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**I. ASSIGNMENT OF ERROR**

Appellant was improperly disenfranchised when he lost his right to vote under Washington's felon disenfranchisement law, which has been found to violate the Federal Voting Rights Act.

**II. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR**

Was Appellant improperly disenfranchised when he lost his right to vote under Washington's felon disenfranchisement law, where that law has recently been found to violate the Federal Voting Rights Act?

**III. STATEMENT OF THE CASE**

The State charged Avery Pierre Clay by Information with one count of second degree rape (RCW 9A.44.050(1)(a)). (CP 1) The State alleged that Clay engaged in sexual intercourse with S.G. by means of forcible compulsion. (CP 1) S.G. testified at trial that Clay hit her on the head repeatedly, then he demanded oral and vaginal sex. (07/22/09 RP 102, 105, 106)<sup>1</sup> When she screamed, Clay placed his hand over her mouth and said he would break her neck. (07/22/09 RP 103) She testified that she complied with his demands because she was afraid that he would kill her. (RP 105,

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<sup>1</sup> Citations to the transcripts will be to the date of the proceeding followed by the page number.

106, 107-08)

Laboratory tests showed the presence of Clay's DNA on a vaginal swab taken from S.G. at the hospital on the day of the incident. (07/22/09 RP 208-09; Exh. P-14) A latent print matching Clay's fingerprint was also found on a glass in S.G.'s apartment. (07/22/09 RP 194, 196)

A jury convicted Clay as charged. (07/27/09 RP 4; CP 34) The trial court sentenced Clay to a standard range sentence of 240 months to life. (CP 53, 56; 08/28/09 RP 18) This appeal timely follows. (CP 69)

#### **IV. ARGUMENT & AUTHORITIES**

The United States Congress enacted the Voting Rights Act (VRA) of 1965 for the broad remedial purpose of "rid[ding] the country of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S. 301, 315, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). The VRA currently provides:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....

42 U.S.C. § 1973(a).

Washington's felon disenfranchisement law, set forth in Article VI, § 3 of the Washington Constitution, provides: "All persons convicted of infamous crime unless restored to their civil rights ... are excluded from the elective franchise." An "infamous crime" is defined as one that is "punishable by death in the state penitentiary or imprisonment in a state correctional facility." RCW 29A.04.079.

In the recent Ninth Circuit case of Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010), the plaintiffs challenged Washington's felon disenfranchisement law as violating the VRA. The plaintiffs, who had all lost their right to vote pursuant to Washington's felon disenfranchisement law, argued that Washington's law interacts with a racially discriminatory criminal justice system and, as a result, racial minorities are disproportionately denied the right to vote. 590 F.3d at 1008.

The Ninth Circuit agreed, finding first that the expert reports submitted by the plaintiffs "provide compelling circumstantial evidence of discrimination in Washington's criminal justice system." 590 F.3d at 1009. The Court then held:

Plaintiffs here established a violation of [the VRA] by adducing evidence sufficient to establish a vote denial claim-that there is discrimination in Washington's

criminal justice system on account of race, . . . and that such discrimination clearly hinder[s] the ability of racial minorities to participate effectively in the political process.

590 F.3d at 1008 (internal quotation marks and citations omitted).

The Court concluded that Washington's felon disenfranchisement law violates the VRA. 590 F.3d at 1016.

Similarly here, Clay, who is also a member of a racial minority group, has lost his right to vote pursuant to Washington's felon disenfranchisement law. (CP 1, 62, 64) But Washington's law has been struck down by the Ninth Circuit because it violates the Voting Rights Act. Accordingly, the State does not have any legal authority at this time to deprive Clay of his voting rights. This portion of the Judgment and Sentence should be stricken and the trial court should issue an order restoring Clay's voting rights.

#### V. CONCLUSION

Because Clay's disenfranchisement violates the Voting Rights Act, the trial court should be directed to enter an order restoring his constitutionally guaranteed right to vote.

DATED: February 11, 2010



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STATE OF WASHINGTON

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DEPUTY

**CERTIFICATE OF MAILING**

I certify that on 02/11/2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Avery Pierre Clay, #820361, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



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