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

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*In re the Personal Restraint of*  
WILLIAM HOWARD THOMPSON,  
  
Petitioner.

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REGARDING THE JUDGMENT AND SENTENCE ENTERED BY  
THE SUPERIOR COURT OF KITSAP COUNTY  
Superior Court No. 16-1-00704-8

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BRIEF OF RESPONDENT

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<b>SERVICE</b>	<p>Jared Berkeley Steed 1908 E Madison St Seattle, Wa 98122-2842 Email: <a href="mailto:steedj@nwattorney.net">steedj@nwattorney.net</a></p> <p>William H. Thompson, #735089 Stafford Creek C. C. 191 Constntine Way Aberdeen, WA 98520</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED September 16, 2019, Port Orchard, WA <i>Elizabeth Allen</i> <b>Original e-filed at the Court of Appeals; Copy to counsel listed at left.</b> Office ID #91103 <a href="mailto:kcpa@co.kitsap.wa.us">kcpa@co.kitsap.wa.us</a></p>
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**I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether recorded communication between Thompson and the victim was properly admitted at trial?

**II. RESPONSE**

The State respectfully moves this court for an order dismissing the petition with prejudice because the nonconstitutional claim presented lacks merit.

**III. STATEMENT OF THE CASE**

**A. PROCEDURAL HISTORY<sup>1</sup>**

William Howard Thompson was charged in the original information filed in Kitsap County Superior Court with second degree rape of a child, domestic violence and first degree incest, domestic violence. CP 1-3. A first amended information charged an additional count of first degree incest and added to each charge special allegations of use of position of trust and ongoing pattern of sexual abuse. CP 25-28. A second amended information added another count of first incest, domestic violence (count IV) with the same special allegations. CP 37. A third amended information was filed again adding an additional count of first degree incest, domestic violence with the abuse of trust and ongoing

---

<sup>1</sup> The following statement of facts and procedures is copied from the state's responsive brief on direct appeal under the same cause number.

pattern aggravators included. CP 44-45. Finally, a fourth amended information was filed, which changed an error in the date range in count II and continued the five counts and special allegations from the third amended information. CP

The matter proceeded to trial on these five charges. The jury found Thompson guilty of all five counts. CP 89-90. The jury returned special verdicts finding as to each count that Thompson and the victim were members of the same household or family, that Thompson's acts constituted an ongoing pattern of sexual abuse of a victim under the age of 18, and that Thompson used a position of trust to facilitate his crimes. CP 91-100.

Thompson was sentenced to 280 months, which is the high-end of the standard range on an offender score of 12. CP 112-13.

Thompson timely appealed. CP 124. Thompson also asserted a CrR 7.8 motion that the trial court transferred to this Court as a personal restraint petition.

## **B. FACTS**

MT began living with her father when she was five or six years old. 4RP 626. Her parents were divorced and she lived with her father,

stepmother, and three stepsiblings. 4RP 626-27. They moved into a residence where MT had a downstairs bedroom and the other children had bedrooms upstairs. 4RP 629.

When MT was 12 years old, her father raped her for the first time. 4RP 630. No one else was home and MT was watching television. 4RP 630. Her father called her into his room. 4RP 631. He told her that he was going to do things to her and that if she told anyone she and her family would be hurt. 4RP 631. He began to touch her chest. 4RP 632. He reached down her pants to her underwear and took off her pants and underwear. 4RP 632-33. He put his finger inside of her. 4RP 633. MT was afraid and cried. 4RP 633-34.

Thompson then had MT lay down and he removed his clothes and the rest of her clothes. 4RP 634. He then got on top of her and put his penis in her vagina. 4RP 635. Finished, Thompson cleaned himself with a towel and gave the towel to MT to clean herself. 4RP 635.

Another time, MT was uncertain about the dates, Thompson asked her to shower with him. 4RP 637. Again, no one else was home. 4RP 638. They undressed and got in the shower together. 4RP 638. MT did not object because of her father repeatedly telling her that others would be hurt if she told. 4RP 638. He picked her up and repeatedly put his penis inside her. 4RP 639.

Another time, again when no one else was home, Thompson called MT into his bedroom and this time he told her they were going to 69. 4RP 640. He explained the behavior to her and then the two got undressed. 4RP 640-41. He instructed her to climb atop him and he licked her while he placed his penis in her mouth. 4RP 641. This last move caused her to run to the bathroom and vomit after which the incident ended. 4RP 641.

Another time, others were home during the abuse. 4RP 642. It was very early morning before the family was awake and he came to her room and had her “kiss it.” 4RP 642. She again vomited but just a little bit in her mouth. 4RP 644.

Those four particular incidents were a part of ongoing abuse. 4RP 647. There was no “regular schedule” but the abuse sometimes happened as often as twice a week and sometimes a couple of months would pass in between incidents. 4RP 647. The incidents of abuse lasted three or four years until MT was 16 or 17 years old. 4RP 650. One day Thompson simply told her that they were done and the abuse ended. 4RP 650-51.

Eventually, the abuse was reported to school personnel. 4RP 653-54. MT sought out a supportive teacher when her grandmother died. 4RP 654-55. MT inadvertently disclosed and the teacher advised her that he had to report. 4RP 655-66. The next day, MT met with law enforcement officers. 4RP 662. With law enforcement, MT engaged in a wiretapped

conversation with her father. 4RP 662.

Law enforcement officers interviewed MT at her school. 4RP 607. MT was pleasant but sometimes emotional and “weepy” during the interview. 4RP 607.

#### **IV. AUTHORITY FOR PETITIONER’S RESTRAINT**

The authority for the restraint of William Howard Thompson lies within the judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on June 22, 2018 in cause number 16-1-00704-8, upon Thompson’s conviction of second degree rape of a child, aggravated by domestic violence, abuse of a position of trust, and an ongoing pattern of sexual abuse, and four counts of first degree incest, with each of the four in turn aggravated by the same three special allegations.

#### **V. ARGUMENT**

##### **A. THIS IS A NONCONSTITUTIONAL CLAIM, THOMPSON MUST PROVE A FUNDAMENTAL DEFECT RESULTING IN A COMPLETE MISCARRIAGE OF JUSTICE.**

Thompson argues that the trial court should not have admitted the recorded communication between he and his daughter because the recording was admitted in violation of the Privacy Act. This claim is without merit because it does not raise a manifest constitutional issue and

does not satisfy the demanding standard for nonconstitutional claims in post-conviction matters.

Petitions for collateral relief must be filed within one year of the entry of the judgment. RCW 10.73.090(1). The present judgment was entered on June 22, 2018 and the present petition was filed on May 23, 2019. The petition is timely.

Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” *In re Hagler*, 97 Wn.2d 818, 824, 650 P.3d 1103 (1982). Thompson must prove error by a preponderance of the evidence. *In re Crow*, 187 Wn. App. 414, 420-21, 349 P.3d 902 (2015). Then, if he is able to show error, he must also prove prejudice. *Crow*, 187 Wn. App. at 421. Constitutional error must have resulted in actual and substantial prejudice. *In re Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). “Actual and substantial prejudice, which ‘must be determined in light of the totality of circumstances,’ exists if the error ‘so infected petitioner’s entire trial that the resulting conviction violates due process.’” *Crow*, 187 Wn. App. at 421, quoting *In re Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985).

If the error is nonconstitutional, the petitioner must meet a stricter standard and demonstrate that the error resulted in a fundamental defect

which inherently resulted in a complete miscarriage of justice. *In re Schreiber*, 189 Wn. App. 110, 113, 357 P.3d 668 (2015) (subsequent Habeas Corpus proceedings not cited). This standard requires more than a “mere showing of prejudice.” *In re Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004).

The showings of error and prejudice must be supported by particular facts that, if proven, would entitle Thompson to relief and these factual allegations must be based on more than speculation and conjecture. RAP 16.7(a) (2); *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied* 506 U.S. 958 (1992). Conclusory allegations are insufficient. *Cook*, 114 Wn.2d at 813-14. The petition should be denied absent a prima facie showing of either actual and substantial prejudice or a fundamental defect. *In re Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). If this showing is made, but the record is insufficient, a reference hearing may be ordered. 177 Wn.2d at 18.

Thompson claims that the case raises a manifest constitutional issue. He supports this assertion by referring to RAP 4.2(a)(2)(4), RCW 10.73.100(4), and RCW 9.73.050. Petition at 1. None of these provisions raises Thompson’s statutory argument to a constitutional issue. RAP 4.2 addresses the types of cases that may be filed in the Supreme Court. The rule has no provision that indicates what is or is not a constitutional issue.

RCW 10.73.100 is a statute that address exceptions to the one-year time-bar on collateral attacks. The statute does not address what is and what is not a constitutional issue. Further, Thompson cites to subsection (4) of RCW 10.73.100 which subsection involves sufficiency of the evidence—an issue Thompson claims in his request for relief (Petition at 6) but makes no legal argument in support of that claim. Finally, RCW 9.73.050 addresses admissibility under the intercepted communication statutory scheme and, again, this provision does not raise a violation thereof to the level of a constitutional issue. *State v. Courtney*, 137 Wn. App. 376, 383, 153 P.3d 238 (2007) *review denied* 163 Wn.2d 1010 (2008), *citing State v. Cunningham*, 93 Wash.2d 823, 831, 613 P.2d 1139 (1980).

Thompson presents a nonconstitutional claim. He therefore must show a fundamental defect in the trial that resulted in a complete miscarriage of justice.

**B. THOMPSON'S NONCONSTITUTIONAL CLAIM IS WITHOUT MERIT AND THEREFORE FAILS TO SHOW A FUNDAMENTAL DEFECT IN THE PROCEEDING BELOW.**

Thompson claims that the trial court erred in admitting an intercepted electronic communication between himself and the victim.

This claim is without merit because the intercept was done in compliance with the Privacy Act.

Thompson correctly refers to Chapter 9.73 RCW. But review of the entire chapter reveals that Thompson's Petition leaves out a crucial portion of the law—RCW 9.73.090(2).

First, RCW 9.73.030 in relevant part provides:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

And, RCW 9.73.050 provides:

Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

Thompson makes much of these initial provisions of the Act. But

the present case is not controlled by these primary provisions. Rather, the present intercept order proceeded from RCW 9.73.090(2):

It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, *if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony*: PROVIDED HOWEVER, That if such authorization is given by telephone the authorization and officer's statement justifying such authorization must be electronically recorded by the judge or magistrate on a recording device in the custody of the judge or magistrate at the time transmitted and the recording shall be retained in the court records and reduced to writing as soon as possible thereafter.

Any recording or interception of a communication or conversation incident to a lawfully recorded or intercepted communication or conversation pursuant to this subsection shall be lawful and may be divulged.

All recordings of communications or conversations made pursuant to this subsection shall be retained for as long as any crime may be charged based on the events or communications or conversations recorded.

(emphasis added). Thence to subsection .130, which provides:

Each application for an authorization to record communications or conversations pursuant to RCW 9.73.090 as now or hereafter amended shall be made in writing upon oath or affirmation and shall state:

- (1) The authority of the applicant to make such application;
- (2) The identity and qualifications of the investigative or

law enforcement officers or agency for whom the authority to record a communication or conversation is sought and the identity of whoever authorized the application;

(3) A particular statement of the facts relied upon by the applicant to justify his or her belief that an authorization should be issued, including:

(a) The identity of the particular person, if known, committing the offense and whose communications or conversations are to be recorded;

(b) The details as to the particular offense that has been, is being, or is about to be committed;

(c) The particular type of communication or conversation to be recorded and a showing that there is probable cause to believe such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be recorded;

(d) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be recorded;

(e) A statement of the period of time for which the recording is required to be maintained, if the character of the investigation is such that the authorization for recording should not automatically terminate when the described type of communication or conversation has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;

(4) Where the application is for the renewal or extension of an authorization, a particular statement of facts showing the results thus far obtained from the recording, or a reasonable explanation of the failure to obtain such results;

(5) A complete statement of the facts concerning all previous applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to record a wire or oral communication involving any of the same facilities or places specified in the application or

involving any person whose communication is to be intercepted, and the action taken by the court on each application; and

(6) Such additional testimony or documentary evidence in support of the application as the judge may require.

Issues of statutory construction are reviewed de novo. *State v. Courtney*, 137 Wn. App. 376, 382, 153 P.3d 238 (2007) *review denied* 163 Wn.2d 1010 (2008).

As noted above, violation of the Privacy Act is not a constitutional violation. *Courtney*, 137 Wn. App. at 383. Thus, the erroneous admission of evidence in violation of the Act must be prejudicial in order to warrant reversal. 137 Wn. App. at 383-84. Prejudice obtains if “the erroneous admission of the evidence materially affected the outcome of the trial.” *Id.*

But in the present case, there is no need to consider the level of prejudice that may attend a violation of the statute because the statute was not violated. First, the trial court found, and Thompson does not contest, that there was an adequate showing of probable cause in the application for the communication intercept. CP 30. The denial of a motion to suppress is reviewed to determine whether substantial evidence supports the trial court’s findings of fact and whether the findings support the conclusions of law. *See State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151 (2014). The trial court’s finding is supported by the inclusion in the application of approximately three-and-one-half pages of factual material

which more than adequately establish probable cause for the crimes of child rape and incest. Appendix A.

The plain language of RCW 9.73.090(2) applies because a law enforcement officer made the application. The deputy sheriff was a law enforcement officer acting in the course of her official duties. One party, the victim, gave consent. The intercept was authorized on application to the superior court. The question of whether the application satisfies the statute is charged to the discretion of the issuing court. *State v. Porter*, 98 Wn. App. 631, 634, 990 P.2d 460 (1999) *review denied* 140 Wn.2d 1024 (2000). And, finally, there was “probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony.”

Further, the trial court’s findings establish that the deputy’s application was properly done. CP 30-31. Again, Thompson does not challenge these findings. Moreover, attachment A, the application, clearly shows the accuracy of the trial court’s findings as the deputy addressed each of the considerations required by RCW 9.73.130.

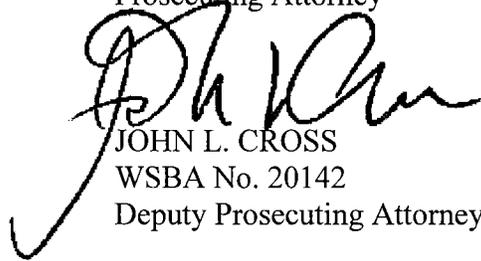
Proper procedure supported the admission of the communication intercept in this case. There was not error.

## **VI. CONCLUSION**

For the foregoing reasons, Thompson’s petition should be denied.

DATED September 16, 2019.

Respectfully submitted,  
CHAD M. ENRIGHT  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

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## **Appendix A**

ORIGINAL

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ALISON H. SONNTAG

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,	)	
	)	No. 16-1-00704-8
Plaintiff,	)	
	)	MEMORANDUM OF AUTHORITIES RE:
v.	)	ADMISSIBILITY OF RECORDED
	)	CONVERSATION BETWEEN MT AND
WILLIAM HOWARD THOMPSON,	)	DEFENDANT
Age: 41; DOB: 11/08/1975,	)	
	)	
Defendant.	)	

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through its attorney JENNIFER Y. KOO, Deputy Prosecuting Attorney, with the following Memorandum of Authorities Re: Admissibility of Recorded Conversation Between MT and Defendant-

**A. ISSUE(S) PRESENTED**

**1. Issue One**

Was the recording of the phone conversation between MT and the defendant obtained in violation of RCW 9.73.130(3)? No.

**B. STATEMENT OF THE CASE**

**1. Procedural History**

The defendant has been charged with Rape of a Child in the Second Degree and two counts of Incest in the First Degree. Each of these crimes are also charged with aggravators of domestic violence, abuse of trust, and an ongoing pattern of abuse. These incidents occurred



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1 between February 1, 2011 and February 7, 2014. On July 17, 2017, the defense filed a motion to  
2 suppress the recorded conversation between MT and the defendant. The defense CrR 3.6 motion  
3 is set for argument on September 5, 2017.

## 4 5 **2. Anticipated Facts**

6 On May 11, 2016, MT disclosed to law enforcement that her father, the defendant, had  
7 been raping her since she was 13 years old. She disclosed that the rapes occurred one or two  
8 times a week or one to two times a month until she was 17 years old. On May 25, 2016, Detective  
9 Nicole Menge of the Kitsap County Sheriff's Office applied for a warrant to intercept and record  
10 a phone conversation between MT and the defendant. Probable cause for the felony crime of  
11 Rape of a Child was outlined in the application for search warrant. The warrant was granted by  
12 Judge Kevin Hull and that same day, Detective Menge recorded a phone conversation between  
13 the defendant and his daughter.

## 14 15 **C. ARGUMENT**

### 16 **1. The recording between MT and the Defendant is admissible under** 17 **RCW 9.73.090 (2).**

18 Washington's privacy act, chapter 9.73 RCW, prohibits the interception and recording of  
19 private communications and conversations without the consent of all parties.<sup>1</sup> Exceptions exist,  
20 however, and the police may intercept and record communications if one party consents, if there  
21 is probable cause to believe the nonconsenting party has committed a felony, and if a judge  
22 authorizes interception and recording.<sup>2</sup> Tape recordings obtained in violation of the state privacy  
23 act are inadmissible in state court proceedings.<sup>3</sup>

24 An application for court approval to intercept and record communications must satisfy  
25 the requirements of RCW 9.73.130. The application must contain a statement of the facts  
26 justifying interception and recording, including a statement of probable cause, detailed  
27 information concerning the offense, the need to intercept and record, and under subsection (3)(f),  
28

29 <sup>1</sup> RCW 9.73.030(1)(a); State v. Constance, 154 Wash.App. 861, 877, 226 P.3d 231 (2010).

30 <sup>2</sup> RCW 9.73.090(2); Constance, 154 Wash.App. at 878, 226 P.3d 231.

31 <sup>3</sup> RCW 9.73.050; State v. Williams, 94 Wash.2d 531, 534, 617 P.2d 1012, 24 A.L.R.4th 1191 (1980).



1 a particular statement of facts showing that other normal investigative procedures with  
2 respect to the offense have been tried and have failed or reasonably appear to be unlikely  
3 to succeed if tried or to be too dangerous to employ.<sup>4</sup>  
4

5 RCW 9.73.130(3)(f) requires "something less than a showing of absolute necessity to  
6 record to acquire or preserve evidence." The need requirement is interpreted in a "common sense  
7 fashion."<sup>5</sup> In determining whether to authorize the interception and recording of  
8 communications, the judge "has considerable discretion to determine whether the statutory  
9 safeguards have been satisfied."<sup>6</sup> The judge also must consider the nature of the crime and the  
10 inherent difficulties in proving it.<sup>7</sup> The facts must be minimally adequate to support the intercept  
11 application.<sup>8</sup>

12 Here, the requirements of 9.73.130(3)(f) were satisfied. Detective Menge clearly  
13 outlined in her application for interception a statement of the facts justifying interception and  
14 recording, including a statement of probable cause, detailed information concerning the offense,  
15 the need to intercept and record, and why other investigative procedures reasonably appeared  
16 unlikely to succeed. Detective Menge explained that placing an officer in a concealed location  
17 where he/she could overhear a conversation between the victim and the defendant would be  
18 extremely difficult, especially because the victim no longer lived with the defendant and had been  
19 actively avoiding contact with him. Also, the nature of the offense here is one that is inherently  
20 difficult to prove. The defendant was being investigated for a sex offense. Sex offenses are  
21 extremely difficult to prove due to the secretive nature of the abuse. Sex offenses are committed  
22 in secret with no witnesses to the crime, other than the victim. At trial, these cases often come  
23 down to who the jury finds more credible, the defendant or the victim. Furthermore, it is not  
24 unusual for sex offenses to be disclosed years after the crime has already been committed, as is

25 <sup>4</sup> RCW 9.73.130; Constance, 154 Wash.App. at 878-79, 226 P.3d 231.

26 <sup>5</sup> State v. Platz, 33 Wash.App. 345, 349, 655 P.2d 710 (1982) (citing State v. Kichinko, 26 Wash.App. 304,  
27 311, 613 P.2d 792 (1980)).

28 <sup>6</sup> State v. Johnson, 125 Wash.App. 443, 455, 105 P.3d 85 (2005) (citing State v. Cisneros, 63 Wash.App.  
29 724, 728-29, 821 P.2d 1262 (1992)).

30 <sup>7</sup> Constance, 154 Wash.App. at 883, 226 P.3d 231.

31 <sup>8</sup> State v. Manning, 81 Wash.App. 714, 718, 915 P.2d 1162 (1996).



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the case here. Because this was a late disclosure of abuse by the victim, there is a lack of physical evidence to corroborate the victim's statements. For example, there is no DNA evidence or documented physical trauma to the victim.

Detective Menge also outlined in her application for interception why she believed it would be too dangerous to employ other investigative procedures. She was concerned for the safety of the victim due to the inherent violent nature of the crime and the noted prior threats to harm the victim and her family members if the victim were to disclose the abuse. The victim told Detective Menge that she had never disclosed what her father had done to her because she was afraid of what he might do to her and her family. She said her father had a temper and feared what might happen to her and her family if he found out that she had disclosed the abuse.

The defense argues that the recorded phone interception should be suppressed because the application did not indicate whether the police tried, or even considered, other investigative techniques. To make his argument, the defendant cites to *State v. Porter*. *Porter* was a felony drug case.<sup>9</sup> *Porter* was an attorney who law enforcement suspected used illegal drugs.<sup>10</sup> Law enforcement sought and a judge approved an intercept warrant allowing the police to listen to conversations between *Porter* and his dealer.<sup>11</sup> The recorded conversations were used to convict *Porter* of possession of methamphetamine.<sup>12</sup> *Porter* appealed his conviction arguing that the application for intercept did not comport with the requirements of RCW 9.73.130(3)(f).<sup>13</sup> *Porter* challenged the particularity of the intercept application with respect to the inadequacy of normal investigation procedures.<sup>14</sup>

The Court of Appeals found that the intercept application was deficient because it did not allege whether other methods were tried or were unlikely to succeed.<sup>15</sup> They specifically noted that the crime under investigation was a possession of a controlled substance.<sup>16</sup> The usual investigative technique in a drug case is to obtain a warrant to search the subject's premises, or to

<sup>9</sup> *State v. Porter*, 98 Wash.App. 631, 990 P.2d 460 (1999).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*



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arrest the suspect for some other reason and conduct an incident to search.<sup>17</sup> The intercept affidavit did not allege that these methods, or for that matter, any other methods, were tried or were unlikely to succeed.<sup>18</sup> In fact, there is no indication that the Yakima police tried, or even considered, other investigative techniques.<sup>19</sup>

*Porter* is distinguishable from the case at hand specifically because of the fact that it was a drug case. There were other investigative options law enforcement could have entertained and employed, but did not. For example, in drug cases, law enforcement has the option to set up a buy using a confidential informant with several law enforcement officers watching everything that takes place. Law enforcement can also go undercover themselves and buy drugs from a suspect. Here, we have a sex case which is inherently more difficult to prove than a simple drug possession case. There really were no other investigative methods Detective Menge could have tried before applying for the intercept. Furthermore, RCW 9.73.130(3)(f) does not only require that a particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed. The requirements of RCW 9.73.130(3)(f) are also satisfied if law enforcement outlines why other investigative procedures reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ. Courts also look at the type of crime being investigated and the inherent difficulties in proving it in determining whether the requirements of RCW 9.73.130(3)(f) have been met. Here, we have sex offense which are inherently difficult to prove. Also, these types of crimes happen in secret with no other witnesses to the crime to corroborate the victim's statements. Detective Menge explained that having officers in a concealed location close enough to overhear a conversation between the defendant and the victim would have been extremely difficult. Detective Menge was also concerned for the safety of the victim due to the inherent violent nature of the crime and the noted prior threats to harm the victim and her family. Furthermore, because this was a late disclosure, there was a lack of physical evidence of the crime such as physical trauma to the victim or the suspect's DNA in/on the victim. Detective Menge detailed all of this in her application for interception which was enough to satisfy the requirements of RCW 9.73.130(3)(f). A judge "has considerable

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<sup>17</sup> *Id.*  
<sup>18</sup> *Id.*  
<sup>19</sup> *Id.*



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discretion to determine whether the statutory safeguards have been satisfied. In this case, Judge Hull determined that the statutory safeguards had been satisfied and issued the intercept warrant.

### D. CONCLUSION

Accordingly, this Court should deny the Defendant's motion to suppress the recording of the phone conversation between the defendant and MT.

RESPECTFULLY SUBMITTED this 5th day of September, 2017.

STATE OF WASHINGTON

  
JENNIFER Y. KOO, WSB#NO. 42016  
Deputy Prosecuting Attorney

Prosecutor's File Number--16-225610-1



MAY 25 2016

THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KITSAP

DAVID W. PETERSON  
KITSAP COUNTY CLERK

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IN THE MATTER OF AUTHORIZATION ) NO. 20160232  
TO INTERCEPT AND RECORD )  
COMMUNICATIONS AND ) APPLICATION  
CONVERSATIONS PUSUANT TO )  
R.C.W. 9.73.090 )

I, Detective Nicole MENGE (affiant), a deputy sheriff for the Kitsap County Sheriff's Office, being first duly sworn on oath, deposes and says:

(1) The affiant is a commissioned law enforcement officer having been commissioned by the Sheriff of Kitsap County. Affiant has been authorized by Deputy Prosecuting Attorney Jonathan Salamas of the Kitsap County Prosecutors Office to make this application; that affiant makes this application by authority of RCW 9.73.090 (2).

(2) The Kitsap County Sheriff's Office has access to various items of electronic, audio, and video equipment designed to intercept and record communications and or conversations and this affiant is familiar with their use.

(3) There is probable cause to believe that WILLIAM HOWARD THOMPSON, DOB: 11/08/1975, has been engaged the felony crime of Rape of Child. The interception and recording of all communications or conversations between WILLIAM THOMPSON and the victim, herein referred to by her initials, MTT (DOB: 02/07/1998), and/or other unknown persons who may inadvertently take part in said communication, is vital to the successful prosecution of this crime. This Affiant believes the interception and/or recording of those transactions should be authorized for the following reasons:

**PROBABLE CAUSE**

On 05/11/2016 at 1950 hours Deputy D. Linder contacted MTT after receiving a Child Protective Services (CPS) follow-up report. The CPS report stated that MTT disclosed to a school intervention specialist that she had been raped for several years by her biological father, William Howard

1 Thompson (DOB: 11/08/1975). MTT told Deputy Linder that she had lived with William at 8429  
2 Hickory Pl NE in Bremerton until two weeks after her 18th birthday. She advised that her father  
3 began raping her about five days before her 13th birthday.  
4

5  
6 On that first occasion she said her step-mother, step sisters, and step brother left the house to go to  
7 church, leaving her alone at the Hickory Pl residence with William. MTT advised that at that time,  
8 William told her to come down to his bedroom. William then told her he was going to do things to  
9 her and she was not going to tell anyone. MTT advised that William told her if she did say  
10 something her family would pay.  
11

12  
13 MTT said William took off her shirt and sucked on her breasts. MTT advised she was crying and in  
14 shock so she did not tell him to stop and sat there still. William took off her shorts and rubbed her  
15 over her underwear. MTT said his hands were all over her. She advised that William then "took my  
16 virginity". Deputy Linder asked her to explain what she meant and she said her father had sexual  
17 intercourse with her. MTT advised that she was crying and holding onto a blanket during the assault.  
18 She said she did not remember where he ejaculated, but she did remember him cleaning up with a  
19 towel.  
20  
21

22  
23 MTT said that after that first incident, William would come into her bedroom around 0100 or 0200  
24 hours and have sexual intercourse with her unless she was on her period, then he would just kiss and  
25 touch her. MTT advised that this occurred about one to two times a month or one to two times a  
26 week until her 17th birthday. MTT advised that this happened in her bedroom or in the living room.  
27 She told Deputy Linder that she did not report the incidences before because William had threatened  
28 to hurt her family.  
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1 On May 18, 2016 Detective Jennifer Rice and contacted MTT at her school and conducted further  
2 interview. Her mother was also present toward the end of the interview. MTT told us that her  
3 parents divorced before she was about 3 years old and that she started living with her father, William  
4 Thompson, when she was around 4 or 5 years old. She advised that she ended up living with  
5 William and her step-mom and step-sisters and step brother, at the Hickory PI NE residence. She  
6 had visitation with her mother during the time frame she lived with her father.  
7

8  
9  
10 MTT advised us that her father started raping her on her cousin's birthday, 5 days before her own  
11 13<sup>th</sup> birthday. On this occasion everyone else in the family had gone to church except her and her  
12 father. He asked her to go downstairs to his bedroom and had her sit on the center edge of the bed.  
13 He told her that he was going to "do things to her" and not to tell anyone or he would hurt her or her  
14 family. He proceeded to pull up her shirt and pull down her basketball shorts. He began kissing her  
15 and rubbing all over her breasts. He pulled down her underwear, gave her oral sex, and then pinned  
16 her arms up over her head and put his penis into her vagina. MTT thought that her father ejaculated  
17 inside her and then he "cleaned himself" up with a towel. She advised us that she cried so hard  
18 during the incident that she could hardly see.  
19

20  
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22 MTT described another time where he came into her bedroom at about 0200 hours and made her sit  
23 on her knees on the floor with her back up against the side of the bed, while he forced his penis into  
24 her mouth. She advised that she pushed him away, then ran upstairs and threw up. She indicated  
25 that he also put his penis in her anally once or twice and that he never used a condom during any of  
26 the assaults. She said that more incidents involving him having sexual intercourse with her as  
27 described in the first incident when she was 12 years old, repeatedly occurred one to two times a  
28 week or one to two times a month until she was late 16 or early 17.  
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1 She stated that the abuse stopped when she eventually "snapped" due to being so upset and sick of it  
2 she told him that she would not do it anymore. She advised that she told him that she did not care if  
3 he hurt anyone because she was so distraught over it. She indicated that she suffered anxiety,  
4 depression, and had trouble sleeping because she was so afraid he would come into her room at night  
5 to abuse her. She indicated that she also started self-harming by "cutting" as a means of coping.  
6 She said that since she told him she would not let him touch her anymore, he has not attempted to  
7 assault her, and has even tried to talk to her about it a few times and apologized. The last time he  
8 tried to talk to her about it was in February 2015 when she told him that she was moving out after  
9 her 18<sup>th</sup> birthday. She subsequently has moved in with her biological mother.  
10  
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12

13 MTT said that her father would make her promise him that she would not tell anyone about the  
14 sexual assaults after almost every incident, threatening that "people would get hurt". He advised her  
15 that he would specifically hurt her mother or other family members. She told us that she believed he  
16 might actually hurt people and that she was afraid of him even now. She indicated that she had  
17 never disclosed what her father had done to her until recently because she was afraid of what he  
18 might do to her or her family. She only disclosed the abuse to the school intervention specialist  
19 recently in the course of seeking counsel from him regarding the recent passing her of grandmother.  
20 She then disclosed what she told the counselor to a close friend and her mother, but no one else. She  
21 indicated that she was having flashbacks of the abuse, nightmares, and depression. She said that her  
22 father has a temper, but has not been otherwise violent with her outside of the sexual abuse. She did  
23 not know if he would indeed hurt her or others if he knew that she had disclosed what he did, but  
24 feared that he might.  
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28  
29 MTT discussed the possibility of attempting a conversation with her father about the abuse and she  
30 advised that she would be willing to call him and attempt to engage in the subject. She also said she  
31

1 would consent to detectives recording any such attempted verbal contact with William. MTT told  
2 me that she has recently been actively avoiding contact with her father in person or via phone/text,  
3 but that he has been reaching out to her via phone and through her step-siblings. MTT believes that  
4 her father would make incriminating statements during such a conversation that would corroborate  
5 the sexual abuse allegations.  
6

7  
8 I am seeking the issuance of an Order Authorizing the Recording the Conversation for the purposes  
9 of assisting with this felony investigation. A conversation between MTT and her father, William  
10 Thompson, will likely prove the guilt or innocence of William. Placing an officer in a concealed  
11 location where he/she could hear a conversation between both parties would be extremely difficult,  
12 particularly since MTT no longer lives with the suspect. The statement of the victim is the primary  
13 evidence in this case. The only people present during the commission of the crimes were the suspect,  
14 William Thompson, and the victim, MTT.  
15

16  
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18 I am concerned for the safety of the victim due to the inherent violent nature of the crime and the  
19 noted prior threats to harm her and/or her family if MTT disclosed the abuse. Other factors to  
20 consider in seeking the issuance of an order are the lack of a witness to the abuse; the secretive  
21 nature of the abuse; the amount of time that has passed since the commission of the crimes; and the  
22 lack of physical evidence of the crimes such as physical trauma to the victim or suspect's DNA in/on  
23 the victim.  
24

25  
26 It is unknown, but likely that William Thompson has a telephone equipped with caller identification,  
27 which could assist him in identifying a call from a suspicious or unknown phone number, and  
28 therefore the attempt to contact would likely be made from the known active number of MTT's  
29 current cell phone. Detectives would necessarily be present with MTT during the attempted initial  
30 telephone contact with William. I have authored a number of wire intercept orders authorizing the  
31

1 recording of suspects with one-party consent for narcotics and general investigations over a number  
2 years. I have found the recording of such conversations to have been highly fruitful and assistive in  
3 the prosecution of defendants in those investigations. I also know based on my training and  
4 experience overseeing the wire intercept and recording of conversations that it is imperative that the  
5 detective handling the cooperating/consenting party to the communication be able to communicate in  
6 some fashion with the victim/caller during the verbal engagement with the suspect. This would be  
7 highly difficult if the communication was conducted via speaker phone for the detective to directly  
8 overhear the conversation, since the suspect may also hear and be suspicious of any other slight  
9 sound or attempted communication between the victim and the detective.  
10  
11

12  
13 (4) The investigation plan at this point is for the victim, MTT (18 years-old), to attempt to  
14 engage in conversation with her biological father, William Thompson (40 years-old) about the crime  
15 of Rape of a Child, specifically regarding William allegedly repeatedly raping MTT starting at the  
16 age of 13 years-old. The victim, MTT, has given her consent to the interception and recording of  
17 these conversations.  
18

19 (5) The initial contact is planned to take place at an, as yet, undetermined location and is  
20 anticipated that the conversation will occur within Kitsap County. Follow up contact or telephone  
21 conversations may take place at locations unknown, but are anticipated to be in Kitsap County, or  
22 adjacent counties.  
23

24 (6) Maximum of seven (7) day limit should be authorized due to the fact that normal business,  
25 school, family, and/or other social obligations may preclude parties to the conversations being able  
26 to get together or communicate at a pre-determined, specific time, and that more than one  
27 conversation or meeting may be needed to determine or corroborate the full extent of William  
28 Thompson's participation in the crime.  
29

30 (7) Successful prosecution of this type of case often time requires corroborative evidence beyond  
31 the mere victim statements/allegations. Due to the nature of the allegations and extended time frame

1 that has passed since the last reported sexual assault, physical corroborative evidence or other  
2 witnesses to the offense are highly likely to be revealed. Therefore corroboration of the criminal  
3 activity necessary for successful prosecution may possibly only be secured through information  
4 contained in a verbal exchange between the suspect and victim. It also is necessary for successful  
5 prosecution to document evidence to preclude a likely defense proposal of the victim making false  
6 allegations. Corroborating the credibility of the parties is important to an investigation of this nature.  
7 What William Thompson may say and how it is said is crucial to the prosecution of this case.  
8 Recording of a conversation can resolve issues of credibility as to what is said, by whom and in what  
9 context. Due to the overall necessary investigative corroboration and for the overall safety of the  
10 victim, the affiant, other officers, and/or others that may become involved as the investigation as it is  
11 further revealed, the recording of in-person conversations, as well as the recording of telephonic  
12 communication may be necessary.

13  
14 (8) This is part of an ongoing investigation into the crime of Rape of a Child 1<sup>st</sup> Degree, RCW  
15 9A.44.060. Premature disclosure of the investigation may prevent obtaining adequate corroborative  
16 evidence of the noted criminal activity and/or would jeopardize the safety of the victim and/or her  
17 family members. Therefore, the affiant requests the Court order the clerk to maintain the file herein  
18 under seal.

19  
20 (9) Affiant knows of no previous applications involving any persons named herein whose  
21 communication or conversation is to be intercepted and recorded.

22  
23 (10) No application for renewal of extension is made at this time.

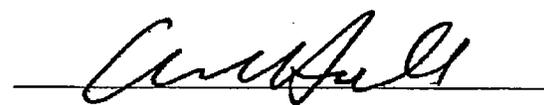
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25 (11) Other normal investigative procedures with respect to the offense suspected, such as  
26 stationing an officer close enough or in a manner to safely overhear the conversation, reasonably  
27 appear to be unlikely to succeed if tried or to be too dangerous to employ.

28  
29 (12) In view of the foregoing, this affiant believes communications and/or conversations  
30 concerning the crime of Rape of a Child, 1<sup>st</sup> Degree, a felony, will occur between William  
31 Thompson and the victim, MTT; that these conversations or communications will be evidence of this

1 crime; and that the intercepting and recording of those conversations or communications by any  
2 device or instrument should be authorized, commencing at the date and time herein listed and to be  
3 completed no later than seven days from date and time of signature. Seven (7) days maximum.

4  
5   
6 Detective Nicole Menge #32

7  
8  
9 SUBSCRIBED AND SWORN BEFORE ME this 25<sup>th</sup> day of May, 2016.

10  
11   
12 JUDGE  
13 KEVIN D. HULL  
14

15 Presented by:

16  
17   
18 39721  
19 Jonathan Salamas  
20 Deputy Prosecuting Attorney

MAY 25 2016

DAVID W. PETERSON  
KITSAP COUNTY CLERK

THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KITSAP

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IN THE MATTER OF AUTHORIZATION ) NO. 2016 0230  
TO INTERCEPT AND RECORD )  
COMMUNICATIONS AND ) ORDER AUTHORIZING INTERCEPT  
CONVERSATIONS PUSUANT TO ) AND RECORDING  
R.C.W. 9.73.090 )

WHEREAS, a sworn application having been made before me by Detective Nicole MENGE, a commissioned Deputy Sheriff with the Kitsap County Sheriff's Office, currently assigned to the General Detectives division and full consideration having been given to this matter set forth therein, the court hereby finds:

(a) There is probable cause to believe that the conversations between, WILLIAM HOWARD THOMPSON (DOB: 11/08/1975), and the victim, MTT (DOB: 02/07/1998), pertaining to the crime of Rape of a Child 1<sup>st</sup> Degree, a felony, will occur on or about May 24, 2016, at a location as of yet undecided, but within Kitsap County, Washington State. Further conversations between these parties may occur within the succeeding fourteen days;

(b) There is probable cause for belief that communications or conversations relating to said offense involving Rape of a Child, RCW 9A.44.060, will take place and will be obtained as evidence through the interception and recording as hereafter set forth;

(c) The victim, MTT, one party to the expected communications or conversations, has given her consent to the intercept and recording of same;

(d) Normal investigative techniques reasonably appear to be unlikely to obtain corroborative, convincing, and accurate evidence of the crime and/or appear to be too dangerous to employ; now, therefore, it is hereby:

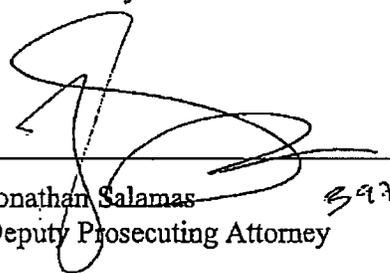
1 ORDERED that Detective Nicole MENGE and/or other Kitsap County Sheriff's Office detectives,  
2 together with necessary technical assistants, are authorized to intercept and record by any device or  
3 instrument the communications or conversations between WILLIAM HOWARD THOMPSON  
4 (DOB: 11/08/1975) and MTT, and/or any other unknown persons who may be inadvertently present  
5 and involved in said communication, originating from a telephone conversation or in person, and  
6 originating in part from a location that is yet unknown but likely within Kitsap County.

7  
8 IT IS FURTHER ORDERED that this authorization is effective beginning at the date and time  
9 signed below and shall terminate upon intercept and recording of all communications and  
10 conversations described above concerning the crime of Rape of a Child, a felony, or in any event  
11 upon the passage of seven days from the effective date.

12  
13 DONE IN OPEN COURT this 25<sup>th</sup> day of May, 2016 at 1:20 hrs.

14  
15  
16   
17 \_\_\_\_\_  
18 JUDGE  
19 KEVIN D. HULL

20 Presented by:

21   
22 \_\_\_\_\_  
23 Jonathan Salamas 39721  
24 Deputy Prosecuting Attorney

**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

**September 16, 2019 - 1:44 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52224-1  
**Appellate Court Case Title:** State of Washington, Respondent v. William Howard Thompson, Appellant  
**Superior Court Case Number:** 16-1-00704-8

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