

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIV-II

IN RE THE PERSONAL	)	NO. 53586-6-II
RESTRAINT PETITION OF	)	
	)	RESPONSE TO
	)	PERSONAL RESTRAINT
DENNIS SOMERVILLE	)	PETITION

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Joseph J.A. Jackson, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY.

Arising out of a jury's August 8, 2002 conviction, the petitioner, Dennis Somerville, is currently in the custody of the Washington Department of Corrections, serving a 300 month sentence for first degree rape. Appendix A (Somerville's Judgment and Sentence).

II. STATEMENT OF PROCEEDINGS.

Somerville has repeatedly challenged his 2002 conviction. While the State has attempted to account for each of Somerville's

PRPs below, the sheer volume of his appellate history makes it difficult to track:

On January 13, 2004, the Court of Appeals affirmed Somerville's conviction, Appendix B, and after the Supreme Court denied review, a mandate issued on December 20, 2004, Appendix C (Order and Mandate).

On March 16, 2005, Somerville filed his first PRP—alleging approximately 24 claims. On November 30, 2005, the Court of Appeals dismissed Somerville's petition as procedurally barred and frivolous, Appendix D; and on January 27, 2006, the Supreme Court denied review, Appendix E. A Certificate of Finality issued on April 24, 2006. Appendix F.

On April 4, 2007, the Supreme Court dismissed Somerville's second PRP. Appendix G. On June 6, 2007, the commissioner denied Somerville's motion to modify and issued a Certificate of Finality. Appendix H (Order and Certificate of Finality).

On March 26, 2008, the Supreme Court denied Somerville's third PRP, issuing a Certificate of Finality on May 20, 2008. Appendix I (Ruling and Certificate of Finality).

On September 29, 2008, the Supreme Court denied Somerville's fourth PRP and issued a Certificate of Finality. Appendix J (Ruling and Certificate of Finality).

On April 22, 2009, the Supreme Court denied Somerville's fifth PRP, issuing a Certificate of Finality on June 5, 2009. Appendix K (Ruling and Certificate of Finality).

On June 16, 2010, the Supreme Court denied Somerville's sixth PRP, issuing a Certificate of Finality on August 2, 2010. Appendix L (Ruling and Certificate of Finality).

On October 26, 2011, the Court of Appeals dismissed Somerville's seventh PRP. Appendix N.

On April 10, 2012, Somerville filed his eighth PRP challenging to his 2002 conviction. Marking what appears to be his eighth PRP, this too was subsequently dismissed. Appendix M (Ruling Dismissing Personal Restraint Petition, 87239-2).

Somerville filed another PRP in the Supreme Court, No. 97221-4, which has been transferred to this Court for consideration in this cause number.

For the factual basis that supported Somerville's conviction, the State relies upon the facts included in this Court's ruling on direct

appeal and on the facts contained in the Order Dismissing Petition in No, 33112-8-2. Appendix B and D.<sup>1</sup>

Somerville entered the Ed Wyse Beauty Supply store on October 18, 1998. The victim, Debra Westfield, testified that Somerville said, "This was a fucking robbery. And, don't fuck with him and that he had a gun." Appendix B at 2. After taking money and directing a store customer to a bathroom, Somerville took Westfield behind a counter, pushed her down, and made her perform oral sex. Appendix B at 2-3. DNA supported that Somerville was the assailant. Appendix D at 7.

At trial, Somerville was represented by attorney Paul Reed. During his opening statement, Reed indicated that he was going to be "straightforward" with the jury regarding the evidence. Appendix O at

3. He stated

As you've heard, the defense isn't required to put on testimony, put on evidence and so forth, although we certainly can. But the defense investigation at this point, frankly, we don't have argument with the State's science here or the handling of their evidence. And to some degree, this is a 'proof is in the pudding' type of thing. And so we will hear what actually happens at trial,

---

<sup>1</sup> The State notes that Somerville's PRP references the Report of Proceedings from the direct appeal, No.29320-0-II, however it does not appear that the record has been transferred to this PRP. The defense opening statement and closing argument at issue are attached hereto as Appendix O and Appendix P.

of course, but I'm not anticipating defense evidence about the science.

Appendix O at 2-3. He continued,

So I'm just telling you that now there's - - what I think will be important here, and what you will need to concern yourselves with in the long run, is the descriptions by the two young ladies about what happened that particular day; the sequence of events, what was said, when it was said, how it was said, the context of the events that have been described by [the prosecutor], and particularly whether or not any threats were made, whether or not there was mention of a gun.

Appendix O at 4.

Reed's closing argument was discussed in the order dismissing petition in No. 33112-8-II. Appendix D at 11. Additional facts are included as necessary in the response below.

### III. RESPONSE TO ISSUES RAISED.

1. This petition is time barred and there has not been a significant change in the law which would provide for an exception to the time bar.

A petitioner has one year from the time his judgment becomes final to file a PRP or other form of collateral attack. RCW 10.73.090(1), (2). A judgment is "final" when it is filed with the clerk of the trial court, when an appellate court issues its mandate disposing of a timely direct appeal, or when the U.S. Supreme Court denies a

timely petition for certiorari to review a decision affirming a conviction on direct appeal—whichever comes last. RCW 10.73.090(3).

The one-year limit may be avoided only if the petitioner's judgment is invalid on its face or was entered by a court without competent jurisdiction, RCW 10.73.090(1); or if the petition is based solely on one or more of the statutory exceptions to the time limit listed in RCW 10.73.100, Id.

RCW 10.73.100 lists six exceptions to the one-year time limit:

- (1) newly discovered evidence uncovered with reasonable diligence;
- (2) facial or as applied unconstitutionality of the statute under which the petitioner was convicted;
- (3) double jeopardy;
- (4) insufficient evidence to support the conviction (if the petitioner plead not guilty);
- (5) a sentence in excess of the trial court's jurisdiction; and
- (6) a significant and material change in the law that applies retroactively.

Id. Regardless of the exception a petitioner claims, he must state with particularity facts that, if proven, would entitle him to relief. In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Bald assertions and conclusory allegations are not sufficient. In re Pers. Restraint of Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004) (citing Rice, 118 Wn.2d at 886).

Somerville argues that the United States Supreme Court decision in McCoy v. Louisiana, 138 S.Ct. 1500, 200 L.Ed 2d 821 (2018), is a significant and material change in the law that applies retroactively. A significant change in the law occurs when “an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue.” In re Pers. Restraint of Colbert, 186 Wn.2d 614, 619, 380 P.3d 504 (2016).

In McCoy, the United States Supreme Court considered whether defense counsel in a capital case violated the defendant’s Sixth Amendment right to assistance of counsel by conceding guilt during the guilt phase of trial over the defendant’s objection in an effort to avoid the death penalty. 138 S.Ct. at 1505. The Court indicated “trial management is the lawyer’s province: Counsel provides his or her assistance by making decisions such as what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.” Id. at 1508. However, some decisions “are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal.” Id., *citing* Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

The court then stated, “autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category.” Id. The Court indicated that the autonomous right included insisting “on maintaining her innocence at the guilt phase of a capital trial.” Id. In making its decision, the Court distinguished McCoy from its earlier decision in Florida v. Nixon, 543 U.S. 175, 178-179, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), where the Court found that counsel was not ineffective by conceding guilt during the guilt phase of a capital case after the defendant was generally unresponsive to counsel regarding the approach during pretrial preparations and never approved or protested the strategy. McCoy, at 1509. The difference between McCoy and Nixon was that McCoy “opposed his attorney’s assertion of guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court.” United States v. Felicianosoto, 934 F.3d 783, 787 (8<sup>th</sup> Cir. 2019).

Division III of the Court of Appeals discussed McCoy in the unpublished opinion of State v. Zimmer, 2019 Wash.App. LEXIS 1299 (May 21, 2019).<sup>2</sup> Division III noted, “*McCoy* clarified that a client also has the personal right to decide that the objective of the defense is to

---

<sup>2</sup> Unpublished Opinion offered for whatever persuasive value the Court deems

assert innocence.” Id. at 8. The only other Washington case that the State can locate which discusses McCoy is the unpublished opinion of Division I of the Court of Appeals in State v. Urbina, 2019 Wash.App.LEXIS 914,<sup>3</sup> however, that case involved a claim regarding the defendant’s opportunity to testify.

The Sixth Amendment right to autonomy has long been recognized by our Courts. See, State v. Coristine, 177 Wn.2d 370, 375, 300 P.3d 400 (2013); McKaskle v. Wiggins, 465 U.S. 168, 176-77, 104 S.Ct. 944, 79 L.Ed. 2d 122 (1984). In State v. Silva, Division I of the Court of Appeals held that a partial concession of facts sufficient for the least serious charges was a legitimate tactical decision and did not amount to an unauthorized guilty plea. 106 Wn. App. 586, 599, 24 P.3d 477 (2001). Key to the decision was the fact that the concession was not a complete concession of guilt. In fact, the Court distinguished Wiley v. Sowders, 647 F.2d 642, 644 (6<sup>th</sup> Cir. 1981) (an attorney may not stipulate to facts which amount to the functional equivalent of a guilty plea) and United States v. Swanson, 943 F.2d 1070 (9<sup>th</sup> Cir. 1991) (when a defense attorney concedes that

---

appropriate. GR 14.1.

<sup>3</sup> Unpublished Opinion offered for whatever persuasive value the Court deems appropriate. GR 14.1.

there is no reasonable doubt concerning the only factual issues in dispute, the Government has not been held to its burden of persuading the jury that the defendant is guilty), both of which involved defense attorneys making complete concessions without any apparent strategic reason to do so. Silva, 106 Wn. App. at 598. The opinion contained no discussion of the expressed objective of the defendant.

Given that Wiley and Swanson predated Silva, and the lack of discussion regarding the objective of the defense in Silva, it is not clear that McCoy actually announced a new rule of law. No case has specifically overturned the holding in Silva. The State is aware of no case that expressly holds that McCoy is a new rule of law for purposes of determining whether a collateral attack is barred.

Even if it is assumed to be a new rule of law, a new rule of law warrants retroactive application only if it is a “substantive rule that places certain behavior beyond the power of the criminal law-making authority to proscribe, or a watershed rule of criminal procedure ‘implicit in the concept of ordered liberty.’” In re Colbert, 186 Wn.2d at 624; Teague v. Lane, 489 U.S. 288, 299, 311, 109 S.Ct. 1060, 103

L.Ed 2d 334 (1989); In re Pers. Restraint of Gentry, 179 Wn.2d 614, 316 P.3d 1020 (2014).

The rule in McCoy is not a substantive rule that limits the criminal law-making authority, therefore, if it is to be applied retroactively, there must be a demonstration made that it involves a “watershed rule” of criminal procedure. “In announcing watershed rules, courts have been sparing to the point of unwillingness.” Gentry, 179 Wn.2d at 628-629, *citing* In re Pers. Restraint of Markel, 154 Wn.2d 262, 269 n. 2, 111 P.3d 249 (2005). In order to qualify as a watershed rule, the rule “must be one without which the likelihood of an accurate conviction is seriously diminished.” Markel, 154 Wn.2d at 269, *citing* Teague, 489 U.S. at 311.

The State is aware of no case that indicates that the ruling in McCoy constitutes a “watershed rule” to be applied retroactively. Given that the law has recognized the Sixth Amendment right to autonomy, it cannot be said that the rule in McCoy is one without which the likelihood of an accurate conviction is seriously diminished, such that the rule alters “our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” Sawyer v. Smith,

497 U.S. 227, 242, 111 L.Ed. 2d 193, 110 S.Ct. 2922 (1990). Even if the rule is new, it should not be applied retroactively.

Somerville fails to demonstrate that McCoy v. Louisiana announced a new watershed rule that applies retroactively. As such, he fails to demonstrate that his petition is not time barred because he cannot demonstrate a significant change in the law that applies retroactively. RCW 10.73.100(6). His petition must be dismissed as time-barred. RCW 10.73.090.

2. Somerville's defense counsel did not concede guilt to any crime during either his opening statement or his closing argument.

Somerville raised the claim that his defense attorney conceded guilt at trial in a previous personal restraint petition, No. 33112-8-II. Appendix D. In that petition, Somerville argued "the oral sex occurred [sic] because after the robbery I made the statement 'will you go down on me' and she did with out [sic] me forcing her." Appendix D at 8. In considering Somerville's argument that his attorney had conceded guilt in the opening statement, this Court noted that the transcript of the opening statement had not been provided, but stated

Even assuming that his counsel made such a statement, petitioner has not demonstrated prejudice. Petitioner seems to assume that such a concession

would be per se prejudicial; this is incorrect. State v. Silva, 106 Wn. App. 586, 596-597, 24 P.3d 477 (2001).

Appendix D at 10.

For this response, the State has obtained defense counsel's opening statement. Appendix O. Contrary to Somerville's claim, his defense attorney never conceded guilt to any crime in his opening statement. Defense counsel indicated that the defense was not required to put on evidence and indicated that the defense would not provide evidence about the science in the case. Appendix O at 3-4. Defense counsel then asked the jury to consider the sequence of events and "particularly whether or not any threats were made, whether or not there was any mention of a gun." Appendix O at 4. Defense counsel's opening statement did not concede guilt.

When this issue was previously before this Court, this Court reviewed the closing argument of defense counsel. Appendix D at 11.

This Court stated

Petitioner's counsel acknowledged the strength of the DNA-based identification evidence and made a tactical decision to argue strongly that the State had not proved a threat with a weapon. In an effort to prevent conviction of a greater crime, he argued that, at most, the State had proved second degree, rather than first degree rape. Even while acknowledging the detailed evidence of identity, Petitioner's counsel did not

concede this issue completely and did not concede that his client had committed any crime.

Appendix D at 11. Even if this Court decided that McCoy is a significant change in the law that applies retroactively, McCoy is not material to this case because Somerville's counsel never conceded guilt to any crime and the record does not demonstrate in anyway that Somerville's counsel violated the right of Somerville to direct the objective of his defense. To the contrary, though counsel faced an uphill battle, he argued that the State did not present sufficient evidence to convict.

During his closing argument, defense counsel argued, in the context of the robbery, the victim may have wanted to justify the sexual contact and conclude in her mind "I did this because he said he had a gun. I didn't just do it." Appendix P at 341.<sup>4</sup> Without conceding guilt, this argument was consistent with the argument put forth by Somerville in his prior PRP that after the robbery, he asked her to perform oral sex on him. Appendix D at 8. There is absolutely no basis in the record to conclude that defense counsel's arguments were inconsistent with Somerville's objectives in his defense. See,

---

<sup>4</sup>The page number refers to the page number from the original transcript for ease of reference.

United States v. Felicianosoto, 934 F.3d at 787; United States v. Hashimi, 768 Fed. Appx. 159, 162-163 (4<sup>th</sup> Cir. 2019);<sup>5</sup> People v. Bernal, 42 Cal.App.5<sup>th</sup> 1160, 1166 (December 5, 2019) (McCoy does not assist defendant because the record does not reflect a directive to maintain innocence on all charges).

IV. CONCLUSION.

The United States Supreme Court ruling in McCoy v. Louisiana merely clarified that Sixth Amendment right to autonomy in presenting a defense. It was not a watershed rule that applies retroactively, therefore, Somerville cannot demonstrate a significant change in the law that is material to his case and applies retroactively. Regardless, the record is clear that Somerville's trial counsel did not concede any crime and Somerville has not demonstrated that his counsel contravened the objective of his defense over his objection. This

//

//

//

//

---

<sup>5</sup> Unpublished opinion offered only for whatever persuasive value the Court deems appropriate per GR 14.1, USCS Fed Rules App Proc R 32.1.

Petition is without merit, subject to time limitation of RCW 10.73.090 and the State respectfully requests that this Court dismiss the petition.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of January, 2020.

JON TUNHEIM  
Prosecuting Attorney



---

Joseph J.A. Jackson, WSBA #37306  
Deputy Prosecuting Attorney

**DECLARATION OF SERVICE**

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

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

Date: January 8, 2020

Signature: 

# APPENDIX A

FILED  
 SUPERIOR COURT  
 THURSTON COUNTY, WASH.  
 02 SEP 12 AM 9:58  
 DEPT. CLERK  
 BY \_\_\_\_\_ 12  
 BT/TS

SUPERIOR COURT OF WASHINGTON  
 COUNTY OF THURSTON

STATE OF WASHINGTON, Plaintiff,  
 v.  
 DENNIS WAYNE SOMERVILLE,  
 Defendant.  
 PCN: 006945783  
 SID: WA19588582  
 DOB: 10/3/1970

No. 02-1-908-9  
 (FOR CRIMES COMMITTED ON OR AFTER 7-1-00)  
**JUDGMENT AND SENTENCE (JS)**  
 Prison  
 Jail One Year or Less  
 First-Time Offender  
 Special Sexual Offender Sentencing Alternative  
 Special Drug Offender Sentencing Alternative

**I. HEARING**

1.1 A sentencing hearing was held on September 12, 2002 and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

**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 August 8, 2002 by  plea  jury-verdict  bench trial of:

COUNT	CRIME	RCW	DATE OF CRIME
1	RAPE IN THE FIRST DEGREE	RCW 9A.44.040(1)(a)	October 18, 1998

as charged in the Original Information.

- A special verdict/finding for use of **firearm** was returned on Count(s) \_\_\_\_\_ RCW 9.94A.125, .310.
- A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) \_\_\_\_\_ RCW 9.94A.125, .310.
- A special verdict/finding of **sexual motivation** was returned on Count(s) \_\_\_\_\_ RCW 9.94A.127.
- A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) \_\_\_\_\_, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

COPY TO SHERIFF  
 573

JASS

02-9-11380-2

JUDGMENT AND SENTENCE (JS) (Felony)  
 (RCW 9.94A.110, .120)(WPP CR 84.0400 (6/2000))

02-1-908-9

COPY TO DOC

page 1 of 9

- A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine when a juvenile was present in or upon the premises of manufacture was returned on Count(s) \_\_\_\_\_, RCW 9.94A, RCW 69.50.401(a), RCW 69.50.440.
- The defendant was convicted of vehicular homicide which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.
- This case involves 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 the offender is not the minor's parent. RCW 9A.44.130.
- The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.
- The crime charged in Count(s) \_\_\_\_\_ involve(s) domestic violence.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400):
  
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.360):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1 Battery w/serious bodily injury	10-29-92	Solano, CA	1992	A	V
2 Robbery in the First Degree	5-25-00	Clark, WA	11-4-98	A	V
3 Att. Robbery in the 2 <sup>nd</sup> Degree	5-25-00	Clark, WA	5-26-98	A	V
4 Robbery in the Second Degree	5-25-00	Clark, WA	5-11-99	A	V
5 Robbery in the Second Degree	5-25-00	Clark, WA	5-11-99	A	V
6 Robbery in the Second Degree	5-25-00	Clark, WA	5-11-99	A	V
7 Robbery in the Second Degree	5-25-00	Clark, WA	5-11-99	A	V
8 Robbery in the Second Degree	5-25-00	Clark, WA	5-11-99	A	V
9 Robbery in the Second Degree	11-30-00	Clackamas, Oregon	6-7-98	A	V
10 Robbery in the Second Degree	5-2-01	Multnomah, Oregon	2-28-99	A	V

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360.
- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360):
  
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
1	20	XII	240-318 months	N/A	SAME	Life in Prison and/or \$50,000 fine

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

2.4 [ ] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence [ ] above [ ] within [ ] below the standard range for Count(s) \_\_\_\_\_. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows: \_\_\_\_\_

### III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The Court DISMISSES Counts \_\_\_\_\_ [ ] The defendant is found NOT GUILTY of Counts \_\_\_\_\_

### IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

<u>JASS CODE</u>	\$ _____	Restitution to: _____	
	\$ _____	Restitution to: _____	
RTN/RJN	\$ _____	Restitution to: _____	
		(Name and Address—address may be withheld and provided confidentially to Clerk's Office).	
PCV	\$ <u>500.00</u>	Victim assessment	RCW 7.68.035
CRC	\$ <u>110.00</u>	Court costs, including	RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190
		Criminal filing fee \$ <u>110.00</u>	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ _____	SFR/SFS/SFW/WRF
		Jury demand fee \$ _____	JFR
		Other \$ _____	
PUB	\$ _____	Fees for court appointed attorney	RCW 9.94A.030
WFR	\$ _____	Court appointed defense expert and other defense costs	RCW 9.94A.030
FCM/MTH	\$ _____	Fine RCW 9A.20.021; [ ] VUCSA additional fine deferred due to indigency	RCW 69.50.430
CDF/LDI/PCD NTF/SAD/SDI	\$ _____	Drug enforcement fund of _____	RCW 9.94A.030
CLF	\$ _____	Crime lab fee [ ] deferred due to indigency	RCW 43.43.690
EXT	\$ _____	Extradition costs	RCW 9.94A.120
	\$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum)	RCW 38.52.430
	\$ <u>100.00</u>	Other costs for: <u>DNA testing</u>	
	\$ <u>710.00</u>	TOTAL	RCW 9.94A.145

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.142. A restitution hearing:  
 shall be set by the prosecutor  
 is scheduled for \_\_\_\_\_

RESTITUTION. Schedule attached, Appendix 4.1.

Restitution ordered above shall be paid jointly and severally with...  

NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount-\$)
-------------------------	--------------	---------------	-------------

RJN

The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010.

All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ \_\_\_\_\_ per month commencing \_\_\_\_\_ . RCW 9.94A.145.

In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145.

The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2  HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.3 The defendant shall not have contact with those persons named in Section 4.4 below (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE (not to exceed the maximum statutory sentence).

Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.4 OTHER: The defendant shall have no contact, as that is defined in Section 4.3 above, with :

DEBRA L. WESTERFIELD, DOB 9-17-70, or SUSAN M. PETERSON, DOB 8-12-66.

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

300 months on Count I months on Count \_\_\_\_\_  
\_\_\_\_\_ months on Count \_\_\_\_\_ months on Count \_\_\_\_\_  
\_\_\_\_\_ months on Count \_\_\_\_\_ months on Count \_\_\_\_\_

Actual number of months of total confinement ordered is: 300 months  
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: \_\_\_\_\_

The sentence herein shall run consecutively with the sentence in cause number(s) CLARK COUNTY  
CRANJA NO. 99-1-00783-2 and Consecutive to Multnomah County  
but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400 Cause No.  
99-06-34722  
Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: \_\_\_\_\_

4.6  COMMUNITY CUSTODY is ordered as follows: Count I for 36 months;  
Count \_\_\_\_\_ for \_\_\_\_\_ months; Count \_\_\_\_\_ for \_\_\_\_\_ months;

COMMUNITY CUSTODY is ordered as follows:  
Count \_\_\_\_\_ for a range from \_\_\_\_\_ to \_\_\_\_\_ months;  
Count \_\_\_\_\_ for a range from \_\_\_\_\_ to \_\_\_\_\_ months;  
Count \_\_\_\_\_ for a range from \_\_\_\_\_ to \_\_\_\_\_ months;

or for the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community custody, the defendant shall comply with all conditions set forth in APPENDIX H to this Judgment and Sentence, which is attached hereto and is incorporated herein by reference. The residence location and living arrangements of the defendant are subject to the prior approval of DOC while in community custody.

Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

Defendant shall have no contact with: DEBRA L. WESTERFIELD or SUSAN M. PETERSON.

Defendant shall remain  within  outside of a specified geographical boundary, to wit: See Appendix H

The defendant shall participate in the following crime-related treatment or counseling services: See Appendix H

The defendant shall undergo an evaluation for treatment for  domestic violence  substance abuse  mental health  anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: See Appendix H.

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: \_\_\_\_\_

- 4.7  **WORK ETHIC CAMP.** RCW 9.94A.137, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.
- 4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: \_\_\_\_\_

#### V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.145 and RCW 9.94A.120(13).
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030.
- 5.4 **RESTITUTION HEARING.**  
 Defendant waives any right to be present at any restitution hearing (sign initials): \_\_\_\_\_
- 5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200.
- 5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

Cross off if not applicable:

5.7 **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 but you are a student in Washington or you are employed in Washington or you carry on a vocation in 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 that 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 out of Washington State, you must also send written notice within 10 days of moving 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.

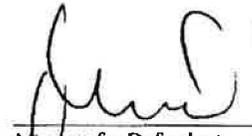
Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days after ceasing to have a fixed residence. If you enter 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 are registered on a weekly basis if you have been classified as a risk level II or III, or on a monthly basis if you have been classified as a risk level I. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level.

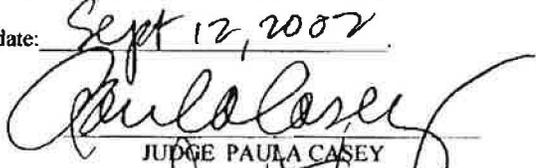
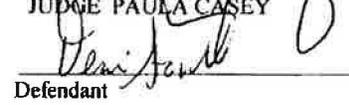
If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5.8 **OTHER:** Bail previously posted, if any, is hereby exonerated and shall be returned to the posting party.

DONE in Open Court and in the presence of the defendant this date: Sept 12, 2007

  
Deputy Prosecuting Attorney  
WSBA #12791  
Print name: JAMES C. POWERS

  
Attorney for Defendant  
WSBA #16838  
Print name: PAUL REED

  
JUDGE PAULA CASEY  
  
Defendant  
DENNIS WAYNE SOMERVILLE

Interpreter signature/Print name: \_\_\_\_\_  
I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the \_\_\_\_\_  
\_\_\_\_\_ language, which the defendant understands. I translated this Judgment and Sentence for the  
defendant into that language.

CAUSE NUMBER of this case: 02-1-908-9

I, \_\_\_\_\_, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_

Clerk of said County and State, by: \_\_\_\_\_, Deputy Clerk

**IDENTIFICATION OF DEFENDANT**

SID No. WA19588582

Date of Birth 10/3/1970

(If no SID take fingerprint card for State Patrol)

FBI No. 914028AB5

Local ID No. \_\_\_\_\_

PCN No. 006945783

Other \_\_\_\_\_

Alias name, SSN, DOB: \_\_\_\_\_

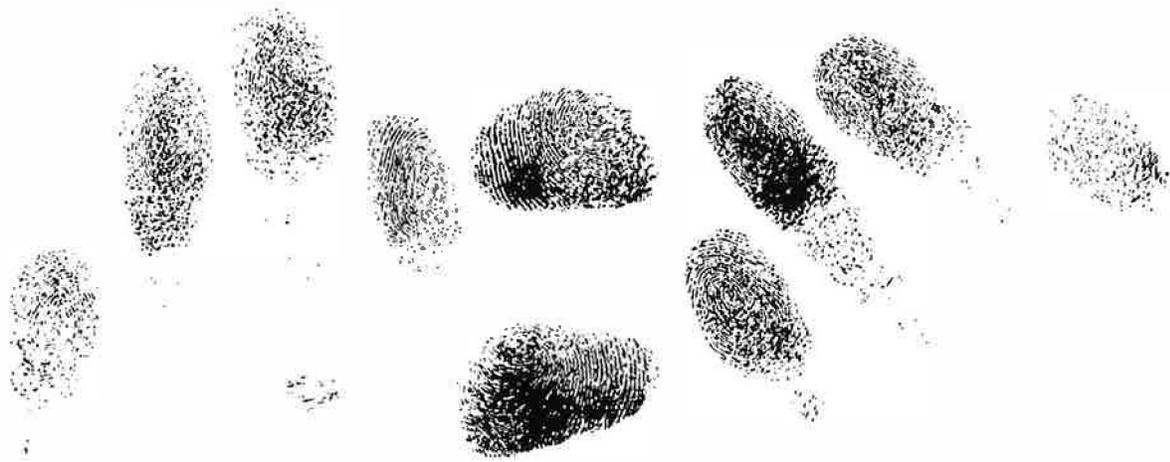
Race:

- |   |   |   |  |  |
|---|---|---|--|--|
| <input type="checkbox"/> Asian/Pacific Islander | <input type="checkbox"/> Black/African-American | <input checked="" type="checkbox"/> Caucasian | <b>Ethnicity:</b>                                | <b>Sex:</b>                              |
|   |   |   | <input type="checkbox"/> Hispanic                | <input checked="" type="checkbox"/> Male |
| <input type="checkbox"/> Native American        | <input type="checkbox"/> Other: _____           |   | <input checked="" type="checkbox"/> Non-Hispanic | <input type="checkbox"/> Female          |

**FINGERPRINTS** I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, [Signature] Dated: 7-17-02

DEFENDANT'S SIGNATURE:

<u>[Signature]</u>			
Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON

NO. 02-1-908-9

Plaintiff,

vs.

WARRANT OF COMMITMENT ATTACHMENT  
TO JUDGMENT AND SENTENCE (PRISON)

DENNIS WAYNE SOMERVILLE,

Defendant.

DOB: 10/3/1970  
SID: WA 19588582 FBI: 914028AB5  
PCN: 006945783  
RACE: W  
SEX: M  
BOOKING NO:

THE STATE OF WASHINGTON TO:

The Sheriff of Thurston County and to the proper officer of the Department of Corrections.

The defendant DENNIS WAYNE SOMERVILLE has been convicted in the Superior Court of the State of Washington for the crime(s) of: RAPE IN THE FIRST DEGREE, RCW 9A.44.040(1)(a)

and the court has ordered that the defendant be sentenced to a term of imprisonment as set forth in the Judgment and Sentence.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

By direction of the Honorable:

\_\_\_\_\_  
JUDGE PAULA CASEY

\_\_\_\_\_  
BETTY J. GOULD  
CLERK

By:   
DEPUTY CLERK

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF Thurston**

STATE OF WASHINGTON	]	Cause No.: 02-1-00908-9
	]	
	Plaintiff ]	
	v. ]	<b>JUDGEMENT AND SENTENCE (FELONY)</b>
Somerville, Dennis		<b>APPENDIX H</b>
	Defendant ]	<b>COMMUNITY PLACEMENT / CUSTODY</b>
	]	
DOC No. 810921	]	

---

The court having found the defendant guilty of offense(s) qualifying for community placement, it is further ordered as set forth below.

**COMMUNITY PLACEMENT/CUSTODY:** Defendant additionally is sentenced on convictions herein, for each sex offense and serious violent offense committed on or after June 6, 1996 to community placement/custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150 (1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, but before June 6, 1996, to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.150 (1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community placement.

Community placement/custody is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

(a) **MANDATORY CONDITIONS:** Defendant shall comply with the following conditions during the term of community placement/custody:

- (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 consume controlled substances except pursuant to lawfully issued prescriptions;
- (4) While in community custody not unlawfully possess controlled substances;
- (5) Pay supervision fees as determined by the Department of Corrections;
- (6) Receive prior approval for living arrangements and residence location;
- (7) Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community service, community supervision, or both (RCW 9.94A, 120 (13));
- (8) Notify community corrections officer of any change in address or employment; and
- (9) Remain within geographic boundary, as set fourth in writing by the Community Corrections Officer.

**WAIVER:** The following above-listed mandatory conditions are waived by the Court:

- (b) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement / custody:

- (1) Enter into and successfully complete sexual deviancy therapy as directed by the Community Corrections Officer;
- (2) Inform the Community Corrections Officer of any romantic relationships to verify the adult is aware of your crime and conditions of supervision;
- (3) Do not possess or peruse sexually explicit materials, as defined by your therapist or CCO, unless given prior approval by your therapist or Community Corrections Officer.
- (4) Do not attend X-rated movies, peep shows, or adult bookstores without the approval of the sexual deviancy therapist and Community Corrections Officer.
- (5) Do not use or possess illegal or controlled substances without the written prescription of a licensed physician. To verify compliance, submit to testing and reasonable searches of your person, residence, and vehicle;
- (6) Notify your employer regarding your history of sexual deviancy and rules and regulations regarding children and legal status;
- (7) Within 30 days of sentencing, submit to DNA and HIV testing as required by law;
- (8) Do not change therapist without prior approval of your Community Corrections Officer;
- (9) Obey all laws;
- (10) Have no contact with the victim of your offense and his/her immediate family for life.
- (11) ~~Do not have access to the internet or a computer with a modem;~~ *90P P=2*
- (12) Do not go into bars, taverns or cocktail lounges;
- (13) Remain within or outside any geographic boundaries specified by the treatment provider and/or Community Corrections Officer;
- (14) Obtain and maintain full-time employment. Employment shall be approved by the Community Corrections Officer.
- (15) Abide by all rules of the treatment program and community placement as well as any additional

rules the therapist and/or Community Corrections Officer deem appropriate;  
(21) Register as a sex offender in accordance with RCW 9A.44.130;  
(22) Must submit to and successfully pass, polygraph testing at the direction of the Community Corrections Officer with no deceptive results.

DATE

Sept 17, 2007

  
JUDGE, Thurston COUNTY SUPERIOR COURT

# APPENDIX B

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

STATE OF WASHINGTON,  
Respondent,  
v.  
DENNIS WAYNE SOMERVILLE,  
Appellant.

No. 29320-0-II

RULING AFFIRMING  
JUDGMENT

04 JAN 13 AM 10:26  
STATE OF WASHINGTON  
BY  DEPUTY

FILED  
COURT OF APPEALS  
DIVISION II

Dennis Wayne Somerville appeals his Thurston County conviction of first degree rape, contending the evidence was insufficient to support the conviction. Pro se, Somerville also contends that: (1) his trial counsel did not effectively represent him; (2) the court improperly admitted DNA evidence; (3) the State failed to preserve evidence; and (4) in calculating his offender score, the trial court failed to consider whether five prior convictions constituted the same criminal conduct and abused its discretion in making his current sentence consecutive with sentences for prior crimes. This court considered the matter pursuant to its own motion on the merits. RAP 18.14.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338 (1993); *State v. Green*, 94 Wn.2d 216, 221 (1980). A claim of insufficiency

admits the truth of the State's evidence and requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201 (1992). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638 (1980). The court must give deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, *review denied*, 119 Wn.2d 1011 (1992). Thus, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71 (1990).

To convict Somerville of first degree rape, the State had to prove that he engaged in sexual intercourse with the victim by forcible compulsion and that he used or threatened to use a deadly weapon.<sup>1</sup> The victim, Debra Westerfield, testified that she was working at Ed Wyse Beauty Supply on October 18, 1998. Westerfield was helping a customer, Susan Peterson, when Somerville entered the store. When Westerfield rang up Peterson's sale and the till drawer opened, Somerville began to pull money out. Westerfield testified that Somerville said, "This was a fucking robbery. And, don't fuck with him and that he had a gun."<sup>2</sup> Westerfield did not see a gun. After taking the money from the till and a cash bag, and demanding money from Peterson, Somerville led her to the bathroom

---

<sup>1</sup> RCW 9A.44.040.

<sup>2</sup> Report of Proceedings Aug. 6, 2002 at 39.

and partially closed the door. He then took Westerfield behind a counter, pushed her down, and made her perform oral sex. Westerfield stated she was afraid Somerville would kill her.

Contrary to Somerville's argument, the first degree rape statute does not require the State to prove that the defendant possessed an actual deadly weapon during the rape, but only that a believable or credible threat to use a deadly weapon was made. *State v. Hentz*, 99 Wn.2d 538, 541 (1983). Also contrary to Somerville's contention, the jury could find that the threat to use a gun applied to the rape, even though Somerville mentioned it only during the robbery. There was sufficient evidence to support the conviction.

Somerville, pro se, contends that his offender score is incorrect, asserting that five of his prior crimes constituted the same criminal conduct and should have counted only one point.<sup>3</sup> Somerville argued at sentencing that five of the 2000 second degree robbery convictions occurred at one bank with five different tellers, so they constituted the same criminal conduct for sentencing purposes.

A court's determination of whether crimes constitute the same criminal conduct is reviewed for abuse of discretion. *State v. Haddock*, 141 Wn.2d 103, 110 (2000). Crimes involving separate victims do not constitute the same criminal conduct, for purposes of calculating the offender score at sentencing, though some of the crimes occurred at the same time and place. *State v. Israel*,

---

<sup>3</sup> Somerville's criminal history is comprised of a California battery in 1992, one first degree robbery in 2000, six second degree robberies in 2000, one second degree attempted robbery in 2000, and a second degree robbery in 2001. Clerk's Papers at 46.

113 Wn. App. 243, 295 (2002) *review denied*, 149 Wn.2d 1013 (2003); former RCW 9.94A.400(1)(a).<sup>4</sup>

Somerville also contends the trial judge changed her mind four times with regard to whether his rape sentence should be consecutive to his other sentences. This is simply not correct. The judge was adamant that the sentence should be consecutive. She misspoke during the oral ruling, but quickly corrected herself. A sentencing court is granted broad discretion in choosing whether to make the sentences it imposes consecutive with other sentences. The judge need only order that the sentences be served consecutively; no reason for the decision is required. *State v. Mathers*, 77 Wn. App. 487, 494, *review denied*, 128 Wn.2d 1002 (1995). Somerville's argument is without merit.

Likewise without merit is the claim of ineffective assistance of counsel. Somerville contends his attorney should have objected to DNA evidence, should have obtained an independent test of the semen sample, and should have offered a rebuttal witness regarding the reliability of DNA testing. He also asserts counsel did not adequately cross-examine witnesses. Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and counsel's deficient performance prejudices the defendant. *In re Brett*, 142 Wn.2d 868, 873 (2001) (citing *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77 (1996)). In order to establish prejudice, the defendant must demonstrate a reasonable probability that, but for

---

<sup>4</sup> Recodified as RCW 9.94A.589 by Laws of 2001, ch. 10 § 6.

counsel's errors, the result of the trial or sentencing would have been different. See *State v. McFarland*, 127 Wn.2d 322, 335 (1995).

Somerville contends that counsel failed to cross-examine Peterson and Westerfield about inconsistencies in their testimony. Peterson was in the bathroom and did not witness the rape. She did testify that she heard Westerfield plead with Somerville, stating, "Oh, god, please don't," two times.<sup>5</sup> Westerfield had previously testified that she had said "I don't want to" and "Please don't make me do that" when Somerville was forcing compliance.<sup>6</sup> This testimony may have minor differences, but the inference by the jury would be the same. Somerville also contends Westerfield initially told police that he had *asked* her to perform oral sex (not demanded it), and his attorney should have questioned her about that. Whatever term Westerfield may have used originally, the description of events given by her and Peterson clearly indicated that Somerville forced her to perform oral sex.

Somerville also contends that counsel should have objected to the DNA evidence because the short tandem repeat (STR) test is not universally accepted. There is no question that the underlying scientific theory of DNA typing is accepted in the scientific community for identification purposes in the forensic setting. *Gentry*, 125 Wn.2d at 586-87 (citing *State v. Russell*, 125 Wn.2d 24, 54 (1994) *cert. denied*, 514 U.S. 1129 (1995)). Karen Lindell, forensic

---

<sup>5</sup> Report of Proceedings Aug. 7, 2002 at 110.

<sup>6</sup> Report of Proceedings Aug. 6, 2002 at 47.

scientist with the Washington State Patrol crime lab, testified about the STR method of DNA testing. Lindell stated the STR technique had been validated in the Tacoma lab since March of 2000. Additionally, she testified that the STR method of DNA testing is generally accepted in the scientific community, and meets the Frye test.

Assuming, as Somerville contends, that the State did not provide the lab report in a timely manner, and the report could therefore have been excluded pursuant to CrR 6.13(b), that would not have precluded the testimony of the experts who performed the analysis, and those experts did, in fact, testify. As to the need for another test of the semen removed from Westerfield's mouth, or an expert to challenge the DNA evidence, there is nothing more than speculation to suggest that a second test would have had different results, or that counsel could have successfully challenged the reliability of the tests performed.. There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *State v. Sherwood*, 71 Wn. App. 481, 483 (1993) *review denied*, 123 Wn.2d 1022 (1994). This presumption cannot be rebutted by bare allegations. Somerville has demonstrated neither deficient performance by trial counsel, nor prejudice.

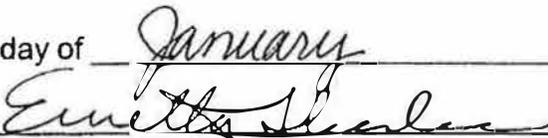
Finally, Somerville claims the State failed to preserve the blood sample he provided. The record does not support this claim. Detective Steve Galagher of the Olympia police department testified he served a search warrant on Somerville authorizing a blood draw on December 7, 2001. Galagher provided a copy of the warrant to Somerville. Chet Mackaben, evidence technician for the

Olympia police department, testified that a tube of blood was drawn from Somerville on December 7, 2001 and received into evidence the same day. The blood was transported to the Washington State Patrol crime lab on December 10, 2001 for DNA testing. The blood came back from the crime lab on March 6, 2002 and was placed in the Olympia police department refrigerator. Mackaben testified he brought the blood to court on the day of trial in substantially the same condition as when it was first received.

Somerville having failed to present any meritorious issue, it is hereby

ORDERED that the judgment is affirmed.

DATED this 13<sup>th</sup> day of January, 2004.



Ernetta G. Skerlec  
Court Commissioner

cc: Patricia Anne Pethick  
James C. Powers  
Hon. Paula Casey  
Thurston County Superior Court  
Cause number: 02-1-00908-0  
Indeterminate Sentence Review Board  
Dennis Wayne Somerville

# APPENDIX C

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, )  
)  
Respondent, )  
)  
v. )  
)  
DENNIS WAYNE SOMERVILLE, )  
)  
Petitioner. )  
\_\_\_\_\_ )

NO. 75388-1

ORDER

C/A NO. 29320-0-II

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2004 NOV 30 PM 2:00  
BY CLERK  
bph

Department I of the Court, composed of Chief Justice Alexander and Justices Johnson, Sanders, Bridge, and Owens (Justice Chambers sat for Justice Sanders) (Justice Ireland sat for Justice Bridge), considered this matter at its November 30, 2004, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 30<sup>th</sup> day of November, 2004.

*Gerry L. Alexander*  
\_\_\_\_\_  
CHIEF JUSTICE

*Duplicate*

FILED  
SUPERIOR COURT  
THURSTON COUNTY WASH.

'04 DEC 27 19:53

DEPUTY  
*gn?*

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

STATE OF WASHINGTON,

Respondent,

v.

DENNIS W. SOMERVILLE,

Appellant.

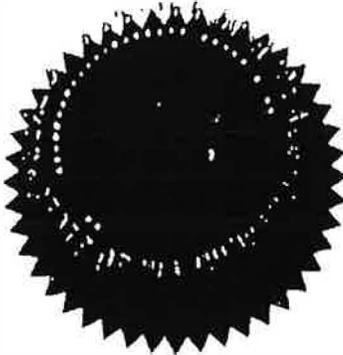
No. 29320-0-II

MANDATE

Thurston County Cause No.  
02-1-00908-9

The State of Washington to: The Superior Court of the State of Washington  
in and for Thurston County

This is to certify that the Court of Appeals of the State of Washington, Division II, entered a Ruling Affirming Judgment in the above entitled case on January 13, 2004. This ruling became the final decision terminating review of this court on November 30, 2004. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the determination of that court.



IN TESTIMONY WHEREOF, I have  
hereunto set my hand and affixed the  
seal of said Court at Tacoma, this  
20<sup>th</sup> day of December, 2004.

*[Signature]*  
Clerk of the Court of Appeals,  
State of Washington, Div. II

02-9-11380-2

# APPENDIX D

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

In re the  
Personal Restraint Petition of  
  
DENNIS W. SOMERVILLE,  
  
Petitioner.

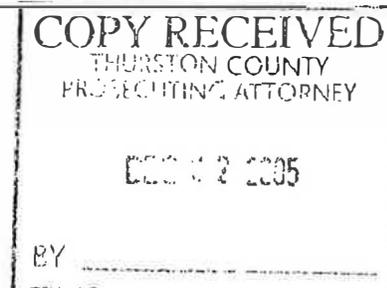
No. 33112-8-II

ORDER DISMISSING PETITION

FILED  
COURT OF APPEALS  
DIVISION II  
05 NOV 30 AM 10:44  
STATE OF WASHINGTON  
BY DEPUTY

Dennis W. Somerville seeks relief from personal restraint imposed following his jury trial conviction of first degree rape in Thurston County Cause No. 02-1-00908-9. The jury convicted petitioner on August 8, 2002, and the trial court imposed a standard range sentence of 300 months on September 12, 2002, to be consecutive to sentences imposed previously by other courts. In addition to release from confinement, Petitioner seeks a reference hearing and appointment of counsel. Petitioner bases his requests for relief on approximately 24 claims; each is either procedurally barred or frivolous. This court dismisses his petition.

Petitioner unsuccessfully appealed his conviction and his sentence; his conviction became final on December 20, 2004, when the mandate issued. *See* RCW 10.73.090(3)(b). Although Petitioner has filed previous personal restraint petitions with this court, this is his first petition challenging his 2002 first degree rape conviction. This petition is therefore timely under RCW 10.73.090(1) and is not barred as a successive petition under RCW 10.73.140.



The procedural barriers found in Chapter 10.73 RCW are not the only barriers to collateral attacks such as personal restraint petitions, however. Courts have imposed limitations on collateral attacks purposefully and for good reasons:

“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. These are significant costs which require that collateral relief be limited.” Furthermore, collateral review is not a substitute for appeal. . . . [C]ollateral attacks on convictions, whether based on constitutional or nonconstitutional grounds, are limited, but not so limited as to prevent the consideration of serious and potentially valid claims.

*In re Pers. Restraint of Cook*, 114 Wn.2d 802, 809, 792 P.2d 506 (1990) (citations omitted, quoting *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 86, 660 P.2d 263 (1983)).

Thus, to be entitled to relief in a personal restraint petition, as opposed to a direct appeal, a petitioner must meet several special requirements. First, the petitioner can only obtain relief for restraint that is unlawful for the limited reasons set forth in the rules defining the procedure. RAP 16.4(c); *Cook*, 114 Wn.2d at 809. Second, a petitioner cannot obtain relief by petition if he or she has other adequate remedies. RAP 16.4(d). Third, a petitioner cannot raise grounds previously decided on the merits, either in a prior petition or on appeal, without demonstrating good cause (prior petition) or that the interests of justice require relitigation (prior appeal). See RAP 16.4(d); *Cook*, 114 Wn.2d at 806-07, 813 (prior petition); *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 445, 21 P.3d 687 (2001)(prior appeal).

Although petitions raising either constitutional or non-constitutional issues not raised at trial or on appeal are no longer absolutely barred, special restrictions still apply. *Hews*, 99 Wn.2d at 85-87; *Cook*, 114 Wn.2d at 812. A fourth limitation is thus that a petitioner claiming purported *constitutional* error must demonstrate actual prejudice from

the error before the court will consider the merits. *Hews*, 99 Wn.2d at 85-87; *see also In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328-30, 823 P.2d 492 (1992)(applying this threshold standard to deny relief for a constitutional error that would be per se prejudicial error on appeal). Fifth, a petitioner claiming purported *non-constitutional* error must “establish that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” *Cook*, 114 Wn.2d at 812; *see also In re Pers. Restraint of Fleming*, 129 Wn.2d 529, 532-34, 919 P.2d 66 (1996)(applying this threshold standard to deny relief for an error that would require reversal on direct appeal). These required demonstrations are threshold requirements; this court will not reach the merits without the required showings.<sup>1</sup> *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 884, 828 P.2d 1086 (1992); *Cook*, 114 Wn.2d at 813; *Hews*, 99 Wn.2d at 93.

Even meeting this threshold does not automatically entitle a petitioner to relief or a reference hearing, however. A personal restraint petitioner is required by our rules to provide both “[a] statement of . . . the facts upon which the claim . . . is based and the evidence available to support the factual allegations. RAP 16.7(a)(2)(i). Appellate decisions have explained and amplified these requirements. Accordingly, a sixth procedural prerequisite to consideration of the merits is that “the petitioner must state with particularity facts which, if proven, would entitle him to relief”; “bald assertions” and “conclusory allegations” are not enough. *Rice*, 118 Wn.2d at 886; *Cook*, 114 Wn.2d at 813-14; *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 364-65, 759 P.2d 436

---

<sup>1</sup> The required threshold showings of actual prejudice or complete miscarriage of justice are not required when “the petitioner has not had a prior opportunity for judicial review.” *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 299, 88 P.3d 390 (2004).

(1988). Seventh, “the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief”; claims as to what other persons would say must be supported by “their affidavits or other corroborative evidence” consisting of competent and admissible evidence.<sup>2</sup> *Rice*, 118 Wn.2d at 886; *see Cook*, 114 Wn.2d at 813-14; *Williams*, 111 Wn.2d at 364-65. Both the factual basis and evidentiary support requirements are threshold procedural bars; this court must refuse to reach the merits of any petition that fails to comply. *Cook*, 114 Wn.2d at 814.

Finally, if a petition clears these (and sometimes additional) procedural hurdles, the petitioner still must actually prove the error that makes his or her restraint unlawful by a preponderance of the evidence. *See St. Pierre*, 118 Wn.2d at 328; *Cook*, 114 Wn.2d at 814. In responding to a properly supported petition, the State must also include competent evidence; if that response reveals disputed issues of fact, then this court will order a reference hearing or a determination on the merits in superior court. *Rice*, 118 Wn.2d at 886-87; RAP 16.9, 16.11(a), (b), 16.12.

#### ISSUES DECIDED ON DIRECT APPEAL

Petitioner raised six of the claimed errors in the current petition during his direct appeal. As noted above, a personal restraint petition may not raise an issue previously raised and rejected in a direct appeal unless it is in the interest of justice to relitigate that issue. *Brown*, 143 Wn.2d at 445. During his direct appeal, this court decided the following issues against Petitioner: (1) a claim of insufficiency of the evidence,

---

<sup>2</sup> Inadmissible hearsay or the petitioner’s own speculation and conjecture will not satisfy this requirement. *Rice*, 118 Wn.2d at 886. The documents suggested as examples in *Rice* and *Williams*, 111 Wn.2d at 364-65, are not necessarily the exclusive means of meeting the rigorous evidentiary standard. When a petitioner alleges specific facts in the trial record below entitle him to relief, then the rules require the respondent to provide that record. RAP 16.9.

specifically including a claim that there was insufficient evidence of a threat to use a deadly weapon; (2) ineffective assistance of counsel for failing to move to exclude DNA test results of semen because of a purported violation of CrR 6.13(b)(3) notice requirements;<sup>3</sup> (3) ineffective assistance of counsel for failing to seek independent testing of the semen; (4) ineffective assistance of counsel for failing to obtain and present defense experts on DNA;<sup>4</sup> (5) ineffective assistance of counsel for failure to cross-examine witnesses about purported inconsistencies; and (6) a claim that the trial court should have considered some of his prior convictions as one point rather than multiple separate points. Petitioner makes no argument as to why relitigation is in the interests of justice as to the first five of these arguments, and we thus decline to consider them further.

#### CRIMINAL HISTORY SCORE

As to the sixth argument, on appeal, this court held that Petitioner's prior crimes were properly scored as separate offenses or points because they did not qualify as same criminal conduct. Petitioner argues that this court misunderstood his argument; he concedes that his prior crimes do not qualify as same criminal conduct but argues that the

---

<sup>3</sup> Petitioner continues to misunderstand CrR 6.13, which is designed to allow the admission of a test report without any foundational testimony *as a substitute* for expert testimony about the testing of a substance and the results of that testing. Noncompliance with the notice provisions will prevent a proponent of the report from following this procedure. But the State in Petitioner's case did not attempt to admit the report as a substitute for expert testimony; it presented extensive expert testimony instead. Noncompliance with the notice provisions of CrR 6.13, if any there was, is thus irrelevant to the admissibility of the evidence of the DNA testing.

<sup>4</sup> Petitioner's assertion that retained, as opposed to appointed, counsel would necessarily have obtained independent testing and experts is incorrect; his implication that he would have been acquitted if he were rich is offensive. Deciding when independent testing will benefit a client and when such testing instead will help to convict a client is a tactical one made by both appointed and retained lawyers. This is one reason why any petitioner, rich or poor, must demonstrate more than mere speculation when challenging his lawyer's tactical decisions.

sentencing court nevertheless erred by failing to count as one point multiple prior convictions for which he previously served concurrent sentences.

Petitioner relies upon a series of appellate cases beginning with *State v. Lara*, 66 Wn. App. 927, 834 P.2d 70 (1992) and culminating in *State v. Bolar*, 129 Wn.2d 361, 917 P.2d 125 (1996). Those cases interpreted a former version of RCW 9.94A.360(6) as providing discretion to sentencing courts to score *any* prior concurrent offenses as one point, whether or not those offenses constituted same criminal conduct. But, as J. Talmadge's concurrence in *Bolar* pointed out, the legislature overruled this line of cases when it amended RCW 9.94A.360(6) in 1995 to limit a sentencing court's discretion such that it can count prior offenses as a single point *only* if those prior offenses constitute same criminal conduct.<sup>5</sup> *Bolar*, 129 Wn.2d at 367-68 (Talmadge, J., concurring); Laws of 1995, ch. 316, § 1. The trial court thus did not err in counting Petitioner's prior offenses separately, because they did not constitute same criminal conduct and because Petitioner committed the current offense in 1998 and was sentenced in 2002.

Petitioner's secondary scoring argument is that the trial court erred in counting a 1992 California conviction as a prior violent offense when calculating his offender score. Petitioner asserts that this conviction was a misdemeanor in California. It is not clear whether Petitioner is arguing that this offense is not a felony for Washington scoring purposes or whether he is arguing that it had "washed out." In either case, Petitioner fails to meet the threshold factual and evidentiary requirements to raise this issue in a personal restraint petition: he has not provided any factual details or documentation regarding this

---

<sup>5</sup> This limitation persists in the current version of this statute, now codified at RCW 9.94A.525(5)(a)(i).

California conviction.<sup>6</sup> This court must therefore reject this claim, as well. *See Rice*, 118 Wn.2d at 886; *Cook*, 114 Wn.2d at 813-14; *Williams*, 111 Wn.2d at 364-65.

#### ISSUES RELATING TO EVIDENCE OF IDENTITY

At trial, the State presented extensive DNA evidence identifying petitioner as the source of semen swabbed from the victim's mouth; the State also presented eyewitness identification testimony. Petitioner raises a large number of issues related to the admission of evidence that tended to prove that he was the person who engaged in genital to mouth sexual contact with the victim. He raises these issues both as ineffective assistance of counsel claims and as substantive claims.

Petitioner raises the following identity-evidence claims: (1) ineffective assistance of counsel for failure to object to the victim, prior to her testimony, observing Petitioner in the courtroom and to the victim's subsequent in-court identification of Petitioner; (2) admission of the test swabs and DNA tests because police purportedly framed petitioner by tainting the test swabs from the victim with semen obtained from petitioner while he was jailed on a different charge in Clark County; (3) ineffective assistance of counsel for failing to pursue suppression on this basis; (4) admission of the test swabs and DNA tests because Clark County authorities purportedly swabbed petitioner's mouth while investigating a different crime and these swabs somehow tainted the Thurston County samples; (5) ineffective assistance of counsel for failing to pursue suppression on this basis; (6) admission of the sexual assault kit despite a supposedly inadequate chain of custody; (7) ineffective assistance of counsel for failing to pursue suppression on this

---

<sup>6</sup> Our review of the record of the sentencing hearing reveals that before the court included the California conviction as part of Petitioner's felony criminal history score, the State submitted and the court considered a certified judgment and sentence as well as the relevant California statutes.

basis; (8) purported failure to preserve as evidence swabs from the victim's mouth and gum that was in the victim's mouth; (9) purported police seizure of more tubes of blood from defendant for DNA testing than a search warrant authorized; (10) ineffective assistance for not pursuing suppression of the DNA evidence on this basis; (11) admission of DNA evidence because prison authorities purportedly obtained DNA samples from petitioner illegally; and (12) ineffective assistance for not objecting to the DNA evidence on this basis.

There are many reasons that these claims do not entitle petitioner to relief; some are flawed for multiple reasons.<sup>7</sup> But all 12 of these claims lack a showing of prejudice or harm, a threshold requirement for personal restraint petitions. *Rice*, 118 Wn.2d at 884; *Cook*, 114 Wn.2d at 812; *Hews*, 99 Wn.2d at 85-87. Each of these claims involves the purportedly improper admission of evidence tending to prove that Petitioner was the man who had sexual intercourse with the victim. Petitioner cannot establish prejudice from the admission of such evidence because, in his briefing to this court, he concedes that he committed the robbery and had genital to mouth contact with the victim, arguing only that the victim consented to this act.

In his reply brief, Petitioner states that “[t]he oral sex occurred [sic] because after the robbery I made the statement ‘will you go down on me’ and she did with out [sic] me forcing her.” Petitioner’s Reply Brief at 3. He also states that

the truth is that I did not force [victim’s] head down at anytime . . . . It simply is not what happened. I never touched [victim] until after she was

---

<sup>7</sup> As just one example, Petitioner devotes a large amount of space to his highly speculative theory that various law enforcement agencies engaged in a wide-ranging conspiracy to frame him by taking semen from his underwear obtained in a different arrest and using it to taint the swabs in this case. Petitioner seeks an evidentiary hearing to explore his allegations. He does not provide the affidavits or other evidence required to support these non-trial record allegations; thus, *Rice* would require rejection of this claim.

performing oral sex. [Victim] openly lies in court about the [sic] how the oral sex started. She knows it, I know it, god [sic] knows it.

Petitioner's Reply Brief at 11.

Petitioner now acknowledges the sex act, but specifically denies that he ejaculated during its commission: "I told Mr. Reed [trial lawyer] that I never ejaculated at any time durring [sic] the encounter with [victim]." Petitioner's Opening Brief at 9. From this, he argues that the DNA evidence must be somehow tainted or flawed. Regardless of the Petitioner's recollection, the evidence in question was only relevant to prove his identity as the man who had sexual contact with the victim. Petitioner admits he was that man. He therefore cannot demonstrate prejudice from the admission of the identity-related evidence, and the above 12 claims are rejected.<sup>8</sup>

#### REMAINING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

To prove ineffective assistance, Petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *State v. Bowerman*, 115 Wn.2d 794, 808 (1990) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Scrutiny of counsel's performance is highly deferential, and there is a strong presumption of reasonableness. *State v. Day*, 51 Wn. App. 544, 553, review denied, 111 Wn.2d 1016 (1988). If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance. *Day*, 51 Wn. App. at 553. Under the prejudice prong, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Lord*, 117 Wn.2d 829, 883-84, 822

---

<sup>8</sup> This court's rejection for failure to demonstrate prejudice should not be read as a holding that the claims otherwise have merit.

P.2d 177 (1991), *cert. denied*, 113 S.Ct. 164 (1992). Moreover, because the defendant must prove both ineffective assistance and resulting prejudice, a lack of prejudice will resolve the issue without requiring an evaluation of counsel's performance. *Lord*, 117 Wn.2d at 884.

Petitioner claims that his trial counsel conceded guilt in his opening statement by telling the jury that the question was only which degree of rape petitioner was guilty of. This court's review of this issue is hampered by the lack of a transcript of the opening statements. When, as here, a petitioner identifies a portion of the underlying proceedings as the evidence for his claim of error, the State has a duty to provide this court with the record of that proceeding. See RAP 16.7(a)(2)(i), 16.9.<sup>9</sup> This court thus cannot tell what Petitioner's lawyer said during opening statement.

Even assuming that his counsel made such a statement, petitioner has not demonstrated prejudice. Petitioner seems to assume that such a concession would be per se prejudicial; this is incorrect. *State v. Silva*, 106 Wn. App. 586, 596-597, 24 P.3d 477 (2001). A partial concession is neither an unauthorized guilty plea nor prejudicial error when the evidence on the conceded point is strong and when the concession is made for the tactically sound reason of gaining credibility with the jury to avoid conviction on a more serious charge. *Silva*, 106 Wn. App. at 596-97. And a lawyer "need not consult with the client before making such a tactical move." *Silva*, 106 Wn. App. at 596.

This court's review of the trial record reveals that the evidence that Petitioner had been the man who engaged in sexual intercourse with the victim in a store after

---

<sup>9</sup>"If an allegation in the petition can be answered by reference to a record of another proceeding, the response should so indicate and include a copy of those parts of the record which are relevant." RAP 16.9.

committing a robbery was strong; the DNA evidence appears to have been compelling and clear. And, as noted, Petitioner now concedes this issue. By contrast, it appears that the evidence of the use of a deadly weapon, while legally sufficient, was less strong. The court had instructed the jury on second degree rape as a lesser included offense.

Although this court does not have a transcript of opening statements, it has reviewed the closing argument of Petitioner's counsel. In his closing argument, Petitioner's counsel acknowledged the strength of the DNA-based identification evidence and made a tactical decision to argue strongly that the State had not proved a threat with a weapon. In an effort to prevent conviction of a greater crime, he argued that, at most, the State had proved second degree, rather than first degree rape. Even while acknowledging the detailed evidence of identity, Petitioner's counsel did not concede this issue completely and did not concede that his client had committed any crime. His final argument to the jury was an effort to explain away the DNA evidence linking the defendant to the crime. While we do not know what Petitioner's lawyer said during his opening statement, based on his closing argument, he chose a reasonable trial tactic in the face of the overwhelming identification evidence in an effort to avoid a first degree rape conviction. Defendant thus has not met his burden of proving prejudice.

Petitioner relies on *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991). This court has reviewed both that case and *Wiley v. Sowders*, 647 F.2d 642 (6th Cir. 1981), another federal case finding *per se* prejudicial error in a lawyer's concession; both are also discussed in *Silva*. These cases can be distinguished, however, as both involved *repeated* and *complete* concessions in *closing argument*; indeed, the lawyers in those cases affirmatively told the jurors that there was no reasonable doubt as to the

defendant's guilt on the only charged crimes. In holding that the defendant need not demonstrate prejudice, the *Swanson* court emphasized that closing argument is a critical stage of a criminal case and that conceding *complete* guilt during that critical stage created a *non*-adversarial process. 943 F.2d at 1072-75. Petitioner claims his lawyer made a limited concession, with an evident and obvious tactical purpose, during opening statement. His lawyer's closing argument was not even a complete concession on the identity issue. *Swanson*'s holding does not govern this claim.

Petitioner also claims that his trial lawyer was ineffective for failing to seek reconsideration of his sentence. Petitioner makes no showing that such a motion would have been successful; he therefore fails to demonstrate prejudice or harm. This claim is also rejected.

Petitioner also claims his trial lawyer was ineffective for failing to pursue a mental defense based on a supposed methamphetamine-induced psychosis. Petitioner asserts that he had been using methamphetamine for days prior to the crime and was not in the "right frame of mind" at the time of the crime. Even assuming an evidentiary basis for these non-trial record claims, which Petitioner fails to provide,<sup>10</sup> these asserted facts do not provide a basis for relief; establishing the mental defenses of diminished capacity or insanity require more than evidence that a defendant was under the influence of drugs, as the mere fact of voluntary intoxication by itself is not a defense. See, e.g., *State v. Coates*, 107 Wn.2d 882, 889-92, 735 P.2d 64 (1987); *State v. Mriglot*, 88 Wn.2d 573, 564 P.2d 784 (1977); *State v. Gallegos*, 65 Wn. App. 230, 237-39, 828 P.2d 37 (1992).

---

<sup>10</sup> As noted above, *Rice* requires Petitioner to provide affidavits or other evidentiary support for non-trial record claims.

Petitioner partly bases this claim on his interchange with the sentencing court, asserting that the court was surprised to hear that he claimed to have been under the influence of methamphetamine; he claims he had previously asked his lawyer to pursue a defense on these grounds. But the record of the sentencing hearing shows that the court was not at all surprised that defendant's methamphetamine use led to robberies, stating that "We see lots of that." Indeed, Petitioner's lawyer ably argued that Petitioner's staggering criminal history was the result of a single year of methamphetamine use. The court simply found that such use would not excuse the rape, stating that "The rape seems to me to have nothing to do with supporting your meth habit." The court only expressed "disappointment" to an apparently new claim in Petitioner's allocution that, *in addition* to methamphetamines, he was involuntarily under the influence of unnamed antipsychotic medications someone had "slipped" him. Even in his allocution, Petitioner conceded "I'm not saying that is what caused my actions that day," and Petitioner relies now only on his supposed methamphetamine "psychosis." In any event, Petitioner also fails to provide any evidentiary support for his original claims about the antipsychotic medications.

Petitioner also makes a brief and somewhat cryptic ineffective assistance of counsel argument that his lawyer in a separate Clark County case told him that Thurston County would not be prosecuting him for this case. Even assuming that such a statement could bind the Thurston County Prosecuting Attorney or entitle Petitioner to relief, he has provided no evidentiary support for this claim. This allegation is clearly outside of the trial record; *Rice* requires Petitioner to provide affidavits containing competent evidence

or other evidentiary support. Petitioner has not done so, and this court rejects this allegation.

#### PROSECUTORIAL MISCONDUCT

Petitioner makes two claims of prosecutorial misconduct. He first argues that the prosecutor lied to the jury by mischaracterizing the victim's testimony to make it appear that Petitioner used physical force to compel intercourse. Petitioner does not identify during what portion of the trial that this supposedly occurred, but his argument suggests a claim that it occurred during the State's closing arguments. The State has provided complete copies of the prosecutor's closing argument; it does not contain the supposed "lie" claimed by Petitioner. Indeed, the record shows that the prosecutor did not rely on Petitioner's use of physical force,<sup>11</sup> but instead on his verbal threat to use a deadly weapon. In his reply, Petitioner neither specifies some other portion of the record containing the "lie" nor provides any part of the record containing the "lie."<sup>12</sup> Without deciding whether this claim would constitute error if proved, it is rejected for failure to identify evidentiary documentation. Petitioner's ineffective assistance claim based on a "failure" to object to the purported prosecutorial "lie" is rejected for the same reason.

Petitioner also argues that the prosecutor "allowed" the victim to lie on the stand or knowingly presented false testimony because her testimony allegedly differed from her version of events recorded in a police report.<sup>13</sup> Petitioner fails to demonstrate a factual

---

<sup>11</sup> When making argument regarding the element of forcible compulsion, the prosecutor stated "Now, in this case we are not talking about the act of force used to overcome resistance. . . . That is one thing we are not considering in this case. But we are considering . . . a threat, express or implied, that places a person in fear of death or physical injury . . . . And that is specifically what occurred in this case."

<sup>12</sup> While it is not Petitioner's burden to provide the record of the underlying proceeding, Petitioner has provided this court with small portions of the record *different than those* served on Petitioner by the State, so the Petitioner apparently has access to the record. This court has also reviewed the record of the prosecutor's direct examination of the victim; the purported "lie" does not appear therein, either.

<sup>13</sup> Neither party has provided the police report; this court does not know whether any differences exist.

basis or any prejudice. By itself, a difference between a witness's trial testimony and the statements attributed to that witness in a police report does not inevitably lead to a conclusion that the trial testimony is perjured. Many other possible explanations exist. While such differences can sometimes be a basis for impeachment, they do not necessarily compel a conclusion that the witness is lying at trial. Thus, it is not *per se* misconduct to present testimony that varies from statements recorded in police reports.

#### OTHER CLAIMS

Petitioner claims that he was denied his constitutional right to testify at his trial; he states that his lawyer refused to honor his request to do so. The State's response includes a colloquy during which the prosecutor, the defense lawyer, the Petitioner, and the court discussed whether Petitioner planned to testify. After Petitioner's lawyer told the court that he and Petitioner had discussed his right to testify several times and that Petitioner had decided not to testify, the trial judge spoke directly to the Petitioner: "Mr. Somerville, after consultation with your attorney, is it your desire not to testify in this matter?" Petitioner replied, "Yes, Your Honor." Clearly, then, the trial record directly refutes Petitioner's claim.

In his reply, Petitioner claims that he changed his mind and decided he wanted to testify the day after the defense rested. He asserts that he told his lawyer that he now wanted to testify and that his lawyer refused to seek court permission to re-open the defense case to allow the defendant to testify. This court need not determine whether these facts would justify relief, as defendant has failed to provide any affidavit supporting his non-record factual claims. Defendant fails to meet the burden imposed by *Rice*.

Finally, Petitioner argues that the trial court erred by relying on facts and recommendations contained within a pre-sentence investigation report (PSI) to impose a sentence in the middle of the standard range instead of at the low end of that range. He objects that the jury did not get to hear these facts, some of which he apparently disputes. This appears to be a claim based on *Blakely v Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Petitioner's argument fails.

As Washington's Supreme Court has recognized, *Blakely* holds that a judge cannot impose a sentence higher than the statutory standard range justified by the facts proved at trial or admitted by the defendant; any facts (other than the fact of prior convictions) that would increase the sentence beyond the statutorily-mandated sentence must also be proved to a jury or admitted by the defendant. *State v. Hughes*, 154 Wn.2d 118, 131, 110 P.3d 192 (2005). Petitioner received a 300 month sentence, within the 240 - 318 month standard range authorized by statute for first degree rape with an offender score of nine or more. The jury found the State had proved beyond a reasonable doubt that Petitioner had committed this crime. The trial court did not rely on the facts within the PSI to exceed the standard range maximum sentence.

Petitioner presents no non-frivolous arguments. Accordingly, Petitioner's requests for appointment of counsel and for a reference hearing are denied, and it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 30 day of November, 2005.

Van Deren, A.C.J.  
Acting Chief Judge

# APPENDIX E

THE SUPREME COURT OF WASHINGTON

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2008 JAN 27 P 3:03  
BY C.J. HERRITT  
CLERK

In re the Personal Restraint  
Petition of  
  
DENNIS W. SOMERVILLE,  
  
Petitioner.

NO. 78154-1  
RULING DENYING REVIEW

Dennis Somerville was convicted in 2002 of first degree rape. Division Two of the Court of Appeals affirmed the judgment and sentence on direct appeal. Mr. Somerville timely filed a personal restraint petition in the Court of Appeals, reasserting arguments rejected on direct appeal and raising other grounds for relief. Declining to reconsider arguments raised on appeal, and finding the other claims clearly meritless, the Acting Chief Judge of the Court of Appeals dismissed the petition. Mr. Somerville now seeks this court's discretionary review. RAP 16.14(c); RAP 13.5.

Initially, I note that, in arguing for review, Mr. Somerville mistakenly cites the criteria listed in RAP 13.4(b). Those criteria apply to petitions for review. Orders denying personal restraint petitions are reviewable only by motion for discretionary review. RAP 16.14(c). Therefore, I may consider only whether the Acting Chief Judge obviously or probably erred or so far departed from the usual course of proceedings as to call for this court's review. RAP 13.5(b).

As indicated, the Acting Chief Judge declined to reexamine issues that were raised and rejected on direct appeal. Mr. Somerville does not show that the

489/20

interests of justice require reconsideration of any of those issues. See *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). As for the other issues, the Acting Chief Judge thoroughly examined them in a 16-page order. Mr. Somerville identifies no obvious or probable error in the order, nor any departure from the usual course of proceedings.

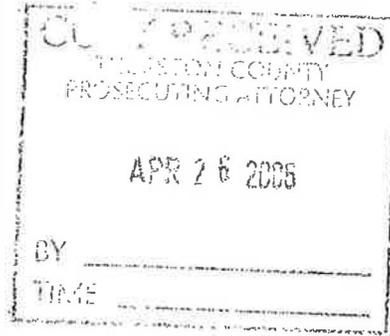
Accordingly, the motion for discretionary review is denied.



COMMISSIONER

January 27, 2006

# APPENDIX F



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

**DIVISION II**

In re the  
Personal Restraint Petition of  
  
DENNIS WAYNE SOMERVILLE,  
  
Petitioner.

No. 33112-8-II  
  
CERTIFICATE OF FINALITY  
  
Thurston County  
  
Superior Court No. 02-1-00908-9

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

This is to certify that the decision of the Court of Appeals of the State of Washington, Division II, filed on November 30, 2005, became final on April 4, 2006. The following costs have been awarded:

Judgment Creditor Respondent State:     \$272.00  
Judgment Debtor Petitioner Somerville:    \$272.00



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this *24th* day of April, 2006.

  
\_\_\_\_\_  
David C. Ponzoha  
Clerk of the Court of Appeals,  
State of Washington, Division II

# APPENDIX G

THE SUPREME COURT OF WASHINGTON

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2007 APR -4 P 12:39  
BY RONALD R. CARPENTER  
CLERK

In re the Personal Restraint  
Petition of  
  
DENNIS W. SOMERVILLE,  
  
Petitioner.

NO. 79415-4

RULING DISMISSING PERSONAL  
RESTRAINT PETITION

Dennis Somerville was convicted in 2002 of first degree rape. Division Two of the Court of Appeals affirmed the judgment and sentence on direct appeal, issuing its mandate in December 2004. Mr. Somerville timely filed a personal restraint petition in the Court of Appeals, but the acting chief judge dismissed the petition. This court denied review. In November 2006, Mr. Somerville filed another personal restraint petition directly in this court.<sup>1</sup> Now before me for determination is whether to dismiss the petition or refer it to the court for consideration on the merits. RAP 16.5(b); RAP 16.11(b).

Mr. Somerville did not file his current petition within one year after his judgment and sentence became final. He raises one ground for relief—insufficient evidence—that is exempt from the time limit. *See* RCW 10.73.100(1). But he asserts other grounds for relief that are not exempt. His petition is therefore “mixed” and must be dismissed. *In re Pers. Restraint of Stenson*, 150 Wn.2d 207, 220, 76 P.3d 241 (2003). Moreover, Mr. Somerville challenged the sufficiency of the evidence both on direct appeal and in his first personal restraint petition. He therefore cannot raise that

<sup>1</sup> After he filed his petition, Mr. Somerville moved to file an amended petition. That motion is granted.

ground for relief again unless the interests of justice require reconsideration or he demonstrates good cause. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994); RAP 16.4(d). He does not show that reexamining the sufficiency of the evidence is justified.

Accordingly, the personal restraint petition is dismissed.

  
COMMISSIONER

April 4, 2007

# APPENDIX H

# THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of  
DENNIS WAYNE SOMERVILLE,  
Petitioner.

)  
)  
)  
)  
)  
)  
)  
)

NO. 79415-4

**ORDER**

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Bridge, Owens and J. M. Johnson, considered this matter at its June 5, 2007, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 6<sup>th</sup> day of June, 2007.

For the Court

FILED  
SUPREME COURT  
STATE OF WASHINGTON

2007 JUN -6 A 7:52

BY RONALD B. CARPENTER

CLERK

*Henry J. Alexander*  
CHIEF JUSTICE

5/5/86

Dupli.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2007 JUN -6 P 12:54  
BY RONALD R. CARPENTER  
*CRF*  
CLERK

# THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of  
DENNIS WAYNE SOMERVILLE,  
Petitioner.

)  
) **CERTIFICATE OF FINALITY**  
)  
)  
)  
)  
)  
)

NO. 79415-4

---

This is to certify that the ruling of the Supreme Court Commissioner of the State of Washington, filed on April 4, 2007, is final.



I have affixed the seal of the Supreme Court of the State of Washington and filed this Certificate of Finality this 6<sup>th</sup> day of June, 2007.

A handwritten signature in black ink, appearing to read "Ronald R. Carpenter", is written over a horizontal line.

RONALD R. CARPENTER  
Clerk of the Supreme Court  
State of Washington

cc: Dennis Wayne Somerville  
Edward Gene Holm  
James C. Powers  
Reporter of Decisions

*12/1/08*

*Duplicate*

# APPENDIX I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED  
SUPERIOR COURT  
STATE OF WASHINGTON  
2001 MAR 26 P 2:15  
BY [unclear]  
[unclear]

In re the Personal Restraint of  
  
DENNIS WAYNE SOMMERVILLE,  
  
Petitioner.

NO. 80744-2  
RULING DISMISSING PERSONAL  
RESTRAINT PETITION

Dennis Sommerville challenges judgments and sentences entered in two criminal matters. In Clark County Superior Court, Mr. Sommerville pleaded guilty to first degree robbery, attempted second degree robbery, and five counts of second degree robbery. The trial court imposed a standard range sentence in May 2000. The Court of Appeals subsequently dismissed three personal restraint petitions challenging that judgment and sentence.

Meanwhile, in Thurston County Superior Court, Mr. Sommerville was convicted by a jury of first degree rape and given a standard range sentence to run consecutively to the Clark County sentence. The Court of Appeals affirmed the judgment and sentence on direct appeal and issued its mandate in 2004. Two subsequent personal restraint petitions challenging that conviction were dismissed by the Court of Appeals and this court.

In a single personal restraint petition in this court, Mr. Sommerville now attacks both judgments and sentences, contending (1) that the five Clark County second degree robbery convictions violate double jeopardy principles, (2) that defense counsel was ineffective in the Thurston County case, (3) that running the Thurston County sentence consecutive to the Clark County sentence results in an illegal

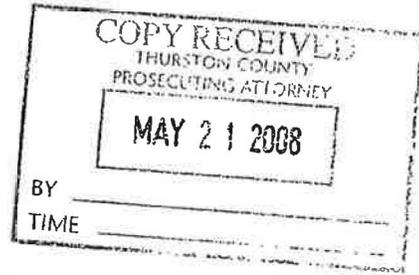
exceptional sentence, and (4) that there was insufficient evidence of first degree robbery in the Clark County case.

As Mr. Sommerville well knows, when challenging a facially valid judgment and sentence more than one year after it became final, he must rely solely on one or more grounds for relief exempt from the one-year limit on collateral attack. RCW 10.73.090(1); RCW 10.73.100. His claim of ineffective assistance of counsel is clearly not one of those grounds. *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 349, 5 P.3d 1240 (2000). Mr. Sommerville thus presents at best a “mixed” petition. *In re Pers. Restraint of Stenson*, 150 Wn.2d 207, 220, 76 P.3d 241 (2003). The petition therefore cannot be considered. *In re Pers. Restraint of Hankerson*, 149 Wn.2d 695, 702, 72 P.3d 703 (2003).

The personal restraint petition is dismissed. RAP 16.11(b). Respondent Thurston County’s request for taxable costs pursuant to RCW 10.73.160 is granted provided it complies with Title 14 RAP.

  
COMMISSIONER

March 26, 2008



# THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of  
DENNIS WAYNE SOMERVILLE,  
Petitioner.

)  
) **CERTIFICATE OF FINALITY**  
)  
) NO. 80744-2  
)  
)  
)  
)

This is to certify that the ruling of the Supreme Court Commissioner, which was filed  
March 26, 2008, dismissing the Personal Restraint Petition, is now final.



I have affixed the seal of the Supreme Court of the State of Washington and filed this Certificate of Finality this 20<sup>th</sup> day of May, 2008.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2008 MAY 20 11:00 AM  
BY [Signature]

RONALD R. CARPENTER  
Clerk of the Supreme Court  
State of Washington

- cc: Dennis Wayne Somerville
- Edward Gene Holm
- Jeremy Richard Randolph
- Arthur David Curtis
- Michael C. Kinnie
- Reporter of Decisions

# APPENDIX J

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of  
DENNIS WAYNE SOMERVILLE,  
Petitioner.

NO. 81610-7  
RULING DISMISSING PERSONAL  
RESTRAINT PETITION

FILED  
SUPREME COURT  
2008 SEP 29 P 3:28  
BY RONALD J. [Signature]  
CLERK

Dennis Somerville challenges judgments and sentences entered in two criminal matters. In Clark County Superior Court cause number 99-100783-2, Mr. Somerville pleaded guilty to first degree robbery, attempted second degree robbery, and five counts of second degree robbery. The trial court imposed a standard range sentence in May 2000. The Court of Appeals subsequently dismissed three personal restraint petitions challenging the judgment and sentence.

Meanwhile, in Thurston County Superior Court cause number 02 1-00908-9, Mr. Somerville was convicted by a jury of first degree rape and given a standard range sentence to run consecutive to the Clark County sentence. The Court of Appeals affirmed the judgment and sentence on direct appeal, and the case was mandated in 2004. Two subsequent personal restraint petitions were dismissed by the Court of Appeals and this court. And I recently dismissed a personal restraint petition that Mr. Somerville filed directly in this court. No. 80744-2.

Mr. Somerville now challenges both judgments and sentences in a personal restraint petition filed directly in this court, contending (1) that the five second degree robbery convictions in Clark County violated double jeopardy principles, (2) that the double jeopardy violation resulted in an incorrect offender score on the Thurston County matter, (3) that running the Thurston County sentence consecutive to the Clark County sentence results in an illegal exceptional sentence, and (4) that there was

insufficient evidence to support the deadly weapon element of his first degree robbery conviction.

Mr. Somerville should recognize that when challenging a facially valid judgment and sentence more than one year after it becomes final, he must rely solely on one or more grounds exempt from the one-year limit on collateral attack. RCW 10.73.090(1); RCW 10.73.100. His claim of insufficient evidence to support a conviction to which he pleaded guilty is not an exempt ground. *See In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 349, 5 P.3d 1240 (2000) (claim of no factual basis for guilty plea not an exempt ground). The claim is frivolous in any event as Mr. Somerville admitted being armed with a knife, and the State withheld a deadly weapon enhancement in return for his guilty plea. Furthermore, the Court of Appeals considered and rejected Mr. Somerville's double jeopardy argument on the merits when it dismissed one of his previous personal restraint petitions. The lack of a valid double jeopardy claim also defeats Mr. Somerville's offender score argument.

Mr. Somerville thus presents at best a "mixed" petition asserting both potentially exempt and nonexempt grounds for reviewing two separate judgments and sentences.<sup>1</sup> *In re Pers. Restraint of Stenson*, 150 Wn.2d 207, 220, 76 P.3d 241 (2003). The petition therefore cannot be considered. *In re Pers. Restraint of Hankerson*, 149 Wn.2d 695, 702, 72 P.3d 703 (2003).

The personal restraint petition is dismissed. RAP 16.11(b).

  
COMMISSIONER

September 29, 2008

---

<sup>1</sup> Nevertheless, I do not decide whether his other grounds are either exempt or meritorious.

NOV 10 2008  
BY \_\_\_\_\_  
TIME \_\_\_\_\_

# THE SUPREME COURT OF WASHINGTON

In Re the Personal Restraint Petition of  
DENNIS WAYNE SOMERVILLE,  
Petitioner.

)  
) **CERTIFICATE OF FINALITY**  
)  
) NO. 81610-7  
)  
)  
)  
)  
)  
)  
)

This is to certify that the ruling of the Supreme Court Commissioner of the State of Washington, filed on September 29, 2008, is final.



I have affixed the seal of the Supreme Court of the State of Washington and filed this Certificate of Finality this 10<sup>th</sup> day of November, 2008.

RONALD R. CARPENTER  
Clerk of the Supreme Court  
State of Washington

- cc: Dennis Wayne Somerville  
Arthur David Curtis  
Michael C. Kinnie  
Edward Gene Holm  
Carol L. La Verne  
Reporter of Decisions

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2008 NOV 10 P 1:22  
CLERK

# APPENDIX K

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of  
DENNIS WAYNE SOMERVILLE,  
Petitioner.

NO. 82362-6

RULING DISMISSING PERSONAL  
RESTRAINT PETITION

2009 APR 22 P 2:14  
[Handwritten initials and signature]

Dennis Somerville was convicted in 2002 of first degree rape. Division Two of the Court of Appeals affirmed the judgment and sentence on direct appeal and issued its mandate in December 2004. Mr. Somerville has since filed several unsuccessful personal restraint petitions. He filed his latest petition directly in this court in November 2008, challenging his sentence. Now before me for determination is whether to dismiss the petition or refer it to the court for a decision on the merits. RAP 16.5(b), 16.11(b).

Mr. Somerville argues that the trial court imposed an exceptional sentence in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). But it did not. It imposed a sentence of 300 months, within the standard range of 240 to 318 months. Mr. Somerville bases his argument on the premise that his correct offender score was zero, not the 20 that the trial court calculated. But this is a challenge to the calculation of his offender score, not to an "exceptional" sentence. The trial court imposed a sentence within the calculated standard range; it therefore did not impose an exceptional sentence.

And Mr. Somerville's challenge to the calculated offender score is clearly meritless. He appears to dispute the convictions included in his score on the ground

that he committed those crimes after he committed the current rape, thus precluding them from counting as “prior” convictions for scoring purposes. But “prior convictions” are convictions that exist *before the date of sentencing on the current offense*. Former RCW 9.94A.360(1) (1997). All of the convictions the trial court counted existed before the current sentencing. Prior convictions are not subject to *Blakely*’s jury trial requirement. *Blakely*, 542 U.S. at 303. And since the trial court set a sentence within the proper standard range, it did not have to submit to a jury the reasons it articulated for imposing a sentence in the upper part of the range, such as the psychological harm to the victim.

Mr. Somerville also contends that his sentence is exceptional because the trial court ordered it to run consecutive to existing sentences for crimes he committed in Clark County, Washington, and Multnomah County, Oregon. But because the trial court had complete discretion to run the sentences consecutively in this circumstance, it again was not required to submit its reasons to a jury. Former RCW 9.94A.400(3) (1998); *State v. Champion*, 134 Wn. App. 483, 486-88, 140 P.3d 633, *review denied*, 160 Wn.2d 1006 (2007).

In sum, Mr. Somerville’s sentence is not unlawful. The personal restraint petition is dismissed.

  
COMMISSIONER

April 22, 2009

COPY RECEIVED  
THURSTON COUNTY  
PROSECUTING ATTORNEY  
JUN 08 2009  
BY  
WIMA

# THE SUPREME COURT OF WASHINGTON

In Re the Personal Restraint Petition of  
DENNIS WAYNE SOMERVILLE,  
Petitioner.

CERTIFICATE OF FINALITY

NO. 82362-6

This is to certify that the ruling of the Supreme Court Commissioner, which was filed April 22, 2009, dismissing the Personal Restraint Petition, is now final.



I have affixed the seal of the Supreme Court of the State of Washington and filed this Certificate of Finality this 5<sup>th</sup> day of June, 2009.

RONALD R. CARPENTER  
Clerk of the Supreme Court  
State of Washington

cc: Dennis Wayne Somerville  
Edward Gene Holm  
Carol L. La Verne  
Reporter of Decisions

2009 JUN -5 A 11:10  
CBF

# APPENDIX L

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of  
DENNIS WAYNE SOMERVILLE,  
Petitioner.

BY RONALD D. [Signature]  
CLERK  
10 JAN 15 11 09 AM '14  
COURT CLERK

NO. 83736-8

RULING DISMISSING PERSONAL  
RESTRAINT PETITION

Dennis Somerville was convicted in 2002 of first degree rape. Division Two of the Court of Appeals affirmed the judgment and sentence on direct appeal, and the judgment became final in December 2004. Mr. Somerville subsequently filed multiple unsuccessful personal restraint petitions. He filed his latest petition directly in this court in October 2009. Now before me for determination is whether to dismiss the petition or refer it to the court for a decision on the merits. RAP 16.5(b), 16.11(b).

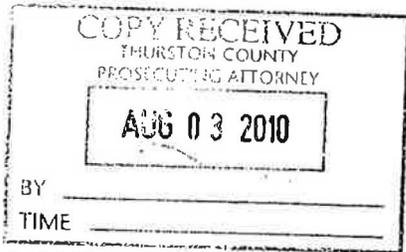
Mr. Somerville argues that he was denied counsel at a "critical stage" of the proceedings when counsel was not present at a postcharge lineup identification. It is not clear what identification procedure Mr. Somerville is concerned with. There was evidently a photographic identification procedure, and just before trial the victim observed Mr. Somerville through the window of the courtroom door to see if she recognized him. But in either instance Mr. Somerville's claim is not exempt from the one-year time limit on collateral attack. RCW 10.73.090(1), .100. Mr. Somerville asserts that he previously raised this issue in a timely personal restraint petition, but his claim was rejected on the improper ground that he failed to show prejudice (he contends that prejudice is presumed). But that does not make his current claim for relief timely.

589/57

The personal restraint petition is dismissed.

  
DEPUTY COMMISSIONER

June 16, 2010



# THE SUPREME COURT OF WASHINGTON

In Re the Personal Restraint Petition of  
DENNIS WAYNE SOMERVILLE,  
Petitioner.

**CERTIFICATE OF FINALITY**  
NO. 83736-8

This is to certify that the ruling of the Supreme Court Deputy Commissioner, which was filed June 16, 2010, dismissing the Personal Restraint Petition, is now final.

FILED  
CLERK  
BY ROBERT H. CARPENTER  
10 AUG - 2 25 PM 1:25  
101  
CLERK OF WASHINGTON



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 2nd day of August, 2010.

*Susan L. Carlson*  
Susan L. Carlson  
Deputy Clerk of the Supreme Court  
State of Washington

cc: Dennis Wayne Somerville  
Carol L. La Verne  
Reporter of Decisions

# APPENDIX M

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DEPUTY  
DIRECTOR  
STATE OF WASHINGTON  
COURT OF APPEALS

In re the Personal Restraint Petition of  
DENNIS WAYNE SOMERVILLE,  
Petitioner.

No. 42048-1-II

ORDER DISMISSING PETITION

Dennis Somerville seeks relief from personal restraint imposed following his 2002 conviction for first degree rape. He argues that his trial counsel provided ineffective assistance by not challenging an identification procedure, by not obtaining independent DNA testing and by conceding during opening statements that Somerville had committed rape.

RCW 10.73.090(1) requires that a petition be filed within one year of the date that the petitioner's judgment and sentence becomes final. Somerville's judgment and sentence became final on December 20, 2004, when we issued the mandate following his unsuccessful direct appeal. RCW 10.73.090(3)(b). He did not file his petition until April 27, 2011, more than one year later. Unless he shows that one of the exceptions contained in RCW 10.73.100 applies or that his judgment and sentence is facially invalid, his petition is time-barred. *In re Personal Restraint of Turay*, 150 Wn.2d 71, 82, 74 P.3d 1194 (2003).

SCANNED

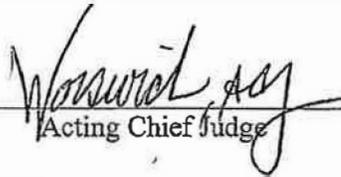
42048-II/2

Somerville does not show that his judgment and sentence is facially invalid. Nor does he show that any of the exceptions to the time bar, contained in RCW 10.73.100, apply to his petition. Therefore, it is

ORDERED that Somerville's petition is dismissed as time-barred under RAP 16.11(b).<sup>1</sup> It is further

ORDERED that Somerville's motion for an evidentiary hearing is denied.

DATED this 26<sup>th</sup> day of October, 2011.

  
Acting Chief Judge

cc: Dennis W. Somerville  
Thurston County Prosecuting Attorney  
Thurston County Clerk  
County Cause No. 02-1-00908-9

---

<sup>1</sup> Because we dismiss this petition as time-barred, we do not address whether it is a successive petition under RCW 10.73.140.

# APPENDIX N

RONALD R. CARPENTER  
SUPREME COURT CLERK

**THE SUPREME COURT**  
STATE OF WASHINGTON



TEMPLE OF JUSTICE  
P.O. BOX 40929  
OLYMPIA, WA 98504-0929

SUSAN L. CARLSON  
DEPUTY CLERK / CHIEF STAFF ATTORNEY

(360) 357-2077  
e-mail: [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)  
[www.courts.wa.gov](http://www.courts.wa.gov)

August 2, 2012

Dennis Wayne Somerville  
#810921  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

Hon. Jon Tunheim (sent by e-mail only)  
Carol L. La Verne  
Thurston County Prosecutor's Office  
2000 Lakeridge Drive SW, Building 2  
Olympia, WA 98502-6045

Re: Supreme Court No. 87239-2 - Personal Restraint Petition of Dennis Wayne Somerville

Counsel and Mr. Somerville:

Enclosed is a copy of the RULING DISMISSING PERSONAL RESTRAINT PETITION signed by the Supreme Court Commissioner, Steven Goff, on August 2, 2012, in the above entitled cause.

Sincerely,

*for* 

Ronald R. Carpenter  
Supreme Court Clerk

RRC: daf

Enclosure



FILED  
SUPREME COURT  
STATE OF WASHINGTON

12 AUG -2 PM 1:35

BY RONALD R. CARRANTER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

DENNIS WAYNE SOMERVILLE,

Petitioner.

NO. 87239-2

RULING DISMISSING PERSONAL  
RESTRAINT PETITION

Dennis Somerville was convicted in 2002 of first degree rape. Division Two of the Court of Appeals affirmed the judgment and sentence on direct appeal, and the judgment became final in December 2004. Mr. Somerville has since filed numerous unsuccessful personal restraint petitions. He filed his latest petition directly in this court in April 2012. He argues that he was denied counsel at a "critical stage" of the proceedings when counsel was not present at a postcharge lineup identification. But this is not a ground for relief exempt from the one-year time limit on collateral attack. RCW 10.73.090(1), .100. Moreover, Mr. Somerville raised this issue in a previous personal restraint petition in this court, which the deputy commissioner dismissed as untimely. No. 83736-8 (June 16, 2010). Mr. Somerville does not show that he has good cause to raise this issue again. RAP 16.4(d).<sup>1</sup>

<sup>1</sup> Mr. Somerville asserts he has not previously raised this issue. But that is clearly not the case.

641/  
178

The personal restraint petition is dismissed.<sup>2</sup>

  
COMMISSIONER

August 2, 2012

---

<sup>2</sup> I also deny Mr. Somerville's motions for an evidentiary hearing and for appointment of counsel.

## APPENDIX O

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

---

STATE OF WASHINGTON,                    )  
  )  
                  Plaintiff,                    )  
  )  
                                  vs.                    ) No. 02-1-00908-9  
  )  
DENNIS WAYNE SOMERVILLE,            )  
  )  
                                  Defendant.                    )

---

PARTIAL TRANSCRIPT OF PROCEEDINGS  
OPENING STATEMENT BY DEFENSE

---

BE IT REMEMBERED that on the 6th day of August, 2002, the above-entitled and numbered cause came on for hearing before the Honorable Paula Casey, Judge, Thurston County Superior Court, Olympia, Washington.

Carolyn Koinzan, Official Court Reporter  
Transcript prepared by:  
Kathryn A. Beehler, CCR No. 2448  
Thurston County Superior Court  
2000 Lakeridge Drive S.W.  
Family and Juvenile Court  
Olympia, WA 98502  
(360) 709-3212

A P P E A R A N C E S

For the Plaintiff:

**James C. Powers**  
Deputy Prosecuting Attorney  
2000 Lakeridge Drive SW  
Building 2, Second Floor  
Olympia, WA 98502  
360-786-5540  
Powersj@co.thurston.wa.us

For the Defendant:

**Paul Stuart Reed**  
Attorney at Law  
1226 State Avenue NE  
Olympia, WA 98506-4235  
360-545-3348  
psreed54@gmail.com

1 August 6, 2002

Olympia, Washington

2 AFTERNOON SESSION

3 The Honorable Judge Paula Casey, Presiding

4 APPEARANCES:

5 The Defendant, Dennis Somerville, present with  
6 his Counsel Paul S. Reed, Attorney at Law;  
7 James C. Powers, Deputy Prosecuting Attorney,  
8 representing the State of Washington.

9 --o0o--

10 THE COURT: Mr. Reed, would you like to give  
11 your opening statement at this time?

12 MR. REED: Yes, I would, Your Honor.

13 THE COURT: I'll ask the jury, give your  
14 attention to Mr. Reed for his opening statement on  
15 behalf of the Defendant.

16 MR. REED: Thank you, Your Honor.

17 Thank you, and good afternoon, ladies and  
18 gentlemen. I'm going to be brief here, but I'm  
19 going to be straightforward with you with what I  
20 think the evidence is going to show; And then we'll  
21 begin with the evidence, and you will see for  
22 yourselves. But, essentially, we are not going to  
23 have a lot to say.

24 As you've heard, the defense isn't required to put  
25 on testimony, put on evidence and so forth, although  
certainly we can. But the defense investigation at

1       this point, frankly, we don't have argument with the  
2       State's science here or the handling of their  
3       evidence. And to some degree, this is a "the proof  
4       is in the pudding" type of thing. And so we will  
5       hear what actually happens at trial, of course, but  
6       I'm not anticipating defense evidence about the  
7       science.

8       So I'm just telling you that now there's -- what I  
9       think will be important here, and what you will need  
10      to concern yourselves with in the long run, is the  
11      descriptions by the two young ladies about what  
12      happened that particular day; The sequence of events,  
13      what was said, when it was said, how it was said,  
14      the context of the events that have been described  
15      by Mr. Powers, and particularly whether or not any  
16      threats were made, whether or not there was a mention  
17      of a gun. And he's already indicated that there was  
18      no sighting of a gun, and there is no gun in  
19      evidence.

20      And so those will be the issues here as to what  
21      was said, when, and for what purpose, or if anything  
22      was said along those lines. So that will be,  
23      essentially, the key to what we will then also  
24      describe or present to you in terms of closing  
25      argument when it's our turn for that, as well.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Thank you.

(Conclusion of Closing Argument  
by Mr. Reed for the Defense.)



# APPENDIX P

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DENNIS SOMERVILLE, )  
 )  
 Defendant. )

NO. 02-1-00908-9  
29320-0-II

VOLUME III

BE IT REMEMBERED that on Thursday, August 8, 2002 the above-entitled matter came on for Trial to a Jury of Twelve before the HONORABLE PAULA CASEY, Judge of the Superior Court of the State of Washington, County of Thurston.

Carolyn M. Koinzan, KOINZCM5050W  
Superior Court  
2000 Lakeridge Dr. SW  
Olympia, Washington 98502  
360/786/5571



COPY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A P P E A R A N C E S

JAMES C. POWERS, Deputy Prosecuting Attorney,  
appearing on behalf of the State of Washington;

PAUL REED, Attorney at Law, appearing on  
behalf of the defendant.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

	<u>PAGE</u>
EXCEPTIONS TO INSTRUCTIONS	300
INSTRUCTIONS TO THE JURY	300
CLOSING BY MR. POWERS	311
CLOSING BY MR. REED	336
REBUTTAL BY MR. POWERS	344
VERDICT	349

1 THE COURT: I'll ask that you give your  
2 attention to Mr. Reed. He'll give the closing argument  
3 on behalf of the defendant.

4 MR. REED: Thank you, Your Honor, good  
5 morning, ladies and gentlemen.

6 It is a terrible crime that's been described  
7 here and Mr. Powers has indicated with great detail, the  
8 State's indicated with great detail the scope of the  
9 State's investigation with the DNA profiles, the checks  
10 and balances and so forth that go with that. But I want  
11 you to focus on a couple of things. One of them is the  
12 key here in terms of accepting the defendant as the  
13 perpetrator and exactly what he did is to distinguish  
14 clearly between the rape in the first degree and rape in  
15 the second degree. What I'm going to propose is the  
16 weak parts in this cases are, the weakest parts in this  
17 case focus on that. And it is the difference between  
18 whether or not, assuming the defendant did the crime,  
19 that he threatened to use a gun or did not. I submit to  
20 you that the evidence suggests in reasonable fashion  
21 that there is reasonable doubt about whether this threat  
22 to use a gun was made or not. And I'm sure the State  
23 will argue that, in fact has used the word speculation  
24 before, that the defense is speculating about this or  
25 that and it is not really supported by the evidence.

1 But, as you know from the instructions, reasonable doubt  
2 can arise from either evidence or lack of evidence. And  
3 in this case, that question in particular, there is both  
4 evidence and lack of evidence on that particular  
5 question.

6           You can take the evidence and draw a  
7 reasonable inferences from it. And there is reasonable  
8 inferences to be drawn from several factors which I'll  
9 outline suggesting that maybe he didn't make that  
10 threat. And of course, the result in considering that  
11 is we believe that you would have a doubt as to whether  
12 the threat to use a gun was made. All the other parts  
13 of the case may be there. But then you conclude that  
14 this is not a rape in the first degree, it would be a  
15 rape in the second degree, because that element is  
16 questionable, reasonably questionable.

17           Now, one thing is -- and I think it just pops  
18 in one's head. As soon as a person realizes that they  
19 are in a situation that is a robbery, robbery brings up  
20 that connotation every kind of stick 'em up, you know,  
21 that's the immediate reaction I think that everybody  
22 would get. So whenever somebody is in that situation,  
23 they are going to think gun, because guns and robbery go  
24 hand in hand typically. And we've seen it forever in  
25 our whole lives in the movies and what not. So whenever

1 you realize that that is happening around you, that's  
2 the first thing you are going to think of. There is  
3 probably a gun.

4           So that idea is going to be planted in  
5 anyone's mind in this situation. Now, that idea, I  
6 think is supported by Susan Peterson's description of  
7 the situation. She was there standing at the counter  
8 when the perpetrator walked up to the cash register and  
9 started taking action that was showing that this was  
10 going to be a stick up, a robbery. Perhaps he said,  
11 "This is a robbery." He reached toward the drawer, and  
12 he said get me the money from this drawer or the other  
13 drawer. So it's clear that that is going to be a holdup  
14 basically. So Susan Peterson was right there on the  
15 other side of the counter by the cash register  
16 processing her credit card transaction at that point.  
17 She was right there.

18           But she doesn't remember now hearing that.  
19 She remembers thinking that he might have had a gun.  
20 She doesn't remember actually hearing the words. Yes,  
21 she gave a statement soon after the crime, an hour or so  
22 later where he said that, but that wasn't the first  
23 thing in her mind.

24           In fact, she wasn't even all that scared at  
25 first, it seems like. She was a little bit flippant

1 with him, because in that process of the first minute or  
2 so when the demands were being made and he asks her to  
3 -- or tells her to empty her purse, and she takes out 20  
4 dollars or so, and he thinks she must have more, and she  
5 kind of flippantly says: What, do you want my change  
6 too? She's clearly, at that point she's, like I say,  
7 acting kind of flippantly. She's not that fearful. In  
8 fact, she said she wasn't really all that fearful. She  
9 really got afraid later when the robbery was basically  
10 complete. And she was being directed to go back in the  
11 bathroom and then she starts feeling she's going to be  
12 cornered somewhere and maybe this isn't going to be the  
13 end, that something worse is going to happen. So at  
14 that point, she starts getting fearful. So I think that  
15 is another part of evidence that is here that tends to  
16 suggest that he may not have said "gun" right in the  
17 beginning because she didn't really react all that  
18 fearfully right in the beginning.

19 Now, there were several things that were said  
20 right in that first few seconds when he approached the  
21 cash register. You know, perhaps or maybe it all kinds  
22 of lumps together and everybody is not sure exactly  
23 which order things were said, but supposedly it was the  
24 gun, robbery, don't fuck with me, give me the money.  
25 That sort of thing. All kind of lumped in the

1 beginning. But then at that point, he was -- the  
2 perpetrator was being fairly calm and gets more agitated  
3 later as more time goes by.

4           And he also gets angry for a specific purpose,  
5 according to Debra Westerfield. Later when he takes  
6 Susan Peterson back to the bathroom, she tries to hit  
7 the alarm button at that point basically after he's  
8 already got the money and she thinks he saw her and got  
9 more angry and yet there is no reference to him saying  
10 anything more about a gun or any other threat. And you  
11 would think that that would be the natural progression  
12 here. He's getting more angry. Somebody's trying to  
13 frustrate his robbery attempt here. That he would then  
14 make some more reference to the gun or pull a gun out or  
15 whatever. Obviously, there is no gun present here,  
16 nobody saw a gun. So there is no question but that  
17 nobody is saying yes, there was a gun. I guess it was  
18 never seen if there was one.

19           But again, I think that kind of progression  
20 tends to suggest that if he would have made a threat  
21 about a gun early, he would have made it again later.  
22 Maybe when the scenario shifts into the sexual contact  
23 that there would have been reference to the gun there if  
24 he had that kind of force. He would have said that  
25 again or shown it or something, and it did not occur.

1           One can also think, and I think reasonably,  
2 that, again, I guess it's the idea that if he would have  
3 had a gun, or if he had the idea that he was going to  
4 threaten to use the gun, he would have repeated that,  
5 especially when he got more agitated toward the end,  
6 especially from when he moved from robbery to rape and  
7 that's that he wanted to accomplish, that result as  
8 well, it would have come up again and it did not. So  
9 because of the fact that I think the whole idea of  
10 robbery connotes a stick 'em up kind of situation that  
11 anyone would have that fear immediately, and so would  
12 get in their mind he must have had a gun.

13           I think also this, you know, you think Debra  
14 Westerfield, well, this is, you know a terrible thing  
15 that happened to her. It's scary, it's more than  
16 scary, it's demeaning and so forth. And when she  
17 presents that or when she feels how to react to that  
18 terrible insult that has happened, she would naturally  
19 want to kind of justify it, I think. And I think this  
20 is a reasonable reaction, as well. Well, I did this  
21 because he said he had a gun. I didn't just do it. So  
22 it's kind of a natural, I think, reaction. And probably  
23 even believe to think, well, he must have had a gun, he  
24 must have said something about having a gun because this  
25 is a terrible thing. And to justify it in her own mind,

1 when she maybe even believes that he said that because,  
2 you know, that's what pops into one's mind and then you  
3 believe it under that circumstance of very intense  
4 stress of a very short time and not knowing how to react  
5 and so forth. So I think that is also the natural  
6 progression here.

7 Now, as we've indicated, and Mr. Powers  
8 indicated, if that is the issue for you, and I think it  
9 should be the result, then at worst this is a rape in  
10 the second degree, not a rape in the first degree. And  
11 that's explained I think in the normal reading of the  
12 instructions. It is pretty straightforward.

13 Now, again, I think the State's usually make  
14 arguments about this is speculation, but I suggest that  
15 it's not. It's reasonable inferences based upon this  
16 evidence. It's not speculation. I'll draw an inference  
17 just for argumentative purposes, or not an inference,  
18 but an example. You know, we could speculate, for  
19 example, that a person in Debra Westerfield's position  
20 who might be in fear for her life reasonably might, and  
21 where the perpetrator is getting more agitated, where he  
22 looks like he's going to maybe, you know, put people in  
23 the bathroom and shoot them or something, and she has  
24 this great fear about her life, might think, well, maybe  
25 if I do sexual contact with him, it will take the edge

1 off and he won't kill us or something like that. That's  
2 a reasonable scenario. But I think in this case, that  
3 is a speculative scenario, because, you know, that's a  
4 stretch factually. So I think that would be an example  
5 of an argument where we are really stretching it beyond  
6 what is presented by the facts or the evidence and I  
7 think in to contrast something like that with the  
8 earlier arguments I've made here will show that the idea  
9 that this statement about a gun was just something that  
10 came up in their minds, rather than actually having been  
11 said. You know, it is consistent with the evidence.

12 Now, the State spent a great deal of time, and  
13 I'm just going to leave you with this, with the DNA  
14 testing. The identity question. There was one thing  
15 left hanging there. And that is something I think that  
16 Karen Lindell spoke of when she's talking about her  
17 probabilities, and that only one person in the world  
18 would likely have this profile. We don't even know what  
19 the numerical probability is. She didn't say. But she  
20 said it was probably not more than one person in the  
21 world who would have this profile. But she said with  
22 one exception. And here's something that the State  
23 didn't cover in its evidence. She said the one  
24 exception to that is identical twins, if you remember  
25 that. The State has not presented any evidence about

1 whether there is an identical twin of Dennis Somerville  
2 or not. So I'll leave you with that. And otherwise, I  
3 would ask you to follow the instructions, consider the  
4 evidence carefully, consider reasonable inferences that  
5 you can draw from the evidence and I would ask you to  
6 render verdicts then accordingly. Thank you.

7 THE COURT: Because the burden of proof is on  
8 the State, Mr. Powers has one final opportunity to  
9 address the jury.

10 MR. POWERS: Let me refer to that last one  
11 first here. I'll refer you to your instruction, the  
12 first instruction that you have and it says that the  
13 only evidence you are to consider consists of the  
14 testimony of the witnesses and the exhibits admitted  
15 into evidence.

16 And it also says in the second page of that  
17 instruction: The attorneys' remarks, statements and  
18 arguments are intended to help you understand the  
19 evidence and apply the law. They are not evidence.  
20 Disregard any remarks, statement or argument that is not  
21 supported by the evidence or the law as stated by the  
22 Court.

23 You are not called upon to speculate about  
24 things which are not in evidence.

25 Let's talk about the evidence. The suggestion



**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

**January 08, 2020 - 10:43 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53586-6  
**Appellate Court Case Title:** Personal Restraint Petition of: Dennis Somerville  
**Superior Court Case Number:** 02-1-00908-9

**The following documents have been uploaded:**

- 535866\_Personal\_Restraint\_Petition\_20200108104230D2095781\_9313.pdf  
This File Contains:  
Personal Restraint Petition - Response to PRP/PSP  
*The Original File Name was Sommerville PRP Resp FINAL.pdf*

**A copy of the uploaded files will be sent to:**

- ellis\_jeff@hotmail.com
- jeffreyerwinellis@gmail.com

**Comments:**

---

Sender Name: Linda Olsen - Email: olsenl@co.thurston.wa.us

**Filing on Behalf of:** Joseph James Anthony Jackson - Email: jacksoj@co.thurston.wa.us (Alternate Email: PAOAppeals@co.thurston.wa.us)

Address:  
2000 Lakedrige Dr SW  
Olympia, WA, 98502  
Phone: (360) 786-5540

**Note: The Filing Id is 20200108104230D2095781**