

NO. 39745-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

AVERY CLAY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 08-1-05896-6

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant's claim that he was unlawfully disenfranchised of his right to vote is not properly before this Court on this case?
2. Whether the authority the defendant relies upon for his claim that he was unlawfully disenfranchised of his right to vote is neither precedential nor persuasive authority?

B. STATEMENT OF THE CASE.

1. Procedure

On December 12, 2008, the State charged the defendant, Avery Clay, with one count of Rape in the Second Degree based on an incident that occurred on December 8, 2008. CP 1. The case proceeded to trial and on July 27, 2009 the jury returned a verdict of guilty. CP 34.

On August 28, 2009, the court sentenced the defendant to 240 months to life in prison. CP 50-64. The sentence was ordered to run consecutive to the defendant's other conviction for rape of a child under cause number 08-1-05885-1. CP 56.

The defendant timely filed a notice of appeal on September 2, 2009.

2. Facts

S. G., an adult female, was aware of the defendant Avery Clay as someone from around the Woodmark Apartments in which she lived. 2 RP 84, ln. 24 to p. 89, ln. 7. She did not know him, nor did she know his name until he told her it was Pierre on December 8. 2RP 89, ln. 8 to p. 90, ln. 19.

On December 8, 2008, the defendant contacted S.G. at her apartment in the course of trying to find her neighbor, Kelly. 2RP 90, ln. 22-25. S.G. and Clay had a five minute conversation. 2RP 91, ln. 24 to p. 92, ln. 17. S.G. was comfortable talking to Clay because she had seen him with Kelly and S.G. kind of knew Kelly. 2RP 91, ln. 25 to p. 92, ln. 4.

Clay asked S.G. if she was doing anything and she said, “no” so he asked her if she would take him to the mall to pay his phone bill if he paid for her gas and she agreed. 2RP 92, ln. 7-11. After he completed his first errand he asked S.G. to run several other errands as well, during which she remained in the car. 2RP 94, ln. 1 to p. 95, ln. 2. Clay never did pay for gas as he had promised. 2RP 95, ln. 3-6.

They returned to S.G.’s apartment and Clay followed S.G. in. 2RP 96, ln. 3-13. Clay stayed there for 20 or 30 minutes during which time S.G. began to become uncomfortable with his continued presence there. 2RP 96, ln. 24 to p. 96, ln. 16. After she became uncomfortable with his presence, S.G. put her coat on, got her keys and stuff and said that she had

somewhere to go, and implied that he needed to go. 2RP 97, ln. 18-22.

Clay then pulled out a crack pipe, started smoking it and kind of indicated for S.G. to have some. 2RP 97, ln. 23 to p. 98, ln. 20. S.G. said she didn't do that. 2RP 98, ln. 20. Clay responded that she had never had her pussy eaten out on crack. 2RP 98, ln. 20-21.

S.G. told Clay she felt really uncomfortable and that she didn't like it. 2RP 99, ln. 13-14. Clay became weird and agitated and S.G. started to get scared, so she walked to the door and said she had to go, so let's go. 2RP 99, ln. 14-16. Clay responded, something to the effect of, well, come here, indicating that he wanted S.G. to come and sit on the couch next to him. 2RP 99, ln. 17-19. Based on what Clay said, S.G. felt like she needed to go and sit on the couch and did. 2RP 99, ln. 21-25. S.G. did so because she was scared because Clay was acting weird, she didn't know him all that well and she just wanted him to go. 2RP 100, ln. 2-7. So S.G. sat on the couch next to Clay, but not really close. 2RP 100, ln. 2-9. Although she was scared, S.G. didn't feel the need to run because he was still just sitting there and wasn't trying to attack her. 2 RP 100, ln. 2-20.

Clay told S.G. to suck, suck, suck on the crack pipe, so she did. 2RP 101, ln. 7-12. He then said he was going to blow smoke into her mouth, and she said, o.k. and went along with him because she felt pressured because he was acting so weird. 2RP 101, ln. 14-19. But then she told he she really had to go. 2RP 101, ln. 17-18.

S.G. then got up from the couch, moved toward the entertainment center, and was messing with her phone which she put in her pocket and had the keys in her hand when Clay got up. 2RP 102, ln. 8-13. S.G. thought that was good and that Clay was going to go. 2RP 102, ln. 14. But then Clay just started punching S.G. in the head. 2RP 102, ln. 14-015.

S.G. blacked out, then opened her eyes and Clay was on her back. S.G. had her keys in her hand and tried to press the panic button but Clay grabbed them and threw them. 2RP 102, ln. 20-24. S.G. started screaming hoping someone would hear her, but Clay put his hand over S.G.'s mouth and nose so she couldn't breath. 2RP 102, ln. 1-4. By that point S.G. was laying down on her stomach. 2RP 102, ln. 5-8. Clay said, "If you scream, bitch, I'm going to break your neck." 2RP 103, ln. 9-12.

Clay had something hard in her back like his elbow or knee and said, "Bitch, you're going to give me your money. Kelly told me you have a lot of money." 2RP 103, ln. 23-25. S.G. said, "I don't have a lot of money. I have maybe \$40. Just take my whole purse, its on my bed." 2RP 103, ln. 25 to p. 104, ln. 5.

Clay implied he wanted S.G. to go to the room and she kept trying to tell him to just take the whole purse and go, but he made her get up and go to the bedroom. 2RP 104, ln. 3-6. S.G. tried to hand Clay the purse and he didn't want it. 2RP 104, ln. 6-7. S.G. was finding the \$40 in it and then Clay acted like he didn't want it. 2RP 104, ln. 7-8.

Clay then said, "I think I want to taste the pussy; take your clothes off." 2RP 104, ln. 4-5. S.G. did so and kept begging Clay not to hurt her. 2RP 105, ln. 6. Clay was trying to rush and hurry her to take her clothes off, so she did, but she was shaking so bad. 2RP 105, ln. 6-8. S.G. said, "Just don't kill me please," and took her cloths off. 2RP 105, ln. 8-9.

Clay made S.G. lay down on the floor and performed oral sex on her. 2RP 105, ln. 10-11. S.G. was shaking so bad that she thought she was having a seizure or something because she was so scared. 2RP 105, ln. 11-13. Clay performed oral sex on S.G. for about three minutes. 2RP 105, ln. 17-18.

Clay then told S.G. to suck his "dick" and pulled his pants down. 2RP 105, ln. 19-25. S.G. performed oral sex on Clay for a few minutes. 2RP 106,ln. 9-20. S.G. performed oral sex on Clay because she thought he was going to kill her. 2RP 106, ln. 12. At some point he had told her he had a gun. 2RP 106, ln. S.G. had no idea if he might have a gun, but she figured he had already beat her unconscious, so why wouldn't he kill her as well. 2RP 106, ln. 17-18.

Clay then told S.G. to get on top of him. 2RP 106, ln. 22. Once S.G. realized that Clay was going to [vaginally] rape her she said, "Well, I have a condom." 2RP 107,ln. 16-18. Clay responded, "Bitch, what are you saying; I got something?" 2RP 107, ln. 18-19. So S.G. just shut up and got on top of Clay. 2RP 107, ln. 19-20.

S.G. thought about running but didn't because she was in the bedroom and had her laundry basket in there and figured she could either just try to get through it, or Clay might really kill her. 2RP 107, ln. 22-25.

S.G. was on top of Clay for a few minutes while he raped her. 2RP 108, ln. 1-4. Clay then kind of shoved S.G. off of him and turned S.G. around and vaginally raped her from behind while she was on her hands and knees. 2RP 108, ln. 11-24. This lasted a couple more minutes and it ended when Clay ejaculated. 2RP 109, ln. 3-12.

Throughout the ordeal, S.G. kept asking him not to hurt her, not not to kill her. 2RP 105, ln. 24p. 106, ln. 5; 109, ln. 6-8. Whenever S.G. would say that, Clay kept telling her to just be quite. 2RP 109, ln. 6-8.

After Clay was done, he took the \$40 she tried to give him earlier. 2RP 109, ln. 25 to p. 110, ln. 5. Clay walked to the living room and S.G. thought he was going to leave, so she followed him. 2RP 110, ln. 6-7. Clay then ordered her to go put her clothes on. 2RP 110, ln. 7. S.G. said, "Well, I am going to do that when you leave," because she didn't want to get farther away from the door. 2RP 110, ln. 7-9. Clay responded, "No, go put your clothes on," so S.G. put her clothes on. 2RP 110, ln. 10-13.

Then Clay laughed and something like, "I guess I could have gone about this in a different way," and then asked when she would be home. 2RP 110, ln. 14-16. S.G. was trying to make him think that it was o.k. so she answered, "I don't know, a few hours." Then Clay told S.G. to pinkie promise not to tell anyone what happened, which S.G. did. 2RP 110, ln.

16-21. S.G. was still upset and crying at that point but was trying not to be so shaky. 2RP 110, ln. 25 to p. 111, ln. 1.

After Clay left, S.G. didn't feel safe waiting for the police to arrive and figured if she called them that she would never be able to go home again. 2RP 112, ln. 19-23. So instead she got into her car, drove to her mother's house 20 minutes away pounded on her mother's door crying and hysterical and told her mother she had just been raped. 2RP 112, ln. 15 to p. 114, ln. 11. Her mother then took S.G. to the hospital. 2RP 114, ln. 11 to p. 116, ln. 21.

C. ARGUMENT.

1. CLAY'S CLAIM THAT HE WAS IMPROPERLY DISENFRANCHISED OF HIS VOTING RIGHTS IS NOT PROPERLY RAISED UNDER THIS CAUSE NUMBER AND SHOULD BE FILED SEPARATELY AS AN INDEPENDENT CIVIL ACTION.

On appeal (as opposed to discretionary review), a party may generally only challenge those things permitted in RAP 2.2(a). Of the items listed, only a final judgment is relevant to this case. *See*, RAP 2.2(a)(1). Even on discretionary review, a party may seek review of any act of the Superior Court not appealable as a matter of right. RAP 2.3(a).

The defendant challenges his disenfranchisement via Article VI, § 3 of the Washington Constitution, which provides that:

All idiots, insane persons, and persons convicted of infamous crime unless restored to their civil rights are excluded from the elective franchise.

An “infamous crime” is defined by RCW 29A.04.079 as:

...a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility. Neither an adjudication in juvenile court pursuant to chapter 13.40 RCW, nor a conviction for a misdemeanor or gross misdemeanor, is an “infamous crime.”

On a plain language reading, this appears to apply to felony offenses.

Chapter RCW 29A governs elections. It provides that:

If a registered voter is not eligible to vote as provided in this section [i.e. for being an ineligible felon], the secretary of state or county auditor shall confirm the match through a date of birth comparison and suspend the voter registration from the official state voter registration list.

RCW 29A.08.520(5) (as amended by Laws of Washington 2005 c. 325, sec. 1, effective June 4, 2009).

The voting rights restoration act, (as well as the law that preceded it), establishes that removal or suspension from the voter registration list is undertaken by the Secretary of State or the county auditor. Here, nothing in the judgment and sentence addresses the right to vote, or purports to remove that right. Accordingly, there is no order or action by the superior court under this cause number that the defendant is entitled to challenge on appeal.

Where the defendant's claim does not pertain to any error by the court in this case, the defendant's challenge regarding his voting rights is not properly raised on this appeal. Accordingly, it should be denied.

2. CLAY'S CLAIM THAT HE WAS IMPROPERLY
DISENFRANCHISED OF HIS VOTING RIGHTS IS
WITHOUT SUBSTANTIVE MERIT.

The defendant relies on *Farrakhan v. Gregoire*, in support of his claim that he was unlawfully denied his voting rights. *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010). However, as of April 28, 2010, the ninth circuit Court of Appeals issued an order granting *en banc* rehearing of that decision. *See*, <http://www.ca9.uscourts.gov/datastore/opinions/2010/04/28/0635669ebo.pdf> (copy attached as Appendix A.) Pursuant to that order, as well as 9th Cir. R. 35-3(3), the case no longer may be cited as precedent in the Ninth Circuit or any [federal] district court therein except to the extent it may subsequently be adopted by the *en banc* court. In other words, the case has lost its status as a published opinion of the Ninth circuit.

Even if it were considered as a published opinion of the Ninth circuit, it of course has no precedential value in Washington. Moreover, because of the specific procedural posture of the case, the opinion also has no persuasive value.

The case involved a review of the district court's grant of a motion for summary judgment in favor of the State of Washington, and denial of a

cross motion for summary judgment on behalf of the plaintiffs.

Farrakhan, 590 F.3d at 994-996, 1001-1004. In *Farrakhan*, the district court had granted summary judgment in favor of the State of Washington, and denied summary judgment in favor of Farrakhan and his co-plaintiffs. *Farrakhan*, 590 F.3d at 995 (citing *Farrakhan v. Gregoire*, No. CV-96-076-RHW 2006 WL 1889273 (E.D. Wash. 2006)). The court in *Farrakhan* reversed both rulings of the district court. *Farrakhan*, 590 F.3d at 1011-1015, 1016. In doing so, the court held that the district court erred in its interpretation and application of the VRA in granting summary judgment in favor of the State of Washington. *Farrakhan*, 590 F.3d at 1016. The court then went on to hold that summary judgment in favor of Farrakhan and the other plaintiffs was proper because they had put forth expert reports that the state did not factually dispute in its motion for summary judgment (presumably because to do so would have created a factual dispute that thwarted the motion) so that the court concluded that the claims of the plaintiffs were therefore uncontroverted. *Farrakhan*, 590 F.3d at 1014-15.

Moreover, the *Farrakhan* decision was based on a determination that a now disfavored legal interpretation was controlling as the law of the case. *Farrakhan*, 590 F.3d at 999-1000. Under that interpretation, vote denial claims are cognizable under the Voting Rights Act (VRA). *Farrakhan*, 590 F.3d at 999. The court held that this position had become the law of the case where the court had affirmed it in an earlier appeal.

Farrakhan, 590 F.3d at 999 (citing *Farrakhan v. Washington*, 338 F.3d 109 (9th Cir. 2003), *cert. denied*, 543 U.S. 984, 125 S. Ct. 477, 160 L.Ed.2d 365 (2004) (“*Farrakhan I*”) The court in *Farrakhan* acknowledged that since the issuance of the opinion in *Farrakhan I*, the second, sixth and eleventh circuits had subsequently rejected the position that vote denial claims were cognizable under the VRA. *Farrakhan*, 590 F.3d at 999-1000. The court in *Farrakhan* nonetheless held that the earlier ruling in *Farrakhan I* was the law of the case and therefore controlling on the issue. *Farrakhan*, 590 F.3d at 999-1000.

Where *Farrakhan* was limited to a review of cross motions for summary judgment, and because it was decided on a rule of law imposed on the case by the law of the case doctrine, its scope is too narrowly limited to the procedural posture of *Farrakhan* case to serve as persuasive authority to any other case regarding the issues raised therein. For this reason, it should not be followed.

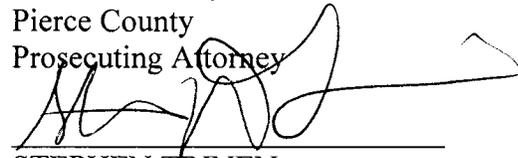
D. CONCLUSION.

There is no basis to bring a challenge to the termination of the defendant’s voting rights under this cause number where he has not been

and will not be removed from the list of eligible voters by any order of the Superior Court. Any such action must be pursued as a separate civil claim.

DATED: May 5, 2010.

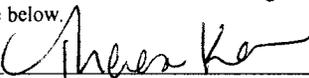
MARK LINDQUIST
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Date Signature

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APPENDIX “A”

Order

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UNITED STATES COURT OF APPEALS

**MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

**MUHAMMAD SHABAZZ
FARRAKHAN, aka Ernest S. Walker;
AL-KAREEM SHADEED; MARCUS
X. PRICE; RAMON BARRIENTES;
TIMOTHY SCHAAF; CLIFTON
BRICENO,**

Plaintiffs - Appellants,

v.

**CHRISTINE O. GREGOIRE; SAM
REED; HAROLD W. CLARKE;
STATE OF WASHINGTON,**

Defendants - Appellees.

No. 06-35669

D.C. No. CV-96-00076-RHW

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.