

No. 41043-5-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

IBN RASUL AQUIL,

Appellant.

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APPEAL FROM SUPERIOR COURT OF CLARK COUNTY

HONORABLE RICH MELNICK, JUDGE

CLARK COUNTY CAUSE NO. 09-1-00668-7

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BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

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**B. ASSIGNMENT OF ERROR NUMBER TWO: THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT OPINION AND HEARSAY EVIDENCE IN THROUGH THE DEPUTIES' TESTIMONY.**

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## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**A. DID THE ADMISSION OF THE 911 RECORDING VIOLATE THE CONFRONTATION CLAUSE?**

**B. WAS THE 911 RECORDING AN EXCITED UTTERANCE?**

**C. DID THE TRIAL COURT ALLOW IN IRRELEVANT HEARSAY AND OPINION EVIDENCE?**

**D. DID FAILING TO VACATE THE ASSAULT IN THE FIRST DEGREE CONVICTION VIOLATE DOUBLE JEOPARDY?**

**E. WERE AQUIL'S VIRGINIA CONVICTIONS COMPARABLE TO WASHINGTON FELONY CHARGES?**

### **III. STATEMENT OF THE CASE**

#### **A. STATEMENT OF FACTS**

Barry Maletsky married Tiara Carroll on November 1, 2007 (RP-139) and the couple built a mansion in the rural Hockinson area of Clark County. (RP-148 to 150) Carroll invited her aunt, Elma Myles and her two children, Ashley Myles and Ibn Aquil to fly out to Washington from their home in Baltimore to visit with her and Maletsky. (RP-122) Parties with the same surname will be referred to by their first name for ease of reference.

Elma became concerned after they arrived when she discovered that much of the house remained unfinished and the house contained no beds. (RP-275) Elma purchased an air mattress for the bed frame in the master bedroom and she and Ashley slept in the master bedroom on the first floor. (RP-275)

Aquil performed a substantial amount of finish carpentry work in the house after his family arrived in early April, 2009. (RP-413) He installed light fixtures, hung doors, and performed a number of other construction projects. (RP-413) The upstairs of the home was essentially unfinished when the family arrived. (RP-413) Aquil slept on the floor in an unfinished bedroom on the second floor. (RP-413)

Aquil and Maletsky got along well. (RP-121 to 122) Aquil worked around the house and watched the NBA playoffs with Maletsky. (RP-121 to 122)

Maletsky and Carroll were not getting along well at the time Aquil and his family arrived. (RP-121) Maletsky called the police to the residence on past occasions when Carroll raged out of control. (RP-121)

On April 13, 2009 Elma and Ashley went to bed in the master bedroom around 7:00 p.m. because they had not adjusted to the three hour time change. (RP-210) Maletsky went to sleep on a couch sometime between 6:00 p.m. and 7:00 p.m. (RP-247) Elma recalls two males and a female coming through the bedroom with Carroll on a tour of the house. (RP-243) When Elma got out of bed to use the bathroom, she saw Carroll and her friends in the hot tub in the bathroom sometime between 7:00 p.m. and 8:00 p.m. (RP-247) Elma recalls two black males besides her son being present at the house that evening. (RP-276)

Carroll and her friends spent time in Carroll's "closet". (RP-273) The closet contained an office area and a living area. (RP-273) Elma testified that

Carroll's closet was larger than the courtroom. (RP-273)

Both Aquil and Ashley observed Carroll ingesting cocaine, alcohol and prescription drugs on multiple occasions, including April 12, 2009. (RP-232, 415) Ashley recalls a black man named D.J. was in the house the evening of April 12, 2009. (RP-232)

Aquil testified that Carroll had men over and spent time in the closet with them while Maletsky was in the residence. (RP-414) Maletsky admitted that a black male named D.J. had lived with he and Carroll at their previous residence. (RP-141) Maletsky paid for Carroll to have an abortion after she became pregnant by a man named Grover Harris. (RP-141) Carroll bragged to Aquil about money, her house and material possessions. (RP-414) Maletsky admitted to Aquil that the bank was foreclosing on the house. (RP-414)

At one point Carroll discussed a life insurance policy on Maletsky's life in front of Ashley and Aquil. (RP-228) Aquil testified that he thought talk of the life insurance policy was simply another instance of Carroll bragging and did not take her seriously. (RP-454)

On the night of April 13, 2009 Aquil observed Carroll giving a group of her friends a tour of the house and then the group went in to Carroll's closet together. (RP-417) Aquil went in and out of the room where Carroll partied with her friends and observed them snorting cocaine and using the jacuzzi. (RP-420) Maletsky came home from hiking around 6:00 p.m. and he and Aquil watched an NBA game on television. (RP-419) A black male and a female left the residence after 9:00 p.m. and Aquil talked to Carroll and a

black male who was her boyfriend. (RP-422)

Maletsky recalls that Ashley and Elma were in the master bedroom when he fell asleep on a couch in the family room. (RP-124) He knew that Aquil and Carroll were going out to a party together and they left the residence after he went to sleep. (RP-124, 140)

Carroll invited Aquil to go with she and her boyfriend to a barbeque. (RP-423) They left the residence to go to the party sometime between 10:00 p.m. and 11:00 p.m. (RP-423) At the party, Aquil, Carroll, her boyfriend and the owner of the home ate and played cards. (RP-426) They all drank vodka and Carroll and the others ingested drugs. (RP-426) Eventually Aquil fell asleep on a couch watching DVD's with the homeowner, who was sleeping on another couch.(RP-427) Carroll and her boyfriend were in another room. (RP-427) Aquil next remembers Carroll waking him up and saying they needed to get home before Maletsky woke up. (RP-428) He drank the remains of a drink on the coffee table and thought it tasted funny, like there might be a drug in it. (RP-427) When they arrived home before dawn, Aquil remembers going up and "crashing" on his bed. (RP-428) Shortly after he fell asleep, he heard a knock at the door and his mom called him to come downstairs. (RP-429)

When he reached the foot of the stairs, he saw Carroll's boyfriend holding his jacket and phone that he had left behind at the party. (RP-429) Aquil thanked him and suggested the boyfriend get a beer out of the refrigerator while Aquil ran upstairs and put his phone on the charger. (RP-

429-430) As Aquil walked back downstairs, he heard noises and a scuffle. (RP-430) He sees Carroll's boyfriend behind Maletsky choking Maletsky around the neck with his arm. (RP-431) Aquil observed Maletsky looked "already gone." (RP-431) Aquil steps in and tries to grab and punch the boyfriend to get him to release Maletsky. (RP-432) When Aquil lands a punch, the boyfriend releases Maletsky, who drops hard to the floor. (RP-432) The boyfriend falls to the floor from being punched by Aquil. (RP-432) The boyfriend gets up off the floor, runs out the front door and drives away. (RP-432)

Maletsky recalls waking up around 6:30 a.m. and going back to sleep with the plan of getting up around 7:30 a.m. (RP-125) He woke up again briefly when he heard a woman screaming and saw a black man choking him. (RP-126) He next woke up in an ambulance with no idea of what happened to him, as he thought he dreamt the choking incident. (RP-127) Maletsky suffers from nearsightedness and wears corrective lens, which he was not wearing at the time of the attack. (RP-144) He was initially unable to identify his attacker to the police. (RP-145)

When Aquil calls the others into the room, panic ensues when they see Maletsky on the floor. (RP-433)

Ashley heard people talking in the hallway and came out of the master bedroom. (RP-212) When she saw Maletsky on the floor and injured, her mother told her to call 911 and Ashley went to get a cell phone. (RP-212 to 214) Ashley thought Carroll and Aquil were both crazy and Aquil

incoherently muttered that he had killed someone. (RP-216 to 219) Carroll told Aquil to jump in the pool and kill himself and Aquil went outside and jumped in the pool then came back into the house. (RP-215)

Elma testified that she arose at 6:00 a.m. and observed Maletsky sleeping on the couch when she went in to the den to use the computer. (RP-247) Ten to fifteen minutes after she got out of bed, Carroll and Aquil returned home. (RP-247) Aquil was in a happy and lighthearted mood, talking about when they were going home to Baltimore. (RP-248) D.J. knocked on the door at approximately 6:30 a.m. and she called her son. (RP-247) D.J. went and had words with Maletsky and Aquil came running downstairs and fought with D.J. (RP-250 to 251) She saw D.J. choking Maletsky and she saw Aquil jump in to get D.J. off of Maletsky. (RP-252) Ashley came in after D.J. left the house. (RP-279)

Elma feared D.J. because she knew him to be a leader of the Crips street gang. (RP-252 to 273) Carroll identified herself as a "Crip wife" which Elma took to mean that she was D.J.'s girlfriend. (RP-272) Elma feared being locked up by the police because of experiences she had in Baltimore. (RP-258)

After Carroll came to where Maletsky was, she started to argue with Aquil. (RP-254) During this time Carroll is on the phone to 911. Aquil was drunk and frustrated that Carroll would not listen to him, so he jumped in the swimming pool as she suggested. (RP-434) He sees Maletsky shaking, panics and runs from the residence. (RP-435) Aquil runs through some woods, loses

a shoe in a creek and arrives at a neighboring residence. (RP-436) He climbs up on the roof to try and hide. (RP-437)

When he tries to climb to the other side of the roof, he starts to slide off the roof and grabs an air vent pipe to try to stop his fall. (RP-439) Aquil jumps down to a balcony at the rear of the house and sees the occupants of the house. (RP-439) When he sees they are scared, he gives up and lays down on the deck and he believes he fell asleep on the deck until law enforcement arrived. (RP-439) Aquil described himself as hypothermic with chattering teeth and shivering. (RP-440) He does not remember making any statements to law enforcement. (RP-440)

Clark County Sheriff's Deputy Chris Luque initially responded to Maletsky's residence. (RP-367) He then responds to the neighbor's residence on a report of a man on the roof. (RP-366) Luque gave Aquil verbal commands at rifle point and took Aquil into custody with the assistance of Deputy Todd Young. (RP-370 to 374) Luque observed Aquil to be yelling, screaming and incoherent. (RP-375) Young testified that Aquil appeared wet from head to toe, crying and that Aquil said "Just shoot me, I fucked up." (RP-198) Young testified that Aquil's demeanor was consistent with a person under the influence of alcohol or drugs. (RP-198)

When the deputies got Aquil outside and removed his clothes to wrap him in a wool blanket, Aquil continued to talk about wanting them to shoot him and wanting to die. (RP-198)

Dr. Marilyn Ronnei, a clinical psychologist from Western State

Hospital testified that she examined Aquil on two occasions and found no evidence of mental disease or defect. (RP-289 to 308) She indicated that his medical records showed that he had a blood alcohol level of .166 at the time his blood was tested on the morning of the incident. (RP-301) This blood alcohol level resulted in her making an Axis I diagnosis of alcohol intoxication, resolved. (RP-289)

Carroll did not appear for trial and the trial court permitted the 911 call to be played for the jury over Aquil's objection. (RP-65 to 68) At the time of trial, Maletsky did not know Carroll's whereabouts. (RP-138)

Maletsky remained in the hospital overnight. (RP-134) He suffered a broken hyoid bone in the neck, bruising to the face and he experienced difficulty speaking. (RP-127 to 134)

Maletsky called Clark County Sheriff's Office Detective Rick Buckner to come talk about the case several days after the incident. (RP-404) Buckner went to the residence on April 16, 2009 and Maletsky told him he thought Grover Harris may have been the one who choked him. (RP-404)

Maletsky filed for a restraining order on April 17, 2009 in which he stated under penalty of perjury that Grover Harris, not Ibn Aquil had choked him. (RP-378)

## **B. STATEMENT OF PROCEDURAL HISTORY**

Aquil proceeded to trial on May 17, 2010 on an amended information

charging attempted murder in the second degree and assault in the first degree. (CP-4) On May 19, 2010 the jury returned guilty verdicts on both charges.

On June 29, 2010 the Honorable Richard Melnick sentenced Aquil to 206.25 months in prison. (CP-59) From that sentence this appeal timely follows.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT VIOLATED THE CONFRONTATION CLAUSE BY ADMITTING THE 911 TAPE.**

On appeal, confrontation clause violations are subject to de novo review. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), cert. denied, 128 S. Ct. 2430 (2008).

In Davis v. Washington, 547 U.S. 813, 827, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) the United States Supreme Court set forth a four part test to aid in determining whether the primary purpose of police interrogation is to enable police assistance to meet an ongoing emergency or to establish or prove past events:

(1) whether the speaker is speaking of events as they are actually occurring or instead describing past events; (2) whether a reasonable listener would

recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the statements were necessary to resolve the present emergency or instead to learn what had happened in the past; and (4) the level of formality of the interrogation.

Carroll tells the 911 operator that she was in the bathroom and does not know what her husband was hit with as she did not see the altercation. (RP-388) She quickly tells the 911 operator no weapons were involved. (RP-389) After Carroll has already told the 911 operator that she is safe, the 911 operator continues to ask about “the bad guy that hit your husband.” (RP-392) The 911 operator continues to ask her about the assault and repeatedly asks her about weapons even though Carroll already indicated a lack of knowledge because she was not in the room and she saw no weapons. (RP-395 to 401)

Admission of the 911 call allowed the prosecution to put Carroll’s testimony before the jury without her being subject to cross examination in violation of Aquil’s rights under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State constitution. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)

**B. CARROLL’S TESTIMONY WAS NOT AN EXCITED**

## **UTTERANCE.**

If this court finds that the 911 tape is nontestimonial hearsay, it is admissible if it qualifies under an exception to the hearsay rule. Davis, *Supra*, at 547 U.S. at 821.

The trial court found the 911 tape admissible under ER 803(a)(2), the excited utterance exception (RP-65 to 67)

ER 803(a)(2) allows admission of an out-of-court statement offered to prove the truth of the matter asserted if it relates to "a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

To admit the 911 tape as an excited utterance, the state must establish: "First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Third, the statement must relate to the startling event or condition." State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

In this case a startling event occurred, the assault on Maletsky which was not witnessed by Carroll.

"The key determination is whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)

No evidence, including Carroll's statement to the 911 operator, establishes that she witnessed the assault. Carroll walked in on a chaotic situation and made a snap judgment that Aquil must be the perpetrator, because he was the only male in the house at the time. The state failed to establish a foundation for the admission of the 911 recording under ER 803(a)(2).

**C. THE COURT REPEATEDLY ADMITTED IMPROPER AND IRRELEVANT OPINION TESTIMONY OF THE DEPUTIES WHO QUESTIONED THE WITNESSES.**

When questioning Deputy Kerr, the prosecutor asked if he had given witnesses Carroll, Elma, and Ashley ample time to give a full statement as to what happened. (RP-161 to 164) Aquil objected as to relevance of the

question. (RP-161 to 164) The prosecutor also inquired of Deputy Gosch as to who he took statements from and whether they had ample opportunity to tell what happened. (RP-182 to 185) He then asked, over Aquil's objection, whether developed any information that they should be looking for anyone other than Aquil. (RP-188) The prosecutor went on further to say that was based on statements made by Elma, Ashley and Carroll. (RP-188)

When Deputy Buckner testified during the defense case, the prosecutor asked Buckner, over Aquil's objection, whether he had interviewed Elma, Ashley and Carroll. (RP-407) He asked Buckner if he had given them every opportunity to tell what happened and if he tried to get every bit of information out them that he could about the incident. (RP-407)

The testimony is irrelevant under ER 401<sup>1</sup> and an impermissible opinion under ER 701<sup>2</sup>

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#### **RULE 401. DEFINITION OF "RELEVANT EVIDENCE"**

##### **RULE 401. DEFINITION OF "RELEVANT EVIDENCE"**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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##### **RULE 701. OPINION TESTIMONY BY LAY WITNESSES**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions

The testimony allows the officer to give an opinion as to the credibility of the witnesses by inferring that they are fabricating their testimony at trial. In general, no witness, lay or expert, may testify as to his or her opinion about the credibility of a witness. City of Seattle v. Heatley, 70 Wn. App. 573, 577-78, 854 P.2d 658 (1993). The jury determines the credibility of witnesses. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

By allowing Carroll's testimony to come in via the officers, it also allows for the admission of hearsay in violation of Crawford, supra.

#### **D. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.**

The prosecutor said in closing argument, "Because the defendant is now trying to go for a mental health defense, you know, he's trying to get evaluated." (RP-500) Aquil promptly objected as to facts not in evidence. (RP-500)

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or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

To establish prosecutorial misconduct in this case, Aquil bears the burden of showing both improper conduct and resulting prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) No evidence was produced at trial that Aquil sought to put forth a mental health defense. The jury was instructed on involuntary intoxication. (CP-27) A prosecutor may not refer to evidence not presented at trial. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor was allowed to argue that Aquil first tried to put forth a mental health defense and when that did not work, he put forth the evidence of the other man being the perpetrator. (RP-499 to 502)

Aquil would respectfully submit that allowing the prosecutor to argue that he pursued a mental health defense without the supporting evidence in the record was highly prejudicial to his case in that it allowed the prosecutor to argue that he had switched defenses and thus was not credible.

#### **E. THE TRIAL COURT FAILED TO VACATE THE ASSAULT IN THE FIRST DEGREE CONVICTION.**

The trial court sentenced Aquil on both attempted murder in the second degree and assault in the first degree, but sentenced Aquil to zero time

on the assault charge due to double jeopardy concerns. (RP-571)

Since that time, the Washington Supreme Court addressed the issue in State v. Turner, 81626-3 (Wash. 8-19-2010) stating:

The double jeopardy clause prohibits the imposition of multiple punishments for the same criminal conduct ("same offense," Wash. Const. art. I, §§ 9). In keeping with this principle, the trial courts in *Turner* and *Faagata* vacated the lesser of two convictions that each defendant received for his offense. The courts also attempted to keep the vacated convictions "alive" for purposes of possible reinstatement should the convictions for the greater offenses be reversed. This contravenes double jeopardy as stated forcefully in *Womac* and clarified herein, and it finds no support in double jeopardy jurisprudence. It remains the law that a lesser conviction previously vacated on double jeopardy grounds may be reinstated if the defendant's conviction for a more serious offense based on the same act is subsequently overturned on appeal.

Aquil would respectfully submit that the assault in the first degree conviction in his case should be vacated on double jeopardy grounds.

**F. AQUIL'S OUT OF STATE CONVICTIONS ARE NOT COMPARABLE TO WASHINGTON FELONY CONVICTIONS.**

Aquil challenges the inclusion of three out of state convictions in his offender score, two burglary charges and a charge of burning or destroying

a dwelling. (CP-59)

RCW 9.94A.525(3) states:

“The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.”

The State bears the burden to prove by a preponderance of evidence the existence and comparability of a defendant's prior out-of-state convictions.

State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999)

Comparability involves a two part test. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). The trial court must first compare the legal elements to the two crimes. Lavery, supra at 255.

If the elements of the foreign crime are not substantially similar to the analogous Washington crime, or if the foreign law is broader than Washington's definition of a particular crime, the sentencing court may look

to factual comparability, the second prong of the test. Lavery, 154 Wn.2d at 255-56; State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)

In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. *Supra* at 258; State v. Farnsworth, 133 Wn. App. 1, 22, 130 P.3d 389 (2006)

In State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007) the sentencing court erroneously included Thiefault's Montana conviction for burglary based on finding legal comparability of the elements of the Montana and Washington burglary statutes and a failure to conduct an analysis of factual comparability between the statutes. In that case, the State submitted the motion for leave to file information, the prosecutor's affidavit, and the judgment, which the appellate courts found were insufficient to establish factual comparability. *Supra* at 417.

In Lavery, *supra* the Washington Supreme Court held that a federal bank robbery charge was not legally or factually comparable to a robbery charge under Washington law, stating:

“As in *Ortega*, Lavery had no motivation in the earlier conviction to pursue defenses that would have been available to him under Washington's robbery statute but were unavailable in the federal prosecution. Furthermore, Lavery neither admitted nor stipulated to facts which established

specific intent in the federal prosecution, and specific intent was not proved beyond a reasonable doubt in the 1991 federal robbery conviction. We conclude that Lavery's 1991 foreign robbery conviction is neither factually nor legally comparable to Washington's second degree robbery and therefore not a strike under the POAA.”

At sentencing the state submitted a “pen pack” which contained a sentencing order indicating the elements of the crime, but no factual basis.

(RP-548)

RCW 9A.48.020 defines the crime of arson in the first degree:

- (1) A person is guilty of arson in the first degree if he or she knowingly and maliciously:
  - (a) Causes a fire or explosion which is manifestly dangerous to any human life, including firefighters; or
  - (b) Causes a fire or explosion which damages a dwelling; or
  - (c) Causes a fire or explosion in any building in which there shall be at the time a human being who is not a participant in the crime; or
  - (d) Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

In contrast, Section 18.2-77 of the Virginia Criminal Code sets forth the crime of burning or destroying dwelling house, etc:

- A. If any person maliciously (i) burns, or by use of any explosive device or substance destroys, in whole or in part, or causes to be burned or destroyed, or (ii) aids, counsels or procures the burning or destruction of any dwelling house or manufactured home whether belonging to himself or another, or any occupied hotel, hospital, mental health facility, or other

house in which persons usually dwell or lodge, any occupied railroad car, boat, vessel, or river craft in which persons usually dwell or lodge, or any occupied jail or prison, or any occupied church or occupied building owned or leased by a church that is immediately adjacent to a church, he shall be guilty of a felony, punishable by imprisonment for life or for any period not less than five years and, subject to subdivision g of §§ 18.2-10, a fine of not more than \$100,000. Any person who maliciously sets fire to anything, or aids, counsels or procures the setting fire to anything, by the burning whereof such occupied dwelling house, manufactured home, hotel, hospital, mental health facility or other house, or railroad car, boat, vessel, or river craft, jail or prison, church or building owned or leased by a church that is immediately adjacent to a church, is burned shall be guilty of a violation of this subsection.

...

The Virginia statute for burning a dwelling does not require that a person acted “knowingly” as required under RCW 9A.48.020 to prove Arson in the State of Washington, thus the two statutes are not comparable and the conviction should not be counted in Aquil’s offender score.

Under the Virginia Criminal Code, burglary is set forth at Section 18.2-89:

Burglary; how punished.

If any person break and enter the dwelling house of another in the nighttime with intent to commit a felony or any larceny therein, he shall be guilty of burglary, punishable as a Class 3 felony; provided, however, that if such person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

RCW 9A.52.030 defines burglary as follows:

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

....

The Virginia statute differs from the Washington Statute in that it requires the “intent to commit a felony or any larceny therein.” Virginia Criminal Code Section 18.2-89 Given that Virginia law requires the intent to commit a felony, not a crime therein, it becomes necessary to determine if the crime Aquil intended to commit was a crime under Washington law, since not all felonies under Virginia law would necessarily be crimes under Washington law. Aquil would respectfully submit that the state failed to meet its burden of proof in establishing comparability of the offenses, therefore the burglary convictions should be excluded from his offender score.

## **V. CONCLUSION**

For the reasons set forth above, Mr. Aquil respectfully requests this court reverse his conviction on the charge of attempted murder in the first degree and assault in the second degree and remand the matter for a new

trial.

Respectfully submitted this 20<sup>th</sup> day of December 2010,

  
\_\_\_\_\_  
SUZAN L. CLARK, WSBA #17476  
Attorney for the Appellant

FILED  
10 DEC 21 04:11:59  
STATE OF WASHINGTON  
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DEPUTY

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

STATE OF WASHINGTON, )  
Appellant, ) NO. 41043-5-II  
v. )  
IBN RASUL AQUIL, )  
Respondent. )  
DECLARATION OF MAILING

I, Judy Adams declare:

That I am a citizen of the United States of America; that I am over the age of 21 years, not a party to the above-entitled action and competent to be a witness therein; that on the 20th day of December, 2010 declarant deposited in the mails of the United States of America properly stamped and addressed envelopes directed to the following named individuals, to-wit:

Mr. David Ponzoha  
Division II Court of Appeals  
950 Broadway, Suite 300, MS TB-06  
Tacoma, Washington 98402-4454  
  
Mr. Ibn Rasul Aquil, DOC# 341729  
Washington State Penitentiary  
1313 North 13<sup>th</sup> Avenue  
Walla Walla, WA 99362

Mr. Mike Kinnie  
Clark County Prosecuting Attorney  
PO Box 5000  
Vancouver, WA 98666-5000

said envelope containing a copy of this declaration and a copy of the Brief of Appellant in this matter.

  
JUDY ADAMS

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