

SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,  
 Respondent,  
 v.  
 SERGIO R. PERALTA,  
 Petitioner.

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FILED  
 BY RONALD N. DANIELS  
 18 FEB - 6 AM '19  
 COURT OF APPEALS  
 SEATTLE, WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE  
 STATE OF WASHINGTON FOR KING COUNTY

The Honorable Barbara A. Mack, Judge

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MOTION FOR DISCRETIONARY REVIEW

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SERGIO R. PERALTA  
 Pro Se, Petitioner  
 D.O.C.# 899693  
 Stafford Creek Corrections Center  
 191 Constantine Way  
 Aberdeen, WA 98520

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A. IDENTITY OF PETITIONER

Mr. Sergio Peralta, asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Peralta seeks review of the Division One Court of Appeals unpublished opinion entered on July 29, 2013 allowing appellate counsel to withdrawal pursuant to State v. Theobald, 78 Wn.2d 184, 470 P.2d 188 (1970), and Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). A copy is attached as Appendix A

C. STANDARD OF REVIEW

A petition for review will be accepted by the Supreme Court only: 1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or, 2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or, 3) If a significant questions of law under the Constitution of the State of Washington or of the United States is involved; or, 4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Sections one, two and three apply in this matter.

D. ISSUES PRESENTED FOR REVIEW

1. Did the Appellate Court err in holding trial counsel was not constitutionally ineffective in failing to ensure Mr. Peralta entered into the February 18, 2009 agreed order knowingly, voluntarily and intelligently?

2. Did the Appellate Court err in holding the Prosecution did not breach the terms of the agreed order when they petitioned

the trial court ex parte to add a finding of Sexual Motivation to Count One, Kidnapping in the First Degree?

3. Did the Court of Appeals err in holding Mr. Peralta's fundamental right to be represented by counsel of choice was not violated where the trial court allowed terminated counsel to represent Mr. Peralta's interest at the modification hearing which took place on July 1, 2009?

4. In failing to review the entire record prior to allowing appellate counsel to withdrawal, did the Court of Appeals deviate from the Anders procedure resulting in Mr. Peralta being denied effective assistance of counsel?

5. Did the Trial Court violate Mr. Peralta's federally protected Due Process rights where it failed to ensure Mr. Peralta entered into the agreed order knowingly, voluntarily and intelligently?

#### E. STATEMENT OF THE CASE

In 2007, Mr. Peralta was convicted of multiple offenses and was sentenced to 284 months. See Appendix B, Judgment and Sentence 2007. Subsequently, Mr. Peralta appealed and in 2008, Division One of the Court of Appeals reversed Mr. Peralta's conviction in count 5 for Rape in the First Degree and instructed: "On remand, his counsel may raise the same criminal conduct argument." See Appendix C, Opinion of August 2008.

On remand, on February 18, 2009 to the Superior Court, before the resentencing proceedings began, Mr. Rogge, defense counsel pointed to page one of the Contract/Agreed Order and advised Mr. Peralta that the prosecutor had agreed to drop the sexual motivation finding on count 1, because it was not listed on the contract in exchange for Mr. Peralta not raising the same criminal conduct argument. Also on said document, Mr. Rogge promised Mr. Peralta a sentence reduction and wrote on it, "-11.5 years" in

exchange for the waiver of his rights and the entry of an Agreed Order to a lesser-degree offense of Rape in the Second Degree. The agreed order included the following terms, 1) "The defendant knowingly, intelligently, and voluntarily waives his right to appeal or collaterally attack the judgment and sentence..."; 2) "This agreement is intended to bring finality to this litigation for all parties"; and, 3) "He [Mr. Peralta] shall be resentenced in accordance with this order." See Appendix D, Contract/Agreed Order February 2009.

The only time Mr. Peralta was addressed on the record was where the court briefly informed Mr. Peralta he could not appeal the matter. Id. at 13 line 21-23. See Appendix E, Report of Proceedings 2/18/09.

At the same time the resentencing proceedings were taking place a new judgment and sentence (J&S) was also executed to reflect the terms of the contract/agreed order. The J&S contained a special section to note: "[ ] With a sexual motivation on count(s) \_\_\_\_\_." Both the box and count(s) sections were left unchecked and blank, as per the agreement. Id. at 2. See Appendix F, J&S 2009.

Following sentencing, Mr. Peralta wrote a letter to Mr. Rogge, his defense attorney terminating his representation. See Appendix G, Letter to Mr. Rogge. Mr. Rogge responded stating, "Your case was a win-win and I thought you would be ecstatic with the outcome of 11.5 years off your sentence." See Appendix H, Letter from Mr. Rogge.

Five months later, on July 1, 2009, the prosecutor on the case and Mr. Rogge, without notifying Mr. Peralta entered an ex parte order amending the 2009 J&S to reflect that count 1 (Kidnapping in the First Degree) was committed with sexual motivation. See Appendix I, Order Amending J&S 2009.

On December 1, 2009, Mr. Rogge was replying to the Washington State Bar Association WSBA file No. 09-01439, regarding the 11.5 years Mr. Rogge had promised Mr. Peralta at the February 18, 2009 resentencing hearing. Mr. Rogge affirmed and stated: "The amount of his sentence reduction was in fact more than 11 years gross." See Appendix J, Reply from Mr. Rogge.

In July 2001, upon learning of the modification of his J&S, Mr. Peralta filed a Notice of Appeal challenging the order amending his J&S and alleging he was not informed of the order within the time to appeal. Subsequently, the Court of Appeals, Division One appointed counsel Nielson Broman & Koch to address the timeliness question.

While Mr. Peralta's appeal was initiating, appellate counsel requested a statement from former counsel for Mr. Peralta, Theodore C. Rogge, regarding the proceedings of the February 18, 2009 resentencing hearing and the July 1, 2009 order amending Mr. Peralta's J&S on count 1. On November 16, 2011, Mr. Rogge provided a declaration and stated the following: "when the resentencing occurred that finding was left out." See Appendix K, Declaration of Mr. Rogge.

On April 30, 2012 appellate counsel filed an Anders brief

requesting to withdrawal. On July 29, 2013 Division One of the Court of Appeals adopted the request and dismissed the appeal. See Appendix A, Opinion of July 2013.

This motion for discretionary review ensues.

F. ARGUMENT

1. Did the Appellate Court err in holding trial counsel was not constitutionally ineffective in failing to ensure Mr. Peralta entered into the February 18, 2009 agreed order knowingly, voluntarily and intelligently?

The Sixth Amendment to the United States Constitution and Article I, § 22 of the Washington State Constitution guarantee effective assistance of counsel. In re Pers. of Riley, 122 Wash.2d 772, 779, 863 P.2d 554 (1993); State v. Sardina, 42 Wash.App. 533, 538, 713 P.2d 122 (1986). Denial of effective assistance of counsel is a manifest error affecting a constitutional right, reviewable for the first time on appeal. State v. Holley, 75 Wash.App. 191, 196-97, 876 P.2d 973 (1994). Appellate Courts review ineffective assistance claims de novo. State v. Cross, 156 Wash.2d 580, 605, 132 P.3d 80 (2006).

Washington follows the ineffective assistance of counsel test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1985); In re Pers. Restraint of Stenson, 142 Wash.2d 710, 720, 16 P.3d 1 (2001). In order to show that he received ineffective assistance of counsel, Mr. Peralta must show 1) that defense counsel's conduct was deficient, and 2) that the deficient performance resulted in prejudice. State v. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004).

Due process requires that Mr. Peralta entered into his plea knowingly, voluntarily, and intelligently. In re Pers. Restraint of Isadore, 151 Wash. 2d 294, 297, 88 P.3d 390 (2004), (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 275 (1964)). If it can be shown that Mr. Peralta was not apprised of a direct consequence of his plea, the plea is considered involuntary. State v. Ross, 129 Wash.2d 279, 284, 916 P.2d 405 (1996).

A direct consequence is one that has "definite, immediate and a largely automatic effect on the range of the defendant's punishment. Id. The length of a sentence is a direct consequence of a plea. State v. Mendoza, 157 Wash.2d 582, 590, 141 P.3d 49 (2006).

During plea bargaining, counsel has a duty to assist the defendant "actively and substantially" in determining whether to plead guilty. State v. Osborne, 102 Wash.2d 87, 99, 684 P.2d 684 (1984); State v. Stone, 71 Wash.App. 182, 186, 858 P.2d 267 (1993). It is counsel's responsibility to aid the defendant in evaluating the evidence against him and in discussing the possible direct consequences of a guilty plea. State v. Holley, 75 Wash.App. 191, 197, 876 P.2d 973 (1994).

It is counsel's duty to protect the rights of their clients when entering into plea's thus ensuring pleas are entered into knowingly, voluntarily and intelligently.

Prior to entering into the agreed order dated February 10, 2009, Mr. Peralta was told by Mr. Rogge, his attorney that by

entering into the agreed order he would receive an eleven-in-a-half year sentence reduction; and, that the State would drop the Sexual Motivation finding on Count One, Kidnapping in the First Degree, in exchange for Mr. Peralta's agreement to not raise the same criminal conduct argument on Counts one and two of the information. Based on this understanding, Mr. Peralta entered into the plea.

Mr. Peralta stayed true to his word and did not raise the same criminal conduct argument. However, Mr. Peralta did not receive what his counsel assured him. The sentence reduction Mr. Peralta received was 34 Months, not 11½ Years. Initially, the Sexual Motivation finding was dropped from Mr. Peralta's judgment. But that was only temporary.

On July 1, 2009 in direct violation of the agreed order, the State prompted by the Department of Corrections, moved the trial court to amend Mr. Peralta's Judgment and Sentence to add the sexual motivation finding. The court, outside of Mr. Peralta's presence and knowledge, granted the motion.

Another factor worth mentioning is the fact that Mr. Rogge failed to ensure that the court entered into a colloquy on the record as required by CrR 4.2(e) and RCW 9.94A.431.

In this case, Mr. Rogge the party Mr. Peralta was relying on to ensure that his rights were being protected, did nothing to ensure they were. He made promises which were left unfulfilled, and did not make sure there was a proper colloquy made on the record.

As a result of the deficient representation, Mr. Peralta forfeited his same criminal conduct argument, in exchange for essentially nothing, but empty promises.

He did not received the 11.5 years off his sentence he was promised and his judgment and sentence was amended to again include the finding of sexual motivation. A finding that was supposed to be dropped as a result of the agreed order.

This is ineffective assistance of counsel at its most fundamental level, and the Court of Appeals failure to recognize the potential probability of success is clearly violative of this court's holding in State v. Thebald, 78 Wash.2d 184, 470 P.2d 188 (1970), quoting Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

2. Did the Appellate Court err in holding the Prosecution did not breach the terms of the agreed order when they petitioned the trial court ex parte to add a finding of Sexual Motivation to Count One, Kidnapping in the First Degree?

A plea induced by promises not subsequently fulfilled is both involuntary and inconsistent with due process. It is a manifest injustice to hold a defendant to a plea made in reliance on unfulfilled promises. Any breach of the agreement by the prosecution which the defendant relied upon to his prejudice may entitle him to relief. In re Pers. Restraint of Palodichuk, 22 Wa.App. 107, 589 P.2d 269 (1978). "Plea agreements are more than simple common law contracts. They concern fundamental rights of the accused; and thus, constitutional due process considerations come into play, which require prosecutors to adhere to the terms of

the agreements." Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); See United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986), (Holding: "[T]he defendant's underlying contract right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law").

Simply put, the State must adhere to the terms of a plea agreement. See e.g., State v. Hall, 104 Wash.2d 486, 490, 706 P.2d 1074 (1985); Mabry v. Johnson, 467 U.S. 504, 509, 104 S.Ct. 2543, 2547, 81 L.Ed.2d 437 (1984).

In this matter, Mr. Peralta agreed to the entry of an order wherein he was assured he would see an eleven-in-a-half-year sentence reduction and that the sexual motivation finding tagged onto his First Degree Kidnapping charge would be dropped in exchange for his agreement not to raise that the same criminal conduct doctrine required merger of Counts one and two.

While the Prosecution enjoyed the benefit of Mr. Peralta not raising the issue; Mr. Peralta did not get eleven-in-a-half-years off his sentence. Moreover, after the entry of the February 18 agreed order, the Prosecution, at the prompting of the DOC, moved the trial court to amend Mr. Peralta's Judgment and Sentence to include the finding of sexual motivation, a finding the state agreed to drop.

When a prosecutor breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise; and, hence his conviction cannot stand. State v. Sledge,

133 Wash.2d 828, 839, 947 P.2d 1199 (1997).

The prosecutor breached the terms of the agreed order. Mr. Peralta relied upon in entering the agreed order. The sexual motivation finding as to count one was to be dropped as evidenced by the agreed order; and he was to receive 11½ years off his sentence as evidenced by the documentation included as Appendix D, H and J. Mr. Peralta did not receive the benefits promised him. It was error for the trial court to allow the modification as it did not comport with the written agreed order and 2009 J&S at issue in this case.

3. Did the Appellate Court err in holding Mr. Peralta's fundamental right to be represented by counsel of choice was not violated where the trial court allowed terminated counsel to represent Mr. Peralta's interest at the modification hearing which took place on July 1, 2009?

The Constitution guarantees a fair trial through the Due Process Clause, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), (quoting U.S. Const. Amend. VI).

The United States Supreme Court has found the counsel clause to have two distinct elements, "the right to effective assistance of counsel" and "the right to select counsel of one's choice." United States v. Gonzalez - Lopez, 548 U.S. 140, 146-48, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

The second-the Right to counsel of choice-was formulated in Wheat v. United States, 486 U.S. 153, 103 S.Ct. 1692, 10 L.Ed.2d 140 (1988), which also discussed some of its limitations. Gonzalez-Lopez, 548 U.S. at 148 n.3, 126 S.Ct. 2557 (1988). Among those limitations are that "defendant may not insist upon representation by an attorney he cannot afford." Wheat, 486 U.S. at 159, 103 S.Ct. 1692.

In Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989), the Court observed that Petitioner does not, nor could it defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel. The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts.

In this matter, Mr. Rogge was hired as private counsel by Mr. Peralta. Mr. Peralta was not an indigent or impecunious defendant. Mr. Peralta later relieved Mr. Rogge from his services. See Appendixes G & H.

Despite this, following the prosecutions motion to amend Mr. Peralta's Judgment and Sentence, the trial court notified Mr. Rogge of the motion and requested his appearance to resolve the matter. No one, not even Mr. Rogge, who no longer worked for Mr. Peralta, bothered to inform Mr. Peralta of the hearing. As such, Mr. Peralta never had an opportunity to retain counsel of choice,

something he had the financial ability to do.

Certainly however, that choice would not have included Mr. Rogge, as Mr. Peralta made it very clear that his services were terminated, as he was not satisfied with his services.

As set forth in Gonzalez-Lopez, it is a violation of the Counsel Clause embedded within the Sixth Amendment to the United States Constitution, to force upon a defendant, such as Mr. Peralta who has the means to retain private counsel, not of his choosing.

Allowing Mr. Rogge to act as counsel clearly prejudiced Mr. Peralta as Mr. Rogge allowed the state to wiggle out of their agreement with Mr. Peralta without so much as an objection. When Mr. Peralta agreed to enter into this agreement he was promised two things. First, Mr. Rogge assured Mr. Peralta that he would net a total sentence reduction of eleven in a half years. This did not happen. Second, Mr. Rogge assured Mr. Peralta that the finding of sexual motivation on the kidnapping charged would be dropped. Initially this occurred. Mr. Rogge however, allowed the State to renege behind Mr. Peralta's back.

Mr. Peralta however kept his word and did not argue that counts one and two encompassed the same criminal conduct. This is what he agreed to forgo in exchange for the benefits he was ultimately denied. This is prejudice at its most basic level.

The Court of Appeal's failure to recognize this violates this court's holding in State v. Theobald, 78 Wash.2d 184, 470 P.2d 188 (1970), quoting Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

Therefore, the Court should allow Mr. Peralta to vacate the agreed order and remand this matter back to the trial court for further proceedings.

4. In failing to review the entire record prior to allowing appellate counsel to withdrawal, did the Court of Appeals deviated from the Anders procedure resulting in Mr. Peralta being denied effective assistance of appellate counsel?

An appeal is frivolous when there are no debatable issues which reasonable minds might differ and the appeal is totally devoid of merit, lending to the proposition that there is not a reasonable probability of reversal. See State v. Rolax, 104 Wn.2d 129, 136, 702 P.2d 1185 (1985). As demonstrated by the arguments and facts laid out above, Mr. Peralta's appeal is not frivolous. It contains debatable issues surrounding the application of an agreed order entered into on February 18, 2009 and its ex parte modification on July 1, 2009.

The Court of Appeals erred in failing to conduct a proper review of the record in this case before permitting appellate counsel to withdrawal pursuant to State v. Theobald, 73 Wn.2d 184, 470 P.2d 188 (1970) and Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). See Appendix A

The record in this case clearly shows that the trial court abused its discretion in allowing the state to violate the terms of the agreed order, and it was error for the Court of Appeals to determine otherwise. Denying a criminal defendant the ability to contest the trial court's fact finding role obviates the clearly settled principle that when constitutional rights are at issue, the

appellate court is obligated to make an independent de novo review of the record to reach its own conclusion of the facts of the case. See e.g., State v. Daugherty, 94 Wn.2d 263, 263 P.2d 649 (1980); State v. Sweet, 90 Wn.2d 282, 289, 581 P.2d 579 (1978).

In reversing Mr. Peralta's judgment and sentence on August 4, 2008 the Court of Appeals reversed count five, Rape in the First Degree and remanded the case for further proceedings. In so doing, the Court of Appeals opted to rule upon Mr. Peralta's claim that counts one and two encompassed the same criminal conduct, determining that Mr. Peralta would be free to raise said issue on remand. See Appendix C

At that time, Mr. Peralta's Judgment and Sentenced entered in 2007 ceased to exist as a final judgment. State v. Harrison, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003). On remand the purpose of the agreed order was to bring an end to the litigation surrounding this case, to ultimately settle the issues identified by the Court of Appeals. The entire foundation of the agreed order rested upon the August 4, 2008 decision, which pursuant to Harrison, supra is the law of this case.

Under the Law of the Case Doctrine, an appellate court's decision is binding on further proceedings in the trial court on remand. State v. Strauss, 119 Wn.2d 401, 412-13, 832 P.2d 78 (1992). This doctrine promotes "the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" Harrison, 148 Wn.2d at 562, 61 P.3d 1104 (quoting Christian v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108

S.Ct. 2166, 100 L.Ed.2d 811 (1988)).

On remand, Mr. Rogge defense counsel for Mr. Peralta, advised that an offer was on the table if Mr. Peralta agreed not to argue that counts one and two encompassed the same criminal conduct the state would drop the sexual motivation finding as to count one and Mr. Peralta would net an eleven in a half year sentence reduction. Based thereupon, Mr. Peralta consented to the entry of the agreed order. See Appendix D

Notice, the agreed order does not contain a sexual motivation finding on count one. This is true for the Judgment and Sentence entered on the same day. See Appendix F This was not a clerical error as the Court of Appeals determined; rather, it was part of the agreement entered into by the parties to this case.

Mr. Rogge provided a declaration where he states, "when the resentencing occurred that finding was left out." See Appendix K

In direct contradiction to the agreed order, the State's argument, which has been adopted by the court of appeals, is that they had the right to amend the Judgment and Sentence because the finding was included on the 2007 Judgment.

The State's position fails for two reasons: 1) the Agreed Order is a contract which is binding on the parties. It does not contain a sexual motivation finding and thus is governed by this Court's holding in State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997); and, 2) Peralta's 2007 Judgment and Sentence ceased to exist as a final judgment on the merits by this court's holding in State v. Harrison, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003), which

controls under the law of the case doctrine.

In addition to the fact that the State breached the agreed order, Mr. Peralta never receive the sentence reduction promised him by Mr. Rogge his defense counsel. Rather, Mr. Peralta received only a sentence reduction of 34 months. Because Mr. Peralta entered into this agreement based upon a false promise it is involuntary under prevailing jurisprudence. See e.g., State v. Lathrop, 125 Wn.App. 353, 104 P.3d 737 (2005), (holding: "When a defendant enters a plea agreement (contract) based upon misinformation affecting the sentencing consequences and the defendant later becomes aware of this misinformation, he or she may choose to either withdraw the plea (contract) or demand specific performance"); see also In Re Pers. Restraint of Bradley, 205 P.3d 123, 165 Wash.2d 934 (2009), (Holding: "Misinformation about the length of a sentence renders a plea (contract) involuntarily").

Not only did the Court of Appeals deny Mr. Peralta a meaningful review of the real issues present in this case, it also denied Mr. Peralta the right to effective assistance of appellate counsel on his direct appeal.

In Gideon v. Wainwright, the U.S. Supreme Court held that the Sixth Amendment right to appellate counsel was both fundamental and an essential part of due process. Id. 372 U.S. 335, 63 S.Ct. 792, 9 L.Ed.2d 799 (1963). Also in Douglas v. California, the U.S. Supreme Court held that the Fourteenth Amendment guarantees a criminal defendant the right to counsel in the first appeal as of right. Id. 372 U.S. 353, 63 S.Ct. 814, 9 L.Ed.2d 811 (1963).

And finally, in Evitts v. Lucey, the U.S. Supreme Court held that a defendant is entitled to effective assistance of counsel in an "appeal as of right". Id. 469 U.S. 387, 397, 105 S.Ct. 830, 83 L.Ed.2d 821 (1965).

In addition to that outlined above, the Court of Appeals also failed to properly consider the fact that the Trial Court failed in its entirety to follow the mandates of CrR 4.2. Failure to comply **fully** with CrR 4.2 requires that the defendant's plea be set aside and his case remanded so that he may plead anew. Wood v. Morris, 87 Wash.2d 501, 511, 554 P.2d 1032 (1976).

The end result of the court of appeals decision entered on July 29, 2013 allowed the state to unlawfully deviate from the agreement they reached with Mr. Peralta inducing him under false pretenses to forego raising the same criminal conduct argument as to counts one and two; deprived Mr. Peralta from properly arguing that his plea was based upon a false promise; and, denied him the right to effective assistance of counsel.

5. Did the Trial Court violate Mr. Peralta's federally protected Due Process rights where it failed to ensure Mr. Peralta entered into the agreed order knowingly, voluntarily and intelligently?

Due process requires under both the state and federal constitution that guilty pleas must be entered intelligently and voluntarily. Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); In re PRP of Montoya, 109 Wash.2d 270, 277, 744 P.2d 340 (1987) U.S. Const. amends. V. XIV; Const. Art. I, § 3. Due process principles are offended by the entry of a guilty plea without an affirmative showing in the record that the

plea was made intelligently and voluntarily. State v. Holley, 75 Wash.App. 191, 197, 876 P.2d 973 (1994).

Because a plea agreement is a contract, issues concerning the interpretation of a plea are questions of law reviewed de novo. State v. Harrison, 148 Wash.2d 550, 556, 61 P.3d 1104 (2005); Tyrrell v. Farmers Ins. Co. of Wash., 140 Wash.2d 129, 133, 944 P.2d 833 (2000).

On August 4, 2008 Division One of the Court of Appeals reversed Mr. Peralta's conviction on count 5-rape in the first degree and instructed:

On remand, his counsel may raise the same criminal conduct argument.

See Appendix C, COA opinion of August 2008.

On remand an agreement was reached by the parties and two promises were made to Mr. Peralta: 1) a sentence reduction of 11.5 years; and, the dismissal of the sexual motivation finding on count 1-Kidnapping in the first degree, in exchange for Mr. Peralta agreeing to the entry of the agreed order and the agreement not to raise the same criminal conduct argument. The agreement was intended to bring finality to the litigation for all parties. See Appendix D.

During the resentencing hearing, Mr. Peralta's defense attorney, Mr. Rogge informed Mr. Peralta that the finding of sexual motivation finding had been dropped as evidenced by the fact that it was not listed on the agreed order. Mr. Rogge also explained that Mr. Peralta would receive an 11.5 year sentence reduction as

evidenced by notation at the top of the agreed order stating "11.5 years." See Appendix D, H, and J.

Plea agreements are contracts. State v. Sledge, 133 Wash.2d 828, 838, 947 P.2d 1199 (1997). A contract is not formed unless there is mutual assent between the contracting parties. Ottgen v. Clover Park Technical College, 84 Wash.App. 214, 219, 928 P.2d 1119 (1996). Mutual assent must be gathered from the outward expression of the parties and not their unexpressed subject intention. City of Everett v. Sumstad's Estate, 95 Wash.2d 853, 855, 631 P.2d 366 (1981).

In this case there is nothing on the record to ascertain whether Mr. Peralta was aware of any other circumstances surrounding the entry of the agreed order other than those articulated to him by his counsel. The only time the trial judge engaged Mr. Peralta was to inform him that he had no right to appeal the matter. See Appendix E, Report of Proceedings.

Due Process requires more than simply filing a copy of the contract with the court. Neither R.C.W. 9.94A.431 nor CrR 4.2, which incorporate essentially the same language, require that the agreement be set forth in writing, but both require the agreement to be stated on the record.

Failure to comply fully with CrR 4.2 requires that the defendant's guilty plea be set aside and his case remanded so that he may plea anew. Wood v. Morris, 87 Wash.2d 501, 511, 554 P.2d 1032 (1976).

G. CONCLUSION

This Court has suggested four indicia of manifest injustice that would allow a defendant to withdraw his guilty plea: 1) the defendant received ineffective assistance of counsel; 2) the defendant did not ratify his plea; 3) the plea was involuntarily; and, 4) the prosecution did not honor the plea agreement. State v. Taylor, 83 Wash.2d 594, 567, 521 P.2d 699 (1974)

Every factor delineated by this court is present in this case. Thus it was improper for the Court of Appeals to permit appellate counsel to withdraw. Mr. Peralta is entitled to withdrawal the agreed order entered into in this matter.

Respectfully Submitted on this 4<sup>th</sup> day of <sup>December</sup>~~November~~, 2013.



Sergio Peralta  
D.O.C.# 899693/H6A 79  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

# APPENDIX – A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 )  
 )  
 SERGIO PERALTA, )  
 )  
 )  
 )  
 Appellant. )

No. 67513-3-I  
DIVISION ONE  
UNPUBLISHED OPINION  
FILED: JUL 29 2013

FILED  
COURT OF APPEALS DIV. 1  
STATE OF WASHINGTON  
2013 JUL 29 AM 10:15

PER CURIAM. Sergio Peralta appeals from an order amending a judgment and sentence entered on July 2, 2009. Peralta's court-appointed attorney has filed a motion to withdraw on the ground that there is no basis for a good faith argument on review. Pursuant to State v. Theobald, 78 Wn.2d 184, 470 P.2d 188 (1970), and Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), the motion to withdraw must:

[1] be accompanied by a brief referring to anything in the record that might arguably support the appeal. [2] A copy of counsel's brief should be furnished the indigent and [3] time allowed him to raise any points that he chooses; [4] the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

State v. Theobald, 78 Wn.2d at 185 (quoting Anders v. California, 386 U.S. at 744).

No. 67513-3-1/2

This procedure has been followed. Peralta's counsel on appeal filed a brief with the motion to withdraw. Peralta was served with a copy of the brief and informed of the right to file a statement of additional grounds for review. Peralta has filed a statement of additional grounds for review.

The facts are accurately set forth in counsel's brief in support of the motion to withdraw. The court has reviewed the briefs filed in this court and has independently reviewed the entire record. The court specifically considered the following potential issues raised by counsel:

1. Whether the trial court violated Peralta's right to be present at the July 2009 entry of the agreed order amending the judgment and sentence?
2. Whether the trial court denied Peralta his right to counsel of choice?

The court also considered the following issues raised by Peralta in his statement of additional grounds on review:

1. Whether Peralta was denied his right to an accurate verbatim report of proceedings?
2. Whether appointed appellate counsel had a conflict of interest?
3. Whether Peralta was denied effective assistance of counsel at the February 18, 2009 resentencing hearing?
4. Whether Peralta voluntarily waived his rights before entry of the agreed order of judgment on the lesser included offense of second degree rape?
5. Whether the State breached the agreed judgment by seeking an amended order restoring the sexual motivation finding?

No. 67513-3-1/3

The potential issues are wholly frivolous. Counsel's motion to withdraw is granted and the appeal is dismissed.

For the court:

Verdine J.  
Appelwhite J.  
COX, J.

# APPENDIX – B

FILED

2007 FEB 21 PM 3:02

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

HW

FEB 21 2007

CERTIFIED COPY TO COUNTY JAIL

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No. 05-1-12344-0 SEA
	)	
Vs.	)	JUDGMENT AND SENTENCE
	)	FELONY
SERGIO RAUL PERALTA,	)	
	)	
	)	Defendant,

I. HEARING

I.1 The defendant, the defendant's lawyer, LAURIE FALL/SCOTT CARTER-ELDRED, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: CHOUNICE WINTNER, CLAUDIO SEWELL

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 10-19-2006 by jury verdict of: guilty

Count No.: I Crime: KIDNAPPING IN THE FIRST DEGREE  
 RCW 9A.44.035 Crime Code: 00616  
 Date of Crime: 11-12-2005 Incident No. \_\_\_\_\_

Count No.: II Crime: INDECENT LIBERTIES  
 RCW 9A.44.020(1)(a) Crime Code: 00854  
 Date of Crime: 11-12-2005 Incident No. \_\_\_\_\_

Count No.: IV Crime: KIDNAPPING IN THE FIRST DEGREE  
 RCW 9A.44.020(1)(b) Crime Code: 00616  
 Date of Crime: 09-01-2005 THROUGH 12-31-2005 Incident No. \_\_\_\_\_

Count No.: V Crime: RAPE IN THE FIRST DEGREE  
 RCW 9A.44.040(1)(b) Crime Code: 00712  
 Date of Crime: 09-01-2005 THROUGH 12-31-2005 Incident No. \_\_\_\_\_

[X] Additional current offenses are attached in Appendix A

**SPECIAL VERDICT or FINDING(S):**

- (a)  While armed with a firearm in count(s) \_\_\_\_\_ RCW 9.94A.510(3).
- (b)  While armed with a deadly weapon other than a firearm in count(s) \_\_\_\_\_ RCW 9.94A.510(4).
- (c)  With a sexual motivation in count(s) I AND IV \_\_\_\_\_ RCW 9.94A.835.
- (d)  A V.U.C.S.A offense committed in a protected zone in count(s) \_\_\_\_\_ RCW 69.50.435.
- (e)  Vehicular homicide  Violent traffic offense  DUI  Reckless  Disregard.
- (f)  Vehicular homicide by DUI with \_\_\_\_\_ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
- (g)  Non-parental kidnapping or unlawful imprisonment with a minor victim. RCW 9A.44.130.
- (h)  Domestic violence offense as defined in RCW 10.99.020 for count(s) \_\_\_\_\_.
- (i)  Current offenses encompassing the same criminal conduct in this cause are count(s) \_\_\_\_\_ RCW 9.94A.589(1)(a).

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): \_\_\_\_\_

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

- Criminal history is attached in Appendix B.
- One point added for offense(s) committed while under community placement for count(s) \_\_\_\_\_

**2.4 SENTENCING DATA:**

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	0	X	51 TO 68		51 TO 68 MONTHS	LIFE AND/OR \$50,000
Count II	10	X	<del>149 TO 198</del> 129-171		<del>149 TO 198</del> MONTHS 129-171	LIFE AND/OR \$50,000
Count IV	0	X	51 TO 68		51 TO 68 MONTHS	LIFE AND/OR \$50,000
Count V	6	XII	162 TO 216		162 TO 216 MONTHS	LIFE AND/OR \$50,000

Additional current offense sentencing data is attached in Appendix C.

**2.5 EXCEPTIONAL SENTENCE (RCW 9.94A.535):**

Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) \_\_\_\_\_. Findings of Fact and Conclusions of Law are attached in Appendix D. The State  did  did not recommend a similar sentence.

**III. JUDGMENT**

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

The Court DISMISSES Count(s) 4 - MERGES w/ COUNT 5

## IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

## 4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.  
 Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.  
 Restitution to be determined at future restitution hearing on (Date) \_\_\_\_\_ at \_\_\_\_\_ m.  
 Date to be set.  
 Defendant waives presence at future restitution hearing(s).  
 Restitution is not ordered.  
 Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

## 4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a)  \$\_\_\_\_\_, Court costs;  Court costs are waived; (RCW 9.94A.030, 10.01.160)  
 (b)  \$100 DNA collection fee;  DNA fee waived (RCW 43.43.754)(crimes committed after 7/1/02);  
 (c)  \$\_\_\_\_\_, Recoupment for attorney's fees to King County Public Defense Programs;  
 Recoupment is waived (RCW 9.94A.030);  
 (d)  \$\_\_\_\_\_, Fine;  \$1,000, Fine for VUCSA;  \$2,000, Fine for subsequent VUCSA;  
 VUCSA fine waived (RCW 69.50.430);  
 (e)  \$\_\_\_\_\_, King County Interlocal Drug Fund;  Drug Fund payment is waived;  
 (RCW 9.94A.030)  
 (f)  \$\_\_\_\_\_, State Crime Laboratory Fee;  Laboratory fee waived (RCW 43.43.690);  
 (g)  \$\_\_\_\_\_, Incarceration costs;  Incarceration costs waived (RCW 9.94A.760(2));  
 (h)  \$\_\_\_\_\_, Other costs for: \_\_\_\_\_

- 4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 500. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:  Not less than \$\_\_\_\_\_ per month;  On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.  
 Court Clerk's trust fees are waived.  
 Interest is waived except with respect to restitution.

4.4 The defendant, having been convicted of a FELONY SEX OFFENSE, is sentenced to the following:

(a) **DETERMINATE SENTENCE** : Defendant is sentenced to a term of confinement in the custody of the  King County Jail  King County *Work/Education Release* (subject to conditions of conduct ordered this date)  Department of Corrections, as follows, commencing:  immediately;  Date: \_\_\_\_\_ by \_\_\_\_\_ a.m. / p.m.

171 months/days on count 2; \_\_\_\_\_ months/days on count \_\_\_\_\_; \_\_\_\_\_ months/days on count \_\_\_\_\_;  
60 months/days on count 7; \_\_\_\_\_ months/days on count \_\_\_\_\_; \_\_\_\_\_ months/days on count \_\_\_\_\_;  
\_\_\_\_\_ months/days on count \_\_\_\_\_; \_\_\_\_\_ months/days on count \_\_\_\_\_; \_\_\_\_\_ months/days on count \_\_\_\_\_.

**ALTERNATIVE CONVERSION - RCW 9.94A.680 (LESS THAN ONE YEAR ONLY):**

\_\_\_\_\_ days of total confinement are hereby converted to:  
 \_\_\_\_\_ days of partial confinement to be served subject to the requirements of the King County Jail.  
 \_\_\_\_\_ days/hours community service under the supervision of the Department of Corrections to be completed as follows:  on a schedule established by the defendant's Community Corrections Officer;  
 \_\_\_\_\_  
 Alternative conversion was not used because:  Defendant's criminal history,  Defendant's failure to appear,  Other: \_\_\_\_\_.

**CONFINEMENT LESS THAN ONE YEAR : COMMUNITY**  **SUPERVISION**, for crimes committed before 7-1-2000,  **CUSTODY**, for crimes committed on or after 7-1-2000, is ordered pursuant to RCW 9.94A.545 for a period of 12 months. The defendant shall report to the Department of Corrections within 72 hours of this date or of his/her release if now in custody; shall comply with all the rules, regulations and conditions of the Department for supervision of offenders (RCW 9.94A.720); shall comply with all affirmative acts required to monitor compliance; and shall otherwise comply with terms set forth in this sentence.

**APPENDIX \_\_\_\_\_**: Additional Conditions are attached and incorporated herein.

**COMMUNITY PLACEMENT / CONFINEMENT OVER ONE YEAR**: pursuant to RCW 9.94A.700, for qualifying crimes committed before 6-6-1996, is ordered for \_\_\_\_\_ months or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer. [24 months for any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 6-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against person defined in RCW 9.94A.440 not otherwise described above.]

**APPENDIX H**: Community Placement conditions are attached and incorporated herein.

**COMMUNITY CUSTODY / CONFINEMENT OVER ONE YEAR**: pursuant to RCW 9.94A.710 for any **SEX OFFENSE** committed after 6-6-96 but before 7-1-2000, is ordered for a period of 36 months or for the period of earned early release awarded under RCW 9.94A.728 whichever is longer.

**APPENDIX H**: Community Custody conditions are attached and incorporated herein.

**COMMUNITY CUSTODY / CONFINEMENT OVER ONE YEAR**: pursuant to RCW 9.94A.715 for qualifying crimes (non RCW 9.94A.712 offenses) committed after 6-30-2000 is ordered for the following established range:

- Sex Offense, RCW 9.94A.030(38) - 36 to 48 months
- Serious Violent Offense, RCW 9.94A.030(37) - 24 to 48 months
- Violent Offense, RCW 9.94A.030(45) - 18 to 36 months
- Crime Against Person, RCW 9.94A.411 - 9 to 18 months
- Felony Violation of RCW 69.50/52 - 9 to 12 months

or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.737.

**APPENDIX H**: Community Custody conditions are attached and incorporated herein.

(b) INDETERMINATE SENTENCE – QUALIFYING SEX OFFENSES occurring after 9/1/01:

The Court having found that the defendant is subject to sentencing under RCW 9.94A.712, the defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing:  immediately; [ ] (Date): \_\_\_\_\_ by \_\_\_\_\_ .m.

Count 1: Minimum Term: ~~90~~ <sup>68</sup> months/days; Maximum Term: \_\_\_\_\_ years/life;

Count 5: Minimum Term: 216 months/days; Maximum Term: \_\_\_\_\_ years/life;

Count \_\_\_\_\_: Minimum Term: \_\_\_\_\_ months/days; Maximum Term: \_\_\_\_\_ years/life;

Count \_\_\_\_\_: Minimum Term: \_\_\_\_\_ months/days; Maximum Term: \_\_\_\_\_ years/life.

[ ] COMMUNITY CUSTODY – pursuant to RCW 9.94A.712 for qualifying SEX OFFENSES committed on or after September 1, 2001, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence as set forth above. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.713, 9.94A.737.

[ ] APPENDIX H: Community Custody conditions are attached and incorporated herein.

4.5 ADDITIONAL CONDITIONS OF SENTENCE

The above terms for counts 1, 5 are consecutive concurrent. TERMS FOR CTS 2, 3, 6, 7, 8 ARE CONCURRENT.

The above terms shall run [ ] CONSECUTIVE [ ] CONCURRENT to cause No.(s) \_\_\_\_\_

The above terms shall run [ ] CONSECUTIVE [ ] CONCURRENT to any previously imposed sentence not referred to in this order.

[ ] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: \_\_\_\_\_

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98.)

[ ] The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The TOTAL of all terms imposed in this cause is 284 months.

Credit is given for  458 days served [ ] days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A.505(6). [ ] Jail term is satisfied – defendant shall be released under this cause.

4.4 4.6 NO CONTACT: For the maximum term of 4FE years, defendant shall have no contact, direct or indirect, in person, in writing, by telephone, or through third parties with: NEEVER HOOKER, JANARD HONFAR, CHAUNICE WINTAKER, [unclear]

[ ] Any minors without supervision of a responsible adult who has knowledge of this conviction.

4.7 **DNA TESTING:** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in **APPENDIX G.**

**HIV TESTING:** For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in **APPENDIX G.**

4.8 **SEX OFFENDER REGISTRATION:**

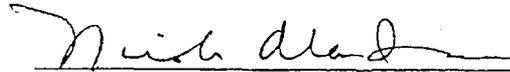
The defendant shall register as a sex offender as ordered in **APPENDIX J.**

4.9  **ARMED CRIME COMPLIANCE, RCW 9.94A.475,.480.** The State's plea/sentencing agreement is  attached  as follows:

\_\_\_\_\_  
\_\_\_\_\_

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 2/16/07

  
\_\_\_\_\_  
JUDGE NICOLE MacINNES  
Print Name:

Presented by:

  
\_\_\_\_\_  
Deputy Prosecuting Attorney, WSBA# 29940  
Print Name: SCOTT LEAST

Approved as to form:

  
\_\_\_\_\_  
Attorney for Defendant, WSBA#  
Print Name: Laurie KF Moeller

FINGERPRINTS



BEST AVAILABLE IMAGE POSSIBLE

RIGHT HAND  
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE: [Signature]  
DEFENDANT'S ADDRESS: D.O.C.

SERGIO RAUL PERALTA

DATED: 2-16-07

[Signature]  
JUDGE, KING COUNTY SUPERIOR COURT

ATTESTED BY: BARBARA MINER,  
SUPERIOR COURT CLERK

BY: [Signature]  
DEPUTY CLERK

CERTIFICATE

I, \_\_\_\_\_,  
CLERK OF THIS COURT, CERTIFY THAT  
THE ABOVE IS A TRUE COPY OF THE  
JUDGEMENT AND SENTENCE IN THIS  
ACTION ON RECORD IN MY OFFICE.  
DATED: \_\_\_\_\_

OFFENDER IDENTIFICATION

S.I.D. NO. \_\_\_\_\_  
DOB: AUGUST 25, 1964  
SEX: M  
RACE: W

\_\_\_\_\_  
CLERK

BY: \_\_\_\_\_  
DEPUTY CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

~~Defendant~~

*Sergio Raul Puella*

Defendant,

No. ~~[CauseNo]~~ *05-1-12344-052A*

JUDGMENT AND SENTENCE  
(FELONY) - APPENDIX A  
ADDITIONAL CURRENT OFFENSES

2.1 The defendant is also convicted of these additional current offenses:

Count No.: VII Crime: RAPE IN THE THIRD DEGREE  
RCW 9A.44.060(1)(a) Crime Code 00762  
Date Of Crime 10-26-2005 Incident No. \_\_\_\_\_

RANGE 51-68 MONTHS (SCORE 7)

Date: 2/16/07

*Nicole MacInnes*  
JUDGE, KING COUNTY SUPERIOR COURT

NICOLE MacINNES

## SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SERGIO RAUL PERALTA,

Defendant,

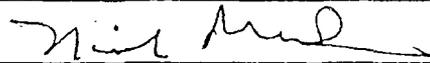
No. 05-1-12344-0 SEA

JUDGMENT AND SENTENCE,  
(FELONY) - APPENDIX B,  
CRIMINAL HISTORY

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
UNLAWFUL SEXUAL INTERCOURSE W/ MINOR	03-22-1988	ADULT	A644725	CALIFORNIA

The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date: 2/14/07
  
 JUDGE, KING COUNTY SUPERIOR COURT

NICOLE MacINNES

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No. 05-1-12344-0 SEA
vs.	)	
	)	JUDGMENT AND SENTENCE
SERGIO RAUL PERALTA,	)	(FELONY) - APPENDIX C,
	)	ADDITIONAL CURRENT OFFENSE(S)
	)	Defendant,
	)	SENTENCING DATA
	)	

2.3 SENTENCING DATA: Additional current offense(s) sentencing information is as follows:

Count	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
VII	87	V	60		60 MONTHS 91-68	5 YEARS AND/OR \$20,000

[ ] The following real and material facts were considered by the court pursuant to RCW 9.94A.530(2):

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Date: 2/16/07

Nicole MacInnes  
 Judge, King County Superior Court

NICOLE MacINNES

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 05-1-12344-0 SEA
	)	
vs.	)	APPENDIX G
	)	ORDER FOR BIOLOGICAL TESTING
SERGIO RAUL PERALTA,	)	AND COUNSELING
	)	
Defendant,	)	

(1) DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2)  HIV TESTING AND COUNSELING (RCW 70.24.340):

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: 2/16/07

Nicole MacInnes  
JUDGE, King County Superior Court  
NICOLE MACINNES

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	No. 05-1-12344-0 SEA
Plaintiff,	)	
	)	
vs.	)	APPENDIX J
	)	JUDGMENT AND SENTENCE
SERGIO PERALTA	)	SEX OFFENDER NOTICE OF
	)	REGISTRATION REQUIREMENTS
Defendant,	)	

**SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with the sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move, work, carry on a vocation, or attend school out of Washington State, you must send written notice within 10 days of establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state, to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 48 hours, excluding weekends and holidays, after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you registered on a weekly basis. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff may require the person to list the locations where the person has stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

Copy Received:

Defendant

Date

JUDGE

NICOLE MacINNES

APPENDIX J

Rev. 11/03 Distribution:

Original/White - Clerk

Yellow - Defendant

Pink - King County Jail

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	No. 05-1-12344-0 SEA
Plaintiff,	)	
	)	
vs.	)	JUDGMENT AND SENTENCE
	)	APPENDIX H
SERGIO RAUL PERALTA,	)	COMMUNITY PLACEMENT OR
	)	COMMUNITY CUSTODY
Defendant,	)	

The Defendant shall comply with the following conditions of community placement or community custody pursuant to RCW 9.94A.700(4), (5):

- 1) Report to and be available for contact with the assigned community corrections officer as directed;
- 2) Work at Department of Corrections-approved education, employment, and/or community service;
- 3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- 4) Pay supervision fees as determined by the Department of Corrections;
- 5) Receive prior approval for living arrangements and residence location;
- 6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.720(2));
- 7) Notify community corrections officer of any change in address or employment; and
- 8) Remain within geographic boundary, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

OTHER SPECIAL CONDITIONS:

- The defendant shall not consume any alcohol.
- Defendant shall have no contact with: \_\_\_\_\_
- Defendant shall remain  within  outside of a specified geographical boundary, to wit: \_\_\_\_\_
- The defendant shall participate in the following crime-related treatment or counseling services: \_\_\_\_\_
- The defendant shall comply with the following crime-related prohibitions: \_\_\_\_\_
- \_\_\_\_\_

Other conditions may be imposed by the court or Department during community custody.

Community Placement or Community Custody shall begin upon completion of the term(s) of confinement imposed herein or when the defendant is transferred to Community Custody in lieu of earned early release. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions [RCW 9.94A.720] and may issue warrants and/or detain defendants who violate a condition [RCW 9.94A.740].

Date: 2/16/07

Nicole MacInnes  
JUDGE NICOLE MacINNES

FILED

2007 FEB 21 PM 3: 23

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

CERTIFIED COPY TO COUNTY JAIL FEB 21 2007

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 05-1-12344-0 SEA

JUDGMENT AND SENTENCE,  
NON-FELONY - Count(s) 3, 6, 7, 8  
(Jail Commitment Only)

v.

SERGIO PERALTA

Defendant.

THIRD AMENDED

The Prosecuting Attorney, the above-named defendant and counsel being present in Court, the defendant having been found guilty of the crime(s) charged in the AMENDED information on by guilty plea / trial and there being no reason why judgment should not be pronounced;

(PLEA DATE)

IT IS ADJUDGED that the defendant is guilty of the crime(s) of: CRIMINAL IMPERSONATION

(3 counts)

and that the Defendant be sentenced to a term of confinement of 12 MONTHS

in the King County Jail, Department of Adult Detention, [ ] in King County Work/Education Release subject to conditions of conduct ordered this date, [ ] in King County Electronic Home Detention subject to conditions of conduct ordered this date, said terms to be served

concurrently [ ] consecutively with each other;

and to be served  concurrently [ ] consecutively with CJS 1, 2, 5, 7 (SEE FELONY J 7S)

The term(s) imposed herein shall be served consecutively with any term not referenced herein.

CREDIT is given for 458 days served [ ] days determined by the King County Jail solely on this cause.

Sentence will commence  immediately [ ] Date: \_\_\_\_\_ no later than \_\_\_\_\_ a.m./p.m.;

Defendant shall pay to the clerk of this Court:

- (1)  Restitution is not ordered;
- Order of Restitution is attached;
- Restitution to be determined at a restitution hearing on (Date) \_\_\_\_\_ at \_\_\_\_\_ m.;
- Date to be set;
- The defendant waives presence at future restitution hearing(s);

(2) \$ \_\_\_\_\_, Court costs;

(3) \$ \_\_\_\_\_, Victim assessment, \$500 for gross misdemeanors and \$100 for misdemeanors;

(4) \$ \_\_\_\_\_, Recoupment for attorney's fees to King County Public Defense Programs;

(5)  \$100 DNA collection fee;

(6) \$ \_\_\_\_\_, Fine;

(7) TOTAL financial obligation: \$500 (TOTAL w/ FEE/INES) \_\_\_\_\_;

The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:  Not less than \$ \_\_\_\_\_ per month;  to be paid in full by (Date) \_\_\_\_\_.

The defendant shall have a biological sample collected for purposed of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in Appendix G (for stalking, harassment, or communicating with a minor for immoral purposes).

Date: 2/16/07

*Neil [Signature]*  
Judge, King County Superior Court  
Print Name: Neil [Print Name]

Presented by: *[Signature]*

Deputy Prosecuting Attorney, WSBA # 29940  
Print Name: Scott Leist

Form Approved for Entry: *[Signature]* 32881

Attorney for Defendant, WSBA #  
Print Name: S. Carter-Eldred

# APPENDIX – C

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

STATE OF WASHINGTON,	)	No. 59642-0-1
	)	
Respondent,	)	MANDATE
	)	
v.	)	King County
	)	
SERGIO PAUL PERALTA,	)	Superior Court No. 05-1-12344-0
	)	
Appellant.	)	<b>Court Action Required</b>

**FILED**  
KING COUNTY, WASHINGTON  
OCT 27 2008

SUPERIOR COURT CLERK  
05-1-12344-0 SEA  
-TK

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on August 4, 2008, became the decision terminating review of this court in the above entitled case on October 17, 2008. An order denying a motion for reconsideration was entered on September 5, 2008. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

c: Dana Lind  
Andrea Vitalich  
Hon. Nicole MacInnes  
Indeterminate Sentencing Review Board

**Court Action Required:** The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 17th day of October, 2008.

**RICHARD D. JOHNSON**  
Court Administrator/Clerk of the Court of Appeals, State of Washington, Division I.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No.59642-0-1
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
	)	
SERGIO PAUL PERALTA,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: August 4, 2008
_____	)	

PER CURIAM. The crime of Kidnapping is not supported by sufficient evidence if the restraint of the victim was merely incidental to another separately charged crime. In this prosecution for multiple offenses, including first degree kidnapping and a first degree rape elevated by the kidnapping, we conclude that Sergio Peralta's restraint and movement of the kidnapping victim were not incidental to his subsequent act of raping her. However, because the jury was instructed on an uncharged means of committing the rape and because the record does not demonstrate which means the jury relied on, we reverse the rape charge and remand for further proceedings consistent with this opinion.

59642-0-1/2

### FACTS

The essential facts are undisputed and will be only briefly summarized here. Based on evidence that Peralta picked up and sexually assaulted three women on Aurora Avenue while posing as a police officer, the State charged him with eight counts: first degree kidnapping and first degree rape of H.H., first degree kidnapping of and indecent liberties with J.H., third degree rape of C.W., and three counts of criminal impersonation.

H.H. testified that in October or November of 2005, she was walking along Aurora Avenue around 10 P.M. when Peralta pulled up in his truck. She agreed to have sex for \$80. Following H.H.'s directions, Peralta drove them a number of blocks east and south to a relatively secluded residential area. Once there, Peralta said he was "vice" and opened his coat to reveal a small badge and what appeared to be a gun. After saying, "[Y]ou don't want me to have to use this, do you?". Peralta placed the gun next to him on the seat. Verbatim Report of Proceedings (VRP) (Oct. 10, 2006) at 63. He told H.H. he was having a busy night taking girls to jail, but he might be able to help her out if she helped him.

Peralta directed H.H. to write down personal information on a pad of paper. He then entered the information into his cell phone as if it were a walkie-talkie. He told H.H. he would not take her to jail if she performed oral sex on him. H.H. was "scared to death" and complied with Peralta's request. Afterward, Peralta told H.H. not to "blow his cover" and promised to "tell other officers it was okay for [her] to work out there" on Aurora. He then took H.H.'s picture with a digital camera. Eventually, Peralta drove

59642-0-1/3

H.H. back to the area where he had picked her up. Before she left the truck, Peralta told her to walk straight ahead without looking back.

A jury convicted Peralta on all eight counts. At sentencing, the State conceded that the kidnapping and rape of H.H. merged. The court accepted the concession, crossed out the kidnapping count on the judgment and sentence, and dismissed it.

### DECISION

Peralta first contends that his convictions for kidnapping and raping H.H. must be reversed because the kidnapping was merely incidental to the rape; therefore, there was insufficient evidence to convict him of either kidnapping or a rape elevated by kidnapping. Although the trial court merged and dismissed the kidnapping conviction and, as discussed below, the rape conviction must be reversed on other grounds, we nevertheless reach Peralta's argument that the kidnapping was "merely incidental" to the rape to determine which charges may be pursued on remand.

To prove that Peralta committed first degree kidnapping as charged in this case, the State had to prove that he abducted H.H. with intent to "facilitate commission of any felony or flight thereafter." RCW 9A.40.020(1)(b). In this context, "abduct" means "to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force." RCW 9A.40.010(2). "Restrain" means to substantially restrict a person's movements without their consent; restraint is without consent if it is accomplished by physical force, intimidation, or deception. RCW 9A.40.010(1). The restraint and/or movement of an alleged kidnapping victim are insufficient to prove kidnapping if they are merely incidental to the

59642-0-1/4

commission of another separately charged crime.<sup>1</sup> To determine whether a kidnapping is incidental to another offense, courts consider the surrounding facts and circumstances and the relevant statutory definitions.<sup>2</sup>

Here, the kidnapping began as soon as Peralta deceived H.H. into thinking he was an ordinary customer and drove her away in his car. At that point, H.H. was being held in a place where she was not likely to be found, particularly at night.<sup>3</sup> This restraint was not merely restraint occurring “during the course of” the rape.<sup>4</sup>

Considering the time and distance involved in moving H.H. from her original location to the location of the rape, we conclude the restraint and movement preceding the rape were not merely incidental to it and, when viewed in a light most favorable to the State, were sufficient to support the kidnapping charge.<sup>5</sup>

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<sup>1</sup> State v. Green, 94 Wn.2d 216, 227, 616 P.2d 628 (1980); State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995).

<sup>2</sup> State v. Harris, 36 Wn. App. 746, 752–53, 677 P.2d 202 (1984); Green, 94 Wn.2d at 224–28.

<sup>3</sup> Harris, 36 Wn. App. At 754 (restraint of victim in car was a place where victim likely would not be found); State v. Whitney, 44 Wn. App. 17, 21, 720 P.2d 853 (1986) (abduction occurred where defendant forced victim into his car, “a place where [she was] not likely to be found”); State v. Billups, 62 Wn. App. 122, 127, 813 P.2d 149 (1991) (children lured into van were in a place where they were not likely to be found).

<sup>4</sup> Green, 94 Wn.2d at 227.

<sup>5</sup> Compare State v. Green, 94 Wn.2d at 227 (brief restraint and movement of victim during course of murder was merely incidental) with Harris, 36 Wn.App. at 754 (evidence of kidnapping sufficient where defendants told victim they would drive her home, but instead drove her to dead end street and raped her; court distinguished Green, stating that “[u]nlike in Green where the victim was moved only 20 to 50 feet to a semipublic place, Jones was moved a much greater distance, restrained by deception and intimidation for a longer period of time, and taken and held in a secluded place where she was not likely to be found.”).

59642-0-1/5

Peralta next contends, and the State concedes, that his rape conviction under count five must be reversed because the jury was instructed on an uncharged alternative means. We agree. A defendant cannot be tried for an uncharged offense.<sup>6</sup> “It is reversible error to try a defendant under an uncharged statutory alternative because it violates the defendant's right to notice of the crime charged.”<sup>7</sup> Such error is prejudicial if “the jury might have convicted the defendant under the uncharged alternative.”<sup>8</sup> In this case, the trial court gave an instruction that included both a charged means of committing the offense (kidnapping) and an uncharged means (displaying what appeared to be a deadly weapon). The State argued both means to the jury, and there is no special verdict or other evidence indicating which means the jury relied on for its verdict. Because the jury could have convicted Peralta on the uncharged means, the rape conviction involving H.H. must be reversed.

Peralta argues that State v. Womac<sup>9</sup> precludes the court on remand from reviving and sentencing him for the kidnapping conviction that it previously merged with the rape conviction and dismissed.<sup>10</sup> This issue is not ripe because the State has identified several options it may pursue on remand, i.e. a sentence for the lesser included offense

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<sup>6</sup> State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986).

<sup>7</sup> State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

<sup>8</sup> Doogan, 82 Wn. App. at 189.

<sup>9</sup> 160 Wn.2d 643, 659, 160 P.3d 40 (2007).

<sup>10</sup> The State disagrees, arguing that Womac's holding does not apply to convictions that are not reduced to judgment.

59642-0-I/6

of second degree rape, a revival of, and sentence for, the kidnapping conviction, or a retrial for first degree rape. Accordingly, we decline to consider Peralta's argument regarding the effect of Womac on this case or address Peralta's claim that his counsel was ineffective for failing to argue that his kidnapping and indecent liberties convictions were the same criminal conduct.<sup>11</sup> On remand, his counsel may raise the same criminal conduct argument.

Peralta's statement of additional grounds for review raises several additional issues. None of them are meritorious, and only one warrants discussion here. Peralta claims his counsel was ineffective for failing to offer a videotape of statements C.W. made to police. He claims the video was "key evidence and favorable for the defendant." Statement of Add'l Grounds for Review at 6. But he fails to provide the video for this court's review. That omission is fatal.<sup>12</sup> In addition, he ignores the fact that his counsel vigorously argued below that the defense should be allowed to impeach C.W. with particular statements on the video and that the court allowed counsel to make limited use of those statements. There is no basis in the record for concluding that Peralta received ineffective assistance of counsel.<sup>13</sup>

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<sup>11</sup> See State v. Gill, 103 Wn. App. 435, 452, 13 P. 3d 646 (2000) (appellate court may decline to consider issue that is not ripe for review).

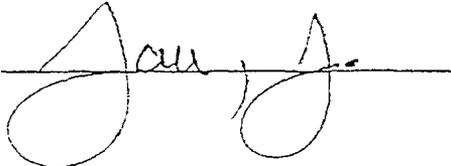
<sup>12</sup> Peralta bears the burden of providing this court with a sufficient record to review the issues raised on appeal. State v. Garcia, 45 Wn. App. 132, 140, 724 P.2d 412 (1986).

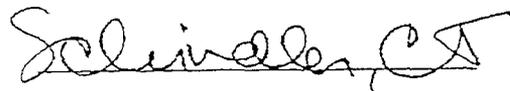
<sup>13</sup> To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice, i.e., a reasonable probability that, but for counsel's omissions, the outcome would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). There is a strong presumption

59642-0-1/7

Reversed in part, affirmed in part, and remanded for further proceedings  
consistent with this opinion.

FOR THE COURT:

  
Cox, J.



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of effective assistance, and deficient performance cannot be established if counsel's  
decisions can be fairly characterized as strategic or tactical. State v. McFarland, 127  
Wn.2d 322, 899 P.2d 1251 (1995).

# APPENDIX – D

11.5 year

Currently  $171 + 216 = 387$

250

137

New Range 210 - 280 -

283

14 years 8.96

11.5 years

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 05-1-12344-0 SEA

vs.

SERGIO PERALTA,

Defendant.

AGREED ORDER ENTERING JUDGMENT ON THE JURY'S FINDING OF GUILTY ON THE LESSER INCLUDED OFFENSE OF RAPE IN THE SECOND DEGREE.

THIS MATTER has come on regularly before the undersigned judge of the above-entitled court upon the motion of both parties. The State of Washington, plaintiff, is represented by Senior Deputy Prosecuting Attorney Zachary C. Wagnild. The defendant, was present and represented by his attorney, Theodore C. Rogge. The court being fully advised in the premises; has been presented with the following agreed facts and information:

On October 29, 2006 the defendant was found guilty by a jury of the following: Ct. I- Kidnapping in the First Degree; Ct. II- Indecent Liberties with Forcible Compulsion; Ct. III- Criminal Impersonation in the First Degree (Gross Misdemeanor); Ct. IV- Kidnapping in the First Degree; Ct. V- Rape in the First Degree; Ct. VI- Criminal Impersonation in the First Degree (Gross Misdemeanor); Ct. VII- Rape in the Third Degree, and Ct. VIII- Criminal Impersonation in the First Degree (Gross Misdemeanor). He was sentenced on February 16, 2007. At that time the court ruled that Ct. IV (Kidnapping in the First Degree) merged with the charge of Rape in the First Degree. Consequently, the court did not sentence the defendant on that count nor was that count used in determining his offender score and standard range.

The defendant subsequently appealed his conviction and the Court of Appeals reversed his conviction on Ct. V, the charge of Rape in the First Degree, due to the fact that the Information charged only one means of committing the offense (Kidnapping) but the jury was instructed on alternative means of committing it (Kidnapping and Deadly Weapon). The Court of Appeals remanded the case for further proceedings as to Ct. V.

AGREED ORDER FINDING DEFENDANT GUILTY OF LESSER INCLUDED OFFENSE.

Daniel T. Satterberg King County Prosecuting Attorney W554 King County Courthouse

FILED

2009 FEB 18 PM 3: 29

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SERGIO PERALTA,

Defendant.

No. 05-1-12344-0 SEA

AGREED ORDER ENTERING  
JUDGMENT ON THE JURY'S  
FINDING OF GUILTY ON THE  
LESSER INCLUDED OFFENSE OF  
RAPE IN THE SECOND DEGREE.

THIS MATTER has come on regularly before the undersigned judge of the above-entitled court upon the motion of both parties. The State of Washington, plaintiff, is represented by Senior Deputy Prosecuting Attorney Zachary C. Wagnild. The defendant, was present and represented by his attorney, Theodore C. Rogge. The court being fully advised in the premises; has been presented with the following agreed facts and information:

On October 29, 2006 the defendant was found guilty by a jury of the following: Ct. I- Kidnapping in the First Degree; Ct. II- Indecent Liberties with Forcible Compulsion; Ct. III- Criminal Impersonation in the First Degree (Gross Misdemeanor); Ct. IV- Kidnapping in the First Degree; Ct. V- Rape in the First Degree; Ct. VI- Criminal Impersonation in the First Degree (Gross Misdemeanor); Ct. VII- Rape in the Third Degree, and Ct. VIII- Criminal Impersonation in the First Degree (Gross Misdemeanor). He was sentenced on February 16, 2007. At that time the court ruled that Ct. IV (Kidnapping in the First Degree) merged with the charge of Rape in the First Degree. Consequently, the court did not sentence the defendant on that count nor was that count used in determining his offender score and standard range.

The defendant subsequently appealed his conviction and the Court of Appeals reversed his conviction on Ct. V, the charge of Rape in the First Degree, due to the fact that the Information charged only one means of committing the offense (Kidnapping) but the jury was instructed on alternative means of committing it (Kidnapping and Deadly Weapon). The Court of Appeals remanded the case for further proceedings as to Ct. V.

AGREED ORDER FINDING DEFENDANT GUILTY  
OF LESSER INCLUDED OFFENSE.

Daniel T. Satterberg  
King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 206.9000 FAX (206) 206.0055



1 The parties agree that, regardless of the alternative means issue on the charge of Rape in  
2 the First Degree, the jury necessarily found the defendant guilty of the lesser included offense of  
3 Rape in the Second Degree. They are, therefore, in agreement with the court entering judgment  
4 on that finding of guilty on one count of Rape in the Second Degree. The parties further agree  
5 that Count IV, the count of Kidnapping in the First Degree that was merged due to the conviction  
6 on the reversed count of Rape in the First Degree, will not be "revived" and the defendant will  
7 not be sentenced on this charge nor will it be used to determine his offender score on any of the  
8 other charges..

9 The defendant has been fully advised of his rights at this stage of the proceedings and is  
10 in agreement with this order. He is aware that he will need to be resentenced on this case. He is  
11 further aware that his minimum indeterminate standard range is now 210-280 months and his  
12 maximum is life in prison. The defendant knowingly, intelligently, and voluntarily waives his  
13 right to appeal or collaterally attack the judgment and sentence based on a conviction for Rape in  
14 the Second Degree . This agreement is intended to bring finality to this litigation for all parties.

15 IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendant is not  
16 guilty of the crime of Rape in the First Degree but is guilty of the lesser included offense of Rape  
17 in the Second Degree. He shall be resentenced in accordance with this order. The charge of  
18 Kidnapping in the First Degree that was merged with the charge of Rape in the First Degree at  
19 his previous sentencing hearing shall not be revived and will not be scored in determining his  
20 new sentence. The defendant's waiver of the right to appeal or collaterally attack this order and  
21 his subsequent resentencing is knowing, intelligent, and voluntary.

22 DONE IN OPEN COURT this 18 day of <sup>February</sup>~~January~~ 2009.

23  
24  
25 *B. Mack*  
26 JUDGE

27 Presented by:  
28 *Zachary C. Wagnild*  
29 Zachary C. Wagnild, WSBA #27640  
30 Deputy Prosecuting Attorney

31 Approved for entry:  
32 *Theodore Rogge*  
33 Theodore Rogge, WSBA #  
34 Attorney for Defendant

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# APPENDIX – E

ORIGINAL

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
KING COUNTY  
DEPARTMENT 37 - HON. BARBARA A. MACK JUDGE

- - -

THE STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	CASE NO.:
	)	05-1-12344-0
vs.	)	Resentencing
	)	
SERGIO PAUL PERALTA,	)	
	)	
Defendant.	)	
	)	

Seattle, Washington; Wednesday February 18, 2009;  
Upon the above date, the defendant being present  
in court in custody and represented by counsel,  
THEODORE ROGGE; ZACH WAGNILD, for the State, that the  
following proceedings were held and were audio-recorded:

(TRANSCRIBED BY:  
CARRIE ANN PEREZ, CSR NO. 12979)

1 SEATTLE, WASHINGTON, WEDNESDAY, FEBRUARY 18, 2009

2 8:46 A.M.

3 - - -

4 THE CLERK: The court is now in session.

5 (Inaudible).

6 MR. WAGNILD: Good morning, your Honor. This is the  
7 case of State of Washington versus Sergio Peralta,  
8 Case Number 05-1-12344-0. Present in court is myself  
9 Zach Wagnild for the State. Mr. Peralta is present and  
10 he's in custody, represented by his attorney  
11 Theodore Rogge.

12 Your Honor, I handed back an agreed order, so  
13 hopefully -- and I apologize you didn't get that  
14 earlier. Hopefully it will give the Court some idea of  
15 what's going on.

16 THE COURT: I did.

17 MR. WAGNILD: Good. Okay. So -- so Mr. Peralta,  
18 just briefly for the record, was originally convicted of  
19 numerous counts back on October 29th, 2006, after a jury  
20 trial. So the Court understands it, as sentencing, the  
21 kidnapping in the first degree, I'm not sure I was clear  
22 with this in the -- in my order. But it was actually --  
23 the kidnapping in the first degree was really dismissed  
24 because they said it merged with the rape in the first  
25 degree. Rape in the first degree, that was considered  
26 sort of a more serious offense.

27 He was then sentenced on those charges. He  
28 appealed. It was only the rape in the first degree,

1 which came back, due to the fact that there was a faulty  
2 jury instruction on that charge.

3 When it came back, I had a chance then to meet  
4 several times with Mr. Rogge. We discussed various ways  
5 that we would -- we could proceed. And after there was  
6 a lot of discussion about it, we came upon the idea.  
7 And again, this is sort of a check-through with our  
8 appellate unit as well to make sure that there's good  
9 legal grounds to do this.

10 But for the Court to enter a finding, and it is  
11 agreed request for the Court to make a finding, that  
12 he's actually guilty of the lesser included of rape in  
13 the second degree because the faulty jury instruction  
14 had to do with alternative means of committing rape in  
15 the first degree; in other words, with a weapon or with  
16 kidnapping. That was the jury instruction that was  
17 given.

18 The information only gave the kidnapping in the  
19 first degree, means of committing the charge. So in  
20 other words, they were instructed with more than what he  
21 was charged, so it was sent back. However, regardless  
22 of that finding, the jury necessarily found that he  
23 committed at least a rape in the second degree, in other  
24 words, forceable -- or sexual intercourse by forceable  
25 compulsion. So we're aiming to this -- we're aiming to  
26 this order agreed.

27 And we also -- the State is also agreeing that  
28 the charge that was dismissed, we're not arguing that it

1 should revive, so we're just arguing the Court to keep  
2 that -- or asking the Court to keep that dismissed, to  
3 enter this order then, and then we will proceed. He  
4 will need to be resentenced because it changes the  
5 scoring.

6 THE COURT: All right. Is this your original that  
7 you sent back?

8 MR. WAGNILD: It is -- well, it is not, actually. I  
9 just signed -- I just wanted the Court to have one to  
10 read.

11 THE COURT: Okay.

12 MR. ROGGE: I think this is the original.

13 Your Honor, I would agree with -- although we  
14 have some different opinions as to revival and so forth,  
15 I think the law is pretty clear that -- that there is a  
16 lesser for rape two, it's a lesser included offense.  
17 And so necessarily, I think in order to achieve all our  
18 goals here, that this is the proper way to go about  
19 this.

20 THE COURT: Thank you, sir. I will sign the order  
21 and (inaudible) like to proceed to sentencing now.

22 MR. WAGNILD: I think that's the plan, actually.

23 MR. ROGGE: That's the plan exactly, your Honor.  
24 Thank you.

25 MR. WAGNILD: And did the Court receive, hopefully,  
26 a copy of our sentencing paperwork?

27 THE COURT: From the original case?

28 MR. WAGNILD: No. I was --

1 THE COURT: I just have the (inaudible).

2 MR. WAGNILD: Okay. Good. Again, what really has  
3 changed from the original is that -- in the original  
4 there were charges (inaudible) for consecutive, and that  
5 does not happen anymore.

6 So just very quickly, we are -- there is one  
7 count, which is a determinate count and that is  
8 Count 7. We're asking for 60 months on that count.  
9 That's the rape in the third degree, it's a "Class C"  
10 felony, so we're simply asking for the maximum.

11 On the other Counts, and that's 1, 2 and 5, the  
12 other felony counts, they are all indeterminate  
13 sentences. We're asking for, on Counts 1 and 2, 198  
14 months, and on Count 5, 280 months. That would be the  
15 minimum sentence that we're asking. And then, of  
16 course, because it's indeterminate, the maximum sentence  
17 would be life. And actually, we're asking that all  
18 these charges run concurrently. And that really is also  
19 concurrent with the gross misdemeanors, which we're  
20 asking -- he probably served all his time. But we're  
21 just simply asking the Court to -- to have him serve his  
22 time and run that all concurrently as well.

23 We're asking that when he's released, he will  
24 necessarily be on community custody for the remainder of  
25 his life. We're asking a court order to give him the  
26 sexual deviancy evaluation, by law, recommended  
27 treatment from that evaluation.

28 We, of course, are asking that there be no

1 contact with the victims in this case. I've outlined  
2 that in the PSI. And I will include all the names in  
3 the judgment sentence.

4 Looking through the file, I wasn't seeing that  
5 restitution was an issue the first time through. It  
6 was, but I wasn't finding specifically what I was  
7 looking for. So what I would ask, because this is a  
8 resentencing, as to the Court, if there is an issue that  
9 I missed, in other words, there was -- restitution was  
10 requested and I'm not finding the order, that we be  
11 permitted to come back and ask for restitution within  
12 180 days that's allowed by -- by statute.

13 Of course the court costs and victim penalty  
14 assessment all remains the same. He will be required to  
15 supply his DNA as well as register as a sex offender,  
16 and of course he loses his right to possess a firearm  
17 and to vote.

18 I believe that's the totality of the State's  
19 recommendation, unless the court has any questions.

20 THE COURT: Would you go back. I got -- I see your  
21 60-month recommendation on Count 7. And the other  
22 counts --

23 MR. WAGNILD: That's the lower -- lower part of the  
24 first -- of the same page. So the 60 months is  
25 determinate.

26 THE COURT: (Inaudible.) And a determinate 190  
27 months on 1 and 2 and 280 months on 5.

28 MR. WAGNILD: Yeah. I think it looks like 198

1 months on 1 and 2. It might just be my sloppy  
2 handwriting.

3 THE COURT: Thank you.

4 MR. ROGGE: Thank you, your Honor. This matter did  
5 go to trial, you know, a couple -- several years ago, at  
6 this point in time now. At the time of the sentencing  
7 on this thing originally -- and, your Honor, I don't  
8 want to rehash the whole case and the whole facts. I've  
9 spent a lot of time reading through tons of paperwork  
10 and all the trial transcripts on this matter.

11 The Court, at that point in time, basically  
12 sentenced Mr. Peralta to the lower end of the ranges. I  
13 mean the ranges that he was facing at the time were  
14 basically the same with regard to counts -- let me get  
15 my notes here. With regard to Counts 1 and 2, the  
16 Court -- the Court sentenced Mr. Peralta to 171 months  
17 on those counts, kind of the mid range, I would say, at  
18 the time.

19 So we're asking the Court here to do the same  
20 thing that the -- the trial judge obviously heard all  
21 the facts in this matter. And without rehashing all  
22 those, I think he took into consideration some of the  
23 issues that were raised at trial. This was a stupid  
24 move by Mr. Peralta, he understands that. But it is not  
25 what I would normally see in a -- in a -- in a sex case.

26 This is also with regard to the -- the range  
27 which at (inaudible) now would be the rape two, I  
28 believe, which is the 210 to 280. Again, the range on

1 that is 210 to 280 months. That was the same that he  
2 was facing previously and the Court sentenced him to 216  
3 months on that matter. The difference --

4 THE COURT: The court did what?

5 MR. ROGGE: Sentenced him to 216 months on that  
6 matter. The difference being, of course, is those were  
7 concurrent -- I mean those were consecutive sentences  
8 and based -- now they would be concurrent sentences.

9 So what I would ask the Court here to do is to  
10 basically follow, I guess, maybe the reasoning of the  
11 trial judge, although I cannot tell you what the  
12 reasoning was -- is, and follow that range, which was  
13 kind of -- kind of the mid to lower end of the range on  
14 the -- on the more serious charge, which carries a  
15 maximum of 280 months.

16 Mr. Peralta is, you know, facing -- all of  
17 these are -- well, three of these were indeterminate  
18 sentences. So he's got, you know, a lot of things he's  
19 facing down the future, if he is able to be released.  
20 He understands that he's going to be facing this sexual  
21 deviancy evaluation and treatment, he's going to be  
22 in -- on community custody for the rest of his life  
23 because of these charges, and he's now been in prison  
24 now for -- well, since -- jail for -- how many years  
25 now?

26 MR. PERALTA: About three years and four months.

27 THE COURT: (Inaudible.)

28 MR. PERALTA: Three years and four months.

1 MR. ROGGE: He's already served on these matters.  
2 So I think that's all I really have to say with regard  
3 to this case. And I think maybe Mr. Peralta has  
4 something to say.

5 MR. PERALTA: Yes. Your Honor, I know that I have  
6 done foolishly and I'm, you know, really sorry for what  
7 happened here. Like I said, I've been down for three --  
8 three years and four months and it's really made me  
9 think of what I've done with my life and let -- my  
10 family is also suffering for what I've done and my kids.  
11 And I would really like to have the opportunity to be  
12 reunited with them one -- one day and be there for them  
13 and be a parent. And all I'm asking from you is to have  
14 clemency and a meeting with them.

15 THE COURT: Mr. Peralta, is that (inaudible)?

16 MR. PERALTA: Yes. Thank you.

17 THE COURT: All right. So I want to make sure I've  
18 got straight what we're sentencing on Counts 1 and 2.

19 And the ranges on 1 and 2 are 148 to one hundred and --

20 MR. ROGGE: 149 to 190 --

21 THE COURT: -- to 198; is that correct?

22 MR. WAGNILD: Yes, your Honor.

23 THE COURT: And on Count 7, it's 60 months; correct?

24 MR. WAGNILD: That's right.

25 THE COURT: And I'm sorry, you've got these out of  
26 order. 5 has --

27 MR. WAGNILD: Count 5, which is the 210 to 280.

28 THE COURT: Count 5 is 210. And the original

1 sentence was consecutive --

2 MR. ROGGE: The original sentence was con- --

3 THE COURT: -- for Counts 1 and 5?

4 MR. ROGGE: That's correct, your Honor.

5 THE COURT: I am going to sentence Mr. Peralta as  
6 follows: I am going to take my (inaudible)  
7 from Judge Maccines who was the judge that heard the  
8 trial in this case. And her 1 and 5 were originally  
9 consecutive.

10 I'm going to sentence Mr. Peralta on Counts 1  
11 and 2 to 180 months, concurrent.

12 On Count 5, to 250 months, concurrent.

13 And on Count 7, to 60 months, concurrent.

14 He will be on community custody.

15 MR. WAGNILD: That will be for the rest of his life,  
16 I think, because (inaudible) --

17 THE COURT: The rest of his life. I will order a  
18 sexual deviancy evaluation follow-up. I will order no  
19 contact with the victims listed Whittiker, Sool,  
20 (inaudible), Hauser, Humphrey and Bullock (phonetically  
21 spelled names.)

22 I will prevent restitution not to be presented  
23 at a later date, yet the State finds that they're  
24 (inaudible). Mr. Peralta can waive his presence, if in  
25 fact, we do. I am going over court costs and the  
26 mandatory penalty assessment as well as (inaudible)  
27 collection. I assume that's already --

28 MR. ROGGE: It's already been taken care of. And,

1 your Honor, just for the record, he does waive his  
2 presence for the restitution hearing.

3 THE COURT: Thank you. And I can waive all other  
4 fees, financial (inaudible) including (inaudible).

5 UNIDENTIFIED FEMALE: Your Honor, for my  
6 verification, do you want him to do 180 months each?

7 THE COURT: That's just -- (inaudible.)

8 UNIDENTIFIED FEMALE: Okay.

9 THE COURT: And to -- do you need to resentence on  
10 this page or (inaudible)?

11 MR. WAGNILD: Your Honor, I think to be safe, that  
12 we should. But I have paperwork for that.

13 THE COURT: On the misdemeanor's Counts 3, 6 and  
14 8 -- Mr. Rogge, were you heard on misdemeanor  
15 (inaudible)?

16 MR. ROGGE: Your Honor, the only -- the only thing I  
17 would like to add on the -- on the misdemeanors, I  
18 believe those sentences have already been served. I  
19 think they were actually served prior to even the trial  
20 in this matter. And I would just ask the court to make  
21 it clear for the time he's already served on those.

22 THE COURT: The State is going to pose 12 months on  
23 Counts 3, 6 and 8 as served concurrently with each other  
24 and the Counts 1, 2, 5 and 7.

25 And there is a mandatory victim penalty  
26 assessment of \$100 -- I'm sorry -- \$500 for those three  
27 counts.

28 MR. WAGNILD: Your Honor, I believe that because

1 it's all the same case number --

2 THE COURT: It's (inaudible) sentence.

3 MR. WAGNILD: Right. Did the court impose court  
4 costs and do you know what they are?

5 THE COURT: I did not impose court costs.

6 MR. WAGNILD: Oh, okay.

7 UNIDENTIFIED FEMALE: You did impose costs and fees?

8 THE COURT: I did not. Hang on a second. I imposed  
9 the mandatory victim penalty assessment.

10 UNIDENTIFIED FEMALE: Okay.

11 THE COURT: I do note that Mr. Peralta has signed  
12 the notice of ineligibility to possess firearms and the  
13 loss of his right to vote. And I'm extending that as  
14 well, because also signing the notice of registration of  
15 the presence of a sex offender (inaudible).

16 MR. WAGNILD: And for the record, I'm going to hand  
17 Mr. Peralta both his copy of his notice of ineligibility  
18 to possess a firearm, loss of right to vote, as well as  
19 the Appendix (j) as the requirement for a registered sex  
20 offender.

21 MR. ROGGE: We acknowledge receipt, your Honor.

22 I guess my only question now being because  
23 Mr. Peralta has been back here since November --

24 MR. PERALTA: No. I've been here since November --  
25 no, the last month of October -- the last day of  
26 October, which was...

27 MR. ROGGE: October 31st.

28 MR. PERALTA: Yeah, October 31st.

1 MR. ROGGE: October 31st to today's date. So I  
2 don't know whether we need to include again credit for  
3 time served in the King County Jail once again on the --

4 THE COURT: You'll get credit for all time he served  
5 on this case.

6 MR. WAGNILD: Your Honor, I've checked the box  
7 "2B" as to be determined by the King County Jail. I  
8 know that's what they prefer and --

9 THE COURT: It is.

10 MR. WAGNILD: -- if we all sit down and try to work  
11 it out, we'll come up with three different numbers.

12 THE COURT: It never works.

13 MR. ROGGE: It never works, okay.

14 UNIDENTIFIED FEMALE: (Inaudible.)

15 MR. WAGNILD: That's what I think, yeah.

16 THE COURT: And I know that, Mr. Rogge, that you did  
17 go over this agreed order at length with your client.

18 MR. ROGGE: Yes. We discussed that at length.

19 THE COURT: (Inaudible.)

20 MR. ROGGE: And he understands that there's --

21 THE COURT: And you can't -- you don't have a right  
22 to appeal this?

23 MR. PERALTA: Yeah.

24 MR. ROGGE: He does have a right to appeal the  
25 sentencing on the new charges -- on the new charges.  
26 And he understands he's already exhausted those appeals.  
27 There was an appeal. He did ask for a reconsideration  
28 on that appeal, which was denied as well, so...

1 MR. PERALTA: Your Honor, I wanted to ask you a  
2 question. On your -- do you get labor (phonetic) day  
3 when you spend in King County going to trial. You know,  
4 my last trial I spent about a year and two months in  
5 going to trial. But I don't know how much good time I  
6 got off for that.

7 THE COURT: Well, the jail has its ways of  
8 calculating good time and they include all sorts of  
9 things, including the prior counts, to my understanding.  
10 So the Court cannot calculate --

11 MR. PERALTA: Okay.

12 THE COURT: -- that good time to (inaudible).

13 MR. PERALTA: Okay. Thank you.

14 (A pause in proceedings. Inside conversations  
15 going on.)

16 THE COURT: Here's a community custody section that  
17 should be checked (inaudible).

18 MR. WAGNILD: Yes, your Honor. I think the  
19 confusion in that is that (more than one voice  
20 speaking) -- the court will see that indeterminate.  
21 But -- so we can check that out.

22 (Attorney and defendant are talking amongst  
23 themselves in private during proceedings.)

24 MR. WAGNILD: The Court actually mentioned -- I  
25 think that might have -- yeah. This is the kind of  
26 thing that we'll get it back and get confused because  
27 they get confused. I'd rather just get it back to you.

28 THE COURT: Thank you. And I'll check off the

1 community custody conviction as well (inaudible).

2 MR. WAGNILD: Thank you.

3 UNIDENTIFIED FEMALE: Did you intend to sign (g)?

4 THE COURT: Oh, I have Appendix (a) here. Did I not  
5 sign Appendix (g)?

6 UNIDENTIFIED FEMALE: It was the (inaudible).

7 THE COURT: Thank you for catching that. And I did  
8 sign the agreed order; correct?

9 MR. WAGNILD: You did, your Honor. Thank you.

10 THE COURT: (Inaudible.)

11 MR. WAGNILD: Okay. That's great.

12 THE COURT: Does that complete this --

13 MR. WAGNILD: I think it does. Thank you very much.

14 THE COURT: Thank you.

15 MR. ROGGE: Thank you, your Honor.

16 (The proceedings adjourned at 9:11 a.m.)

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REPORTER'S CERTIFICATE

ORIGINAL

1  
2  
3  
4 I, CARRIE ANN PEREZ, C.S.R. No. 12979, do hereby  
5 certify:

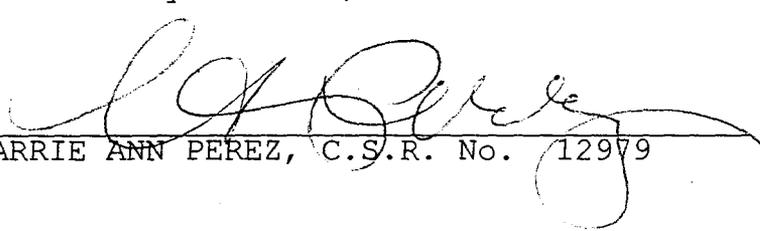
6 That the foregoing proceedings were audio-recorded  
7 on the date therein set forth and was thereafter taken  
8 down by me from the audio-recording in shorthand and  
9 transcribed into typewriting under my direction and  
10 supervision;

11 That the foregoing is a true and correct  
12 transcript, to the best of my ability, of the  
13 audio-recorded proceedings;

14 I further certify that I am not a relative nor an  
15 employee of any attorney of the parties, nor in any way  
16 financially interested in the action.

17 I declare under penalty of perjury under the laws  
18 of California that the foregoing is true and correct.

19 Dated this 12th day of June, 2009.

20  
21   
22 CARRIE ANN PEREZ, C.S.R. No. 12979  
23  
24  
25  
26  
27  
28

---

ATKINSON-BAKER  
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Carrie Ann Perez  
~~Home #~~ \*Cell CSR 12979  
661-645-6268

*Nationwide Court Reporters*

# APPENDIX – F

FILED

2009 FEB 20 AM 10:04

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

HIV

Doc  
COMMITMENT ISSUED **FEB 23 2009**  
PRESENTING STATEMENT & INFORMATION ATTACHED

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No. 05-1-12344-0 SEA
	)	
Vs.	)	JUDGMENT AND SENTENCE
	)	FELONY (FJS)
SERGIO RAUL PERALTA	)	ON RESENTENCING
	)	
	)	SEE MISC JES
	)	
	)	Defendant,

I. HEARING

I.1 The defendant, the defendant's lawyer, THEODORE C. ROGGE, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: \_\_\_\_\_

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 10/19/2006 (counts I, II & VII) and on 02/18/2009 (count V) by jury verdict of:

Count No.: <u>I</u>	Crime: <u>KIDNAPPING IN THE FIRST DEGREE</u>
RCW <u>9A.44.835</u>	Crime Code: <u>00616</u>
Date of Crime: <u>11/12/2005</u>	Incident No. _____

Count No.: <u>II</u>	Crime: <u>INDECENT LIBERTIES</u>
RCW <u>9A.44.100 (1) (a)</u>	Crime Code: <u>00854</u>
Date of Crime: <u>11/12/2005</u>	Incident No. _____

Count No.: <u>V</u>	Crime: <u>RAPE IN THE SECOND DEGREE</u>
RCW <u>9A.44.050 (1) (a)</u>	Crime Code: <u>00744</u>
Date of Crime: <u>09/01/2005 - 12/31/2005</u>	Incident No. _____

Count No.: <u>VII</u>	Crime: <u>RAPE IN THE THIRD DEGREE</u>
RCW <u>9A.44.060 (1) (a)</u>	Crime Code: <u>00762</u>
Date of Crime: <u>10/26/2005</u>	Incident No. _____

[ ] Additional current offenses are attached in Appendix A

**SPECIAL VERDICT or FINDING(S):**

- (a)  While armed with a firearm in count(s) \_\_\_\_\_ RCW 9.94A.510(3).  
 (b)  While armed with a deadly weapon other than a firearm in count(s) \_\_\_\_\_ RCW 9.94A.510(4).  
 (c)  With a sexual motivation in count(s) \_\_\_\_\_ RCW 9.94A.835.  
 (d)  A V.U.C.S.A. offense committed in a protected zone in count(s) \_\_\_\_\_ RCW 69.50.435.  
 (e)  Vehicular homicide  Violent traffic offense  DUI  Reckless  Disregard.  
 (f)  Vehicular homicide by DUI with \_\_\_\_\_ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).  
 (g)  Non-parental kidnapping or unlawful imprisonment with a minor victim. RCW 9A.44.130.  
 (h)  Domestic violence offense as defined in RCW 10.99.020 for count(s) \_\_\_\_\_.  
 (i)  Current offenses encompassing the same criminal conduct in this cause are count(s) \_\_\_\_\_ RCW 9.94A.589(1)(a).

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): \_\_\_\_\_

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

- Criminal history is attached in Appendix B.  
 One point added for offense(s) committed while under community placement for count(s) \_\_\_\_\_

**2.4 SENTENCING DATA:**

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	9	X	149 TO 198		149 TO 198 MONTHS	LIFE AND/OR \$50,000
Count II	9	X	149 TO 198		149 TO 198 MONTHS	LIFE AND/OR \$50,000
Count V	9	XI	210 TO 280		210 TO 280 MONTHS	LIFE AND/OR \$50,000
Count VII	9	V	60 MONTHS		60 MONTHS	5 YRS AND/OR \$10,000

Additional current offense sentencing data is attached in Appendix C.

**2.5 EXCEPTIONAL SENTENCE (RCW 9.94A.535):**

Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) \_\_\_\_\_. Findings of Fact and Conclusions of Law are attached in Appendix D. The State  did  did not recommend a similar sentence.

**III. JUDGMENT**

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

The Court DISMISSES Count(s) \_\_\_\_\_

## IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

## 4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.  
 Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.

Restitution to be determined at future restitution hearing on (Date) \_\_\_\_\_ at \_\_\_\_\_ m.

Date to be set.

Defendant waives presence at future restitution hearing(s).

Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a)  \$ \_\_\_\_\_, Court costs;  Court costs are waived; (RCW 9.94A.030, 10.01.160)  
 (b) \$100 DNA collection fee (RCW 43.43.754)(mandatory for crimes committed after 7/1/02);  
 (c)  \$ \_\_\_\_\_, Recoupment for attorney's fees to King County Public Defense Programs;  
 Recoupment is waived (RCW 9.94A.030);  
 (d)  \$ \_\_\_\_\_, Fine;  \$1,000, Fine for VUCSA;  \$2,000, Fine for subsequent VUCSA;  
 VUCSA fine waived (RCW 69.50.430);  
 (e)  \$ \_\_\_\_\_, King County Interlocal Drug Fund;  Drug Fund payment is waived;  
 (RCW 9.94A.030)  
 (f)  \$ \_\_\_\_\_, State Crime Laboratory Fee;  Laboratory fee waived (RCW 43.43.690);  
 (g)  \$ \_\_\_\_\_, Incarceration costs;  Incarceration costs waived (RCW 9.94A.760(2));  
 (h)  \$ \_\_\_\_\_, Other costs for: \_\_\_\_\_

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 600.-. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:  Not less than \$ \_\_\_\_\_ per month;  On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

Court Clerk's trust fees are waived.

Interest is waived except with respect to restitution.

4.4 The defendant, having been convicted of a FELONY SEX OFFENSE, is sentenced to the following:

(a) **DETERMINATE SENTENCE** : Defendant is sentenced to a term of confinement in the custody of the  
 King County Jail  King County Work/Education Release (subject to conditions of conduct ordered  
this date)  Department of Corrections, as follows, commencing:  immediately;  
 Date: \_\_\_\_\_ by \_\_\_\_\_ a.m. / p.m.

60 months/days on count VII; \_\_\_\_\_ months/days on count \_\_\_\_\_; \_\_\_\_\_ months/days on count \_\_\_\_\_;  
\_\_\_\_\_ months/days on count \_\_\_\_\_; \_\_\_\_\_ months/days on count \_\_\_\_\_; \_\_\_\_\_ months/days on count \_\_\_\_\_;  
\_\_\_\_\_ months/days on count \_\_\_\_\_; \_\_\_\_\_ months/days on count \_\_\_\_\_; \_\_\_\_\_ months/days on count \_\_\_\_\_.

**ALTERNATIVE CONVERSION - RCW 9.94A.680 (LESS THAN ONE YEAR ONLY):**

\_\_\_\_\_ days of total confinement are hereby converted to:  
 \_\_\_\_\_ days of partial confinement to be served subject to the requirements of the King County Jail.  
 \_\_\_\_\_ days/hours community restitution under the supervision of the Department of Corrections to  
be completed as follows:  
 on a schedule established by the defendant's Community Corrections Officer;  
 \_\_\_\_\_  
 Alternative conversion was not used because:  Defendant's criminal history,  Defendant's  
failure to appear,  Other: \_\_\_\_\_

**COMMUNITY CUSTODY** for **FAILURE TO REGISTER AS A SEX OFFENDER** under RCW  
9A.44.130(11)(a) committed on or after 6-7-2006 as to Counts \_\_\_\_\_ (regardless of length of  
confinement) is ordered pursuant to RCW 9.94A.545(2) and RCW 9.94A.715 for the range of 36 to 48  
months.

**FOR CONFINEMENT LESS THAN ONE YEAR** (except for Failure to Register as a Sex  
Offender under RCW 9A.44.130(11)(a) committed on or after 6-7-06) as to Counts \_\_\_\_\_:  
**COMMUNITY**  **SUPERVISION**, for crimes committed before 7-1-2000,  **CUSTODY**, for  
crimes committed on or after 7-1-2000, is ordered pursuant to RCW 9.94A.545 for a period of 12 months.  
The defendant shall report to the Department of Corrections within 72 hours of this date or of his/her  
release if now in custody; shall comply with all the rules, regulations and conditions of the Department for  
supervision of offenders (RCW 9.94A.720); shall comply with all affirmative acts required to monitor  
compliance; and shall otherwise comply with terms set forth in this sentence.

**APPENDIX \_\_\_\_\_**: Additional Conditions are attached and incorporated herein.

**COMMUNITY PLACEMENT (CONFINEMENT OVER ONE YEAR)** as to Counts \_\_\_\_\_:  
pursuant to RCW 9.94A.700, for qualifying crimes committed before 6-6-1996, is ordered for  
\_\_\_\_\_ months or for the period of earned early release awarded pursuant to RCW 9.94A.728,  
whichever is longer. [24 months for any serious violent offense, vehicular homicide, vehicular assault, or  
sex offense prior to 7-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW  
69.50/52, any crime against person defined in RCW 9.94A.440 not otherwise described above.]

**APPENDIX H**, Community Placement conditions, is attached and incorporated herein.

**COMMUNITY CUSTODY (CONFINEMENT OVER ONE YEAR)** as to Counts \_\_\_\_\_:  
pursuant to RCW 9.94A.710 for any **SEX OFFENSE** committed on or after 6-6-1996 but before 7-1-  
2000, is ordered for a period of 36 months or for the period of earned early release awarded under RCW  
9.94A.728 whichever is longer.

**APPENDIX H**, Community Custody conditions, is attached and incorporated herein.

**COMMUNITY CUSTODY (CONFINEMENT OVER ONE YEAR)** as to Counts \_\_\_\_\_: pursuant to RCW 9.94A.715 for qualifying crimes (non RCW 9.94A.712 offenses) committed after 6-30-2000 is ordered for the following established range:

- Sex Offense, RCW 9.94A.030(38): 36 to 48 months
- Serious Violent Offense, RCW 9.94A.030(37): 24 to 48 months
- Violent Offense, RCW 9.94A.030(45): 18 to 36 months
- Crime Against Person, RCW 9.94A.411: 9 to 18 months
- Felony Violation of RCW 69.50/52: 9 to 12 months

or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.737.

**APPENDIX H**, Community Custody conditions, is attached and incorporated herein.

(b) **INDETERMINATE SENTENCE – QUALIFYING SEX OFFENSES** occurring after 9-1-2001:

The Court having found that the defendant is subject to sentencing under RCW 9.94A.712, the defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing:  immediately;  (Date): \_\_\_\_\_ by \_\_\_\_\_ m.

Count I : Minimum Term: 180 months/days; Maximum Term: 1.5 years/life;

Count II : Minimum Term: 180 months/days; Maximum Term: 1.5 years/life;

Count IV : Minimum Term: 250 months/days; Maximum Term: 1.5 years/life;

Count \_\_\_\_\_ : Minimum Term: \_\_\_\_\_ months/days; Maximum Term: \_\_\_\_\_ years/life.

**COMMUNITY CUSTODY**: pursuant to RCW 9.94A.712 for qualifying **SEX OFFENSES** committed on or after September 1, 2001, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence as set forth above. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.713, 9.94A.737.

**APPENDIX H**: Community Custody conditions are attached and incorporated herein.

4.5 **ADDITIONAL CONDITIONS OF SENTENCE**

The above terms for counts I, II, IV, VII are consecutive concurrent

The above terms shall run  CONSECUTIVE  CONCURRENT to cause No.(s) \_\_\_\_\_

The above terms shall run  CONSECUTIVE  CONCURRENT to any previously imposed sentence not referred to in this order.

In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special **WEAPON** finding(s) in section 2.1: \_\_\_\_\_

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (For crimes committed after 6-10-1998.)

The enhancement term(s) for any special **WEAPON** findings in section 2.1 is/are included within the term(s) imposed above. (For crimes before 6-11-1998 only, per In Re Charles)

The **TOTAL** of all terms imposed in this cause is 250 months.

Credit is given for [ ] \_\_\_\_\_ days served  days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A.505(6). [ ] Jail term is satisfied and defendant shall be released under this cause.

4.6 NO CONTACT: For the maximum term of 1.5 years, defendant shall have no contact, direct or indirect, in person, in writing, by telephone, or through third parties with: Chavonice Whittaker, Claudia Sevel, Ashley Busro, Heather Hansen, Sandra Humphrey, Chantell Bullock  
[ ] Any minors without supervision of a responsible adult who has knowledge of this conviction.

4.7 DNA TESTING: The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

HIV TESTING: For sexual offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

4.8 SEX OFFENDER REGISTRATION:  
The defendant shall register as a sex offender as ordered in APPENDIX J.

4.9 [ ] ARMED CRIME COMPLIANCE, RCW 9.94A.475,.480. The State's plea/sentencing agreement is [ ] attached [ ] as follows:  
\_\_\_\_\_  
\_\_\_\_\_

The defendant shall report to an assigned Community Corrections Officer within 72 hours of release from confinement for monitoring of the remaining terms of this sentence.

Date: 2/18/09

[Signature]  
JUDGE  
Print Name: Barbara A. Mack

Presented by:

Approved as to form:

[Signature]  
Deputy Prosecuting Attorney, WSBA# 27642  
Print Name: Zachary C. Vassell

[Signature]  
Attorney for Defendant, WSBA# 20317  
Print Name: Theodor C. Rogge

FINGERPRINTS

BEST AVAILABLE IMAGE POSSIBLE



RIGHT HAND  
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE:  
DEFENDANT'S ADDRESS:

SERGIO RAUL PERALTA

DATED: 2-18-07

ATTESTED BY: BARBARA MINER,  
SUPERIOR COURT CLERK

Barbara A. Mack  
JUDGE, KING COUNTY SUPERIOR COURT  
Barbara A. Mack

BY: Paula Ann O'Ray  
DEPUTY CLERK

CERTIFICATE

OFFENDER IDENTIFICATION

I, \_\_\_\_\_,  
CLERK OF THIS COURT, CERTIFY THAT  
THE ABOVE IS A TRUE COPY OF THE  
JUDGEMENT AND SENTENCE IN THIS  
ACTION ON RECORD IN MY OFFICE.  
DATED: \_\_\_\_\_

S.I.D. NO.  
DOB: AUGUST 25, 1964  
SEX: M  
RACE: W

\_\_\_\_\_  
CLERK

BY: \_\_\_\_\_  
DEPUTY CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SERGIO RAUL PERALTA,

Defendant,

No. 05-1-12344-0 SEA

JUDGMENT AND SENTENCE,  
(FELONY) - APPENDIX B,  
CRIMINAL HISTORY

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
UNLAWFUL SEXUAL INTERCOURSE W/ MINOR	03-22-1988	ADULT	A644725	CALIFORNIA

The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date:

2/18/09

*M. Mack*  
JUDGE, KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SERGIO RAUL PERALTA

Defendant,

No. 05-1-12344-0 SEA

APPENDIX G  
ORDER FOR BIOLOGICAL TESTING  
AND COUNSELING

FAX COPY TO COUNTY JAIL FEB 20 2009

(1) DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2)  HIV TESTING AND COUNSELING (RCW 70.24.340):

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: 2/18/09

M. Mack  
JUDGE, King County Superior Court

**SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 05-1-12344-0 SEA
	)	
vs.	)	JUDGMENT AND SENTENCE
	)	APPENDIX H
SERGIO RAUL PERALTA	)	COMMUNITY PLACEMENT OR
	)	COMMUNITY CUSTODY
Defendant,	)	

The Defendant shall comply with the following conditions of community placement or community custody pursuant to RCW 9.94A.700(4), (5):

- 1) Report to and be available for contact with the assigned community corrections officer as directed;
- 2) Work at Department of Corrections-approved education, employment, and/or community service;
- 3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- 4) Pay supervision fees as determined by the Department of Corrections;
- 5) Receive prior approval for living arrangements and residence location;
- 6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.720(2));
- 7) Notify community corrections officer of any change in address or employment; and
- 8) Remain within geographic boundary, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

**OTHER SPECIAL CONDITIONS:**

- The defendant shall not consume any alcohol.
- Defendant shall have no contact with: \_\_\_\_\_

Defendant shall remain  within  outside of a specified geographical boundary, to wit: \_\_\_\_\_

The defendant shall participate in the following crime-related treatment or counseling services: Defendant shall obtain a sexual deviancy evaluation and follow all recommended treatment

The defendant shall comply with the following crime-related prohibitions: \_\_\_\_\_

\_\_\_\_\_

Other conditions may be imposed by the court or Department during community custody.

Community Placement or Community Custody shall begin upon completion of the term(s) of confinement imposed herein or when the defendant is transferred to Community Custody in lieu of earned early release. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions [RCW 9.94A.720] and may issue warrants and/or detain defendants who violate a condition [RCW 9.94A.740].

Date: 2/18/09

  
JUDGE

**SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

STATE OF WASHINGTON,	)	No. <u>05-1-12344-0 SEA</u>
	)	
Plaintiff,	)	
	)	
vs.	)	APPENDIX J
	)	JUDGMENT AND SENTENCE
<u>Sergio Peralta</u>	)	SEX/ KIDNAPPING OFFENDER NOTICE OF
Defendant,	)	REGISTRATION REQUIREMENTS

**SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. You are required to register your complete residential address with the sheriff of the county where you reside, because you have been convicted of one of the following sex or kidnapping offenses: *Rape 1, 2, or 3; Rape of a Child 1, 2, or 3; Child Molestation 1, 2 or 3; Sexual Misconduct With A Minor 1 or 2; Indecent Liberties; Incest 1 or 2; Voyeurism; Kidnapping 1 or 2 (if victim is a minor and offender is not the minor's parent); Unlawful Imprisonment (if victim is a minor and offender is not the minor's parent); Sexual Exploitation of a Minor; Custodial Sexual Misconduct 1; Criminal Trespass against Children; Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct; Sending, Bringing Into State Depictions of a Minor Engaged in Sexually Explicit Conduct; Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct; Communication with a Minor for Immoral Purposes; Patronizing a Juvenile Prostitute; Failure to Register as a Sex Offender; any gross misdemeanor that is under RCW 9A.28, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030 or RCW 9A.44.130 or a kidnapping offense under 9A.44.130; or any felony with a finding of sexual motivation (RCW 9.94A.835 or RCW 13.40.135).*

**If you are out of custody, you must register immediately upon being sentenced.**

**If you are in custody, you must register within 24 hours of your release.**

**If you change your residence within a county, you must send signed written notice of your change of residence to the county sheriff within 72 hours of moving.**

**If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of the county of your new residence at least 14 days before moving and register with the county sheriff of your new residence within 24 hours of moving. In addition, you must give signed written notice of your change of address to the sheriff of the county where you last registered within 10 days of moving.**

**If you plan to attend a public or private school or institution of higher education in Washington, you are required to notify the county sheriff for the county of your residence within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you are currently attending a public or private school or institution of higher education in Washington, you must notify the county sheriff, for the county where the school is located, immediately.**

**If you lack a fixed residence, you are required to register as homeless. You must also report in person to the sheriff of the county where you registered on a weekly basis. If you are under DOC supervision and lack a fixed residence, you must register in the county where you are being supervised. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county within 24 hours.**

**If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 3 business days after returning to this state or within 24 hours if you are under the jurisdiction of the state department of corrections, the indeterminate sentence review board or the department of social and health services.**

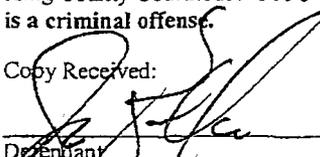
**If you move to a new state, you must register with the new state within 10 days after establishing residence. You must also send written notice, within 10 days of moving to the new state, to the county sheriff with whom you last registered in Washington State.**

**If you are not a resident of Washington, but attend school, are employed, or carry on a vocation in the State of Washington, you must register with the county sheriff for the county where your school, place of employment, or vocation is located.**

**If you are ranked as a Level II or Level III offender (even if you have a fixed residence), you must report, in person, every ninety days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours.**

The King County Sheriff's Office sex offender registration desk is located on the first floor of the King County Courthouse- 516 3<sup>rd</sup> Avenue, Seattle, WA. Failure to comply with registration requirements is a criminal offense.

Copy Received:

 2-18-09  
 Defendant Date

  
 JUDGE

APPENDIX J - Rev. 8/06  
 Distribution:  
 Original/White - Clerk  
 Yellow - Defendant  
 Pink - King County Jail  
 Goldenrod - Prosecutor

FILED  
2009 FEB 20 AM 10:05  
KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

COMMITMENT ISSUED FEB 23 2009

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	No. 05-1-12344-0 SEA
	)	
Plaintiff,	)	JUDGMENT AND SENTENCE,
	)	NON-FELONY - Count(s) <u>III, VI &amp; VIII</u>
v.	)	(Jail Commitment Only)
SERGIO PAUL PERALTA	)	ON RESENTENCING
	)	
Defendant.	)	SEE FELONY JES

The Prosecuting Attorney, the above-named defendant and counsel THEODORE C. ROGGE being present in Court, the defendant having been found guilty of the crime(s) charged in the amended information on 10/19/2006 by trial and there being no reason why judgment should not be pronounced;

IT IS ADJUDGED that the defendant is guilty of the crime(s) of: COUNTS III, VI & VIII CRIMINAL IMPERSONATION IN THE FIRST DEGREE RCW 9A.60.040 (1) (b) (2)

and that the Defendant be sentenced to a term of confinement of 12 months [ ] in the King County Jail, Department of Adult Detention, [ ] in King County Work/Education Release subject to conditions of conduct ordered this date, [ ] in King County Electronic Home Detention subject to conditions of conduct ordered this date, said terms to be served

concurrently [ ] consecutively with each other;

and to be served  concurrently [ ] consecutively with Counts I, II, IV, VII

The term(s) imposed herein shall be served consecutively with any term not referenced herein.

CREDIT is given for [ ] days served [ ] days determined by the King County Jail solely on this cause.

Sentence will commence  immediately [ ] Date: \_\_\_\_\_ no later than \_\_\_\_\_ a.m./p.m.;

Defendant shall pay to the clerk of this Court:

*See Entry  
JWS*

- (1)  Restitution is not ordered;
- Order of Restitution is attached;
- Restitution to be determined at a restitution hearing on (Date) \_\_\_\_\_ at \_\_\_\_\_m.;
- Date to be set;
- The defendant waives presence at future restitution hearing(s);
- (2) \$ \_\_\_\_\_, Court costs;
- (3) \$ \_\_\_\_\_, Victim assessment, \$500 for gross misdemeanors and \$100 for misdemeanors;
- (4) \$ \_\_\_\_\_, Recoupment for attorney's fees to King County Public Defense Programs;
- (5)  \$100 DNA collection fee;
- (6) \$ \_\_\_\_\_, Fine;
- (7) TOTAL financial obligation: \_\_\_\_\_;

The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:  Not less than \$ \_\_\_\_\_ per month;  to be paid in full by (Date) \_\_\_\_\_.

The defendant shall have a biological sample collected for purposed of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in Appendix G (for stalking, harassment, or communicating with a minor for immoral purposes).

Date: 2/18/09

*B. Mack*  
Judge, King County Superior Court  
Print Name: \_\_\_\_\_

Presented by:

*[Signature]*  
Deputy Prosecuting Attorney, WSBA # 27640  
Print Name: Theodore C. Wagbold

Form Approved for Entry:  
*[Signature]*  
Attorney for Defendant, WSBA # 20317  
Print Name: Theodore C. Rogge

Barbara A. Mack

# APPENDIX – G

CLALLAM BAY CORRECTION CENTER  
1830 Eagle Crest Way  
Clallam Bay, Wa. 98326-9724  
April 16, 2009

Thodore C. Rogge  
Rogge Law Office P.S.Inc.  
3211 6th Avenue  
Tacoma, Wa. 98496

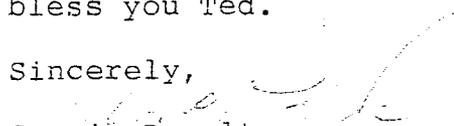
Dear Mr. Rogge:

Salutes to you and your staff. "Greace and peace be multiplied unto you through the knowledge of God, and Jesus our LORD." 2nd Peter, 1:2. Unfortunately there has been a lack of communication between us, because I have not yet received any replieds from your office in regards to my two previous letters I send out one in March 19, 2009, and the other in April 1, 2009, whereby I was requesting some legal documents pertaining to my case.

I understand you must be very busy, if there is a problem getting those documents then by all means please let me know. My problem is that I truly believe that more could have been done in my case. Unfortunately you have not taken the time to give me an explanation for me to think otherwise. Mr. Rogge you were highly recommended by a member of the Gennette's family. This was the main reason I hire you, and why I trust you and never question your integrity.

Now you leave me no other choice but to believe that you are not really interested in helping me get a clear understanding of the matter I have at hand. Do to the fact that you have not made any attempt to contact me to straighten out my concerns, therefore; I hereby terminate your servies. I will no longer need your assistance. Please send me my entire file what ever you have on hand of mine. If your going to credit me any money back from the deposit you received, please send it to my sister, Reyna Peralta at: 39514 Chantilly Ln Palmdale, CA. 93551. Thank you.

Mr. Rogge, believe me I hold no resentment against you for your performance, because this is all a part of God's divine plan. Believe it or not he is in control of our lives. Us meeting is no coincidence everything in life happens for a reason. Look around you and see the signs, for God works in mysterious ways in our lives. Jesus Christ died for our sins in the cross and he rose again from the dead, so that you and I may have eternal life through him. Ask Jesus now! to come in to your heart, and make you a new man. We are at the end of our time here on earth. Jesus wanted me to relate this message to you to day, this is the real reason why we meet. "Seek ye the LORD while he may be found call ye upon him while he is near: Let the wicket forsake his way, and the unrighteous man his thoughts: and let him return unto the LORD, and he will have mercy upon him; and to our God, for he will abundantly pardon." Isaiah, 55:6-7. May the LORD bless you Ted.

Sincerely,  
  
Sergio Peralta

# APPENDIX – H

## Rogge Law Offices

Theodore C. Rogge  
Attorney at Law  
3211 6<sup>th</sup> Avenue  
Tacoma, WA 98406  
Office (253) 272-0503  
Fax (253) 272-1432

April 22, 2009

Sergio Peralta  
DOC # 899693  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA. 98326-9724

Dear Mr. Peralta,

I apologize for not getting back with you sooner, but I have been busy with other matters. My assistant took a week off and I have been working on Felony matters in three different counties. Also, I needed time to organize my thoughts when writing to you. To be honest, I was more than a little shocked that you would even consider attempting to withdraw your plea. I tried to explain this all to your sister, and thought she had a pretty good grasp of how well you did in this negotiated agreement.

First, some of the things you write in your letter are just not possible. It is my opinion that any attempt to withdraw your plea would not only be extremely difficult (if possible at all), but also dangerous to your interests. I don't think you quite understand the breadth of the prior Court of Appeals Decision. As outlined in the letter to you from your previous attorney, the Court of Appeals only stated that the trial court screwed up by not giving the instruction on alternative means to commit Rape 1. It did not say you couldn't be retried on that charge. Additionally, they said that the court's dismissal of the kidnapping charge, after the jury found you guilty, was an error.

Thus, your prior attorney noted the different options the trial court/prosecutors' office had in retrying/resentencing you. Specifically, it was assumed that you would face the kidnapping one charge on retrial or resentencing. The only question they had was whether the prosecutor's office would retry you on the Rape 1 or just sentence you on the underlying Rape 2. Understand that possibility was the sole decision of the prosecutor's office, not yours. So, not only did I avoid you having to face the Rape 1 charge over again, my arguments and legal research with the threat of another appeal, convinced them to abandon the kidnapping charge.

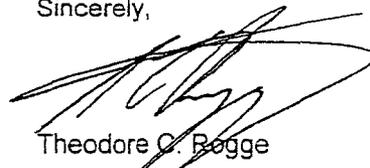
In summary, your sentence was reduced by 137 months not the 86 months "best case scenario" that your appellate attorney thought you could receive.

Assuming that they had to retry you to get the Kidnapping and Rape 1 conviction again (a huge assumption), you had the possibility of facing the original sentence of 171 months being increased to the high end, plus the first degree rape of 216 months, plus 130 months for the kidnapping - if not found to be the same criminal conduct for both the rape and the kidnapping. If you further want to play the game of what if, then understand if you had not agreed to the deal we made, you would have faced the sentenced outlined above (517 months +, more than double your current sentence) on the mere gamble that they had to try you again (not so certain myself) and that the victim wouldn't show up.

Now, all of your sentences run concurrently for 250 months. Your case was a win – win and I thought you would be ecstatic with the outcome of 11.5 years off your sentence.

If you still wish all your papers returned please advise me. I have spent more hours on your case than the monies I received, but have advised your sister I would call it even due to a lot of travel time being necessary. Further, I explained that I would give you a thousand dollar credit if you decided to pursue more relief by way of personal restraint petition. Good luck to you and congratulations on your sentence reduction. If you have any questions let me know.

Sincerely,



Theodore C. Rogge  
Attorney at Law

# APPENDIX – I

FILED

2009 JUL -2 AM 9:40

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

CERTIFIED COPY TO COUNTY JAIL JUL 02 2009

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SERGIO RAUL PERALTA,

Defendant.

No. 05-1-12344-0 SEA

ORDER AMENDING JUDGMENT  
AND SENTENCE (COUNT I ONLY)

THIS MATTER having come on regularly before the undersigned judge of the above-entitled court upon the motion of the State of Washington, plaintiff, for an order Amending the Judgment and Sentence to reflect the jury's finding that Count I - Kidnapping in the First Degree was done with a Sexual Motivation in the above entitled cause, and the court being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Judgment and Sentence shall be amended to reflect that Count I, Kidnapping in the First Degree, was found to have been committed with a sexual motivation. The Judgment and Sentence entered on February 18, 2009 is otherwise accurate.

DONE IN OPEN COURT this 1 day of <sup>July</sup>~~May~~, 2009.

  
JUDGE BARBARA MACK

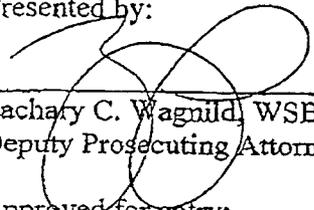
ORDER AMENDING JUDGMENT AND SENTENCE  
(COUNT I ONLY) - 1

**ORIGINAL**

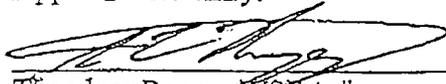
Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

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Presented by:

  
Zachary C. Wagnild, WSBA #27640  
Deputy Prosecuting Attorney

Approved for entry:

  
Theodore Rogge, WSBA #  
Attorney for Defendant

ORDER AMENDING JUDGMENT AND SENTENCE  
(COUNT I ONLY) - 2

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

# APPENDIX – J

## Rogge Law Offices

Theodore C. Rogge  
Attorney at Law  
3211 6<sup>th</sup> Avenue  
Tacoma, WA 98406  
Office (253) 272-0503  
Fax (253) 272-1432

December 1, 2009

RECEIVED

DEC 02 2009

WSBA OFFICE OF  
DISCIPLINARY COUNSEL

Leslie Ching Allen  
Disciplinary Counsel  
WSBA 1325 4th Ave., Suite 600  
Seattle, Washington 98101-2539

Re: Grievance of Reyna Peralta  
WSBA file No. 09-01439

Dear Counsel,

In follow-up to the materials provided to me in the letter dated November 18, 2009, I would like to reiterate a few items that continue to be bothersome. First, Ms Peralta was never my client, she was my client's family member contact for the purposes of payment of fees.

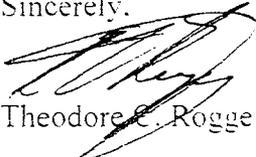
Second, I had never seen the alleged Power of Attorney until after Mr. Peralta attempted (on his own) to set aside the ultimate re-sentence in his criminal case. There is no way that Ms. Peralta gave me that document, or ever referred to it because it is dated after my meeting with her. In fact, it is allegedly executed on October 9, 2009, the day I met Mr. Peralta at Clallam Bay Corrections Center (CBCC). If Mr. Peralta wanted such a document drafted, or had given it to me, I could have notarized it. It just makes no sense.

Third, the sentencing document noted as exhibit "D" from the November 18 letter is only as to counts I and V which ran consecutive to all the other counts not scored, on that document. The amount of his sentence reduction was in fact more than 11 years gross.

Fourth, and finally, I never had a lump sum contract with Mr. Peralta. While at CBCC, Mr. Peralta decided to hire me. I told him I would send my standard fee agreement. He insisted that I draft something right there by hand. All **retainer** quotes were based on an estimated number of hours to complete each task. In fact the \$25,000 quoted for trial retainer was just that, a retainer, not the cost of trial. Mr. Peralta was well aware that I was charging by the hour. In fact, Ms. Peralta and I arrived at the \$1000.00 fee for my visit to CBCC by figuring one day of trial was approximately that much based on an hourly fee of \$150.00

I have numerous concerns with the production of various alleged letters and documents in this matter that are just plain made-up after the fact.

Sincerely,



Theodore C. Rogge

# APPENDIX – K

RECEIVED

NOV 18 2011

Nielsen, Broman & Koch, P.L.L.C.

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7 **IN THE COURT OF APPEALS FOR THE**  
8 **STATE OF WASHINGTON**  
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12 **State of Washington,**  
13 **Respondent,**  
14 **vs.**  
15 **Sergio Peralta,**  
16 **Appellant.**  
17  
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COA No. 67513-3-I

**DECLARATION OF  
THEODORE C. ROGGE**

19  
20  
21 I, Theodore Rogge, am eighteen years of age or older, am competent to testify before the Court, and  
22 make the following Declaration to the Court:

- 23  
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1. I was the attorney of Record for Sergio Peralta in 2009. In February 2009, following reversal of Mr. Peralta's conviction on count V of the information for Rape in the First Degree and remand to the Superior Court, that conviction was replaced with a conviction for Rape of a Child in the Second Degree, and Mr. Peralta was resentenced accordingly. Mr. Peralta was present for that resentencing.
  2. On July 2, 2009, the deputy prosecuting attorney and I agreed to entry of an order amending count I (Kidnapping in the First Degree) to reflect the jury's finding that the crime was

1 committed with sexual motivation. As I recall, the July 2 order was never seen by or signed by  
2 Mr. Peralta. I do not recall that he was ever advised of his right to appeal that order as it merely  
3 clarified the jury's verdict on that count, *and when the resentencing occurred that*  
4 *finding was left out.*

5 I declare under penalty of perjury under the law of the State of Washington that the forgoing is true  
6 and correct.

7 Signed this 16<sup>th</sup> day of Nov., 2011 at Tacoma, Washington.  
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12 Theodore Rogge, WSBA # 20317  
13 Previous counsel for Mr. Peralta  
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DECLARATION OF SERVICE BY MAIL  
GR 3.1

I, Sergio R. Peralta, declare and say:

That on the 4th day of December, 2013, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 89287-3:

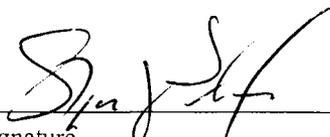
Petitioner's Motion For Discretionary Review with the attached ;  
Appendixes A-K. ;  
\_\_\_\_\_  
\_\_\_\_\_

addressed to the following:

<u>Susan L. Carlson, Clerk</u>	<u>Hon. Richard Jonhson, Clerk</u>	<u>Amy R. Meckling</u>
<u>Supreme Court St. of WA.</u>	<u>Division I, Court of Appeals</u>	<u>King Co. Prosecutor</u>
<u>Temple of Justice</u>	<u>One Union Square</u>	<u>513 3rd Av. W554</u>
<u>P.O. Box 40929</u>	<u>600 University Street</u>	<u>Seattle, WA 98104</u>
<u>Olympia, WA 98504</u>	<u>Seattle, WA 98101</u>	_____

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

DATED THIS 4th day of December, 2013, in the City of Aberdeen, County of Grays Harbor, State of Washington.

  
\_\_\_\_\_  
Signature

Sergio R. Peralta, Petitioner

\_\_\_\_\_  
Print Name

DOC 899693 UNIT H6-79  
STAFFORD CREEK CORRECTIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN WA 98520

13 DEC -6 AM 8:19

BY RONALD R. CARPENTER