

No. 63235-3-I

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IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION ONE

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IN RE THE PERSONAL RESTRAINT PETITION OF:

GAIL GABRIEL,

Petitioner.

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REPLY BRIEF OF PETITIONER

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Restraint from King County Superior Court  
No. 99-1-02573-0 Sea  
The Hon. Joanne Dubuque, Presiding

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2010 JAN 19 PM 3:11

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**A. ISSUES IN REPLY**

1. Does *In re Farney*, 91 Wn.2d 72, 583 P.2d 1210 (1978), require this Court to apply even a new rule of law regarding double jeopardy retroactively?
2. Does RAP 16.4(d) bar relief?
3. Does the doctrine of “invited error” apply to this case where there is no evidence that Mr. Gabriel’s attorney asked the trial court to punish him multiple times for the same incident?
4. Is the error in this case multiple punishments for the same act as opposed to erroneous instructions?
5. Was Mr. Gabriel prejudiced by the violation of his constitutional right to be free from double jeopardy under U.S. Const. amend. 5 (as applied to the State of Washington through the Due Process Clause of U.S. Const. amend. 14) and Wash. Const. art. 1, § 9?

**B. ARGUMENT IN REPLY**

**1. *The State Fails to Discuss Binding Precedent***

As it did in its initial response to Mr. Gabriel’s pro se PRP, the State argues that *State v. Borsheim*, 140 Wn. App. 357, 165 P.3d 417 (2007), represented an “intervening change in the law” and a “new rule of

criminal procedure,” and that therefore Mr. Gabriel’s PRP is barred by *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 10160, 103 L.Ed.2d 334 (1989) (plurality). *Brief of Respondent*, at 10-23. The State, though, fails to cite, mention, or distinguish controlling Washington precedent holding that double jeopardy rules are to be applied retroactively, even to cases on collateral review. *In re Farney, supra*.

In *Farney*, a 17 year old child was charged with burglary in juvenile court, where he pled guilty and was given a suspended disposition. Two months later, the child was charged with the same crime as an adult in superior court. He pled guilty and received a suspended sentence, which was later revoked, and he was sent to prison. Seven years later, he filed a PRP challenging the second conviction on double jeopardy grounds, based on an intervening United States Supreme Court decision which held that jeopardy attaches to a juvenile guilty plea. 91 Wn.2d at 74-75, citing *Breed v. Jones*, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975). Once the Washington Supreme Court determined that jeopardy had attached at the juvenile proceeding, the only remaining issue was whether the newly announced principle of double jeopardy should be

applied retroactively to Mr. Farney on collateral attack. The Supreme

Court held that it did::

The second issue is whether the rule of *Breed* is to be applied retroactively since the proceedings in this case took place prior to that decision. Again the result is determined by a United States Supreme Court case, *Robinson v. Neil*, 409 U.S. 505, 35 L. Ed. 2d 29, 93 S. Ct. 876 (1973). In that case, the court drew the distinction between a constitutional prohibition against a second trial and procedural rights governing the conduct of a trial. *See* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557, 1585 (1975). We read *Robinson* to mean that when a positive constitutional right, such as the prohibition against placing a defendant in double jeopardy, is violated, the controlling United States Supreme Court decision is retroactively applied. We so hold.

91 Wn.2d at 75-76 (emphasis added).

The Washington Supreme Court has never modified or overruled its holding in *Farney*. As noted in Mr. Gabriel's opening brief (p. 17 n. 8), this holding is binding on this Court because rules regarding retroactivity and collateral review even of federal constitutional issues are a matter of state, not federal, law. *Danforth v. Minnesota*, 552 U.S. 264, 128 S. Ct. 1029, 169 L.Ed.2d 859 (2008). Unless the Washington State Supreme Court overrules *Farney*, this Court is bound to apply new rules regarding double jeopardy retroactively. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (“[O]nce this court has decided an issue of state law,

that interpretation is binding on all lower courts until it is overruled by this court.”).

Accordingly, if the State is correct that *Borsheim* announced a new rule of law regarding double jeopardy, under *Farney*, this rule is to be retroactively applied to Mr. Gabriel’s case.

2. ***If Borsheim Did Not Announce a New Rule, Still, RAP 16.4(d) Does Not Require Dismissal of the Current PRP***

The State suggests that if *Borsheim* did not announce a new principle of law, Mr. Gabriel’s current PRP should be dismissed under RAP 16.4(d) because it is successive (to No. 54713-5-I). *Brief of Respondent* at 10-11. This argument should be rejected.

RAP 16.4(d) provides:

**(d) Restrictions.** The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

RAP 16.4(d) is “simply a procedural rule.” *In re Cook*, 114 Wn.2d 802, 807, 792 P.2d 506 (1990). As with other procedural rules, the rules are to:

be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

RAP 1.2(a). Moreover, this Court may “waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c).” RAP 1.2(c).

RAP 16.4(d) contains within it a provision allowing for successive petitions for “good cause shown.” “Good cause” is usually some cause external to the party. *State v. Dearbone*, 125 Wn.2d 173, 179-80, 883 P.2d 303 (1994). Here, the Acting Chief Judge’s error when dismissing Mr. Gabriel’s earlier PRP is a reason “external” to Mr. Gabriel, something that was not his fault, and thus is “good cause” within the meaning of RAP 16.4(d). Given the preference in this State to decide cases on substantive, rather than procedural, grounds, RAP 16.4(d) should be no impediment to granting relief in this case (especially where the only prejudice to the State would be that it can incarcerate Mr. Gabriel for less time than originally planned).

Moreover, the Acting Chief Judge dismissed Mr. Gabriel’s prior pro se PRP under RAP 16.11(b) after a conclusion that the petition was

time-barred under RCW 10.73.090 (“Because Gabriel filed this petition more than one year after that date [the date of mandate], the petition is untimely and must be dismissed. See RCW 10.73.090.”). Appendix C to *State’s Response to Personal Restraint Petition*. RAP 16.11(b) allows for summary dismissal of petitions that present “frivolous” issues, as opposed to non-frivolous petitions that are to be passed to panels of judges to be determined “on the merits.”

The summary dismissal of a “frivolous” PRP for time-bar reasons does not necessarily involve a determination “on the merits” such that a subsequent petition can be dismissed as “successive.” *See State v. Greening*, 141 Wn.2d 687, 700, 9 P.3d 206 (2000) (where pro se litigant’s prior attempt to raise issue was “not sufficient to command judicial consideration,” and the merits were not reviewed, “the issue was not ‘previously heard and determined’ for purposes of successive petition analysis.”).<sup>1</sup> *See also Slack v. McDaniel*, 529 U.S. 473, 486-88, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (habeas petition filed after first petition dismissed on procedural ground is not a successive petition under 28

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<sup>1</sup> It is significant also that Mr. Gabriel was not represented by counsel throughout prior postconviction proceedings and thus it cannot be said that he is “abusing the writ.” *See In re VanDelft*, 158 Wn.2d 731, 738 n.2, 147 P.3d 573 (2006).

U.S.C. § 2241); *Muniz v. United States*, 236 F.3d 122, 127-29 (2<sup>nd</sup> Cir 2001) (second petition is not successive where first petition was incorrectly dismissed as untimely).

Here, where the specific reason given for dismissal of the earlier PRP was the time-bar provisions of RCW 10.73.090 and where the petition was never presented to a panel of judges for adjudication “on the merits,” the current PRP is not successive.<sup>2</sup>

### **3. Mr. Gabriel’s Attorney Did Not “Invite” Error**

The State argues that Mr. Gabriel’s attorney proposed instructions that contained language similar to Instructions Nos. 12 and 13 and that Mr. Gabriel’s attorney asked the judge to instruct the jurors to re-read their instructions when they inquired about the similarity between the two instructions. Therefore, according to the State’s argument, Mr. Gabriel “invited” the double jeopardy violation. *Brief of Respondent* at 23-25. This argument is without merit.

To begin with, a judgment that imposes multiple punishments for the same act necessarily requires the imposition of an illegal sentence – a

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<sup>2</sup> Mr. Gabriel recognizes that the Acting Chief Judge did address his double jeopardy claims before dismissing the petition on time-bar grounds. Nonetheless, the specific basis for dismissal was that the petition was time-barred, and a panel of judges never addressed the petition “on its merits.”

sentence above what the Legislature authorized. Thus, this case is governed by the line of cases that have held that illegal sentences can be corrected at any time, and which have been hostile toward the State's arguments that a defendant can waive or invite an illegal sentence. *See In re Goodwin*, 146 Wn.2d 861, 87-74, 50 P.3d 618 (2002) ("In keeping with long-established precedent, we adhere to the principles that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based upon a miscalculated offender score (miscalculated upward), and that a defendant cannot agree to punishment in excess of that which the Legislature has established."). *See also* RCW 10.73.100(5) (time limits of RCW 10.73.090 not apply where sentence imposed in excess of court's jurisdiction).

In this regard, the violation of Mr. Gabriel's federal and state constitutional right to be free from double jeopardy (under U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 9) is not based upon Instructions Nos. 12 and 13, instructions to which he has not assigned error. Rather, the double jeopardy violation is caused by the Judgment and Sentence in King County Superior Court No. 99-1-02573-0 Sea (attached in App. E to *Brief of Petitioner*). It is this judgment which imposed

multiple punishments for Counts IV and V (and increased the sentences for Counts I and II), and it is the judgment, not the instructions or verdict forms, which cause the double jeopardy violation.

It was not error to instruct the jury on multiple counts for the same act – the double jeopardy violation only occurred when judgment was entered on more than one of those counts. *See State v. Johnson*, 113 Wn. App. 482, 488-89, 54 P.3d 155 (2002) (jury verdicts on multiple counts do not violate double jeopardy if the judgment makes it clear there is but one conviction and does not impose punishment on more than one count, *citing Ball v. United States*, 470 U.S. 856, 865, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)); *State v. Martin*, 149 Wn. App. 689, 693-96, 205 P.3d 931 (2009) (“In a single proceeding, the State may bring multiple charges arising from the same criminal conduct. [Footnote omitted] However, state and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. . . . The State may bring multiple charges arising from the same criminal conduct, [footnote

omitted] but courts may not enter multiple convictions for the same offense without offending double jeopardy”).<sup>3</sup>

There is no place in the record that suggests that Mr. Gabriel (or his lawyer) ever asked the trial court to impose multiple punishments for Counts IV and V (and increase the sentences in Counts I and II). In fact, Mr. Gabriel specifically argued at sentencing that Counts IV and V should only be punished once under the “same criminal conduct” doctrine. RP (12/6/99) 9-13 & App. A (Defendant’s Sentencing Memo). While never arguing that imposing punishment for both Counts IV and V would violate double jeopardy, Mr. Gabriel’s attorney certainly argued against multiple punishments for Counts IV and V and cannot be said to have asked the trial court to impose multiple punishments for the same act.

To be sure, Mr. Gabriel’s trial counsel proposed instructions that contained identical language for Counts IV and V. App. H to *Brief of*

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<sup>3</sup> *Martin* is significant because it holds that not even a plea of guilty can “waive” or “invite” double jeopardy violation. As the Supreme Court recently summarized, when citing *Martin* with approval, “it is not the guilty plea itself that offends double jeopardy but rather the entry of the convictions that violates double jeopardy.” *State v. Hughes*, 166 Wn.2d 675, 681 n.5, 212 P.3d 558 (2009). See also *State v. Knight*, 162 Wn.2d 806, 811-12, 174 P.3d 1167 (2008) (guilty plea does not insulate convictions from collateral attack for violation of double jeopardy because the error goes to the very power of the State to bring a defendant to court).

If a defendant does not “invite” a double jeopardy violation by pleading guilty to two crimes that are based on the same act, proposing identical “to convict” instructions for two counts can hardly be seen as “invited” error.

*Respondent.* However, these instructions merely tracked the charging language for those two counts in the Amended Information (App. A to *Brief of Petitioner*), language that did not distinguish between the acts charged in the two counts. The amended information actually alleged that each count was “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 other.” *Id.* Thus, the charging document, drafted by the prosecutor who tried the case, did not make it clear that Counts IV and V were based on different incidents or acts.

Mr. Gabriel’s trial counsel submitted instructions based upon the specific crimes alleged in the amended information. If the prosecutor’s charging language did not distinguish between the acts alleged in Counts IV and V, Mr. Gabriel’s attorney had no obligation to bring this issue to his attention. *See State v. Hobbs*, 71 Wn. 419, 424, 859 P.2d 73 (1993) (“Defense counsel is an advocate for her client, not a “law clerk” for the prosecutor.”). Similarly, when the jury asked its question about the similarity between the two counts, counsel did not invite any error by asking the court to tell the jury to re-read its instructions. The instructions, as noted, were not erroneous and tracked the charging language.

The State suggests that if the doctrine of “invited error” does not apply here, future defense counsel would have “a strong disincentive to propose jury instructions with the ‘separate and distinct’ language.” *Brief of Respondent* at 24. What this warning ignores is that the State can easily avoid double jeopardy problems in the future if its prosecutors (1) draft charging documents that make clear that the acts alleged in one count are “separate and distinct” from acts in another count and (2) propose their own instructions on the subject.

Mr. Gabriel did not “invite” the double jeopardy violation and the State’s arguments should be rejected.

#### **4. *Mr. Gabriel Can Show Prejudice***

The State’s final argument is that Mr. Gabriel cannot show “prejudice.” However, the prejudice is apparent. Mr. Gabriel’s sentence increased because of the multiple convictions in Counts IV and V. If either Count IV or V were not counted, Mr. Gabriel’s offender score for the remaining counts would have been significantly lower (162 to 216 months (Count I) or 146 to 194 months (Count II and IV or V). Clearly, Mr. Gabriel was prejudiced.

It is also apparent from the jury's question that the jurors did not see a difference between Counts IV and V. RP (10/27/99) 94. This is clear evidence of prejudice and puts to rest the State's claim that there is only speculation that "there is a possibility that the jury based his [Mr. Gabriel's] convictions for Counts IV and V on the same act." *Brief of Respondent* at 26.

The jury's question was rooted in the testimony which was very unclear as to the number of incidents that allegedly took place during the pertinent charging periods in Counts II, IV and V. While it was the State's theory that Mr. Gabriel had sex multiple times with M.B. over a period of days,<sup>4</sup> the only witness who claimed specifically to see such acts, C.H., was hardly a model of clarity on the subject.<sup>5</sup>

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<sup>4</sup> In closing, the prosecutor never argued that each count must involve separate and distinct conduct. While he argued that the act of rape of a child involving C.H. took place the "last night that [s]he was there," and that the alleged videotaping also took place that same night, RP (10/27/99) 37-38, the prosecutor merely argued that the rape of a child counts involving M.B. were based on "the fact that he was, in fact, sexually active with her throughout the time that he was at – that they were staying at the defendant's apartment as she described the fact that she had sex on multiple occasions, providing you with descriptions of particularly the first occasion where she was giving him oral sex underneath the blankets." RP (10/27/99) 38. This argument hardly directed the jurors to determine whether Counts IV and V, both based on the same charging period of March 24 to 26, 1999, involved separate and distinct conduct.

<sup>5</sup> M.B. denied having sex at all with Mr. Gabriel, although she admitted telling a detective she had, but only because the detective "harassed" her. RP (10/25/99) 17-45. The detective testified that, off-tape, M.B. admitted she had both sexual and oral intercourse with Mr. Gabriel "over the weekend" and that "the defendant recorded their

(continued...)

C.H. testified that she saw M.B. give Mr. Gabriel a “blow job” under the blanket. RP (10/20/99) 77-78. When asked if she saw them doing anything else, she answered: “Not really.” *Id.* at 77. When asked if she knew how often she would see them doing “that sort of thing,” she said: “I don’t remember.” *Id.* at 78. She then answered “yeah” to the question if she thought she “saw that happening more than one time.” *Id.* at 78. C.H. also testified that she videotaped M.B. performing oral sex on Mr. Gabriel on the last day that she was at Mr. Gabriel’s apartment. RP (10/20/99) 80, 84-87.

The prosecutor summarized C.H.’s testimony for her, noting the allegation of oral sex on the videotape and the allegation of oral sex under the blankets, and asked if she had “seen them do that sort of thing any other times?” *Id.* at 88. C.H. answered: “I don’t remember.” *Id.* She then agreed with the prosecutor that she had told him on the phone that sexual activity had occurred between Mr. Gabriel and M.B. “almost every day,” but said she did not remember “whether that happened on each of the days.” *Id.* at 88. Later, C.H. was asked if M.B. and Mr. Gabriel were

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<sup>5</sup>(...continued)  
sexual encounter on that Saturday, March 27<sup>th</sup>, 1999, in his apartment unit, with his video equipment.” RP (10/26/99) 48, 57.

sexually active every day, to which she replied that she did not remember. She agreed it was “both days” she was there and admitted she told defense counsel on the phone that it was eight to ten times. RP (10/20/99) at 110-11.

The jury was certainly entitled to believe or disbelieve parts of C.H.’s testimony. It was not bound to believe her one-time claim to defense counsel on the phone that she saw Mr. Gabriel and M.B. have sex eight to ten times.<sup>6</sup> Indeed, some of the jurors evidently did not believe C.H.’s testimony that Mr. Gabriel and M.B. had sexual relations on videotape because the jury did not return a verdict of “guilty” to Count III, the charge of sexual exploitation of a minor. Thus, if there was sufficient evidence at all, the jury was entitled to conclude that Mr. Gabriel and M.B. had sex only twice – once between March 27 and March 28, 1999 (Count II) and once between March 24 and March 26, 1999 (Counts IV and V).

In any case, this Court has already determined that the double jeopardy violation in a case with identical “to convict” instructions does not arise from the “State’s proof or the prosecutor’s arguments.” *State v.*

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<sup>6</sup> Given C.H.’s testimony that Mr. Gabriel went to work during the time that C.H. and M.B. stayed at his apartment, leaving the two girls alone, RP (10/20/99) 79, defense counsel argued to the jury that C.H.’s testimony about seeing Mr. Gabriel have sex with M.B. eight to ten times was not credible. RP (10/27/99) 42.

*Berg*, 147 Wn. App. 923, 935, 198 P.3d 529 (2008). The State’s citation to out-of-state authority, *Brief of Respondent* at 27-28, does not address the issue of the precedential value not only of *Borsheim*, but of this Court’s more recent decision in *Berg*. The State has not given any persuasive reason why the doctrine of stare decisis does not preclude abandoning this Court’s holdings in both of these recent decisions, particularly because, as explained in the opening brief, *Borsheim* and *Berg* were based on statements of law given in prior decisions of this Court and the Supreme Court.<sup>7</sup>

Accordingly, Mr. Gabriel has shown prejudice and relief should be granted under RAP 16.

**C. CONCLUSION**

Mr. Gabriel’s right to be free from double jeopardy, protected by U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 9, has been violated by the judgment in King County Superior Court No. 99-1-02573-0 Sea. Mr. Gabriel did not “invite” this error and he is prejudiced by the error. The judgement should be vacated and the case should be sent to the superior court to (1) vacate either Count IV or Count V, and (2) re-

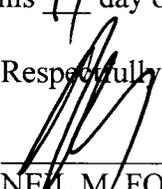
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<sup>7</sup> One wonders why, if the State disagrees with the holdings of *Borsheim* and *Berg*, it never sought review of either decision in the Supreme Court.

sentence Mr. Gabriel for Counts I, II and either IV or V with the proper offender score.

Dated this 19 day of January 2010.

Respectfully submitted,

  
\_\_\_\_\_  
NEIL M. FOX, WSBA NO. 15277  
Attorney for Petitioner

## Appendix A

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION ONE

In re the Personal Restraint of:

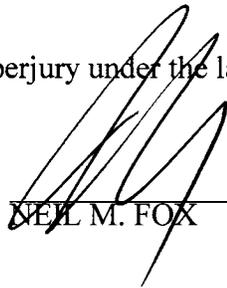
GAIL GABRIEL,  
Petitioner.

} CAUSE NO. 63235-3-I  
} CERTIFICATION OF COUNSEL

I, Neil Fox, do hereby certify that the document attached in Appendix A to this Reply Brief and the documents attached to Appendices A through E of the Brief of Petitioner are true and accurate copies of documents from King County Superior Court Nos. 99-1-02573-0 Sea.

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

1/19/00 Seattle  
DATE AND PLACE

  
NEIL M. FOX

**FILED**

ING COUNTY WASHINGTON

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

GAIL GABRIEL,

Defendant.

No. 99-1-02573-0 SEA

DEFENDANT'S PRE-SENTENCE REPORT

Gail Gabriel comes before the Honorable Joan DuBuque for sentencing on December 6, 1999 at 4:00 pm; pursuant to a jury verdict of guilty to one count of first degree rape of a child, and three counts of second degree rape of a child. He has no prior criminal history. Gail Gabriel's sentencing range is 162-216 months, based on an offender score of 6 and a seriousness level of 12 [first degree rape of a child is assigned a seriousness level of 12, second degree a level of 11].

**DEFENSE RECOMMENDATION**

The defense recommends a sentence at the low end of the sentencing range, 162 months. The defense asks the court to waive imposition of non-mandatory financial obligations.

**OBJECTIONS TO D.O.C. PRE-SENTENCE REPORT**

No Department of Corrections pre-sentence report has been received by defense counsel.

**CONSIDERATIONS FOR DEFENSE RECOMMENDATION**

Other current offenses for which a person is being sentenced are counted as if they were prior convictions for the purpose of the offender score; however, offenses that encompass the "same criminal conduct" are counted as one crime in determining the

DEFENDANT'S PRE-SENTENCE  
REPORT -1

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*Handwritten initials: NB and R*

1 offender score. RCW 9.94A.400(1)(a). Counts four and five encompass the same criminal  
2 conduct, and therefore count as one crime, providing an offender score of six<sup>1</sup>.

3 Counts four and five both charge the offense of second degree rape of a child against  
4 Monique Brooks, to have occurred between March 24-26, 1999.<sup>2</sup> The state spent  
5 considerable time during trial establishing a "relationship" between Monique Brooks and Gail  
6 Gabriel, and showing the relationship was sexual. The state did not present testimony  
7 distinguishing specific instances of sexual activity. Instead, the state stressed the sexual  
8 relationship was ongoing during several days.

9 The phrase "same criminal conduct" is defined as "two or more crimes that require the  
10 same criminal intent, are committed at the same time and place, and involve the same  
11 victim". RCW 9.94A.400(1)(a). Thus, two crimes constitute the same criminal conduct if both  
12 crimes involve: (1) the same objective criminal intent, which can be measured by determining  
13 whether one crime furthered another; (2) the same time and place; and (3) the same victim."  
14 State v. Walden, 69 Wn.App. 183, 847 P.2d 956 (1993); citing State v. Vike, 66 Wn.App.  
15 631, 834 P.2d 48 (1992). See also, State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992).  
16 Under the first prong, the focus is on the extent to which the defendant's criminal intent,  
17 viewed objectively, changed from one crime to the next. State v. Williams, 135 Wn.2d 365,  
18 957 P.2d 216 (1998).

19  
20 The only sensible intent that can be attributed to the acts against Monique Brooks,  
21 and the second degree child rape charge, is the intent to accomplish sexual intercourse. The  
22 evidence did not establish such distinct conduct so as to conclude that Mr. Gabriel's intent at  
23 some point shifted from one crime to another. The state concedes as much by the means  
24 through which it charged Mr. Gabriel in counts four and five, "...which crimes were so closely  
25 connected in respect to time, place and occasion that it would be difficult to separate proof of  
26

27 <sup>1</sup> If each count was scored separately, then Mr. Gabriel's offender score would be nine, providing a sentencing  
range of 240-318 months.

28 <sup>2</sup> Count two covered charging period of March 27-28, 1999.

1 one charge from proof of the other..." It would be intellectually dishonest to accept that the  
2 factual circumstances can be sufficiently separated for purposes of elevating Mr. Gabriel's  
3 offender score, when it was not possible to do so for purposes of charging or proving the  
4 offense.

5 The second and third criteria are indisputable. All evidence pointed to the acts all  
6 taking place at Mr. Gabriel's apartment and the charging period was March 24-26, 1999.  
7 Monique Brooks is obviously the only possible victim.

8 In Walden, supra, the defendant was convicted of rape. The Court found the conduct  
9 charged in counts 1 and 2 constituted the same criminal conduct because the acts occurred  
10 at the same place and *nearly* at the same time, the same victim was involved, and each  
11 count involved the same criminal objective: "When viewed objectively, the criminal intent of  
12 the conduct comprising the two charges is the same: sexual intercourse. Accordingly, the  
13 two crimes of rape in the second degree and attempted rape in the second degree furthered  
14 a single criminal purpose. In addition, one victim was involved and the time and place of the  
15 crimes remained the same." Accordingly, the Court of Appeals remanded for resentencing,  
16 finding the trial court abused its discretion in failing to count the offenses as one crime. State  
17 v. Walden, at 188.

18  
19 Mr. Gabriel's financial resources are exhausted. An order of indigency for appeal will  
20 be presented at sentencing. The defense requests the court impose only mandatory  
21 financial obligations.

22 DATED: November 23, 1999.

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25 DOUGLAS A. STRATEMEYER  
26 Attorney for Defendant  
27 WSBA #21638  
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION ONE

In re the Personal Restraint of:

GAIL GABRIEL,  
Petitioner.

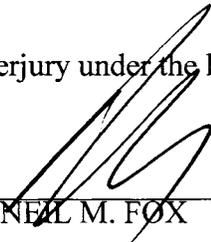
} CAUSE NO. 63235-3-I  
} CERTIFICATE OF SERVICE

I, Neil Fox, do hereby certify that on the 19th day of January 2010 , I served the attached Reply Brief of Petitioner by depositing a copy into the United States Mail, with proper first class postage attached, in an envelope addressed to:

Ann Summers  
King Count Prosecutor's Office  
516 3<sup>rd</sup> Ave. Suite W554  
Seattle WA 98104-2362

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

1/19/10 Seattle  
DATE AND PLACE

  
NEIL M. FOX