional Grounds for Review, or a copy thereof, in the internal mail system of Airway Heights Corrections Center and made arrangements for postage, addressed to:

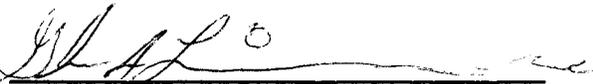
David Ponzoha, Court Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Katherine Svoboda, Esq.
Grays Harbor Pros. Atty.
102 W. Broadway, Suite 102
Montesano, WA 98563

Jodi R. Backlund, Esq.
203 Fourth Avenue E.
Suite 404
Olympia, WA 98501

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

DATED at Airway Heights, Washington on September 10, 2009.


GLEN A. LIVERMORE, Appellant

PRO SE REPRESENTATION

Glen A. Livermore, #241349
Airway Heights Corrections Center
P.O. Box 2049, TB-02-L
Airway Heights, WA 99001-2049

September 10, 2009

Glen A. Livermore, #241349
Airway Heights Corrections Center
P.O. Box 2049, TB-02-L
Airway Heights, WA 99001-2049

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STATE OF WASHINGTON

David Ponzoha, Court Clerk
Court of Appeals, Division II
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Tacoma, WA 98402-4454

Confidential Legal Correspondence

RE: STATE V. LIVERMORE, COA #38582-1-II

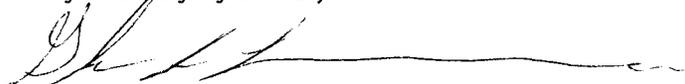
Dear Mr. Ponzoha:

Enclosed are the following documents with regard to the above-entitled appeal:

1. STATEMENT OF ADDITIONAL GROUNDS;
2. DECLARATION OF SERVICE BY MAILING.

Please file and process these documents. Thank you.

Very truly yours,



Glen A. Livermore

Encl.

Cc: Jodi R. Backlund
Attorney for Appellant

Katherine L. Svoboda
Attorney for Respondent