

Personal  
Restraint  
Petition

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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In the matter of the Personal  
Restraint of:  
  
Gregory O. Thomas,  
Petitioner

No. 88921-0  
King County Superior Court No.  
95-1-02081-6

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
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I.

INTRODUCTION

Gregory Thomas was one of the youngest in Washington ever sentenced to 999 months. A sentence equivalent to life in prison without the possibility of parole, (de Facto LWOP). He was fifteen at the time of his offense and had been "intermittently psychotic" for at least two-three years prior to the murder, App. 4 at 148.

He was under the influence of LSD, App. 5 at 60-62. Approximately eight months after the murder, he was tested to have an IQ of 65, App. 5 at 90, 94. Id. at 101-102. He files this Personal Restraint Petition (PRP) in view of the U.S. Supreme Court's decision in Miller v. Alabama, -- U.S. --, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), holding that the Eighth Amendment Prohibits the mandatory imposition of LWOP for defendants who were juveniles at the time of the offense.

Second, there was insufficient evidence of First degree Rape and Second degree Rape to support a First degree Felony Murder conviction.

(1)

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Susan L. Carlson  
Supreme Court Deputy Clerk

01 under RCW 9A.32.030 (1) (c).

02 Thomas has filed this PRP in the Washington Supreme Court because  
03 at least 100 juveniles were sentenced to de Facto LWOP. The lower courts  
04 will benefit from the prompt guidance of this Court.

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## II.

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### STATUS OF PETITIONER / PROCEDURAL HISTORY

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Mr. Thomas applies for relief from confinement. He was convicted  
of First degree Felony Murder after a jury trial in King County,  
Washington, under cause No. 95-1-02081-6.

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He is presently in custody at Stafford Creek Correction Center serving  
a sentence of life in prison without the possibility of parole, (de Facto  
LWOP - beyond life expectancy). He was sentenced on March 1, 1996 by the  
Honorable Mary W. Brucker. He was represented at trial by Eric Lindell  
and James Conroy.

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Mr. Thomas appealed and was represented by James R. Dixon. The Court  
of Appeals affirmed his conviction and sentence, *State v. Thomas*, 91  
Wash.App. 1027 (Wash.App. Div. 1 1998). The Court rejected Thomas' argument  
that his eighty-three (83) year sentence is clearly excessive and was  
unconstitutional under *State v. Ritchie*, 126 WN.2d 388, 395-96, 894 P.2d  
1308 (1995). The Court's entire discussion on that issue follows:

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Thomas argues that the trial court's failure to consider his mental  
illness as a mitigating factor justifies reversal of his exceptional  
sentence. Thomas contends that the imposition of a 999-month  
sentence (83 years) is clearly excessive in light of his mental  
disorder, his youth, the extreme abuse he suffered throughout life,  
and the fact that this was his first conviction. Under *State v.*  
*Ritchie*, the trial court need not state reasons justifying the  
particular length of his sentence chosen once it has given valid  
reason for imposing an exceptional sentence. Thomas contends we should  
not follow *Ritchie* in determining whether or not his sentence is

01 clearly excessive. He claims the trial court's failure to give reasons  
02 for the length of his sentence impedes judicial review and thus  
03 violates due process. Though Ritchie did not expressly discuss due  
04 process, the particular concerns raised by Thomas were necessarily  
05 considered and weighted by the Ritchie court. Unless the Supreme  
06 Court decides to overrule Ritchie, we are bound by it. Applying  
07 Ritchie analysis to present sentence, we find no error.

08 State v. Thomas, No. 38324-8-I.

09 This is Mr. Thomas' fourth PRP. He filed his first and second PRP's  
10 in the Court of Appeals. (PRP No. 46920-3-I) was filed on December 23,  
11 1999 and denied on May 10, 2000. (PRP No. 56370-0-I) was filed on June  
12 6, 2005 and denied on July 8, 2005.

13 Thomas then filed a third PRP raising several grounds, including  
14 insufficient evidence of predicate rape offenses, in Washington Supreme  
15 Court No. 78600-3. That PRP was transferred to the Court of Appeals No.  
16 58896-6-I and denied as a mixed petition.

### 17 III.

#### 18 STATEMENT OF THE CASE

19 On January 1995, Gregory Thomas was only 15 years old. Extraordinary  
20 trauma and neglect dominated Mr. Thomas' life. Mr. Thomas' father suffered  
21 from mental illness, possibly schizophrenia, App. 6 at 7. Mr. Thomas'  
22 mother had a severe drug and alcohol problem and she neglected and abused  
23 him emotionally and physically. Id. For example, Dr. Steven Marquez, a  
24 licensed clinical psychologist, testified at trial that when Mr. Thomas  
25 was three years-old, his mother bit off the foreskin of his penis, App.  
26 7 at 59. Dr. Charles Hale, a psychiatrist testified that when Mr. Thomas'  
27 mother was hospitalized in a psychiatric facility, she said she had an

01 impulse to strangle her son, App. 4 at 154-55.

02 In addition, Mr. Thomas' sister, princess Thomas-Rogers, testified  
03 at trial that when he was five, Mr. Thomas was knocked unconscious for  
04 ten minutes when his mother hit him in the head with a cast-iron frying  
05 pan; on other occasions, she pushed his head into a wall and beat him  
06 with electrical cords. Id. at 78, 81.

07 When he was about six, the state removed Mr. Thomas from his home  
08 due to severe physical and emotional abuse inflicted by his mother and  
09 placed him with Aunt Joy Thomas-Rogers, App. 6 at 7. The abuse, however,  
10 did not end. Over the course of several years, Aunt Joy regularly beat  
11 Mr. Thomas with a 12-inch plastic rod on the hands and buttocks because...  
12 "he was so quiet and to himself." App. 4 at 82. Princess also testified  
13 that in October 1994, Mr. Thomas attempted suicide by hanging himself.  
14 App. 4, Id. at 90-91.

15 On October 12, 1995, during the hearing to determine the admissibility  
16 of Mr. Thomas' statements, the trial court addressed Mr. Thomas' competence  
17 to stand trial, App. 5 at 82-88. In addition to the in-court discussion  
18 on Mr. Thomas' competency, the trial court reviewed the Western State  
19 Hospital's (WSH) evaluation of Mr. Thomas. The WSH evaluation and the  
20 testimony presented at Mr. Thomas' trial on the issue of insanity show  
21 that Mr. Thomas, a 15 year-old boy, suffered from a long history of severe  
22 abuse, emotional disorder and psychiatric problems, App. 6 at 7, 12. The  
23 WSH evaluation stated that Mr. Thomas:

24  
25 had been involved with treatment with Dr. Marla Hooks  
26 through Odessa-Brown Clinic in Seattle. He had also  
27 counseled with Rudolph Andrews, MSW, over two different  
28 periods of time. He had counseled at the teen center  
with Corey Goldstein. While with Dr. Hooks, he was placed  
on Lithium, Thorazine, and Trialfon. He felt that the

01 medications did help calm him down, relax him and help  
02 him sleep, and help with his hearing voices. Id. at 8.

03  
04 Dr. Charles Hale, one of the psychiatrists who prepared the WSH  
05 evaluation testified at trial that Mr. Thomas had been "intermittently  
06 psychotic" (fn.1) since age 12, App. 4 at 148. WSH's diagnostic impression  
07 of Mr. Thomas was that he suffered from psychotic disorder, conduct  
08 disorder and mixed personality disorder, App. 6 at 8.

09 Sadly, on January 10, 1995, police entered Thomas' home, where they  
10 woke him at 3:45 a.m., cuffed him, read him Miranda warnings and they  
11 took him to the Police Station for interrogation. About an hour later,  
12 two detectives interrogated Mr. Thomas in a small windowless room without  
13 reviewing the Miranda warnings or determining whether he understood and  
14 intended to waive his rights.

15 Instead, taking advantage of Mr. Thomas' disabilities, the detectives  
16 offered to Mr. Thomas a "second chance" if he admitted killing the victim  
17 by "accident." After this offer of a second chance, Mr. Thomas admitted  
18 killing the victim accidentally. Id. at 50.

19 Mr. Thomas was originally charged in juvenile court with First degree  
20 Murder; however, upon motion by the State, the juvenile court declined  
21 jurisdiction and the case was transferred to King County Superior Court.

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Footnote: (fn.1) Psychotic illnesses, which may be a subset of  
24 schizophrenia, involve significant, prolonged periods of mental distortion  
25 where an individual is unable to determine the "truthfulness" of reality,  
26 App. 4 at 149.

01 Mr. Thomas was charged with aggravated murder in the first degree  
02 (count 1) and felony murder in the first degree (count 2). The felony  
03 murder was based on the predicate offenses of rape in the first degree,  
04 rape in the second degree, and burglary in the first degree, CP 488-489.

05 The two counts were charged in the alternative, as there was only  
06 one murder, CP 485-87. The jury was unable to reach a verdict on the charge  
07 of aggravated first degree first degree murder but convicted Mr. Thomas  
08 of the crime of first degree felony murder based on burglary in the first  
09 degree, rape in the first and second degree and attempted residential  
10 burglary, CP 838; app.1 Judgment and Sentence.

11 In addition, the jury answered Yes to a special verdict form that  
12 asked whether the state had proven that the crime was committed with sexual  
13 motivation, CP 839. The special verdict form was a general instruction  
14 in that it only asked whether the defendant committed the crime with sexual  
15 motivation, but not whether they found sexual motivation for each of the  
16 three means of committing the offense. See Id.

17 At the sentencing hearing, the state urged the court to impose an  
18 exceptional sentence upwards of 999 months, three times the top end of  
19 the standard range, SENRP 3. The state argued that there were three  
20 aggravating factors: 1) particular vulnerability due to advanced age,  
21 2) invasion of zone of privacy, and 3) sexual motivation.

22 In requesting that the 999 month term be imposed, the state assured  
23 the court "that the trial court doesn't have to delineate the reasons  
24 for the number of months it is imposing," SENRP 4.

25 Defense counsel cautioned against adopting the state's recommended  
26 sentence, emphasizing that the state simply wants "to give him a sentence  
27 that a jury of his peers, if you will, refused to give him, it's life,"  
28

01 SENRP 23. At the conclusion of the sentencing hearing, the court adopted  
02 the state's recommendation and imposed a 999 month exceptional sentence.  
03 Mr. Thomas received an eighty-three (83) year sentence, life imprisonment  
04 without the possibility of release or parole.  
05

06  
07 IV.

08 GROUNDS FOR RELIEF

09 Ground one:

10 1. Thomas' sentence of de Facto life without parole violates the  
11 Eighth Amendment to the U.S. Constitution.

12 2. Thomas' sentence of de Facto life without parole violates Article  
13 I, Section 14 of the Washington Constitution.

14 Ground two:

15 1. There was insufficient to support the jury's verdict that Thomas  
16 committed the predicate offenses of first and second degree rape  
17 to support felony murder conviction for count 2.

18 V.

19 Ground one (Argument)

20 A. THE MILLER DECISION

21 In *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455, 183 L.Ed,2d 407  
22 (2012), the Supreme Court held that "mandatory life without parole for  
23 those under the age of 18 at the time of their crimes violates the Eighth  
24 Amendment's prohibition on 'Cruel and Unusual Punishments.'" *Id.* at 2460.  
25 The Court based the ruling on the Eighth Amendment's "concept of  
26 proportionality" which is viewed "less through a historical prism than  
27 according to the evolving standards of decency that mark the progress  
28 of a mature society." *Id.* at 2463 (citations and internal quotation marks

01 omitted). The Court summarized its rationale as follows:

02 (I)n imposing a state's harshest penalties, a sentencer misses too  
03 much if he treats every child as an adult. To recap: Mandatory life  
04 without parole for a juvenile precludes consideration of his  
05 chronological age and its hallmark features - among them immaturity,  
06 impetuosity, and failure to appreciate risks and consequences. It  
07 prevents taking into account the family and home environment that  
08 surrounds him - and from which he cannot usually extricate himself  
09 - no matter how brutal or dysfunctional. It neglects the circumstances  
10 of the homicide offense, including the extent of his participation  
11 in the conduct and the way familial and peer pressures may have  
12 affected him. Indeed it ignores that he might have been charged and  
13 convicted of a lesser offense if not for incompetencies associated  
14 with youth - for example, his inability to deal with police officers  
15 or prosecutors (including on a plea agreement) or his incapacity  
16 to assist his own attorneys ... and finally, this mandatory punishment  
17 disregards the possibility of rehabilitation even when the  
18 circumstances most suggest it.

11 Id. at 2468. Thus a mandatory sentence of life without parole "poses too  
12 great a risk of disproportionate punishment." Id. at 2469.

13 This reasoning, of course directly contradicts the first rationale  
14 for the decision in State v. Thomas: that the age of the offender is  
15 irrelevant. See Thomas, 91 Wash.App. 1027 (1998) (Thomas contended that  
16 imposition of a 999 month sentence (83 years) is clearly excessive in  
17 light of his mental disorder, his youth, the extreme abuse suffered  
18 throughout life, and the fact that this was a first conviction.)

19 The Court based its conclusions, in-part, on the relatively recent  
20 scientific findings that only a small percentage of adolescents who engage  
21 in illegal activity "develop entrenched patterns of problem behavior,"  
22 and that the juvenile brain is fundamentally and anatomically different  
23 from the adult brain, particularly "behavior control."

24 This means that the moral "culpability" of a juvenile is less than  
25 an adult's and also that there is much more likelihood that his  
26 "deficiencies will be reformed" as his "neurological development occurs."  
27 Id. at 2464-65 (citations and internal quotation marks omitted).

01 The Court expressly rejected the notion that the exercise of  
02 discretion in charging the juvenile as an adult satisfied the Eighth  
03 Amendment. *Id.* at 2474-75. First, the Court may not have full information  
04 at that stage of the proceedings. Second, and "more important," such  
05 decisions often present a choice between extremes" since some states  
06 (including Washington) require a child convicted as a juvenile to be  
07 released at the age of 21. *Id.* This reasoning directly contradicts the  
08 second rationale in *State v. Thomas*: that the Superior Court's decision  
09 to decline juvenile jurisdiction justified imposition of the same sentence  
10 that would apply to an adult, under *Ritchie*, 126 WN.2d at 394-397.

11 The Court left open whether "the Eighth Amendment requires a  
12 categorical bar on life without parole for juveniles, or at least for  
13 those 14 and younger," *Miller*, 132 S.Ct. at 2469, "But given all we have  
14 said ... about children's diminished culpability and heightened capacity  
15 for change, we think appropriate occasions for sentencing juveniles to  
16 this harshest possible penalty will be uncommon." *Id.* "That is especially  
17 so because of the great difficulty ... of distinguishing at this early  
18 age between the juvenile offender whose crime reflects unfortunate yet  
19 transient immaturity, and the rare juvenile offender whose crime reflects  
20 irreparable corruption." *Id.* (citations and internal quotation marks  
21 omitted).

#### 22 B. THE PETITION IS NOT BARRED AS SUCCESSIVE

23 Several provisions of Washington case law, statutes, and rules bar  
24 successive claims under certain circumstances. None of them apply here.

25 Because *Thomas* raised the constitutionality of his de Facto LWOP  
26 sentence on direct appeal, he must show that the "ends of justice" favor  
27 relitigation. In *Re Taylor*, 105 WN.2d 683, 688-89, 717 P.2d 755 (1986).

01 That is easily shown here because the basis for the Court of Appeals'  
02 ruling against Thomas has been overturned by the U.S. Supreme Court.

03 RAP 16.4(d) provides: "No more than one petition for similar relief  
04 on behalf of the same petitioner will be entertained without good cause  
05 shown." "A successive petition seeks similar relief if it either renews  
06 claims already previously heard and determined on the merits or raises  
07 new issues in violation of the abuse of the writ doctrine." In re Greening,  
08 141 WN,2d 687, 699, 9 P,3d 206, 212 (2000) (Citations and internal  
09 quotation marks omitted),

10 A represented petitioner abuses the writ by raising in a successive  
11 petition a claim that was "'available but not relied upon in a  
12 priorition.'" Matter of Jeffries, 114 WN,2d 485, 492, 789 P.2d 731, 737  
13 (1990) (Quoting Kuhlman v. Wilson, 477 U.S. 436, 444 N.6, 106 S.Ct. 2616,  
14 2622 N.6, 91 L.Ed,2d 364 (1986)). Thomas' current claim was not available  
15 to him because - prior to Miller - no intervening change in the law made  
16 an exception to the one-year time limit.

17 RCW 10.73.140 prohibits the Court of Appeals from considering a  
18 personal restraint petition if the petitioner has "Filed a previous  
19 petition on similar grounds," and, if he did not raise the current ground  
20 in a previous petition, requires the petitioner to show "good cause" for  
21 that failure. Because this statute does not apply to the Supreme Court,  
22 there is no need to address it. See In re Johnson, 131 WN,2d 558, 933  
23 P,2d 1019 (1997).

24

25 C. THE PETITION IS TIMELY

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27 Collateral attacks must generally be filed within one year of the  
28

01 date of the conviction became final. RCW 10.73.090. Mr. Thomas' conviction  
02 became final in 1999. There is an exception, however, for a "significant  
03 change in the law ... which is material to the ... sentence" and a court  
04 "determines that sufficient reasons exist to require retroactive  
05 application of the changed legal standard." RCW 10.73.100.

06 Miller is obviously a significant change in the law, as evidenced  
07 by Thomas' own direct appeal. Until Miller was decided, that Court of  
08 Appeals decision stood binding precedent in Washington. As noted above,  
09 the Court of Appeals flatly concluded that age was simply not a factor  
10 in assessing whether a de Facto LWOP sentence constitutes Cruel and Unusual  
11 Punishment. See Thomas, 91 Wash.App. 1027 (1998).

12 The Miller decision is certainly "material" to Thomas' sentence  
13 because he was fifteen when he was sentenced to 999 months. A sentence  
14 that amounts to life without parole, (LWOP) which is unquestionably  
15 unconstitutional under Miller.

16 As for ground two, RCW 10.73.100 subsection (4), entitles Thomas  
17 to file this issue outside of the one-year limit.

18 Moreover, this issue was previously raised in Thomas' third pro se  
19 PRP, No. 58896-6-I. But the court did not reach the merits of that  
20 petition. Instead, the court dismissed that personal restraint petition  
21 as a "mixed petition" and noted Thomas could file on this ground. See  
22 App.2.

23  
24 D. MILLER APPLIES RETROACTIVELY

25 1. INTRODUCTION

26 There are four reasons why this Court should apply Miller  
27 retroactively. First, Miller places the act of imposing a mandatory

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01 sentence of LWOP de Facto on a juvenile beyond the power of the courts.  
02 Second, and alternatively, Miller is a watershed rule of constitutional  
03 procedure. Third, the United States Supreme Court indicated in Miller  
04 itself that it should be applied retroactively by affirming relief to  
05 the defendant in Miller's companion case. Forth, regardless of federal  
06 retroactively standards, this Court should exercise its authority to  
07 correct Thomas' sentence given that Miller and recent decision in Jackson  
08 shows it to be erroneous.

09 When deciding whether a new ruling applies retroactively, the United  
10 States Supreme Court follows the standards set out in Teague v. Lane,  
11 489 U.S. 288, 300-01, 109 S.Ct. 1060, 1070, 103 L.Ed.2d 206 (1989).  
12 Although Justice O' Connor's opinion in Teague was only a plurality, the  
13 Supreme Court later confirmed that it represented the opinion of a majority  
14 of the Court. See Danforth v. Minnesota, 552 U.S. 264, 266, 128 S.Ct.  
15 1029, 1033, 169 L.Ed.2d 859 (2008).

16 The rule will apply to any cases still pending on direct review.  
17 Id. at 304. For cases on collateral review, such as Thomas', the next  
18 issue is whether the rule is "new," that is, one not dictated by existing  
19 precedent. If so, the case will generally apply prospectively only. Id.  
20 at 301. Thomas concedes that Miller sets out a new rule. As discussed  
21 below, however, at least one of Teague's two exceptions to the  
22 non-retroactivity rule apply here.

23 2. Miller and Jackson places the imposition of either a mandatory  
24 sentence of LWOP or a de Facto LWOP on a juvenile beyond the power  
25 of the courts.  
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01 Under Teague, a new rule will apply retroactively if it "places  
02 certain kinds of primary, private individual conduct beyond the power  
03 of the criminal law-making authority to proscribe." *Id.* at 311 (Citation  
04 and internal quotation marks omitted). This exception applies "not only  
05 (to) rules forbidding criminal punishment of certain primary conduct but  
06 also rules prohibiting a certain category of punishments for a class of  
07 defendants because of their status or offense." *Perry v. Lynaugh*, 492  
08 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), abrogated on other  
09 grounds by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d  
10 335 (2002). An example of such case is *Graham v. Florida*, — U.S. —,  
11 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) which held that the Eighth Amendment  
12 precludes a sentence of life without parole for a juvenile who did not  
13 commit a homicide offense. See, e.g., in *Re Sparks*, 657 F.3d 258 (5th  
14 Cir. 2011) (holding that *Graham* applies retroactively under the first  
15 Teague exception). Court rulings subject to this exception are sometimes  
16 referred to as "substantive." See *Saffle v. Parks*, 494 U.S. 484, 494-95,  
17 110 S.Ct. 1257, 108 L.Ed.2d 415, reh'g denied, 495 U.S. 924, 110 S.Ct.  
18 1960, 109 L.Ed.2d 322 (1990).

19  
20  
21 The first Teague exception should apply here because *Miller*  
22 "Prohibit(s) a certain category of punishment for a class of defendants  
23 because of their status or offense." Mandatory LWOP or de Facto LWOP is  
24 precluded for defendants who were under 18 at the time of the offense.  
25 *Miller* and *Jackson* are therefore similar to *Graham v. Florida*.

26 The state may argue, however, that the relevant inquiry is whether  
27 *Miller* and *Jackson* forbids juvenile LWOP or de Facto LWOP under  
28

01 circumstances. The Court should reject such reasoning because the phrase  
02 "category of punishment" is broad enough to include the mandatory nature  
03 of Washington's sentencing for aggravated murder; and first degree murder  
04 where the sentence is the equivalent to aggravated murder. Further,  
05 although the Miller majority declined to decide whether the Eighth  
06 Amendment invariably prohibits LWOP for juveniles, it explained that when  
07 the proper factors are considered there will be few, if any, cases in  
08 which such a punishment would be appropriate. Thus, unlike rulings that  
09 have been categorized as "procedural," Miller has nearly the same effect  
10 as a rule expressly prohibiting a certain punishment under all  
11 circumstances. Further, as discussed in Section E below, this Court should  
12 take Miller and Jackson one step further and hold - as the U.S. Supreme  
13 Court will likely do at some point - that LWOP or de Facto LWOP is  
14 prohibited for juveniles. If the Court agrees, then the Washington rule  
15 will be "substantive" and the first Teague exception will apply.

16  
17 3. If Miller is considered a "procedural" ruling, then as a Watershed  
18 Rule it should be applied retroactively.

19  
20 The second Teague exception applies to "watershed" rules of  
21 constitutional criminal procedure. Teague, 489 U.S. at 311. As the Supreme  
22 Court explained:

23  
24 (I)n some situations it might be that time and growth in social  
25 capacity, as well as judicial perceptions of what can tightly demand  
26 of the adjudicatory process, will properly alter our understanding  
27 of the bedrock procedural elements that must be found to violate  
28 the fairness of a particular conviction.

Id. at 311 (emphasis in Teague) (Quoting Mackey v. United States, 401

01 U.S. 667, 693-94, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971)). The Court  
02 continued:

03 In *Desist* (fn2), Justice Harlan had reasoned that one of the two  
04 principal functions of habeas corpus was "to assure that no man has  
05 been incarcerated under a procedure which creates an impermissibly  
06 large risk that the innocent will be convicted," and concluded "from  
07 this that all 'new' constitutional rules which significantly improve  
08 the preexisting factfinding procedures are to be retroactively applied  
09 on habeas."

10 *Id.* at 312. The Court believed it to be "desirable to combine the accuracy  
11 element" from *Desist* with the "Mackey requirement that the procedure at  
12 issue must implicate the fundamental fairness of the trial." *Id.* In doing  
13 so the Court reconciled "concerns about the difficulty in identifying  
14 both the existence and the value of accuracy-enhancing procedural rules  
15 ... by limiting the scope of the second exception to those new procedures  
16 without which the likelihood of any accurate conviction is seriously  
17 diminished." *Id.* at 313.

18 Although the language in *Teague* focuses on convictions, the Supreme  
19 Court has applied the "watershed" standard procedures concerning  
20 sentencing. See, e.g., *Schiro v. Summerlin*, 542 U.S. 348, 355-57, 124  
21 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

22 Therefore, the closest analog to *Miller* is the U.S. Supreme Court's  
23 ruling in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49  
24 L.Ed.2d 944 (1976), a case the *Miller* Court relied on. See *Miller*, 132  
25 S.Ct. at 2464. *Woodson* overturned a statute mandating the death penalty

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26  
27 Footnote: (fn.2) *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030,  
28 22 L.Ed.2d 248, reh'g denied, 395 U.S. 931, 89 S.Ct. 1766, 23 L.Ed.2d  
251 (1969).

01 for any conviction of first degree murder. *Id.* at 305. This rule was  
02 promptly applied to all 120 prisoners on death row in North Carolina,  
03 regardless of the procedural posture of their cases. See Cynthia F. Adcock,  
04 The twenty-fifth anniversary of post-Furman executions in North Carolina:  
05 A History of one Southern State's Evolving Standards of Decency, 1 *Elon*  
06 *L. Rev.* 113, 119 (2009).

07 First, Miller alters the "bedrock procedural elements" of sentencing  
08 juveniles for murder with aggravating factors. In Washington, juveniles  
09 convicted of one count of murder with aggravating factors can still receive  
10 a sentence of de Facto LWOP. Miller replaces that with a system requiring  
11 consideration of complex and individual factors.

12 Second, the current system allows an "impermissibly large risk" that  
13 a juvenile will be sentenced to a sentence of seventy, eighty or ninety  
14 years (de Facto LWOP). See *Ritchie*, 126 *WN.2d* at 398 - 404. The new rule  
15 "significantly improve(s) the pre-existing fact-finding procedures."  
16 *Teague*, 489 *U.S.* at 312. As the Miller Court noted, "Appropriate occasions  
17 for sentencing juveniles to this harshest possible penalty will be  
18 uncommon." 132 *S.Ct.* at 2469.

19 Thus, in Washington, Miller changes the likelihood of a juvenile  
20 convicted of murder with aggravating factors receiving a de Facto LWOP  
21 from 100 percent to nearly zero percent. In other words, the Miller Court  
22 found that the current system suffers not merely from the possibility  
23 of erroneous sentences in the vast majority of cases. In the words of  
24 the *Teague* Court, "the likelihood of an accurate (sentence)" was "seriously  
25 diminished," 489 *U.S.* at 313, under the sentencing scheme that applied  
26 to Thomas. It is hard to imagine a sentencer who would have imposed a  
27 life sentence on this 15 year-old boy had the totality of circumstance  
28

01 been applied. See Miller, 132 S.Ct. at 2468.

02 Finally, the Miller ruling affects the "fundamental fairness" of  
03 the proceedings, as this case demonstrates. At sentencing, Thomas could  
04 not point out that he was only a boy at the time of the crime, had been  
05 "intermittently psychotic" for at least two-three years prior to the  
06 murder, was on LSD and eight months after the murder was tested to have  
07 an IQ of 65, is "considered the mentally retarded range. (fn.3)," and  
08 that he had the capacity to reform.

09  
10 Research has shown that it is doubtful whether someone of Mr. Thomas'  
11 age and intelligence would, under any circumstances be able to understand  
12 the nature of his rights and the consequences. See Morgan Cloud, et.  
13 al., "words without meaning: The Constitution and Mentally Retarded  
14 Suspects," 69 u. chi. L.Rev. 495, 501 (2002).

15 Mr. Thomas, now 34 years old, languishes in prison even though he  
16 is hardly the same person as the 15 year-old who committed the crime.  
17 He has an exemplary prison record including no major infractions in over  
18 10 years. He has shown a strong work ethic in various prison jobs. He  
19 has obtained a GED and numerous certificates for completing positive  
20 programming in prison. In 2011, Thomas completed a 21-week Redemption  
21 Class which is an offender change program.

22 It is fundamentally unfair that a defendant such as Mr. Thomas must  
23 automatically spend the rest of his life in prison for a transgression

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24  
25 Footnote: (fn.3) See Atkins v. Virginia, 536 U.S. 304, 309 N.5 (2002)  
26 (under prevailing psychiatric definitions, "'mild' mental retardation  
27 is typically used to describe people with an IQ level of 50-55 to  
28 approximately 70").

01 committed as a child. Thus this Court should find that the "watershed"  
02 exception applies here.

03

04 4. The U.S. Supreme Court Treated Miller as Retroactive.

05

06 The Miller Court granted relief not to Evan Miller but also to  
07 Kuntrell Jackson, the petitioner in a consolidated case, Miller, 13 S.Ct.  
08 at 2475. Jackson's conviction became final in 2004, Jackson v. State,  
09 359 Ar. 87, 194 S.W. 3d 757 (Ark. 2004), and his case reached the Supreme  
10 Court after Arkansas Supreme Court affirmed the dismissal of Jackson's  
11 state petition for habeas corpus, Jackson v. Norris, 2011 Ark. 49 (Ark.  
12 2011), cert. granted sub nom Jackson v. Hobbs, 132 S.Ct. 538, 181 L.Ed.2d  
13 395 (2011). The Supreme Court will not apply a new rule to a case on  
14 collateral review unless that rule applies retroactively to all case(s)  
15 on collateral review. See Penry v. Lynaugh, 492 U.S. 302, 313, 109 S.Ct.  
16 2934, 106 L.Ed.2d 256 (1989), abrogated on other grounds by Atkins v.  
17 Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). cf.  
18 Personal Restraint of Jagana, -- U.S. --, 130 S.Ct. 1473, 176 L.Ed.2d  
19 284 (2010), although the petitioner was on collateral attack, suggests  
20 that the Court believed the ruling applied retroactively.

21

22 E. THIS COURT SHOULD RULE THAT THE WASHINGTON CONSTITUTION PROHIBITS  
23 de FACTO LWOP FOR JUVENILES.

24

25 The Supreme Court's ruling in Miller leaves a significant question  
26 unanswered: Does Eighth Amendment prohibit LWOP or de Facto LWOP for  
27 juveniles?

28

01 Washington currently does not have a parole board or system that  
02 would allow a juvenile sentenced to 70, 80, or 90 years, to have a  
03 meaningful opportunity at release. Thus, it is a sentence that amounts  
04 to the death penalty.

05 The majority's strong condemnation of such a sentence suggests that  
06 it may well rule at some point that it is never appropriate to lock the  
07 door and throw away the key. Certainly, the Supreme Court's holding seem  
08 to be moving on such a path. See *Thompson v. Oklahoma*, 487 U.S. 815, 108  
09 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (Eighth Amendment prohibits execution  
10 of juveniles under 16 at time of offense); *Roper v. Simmons*, 543 U.S.  
11 551, 556, 125 S.Ct. 1183, 1188, 161 L.Ed.2d 1 (2005) (Prohibiting death  
12 penalty for 16 and 17 year-olds); *Graham v. Florida*, 130 S.Ct. at 2034  
13 (Prohibiting LWOP for juveniles convicted of non-homicide offenses);  
14 *Miller*, 132, S.Ct. at 2475 (Prohibiting mandatory LWOP for juvenile  
15 homicide offenses). It appears likely that the next ruling will be a ban  
16 on de Facto LWOP for juveniles.

17 This Court should not wait for that ruling, but should anticipate  
18 it. The Court took a similar approach when it ruled, 12 years before the  
19 decision in *Roper*, that Washington does not permit execution of those  
20 under 18 at the time of the offense. See *State v. Furman*, 122 WN.2d 440,  
21 858 P.2d 1092 (1993).

22  
23 Article 1, Section 14 of the Washington Constitution provides,  
24 "Excessive bail shall not be required, excessive fines imposed, nor cruel  
25 punishment inflicted." Const. art. 1, (sec.) 14. The state framers  
26 considered and rejected the language of the Eight Amendment to the United  
27 States Constitution which only prohibits punishment that is both "cruel"  
28

01 and "unusual." U.S. Const. Amend. VIII; State v. Fain, 94 WN.2d 387, 393,  
02 617 P.2d 720 (1980) (Citing the Journal of the Washington State  
03 Constitutional Convention: 1889 501-02 (B. Rosenow ed. 1962)).

04 Because of the differences in text and history, this Court has long  
05 held that article 1, section 14 provides greater protection than its  
06 federal counterpart. State v. Thorne, 129 WN.2d 736, 772, 921 P.2d 514  
07 (1996); Fain, 94 WN.2d at 393. Accordingly, State v. Gunwall, 106 WN.2d  
08 54, 720 P.2d 808 (1986) analysis is not necessary. State v. Roberts, 142  
09 WN.2d at 506 N.11. Rather, this Court will "apply established principles  
10 of state constitutional jurisprudence." Id.

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12

13 To pass state constitutional muster, a sentence must be both inherenty  
14 and comparatively proportional. See Fain WN.2d at 397. This Court evaluates  
15 four factors in determining whether a sentence violates article 1, section  
16 14: (1) the nature of the offense, (2) legislative purpose behind the  
17 statute and whether that purpose can be equally well served by a less  
18 severe punishment, (3) the punishment the defendant would have received  
19 in other jurisdictions for the same offense, and (4) the punishment meted  
20 out for other offenses in the same jurisdiction, Id. at 397, 401 n.7.

21 The Nature of the Offense: The crime of first degree felony murder  
22 is of course serious. It has only recently become clear, however, how  
23 different that similar crime is when committed by a juvenile rather than  
24 an adult. As the Miller Court explained, the culpability and capacity  
25 for change of a juvenile is not the same as that of an adult. This is  
26 especially true when the juvenile is younger than 16. See Miller, 132  
27 S.Ct. at 2469, (Noting that Court might bar LWOP for juveniles under 16

28

01 at the time of the offense even if it did not do so for older juveniles.)

02 Here Mr. Thomas was only 15 at the time of the offense, had been  
03 "intermittently psychotic" for at least two-three years prior to the  
04 murder, and approximately eight months after the murder was tested to  
05 have an IQ of 65. The nature of his offense must therefore be considered  
06 quite different from the same crime committed by an adult.

07 The Legislative Purpose: Statutory provisions are at issue. First,  
08 RCW 13.40.110 authorizes juveniles to be tried as adults under some  
09 circumstances. Second, RCW 9A.32.030(1)(c) set out the penalties for  
10 sentencing on first degree felony murder. Third and fourth RCW's 9.94A.390  
11 (2)(b) and 9.94A.390 (2)(e) are aggravating circumstances. However, the  
12 legislature has not considered how RCW 9A.32.030 (1)(c), RCW 9.94A.390  
13 (2)(b) and RCW 9.94A.390 (2)(e) would apply to juveniles tried as adults.  
14 "The statutes therefore cannot be construed to authorize imposition of  
15 the death penalty for crimes committed by juveniles," of course, the  
16 legislature did not consider how the sentence of LWOP or de Facto LWOP  
17 should be apply to juveniles tried as adults. Therefore, there is no  
18 legislative purpose to provisions at issue here.

19 Punishment in other Jurisdictions: This issue is addressed in Miller,  
20 132 S.Ct. at 2470-73. The Court rejected the notion that LWOP for juveniles  
21 was widely accepted simply because it is a theoretical possibility in  
22 29 jurisdictions. In most of these jurisdictions, as in Washington, the  
23 penalty becomes possible only through a combination of declining juvenile  
24 jurisdiction and then applying the penalties set out in statutes pertaining  
25 to adults. Under those circumstances, it is "impossible to say whether  
26 a legislature has endorsed a given penalty for children (or would do so  
27 if presented with the choice)." Id. at 2472.

28

01           The Punishment in Washington for other Offenses: For adult offenders,  
02 the sentence of LWOP is a reasonable, incremental increase from already  
03 substantial guideline ranges for first degree murder. For juvenile  
04 offenders, the better comparison is to the sentence they could face if  
05 prosecuted in the juvenile system. Even for the most serious crimes,  
06 incarceration can only last until the offender turns 21. RCW 13.40.0357.  
07 In Mr. Thomas' case, that yields a maximum sentence of six years.

08           In theory at least, the decision to decline juvenile jurisdiction  
09 may be based in part on a finding that longer incarceration is necessary.  
10 Thomas does not concede that he should have been tried as an adult. The  
11 finding that declination is appropriate, however, cannot justify the  
12 enormous increase from eight to eighty-three years. A term beyond life  
13 expectancy (de Facto LWOP). When declination is discretionary (fn.4) the  
14 Washington courts consider the eight factors set out in Kent v. United  
15 States, 383 U.S. 541, 566-67, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). See  
16 State v. Holland, 98 WN.2d 507, 515-516, 656 P.2d 1056 (1983).

17  
18           This includes such things as the "prospective merit of complaint"  
19 and "the desirability of ... disposition in one court" when defendants  
20 will be tried as adults, neither of which have any bearing on the  
21 appropriate punishment. Two other factors are: whether the offense was  
22 against persons or property, and whether the offense was committed in  
23 an "aggressive, violent, premeditated or willful manner." Since these  
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25 Footnote: (fn.4) The current statute makes declination mandatory for Class  
26 A felonies committed by those 16 or 17 years old. This makes it even more  
27 likely that the sentence of LWOP or de Facto LWOP would be disproportionate  
28 since the juvenile court cannot even consider factors such as lack of  
prior record, lack of sophistication or the likelihood of rehabilitation  
in the juvenile system,

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are invariably satisfied when the crime is premeditated murder, they should correspond to that for an adult. Other factors, such as the juvenile's prior record and level of sophistication may well justify some increase in punishment, but not the astronomical leap to LWOP or a sentence that is equal to de Facto LWOP.

In short, even when the declination factors are taken into account, a sentence of LWOP or de Facto LWOP is never proportionate to a juvenile court sentence.

Thus, in view of current understanding of juvenile offenders, the Fair Factors lead to the conclusion that Article I, Section 14 absolutely prohibits LWOP or de Facto LWOP for juvenile offenders under all circumstances.

## VI.

### ARGUMENT TWO

F. INSUFFICIENT EVIDENCE of First Degree Felony Murder Predicated on First and Second degree Rape.

Mr. Thomas argues that the evidence is insufficient to convict him of count II, first degree felony murder. The evidence does not support the necessary predicates of first and second degree rape.

Evidence must be sufficient to support each element of the crime. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The court will draw all reasonable inferences from the evidence in favor of the State. State v. Lopez, 79 Wn. App.755, 768, 904 P.2d 1179 (1995). Circumstantial evidence is just as reliable as direct evidence. State v. Meyers, 133

01 Wn.2d 26, 38, 941 P.2d 1102 (1997).

02 Here the State charged Thomas in count II, with murdering Ms. Lamere  
03 in the course of committing first or second degree rape or first degree  
04 burglary. See appendix 3 third amended information number 95-1-02081-6.  
05 The State must then prove each element of predicate felony. State v.  
06 Quillin, 49 Wn. App.409, 412, 685 P.2d 643 (1984).

07 The Court did not instruct the jury that it had to unanimously agree  
08 on a specific predicate crime or crimes. State v. Petrich, 101 Wn.2d 566,  
09 683 P.2d 173 (1984). Therefore, the Court must be able to conclude that  
10 substantial evidence supports each alternative predicate crime to remand  
11 for new trial. State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).

12 The State charged first or second degree rape or first degree burglary  
13 as the alternative predicate crimes. The higher degree of those crimes  
14 necessarily includes the inferior degree. RCW 10.61.003; State v. Tamalin,  
15 134 Wn.2d 725, 731 P.2d 450 (1998). Therefore, the Court need only decide  
16 whether the evidence is sufficient to support first degree rape and first  
17 degree burglary. If, the State presented sufficient evidence to support  
18 those crimes, it necessarily presented evidence sufficient to support  
19 the inferior degree of second degree rape. State v. Workman, 90 Wn.2d  
20 443, 447-48, 584 P.2d 382 (1978).

21 First degree murder includes murder committed in the course of rape  
22 or burglary.

23 RCW 9A.32.030 (1)(c).

24 To prove first degree rape, the State must show that the defendant  
25 engaged in sexual intercourse with the victim by forcible compulsion  
26 and that the defendant either kidnapped the victim, inflicted serious  
27 injury on the victim. RCW 9A.44.040 (1). To prove first degree  
28

01 burglary, the State must show that the defendant with intent to commit  
02 a crime against a person or property therein, he or she enters or  
03 remains unlawful in a building and if, in entering or while in the  
04 building or in immediate flight there from the actor or another  
05 participant in the crime (a) is armed with a deadly weapon, or (b)  
06 assaults any person. RCW 9A.52.020 (1)(a).

07  
08 Next, the Court then need look for sufficient evidence in the record  
09 for both first and second degree rape. *Quillin*, 49 Wn. App. at 164  
10 (citing *Gamba*, 38 Wn. App. at 412).

11  
12 Here, the State showed that Thomas did commit the predicate rape offense  
13 by relying on the following evidence: (1) the victim's state of undress;  
14 (2) laceration on victim's left breast that occurred after death RP  
15 11/1/95; (3) the medical examiner found erosions in the genital area,  
16 indicating that the top layer of skin was removed, as well as little  
17 bruises RP 11/1/95 at 95-96; (4) there were abnormal substances found  
18 around her genital area RP 11/1/95 at 107.

19 However, the State's own certified forensic pathologist, Dr. Richard  
20 C. Harruff testified at trial that, "he found a slimy or greasy type of  
21 substance around the genital area of the victim, but was not able to make  
22 any assessment of what it was." See attached appendix 8 verbatim report  
23 volume XIV at 107.

24 Dr. Harruff, also testified, "there was little areas where the skin  
25 around the genitalia and anus had been rubbed off consistent with injury,  
26 but again, these were very superficial. Very indistinct and was not able  
27 to make any conclusions." See attached appendix 8 verbatim report volume  
28

01 XIV at 108,

02 First degree rape requires a showing that the defendant engaged in  
03 sexual intercourse with another person by forcible compulsion where  
04 defendant inflicts serious physical injury. RCW 9A.44.040 (1)(c).

05 The record reveals no evidence of sexual intercourse, as testified  
06 to at trial by State's expert forensic pathologist Dr. Richard C. Harruff.  
07 See attached appendix 8 verbatim report volume XIV at 106.

08 It is also very important to remember no sperm or related material  
09 was found on any physical evidence at the crime scene. See attached  
10 appendix 9 Washington State Patrol Crime Laboratory report No.  
11 195-00163,A,C.

12 Last and most importantly, Dr. Richard C. Harruff testified at trial  
13 that there was no way he could determine that a rape occurred in Thomas'  
14 case;

15  
16 Prosecutor: Dr. Harruff, "is there any way for you to confirm with absolute  
17 certainty whether or not Ms. Lamere had been raped?"

18 Dr. Harruff: No... the only conclusive proof of rape would be semen within  
19 the orifice, and in this case, I did not find any so I cannot prove rape.  
20 And uh, I have no way of proving attempted rape either.

21 See appendix 10 trial transcripts volume XV page 6.

22 Mr. Thomas' case is most similar to State v. Maupin, 63 Wash. App.  
23 877, 822 P.2d 335 (1992). The defendant in Maupin was convicted of first  
24 degree felony murder based on predicate offenses of second degree  
25 kidnapping, first degree rape and attempted rape. The evidence of the  
26 underlying rape offense in Maupin consisted of: (1) panties missing from  
27 the body; (2) a tear in the child's nightgown; (3) the fact that the lower

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01 half of the body was not covered by the snowsuit.

02 Also in Maupin the State forensic scientists were unable to produce  
03 any physical evidence (hairs, fibers, etc.) showing that the defendant  
04 committed or attempted to commit rape. Maupin, 63 Wash. App. at  
05 \_\_\_\_\_.

06 On appeal, the Court of Appeals held there was no evidence of sexual  
07 intercourse. Thus, the Court of Appeals reversed, finding that, at most  
08 this evidence only suggested the possibility of some unspecified sex  
09 offense. See Maupin, 63 Wash. App. at 893-894.

10 Likewise, there was no evidence of sexual intercourse in Thomas'  
11 case, or any physical evidence of: pubic hairs, fibers or sperm related  
12 material found at the scene.

13 A felony murder conviction must be supported by sufficient evidence  
14 of each element of the predicate offense. Taking the evidence in light  
15 most favorable to the State, there was insufficient evidence that Thomas  
16 committed predicate offenses of first and second degree rape,  
17  
18

19 G. ALTERNATIVE MEANS ANALYSIS

20 Alternative means crimes are ones that provide that the proscribed  
21 criminal conduct may be proved in a variety of ways. As a general rule,  
22 such crimes are set forth in a statute stating a single offense, under  
23 which are set forth more than one means by which the offense may be  
24 committed. State v. Smith, 159 WN.2d 778, 784, 154 P.3d 873 (2007).

25 There are five alternative means of committing first degree felony  
26 murder: He or she commits or attempts to commit the crimes of either (1)  
27 robbery in the first degree; (2) rape in the first or second degree; (3)  
28

01 burglary in the first degree; (4) arson in the first or second degree;  
02 (5) kidnapping in the first or second degree and in the course of or in  
03 furtherance of such crime or immediate flight there from, he or she causes  
04 the death of a person, RCW 9A.32.030 (1)(c).

05 A fundamental protection accorded to a criminal defendant is that  
06 a jury of his peers must unanimously agree on guilt, Const. art.I (sec.)21.

07 See *State v. Stephens*, 93 WN.2d 186, 190, 607 P.2d 304 (1980); See  
08 also *State v. Kitchen*, 110 WN. 2d 403, 409, 756 P.2d 105 (1988); *State*  
09 *v. Workman*, 66 Wash. 292, 294-95, 119 P.751 (1911). In certain situations,  
10 the right to a unanimous jury trial also includes the right to express  
11 jury unanimity on the means by which the defendant is found to have  
12 committed the crime. *State v. Green*, 94 WN.2d 216, 230-35, 616 P.2d 628  
13 (1980); accord *State v. Whitney*, 108 WN.2d 506, 511, 739 P.2d 1150 (1987);  
14 *State v. Franco*, 96 WN.2d 816, 823, 639 P.2d 1320 (1982); *State v. Simon*,  
15 64 WN.App. 948, 961, 831 P.2d 139 (1991).

16 Washington jurisprudence has produced two distinct lines of analysis  
17 regarding the jury unanimity requirement. In one group of cases, unanimity  
18 is presumed so long as it is clear that the verdict was based on only  
19 one of the alternative means (and substantial evidence supported that  
20 means). See (upholding verdict where evidence was only presented on one  
21 of three alternative means), overruled on other grounds by *State v. Smith*,  
22 159 WN.2d 778, 787, 154 P.3d 873 (2007); *State v. Bland*, 71 WN.App. 345,  
23 354, 860 P.2d 1046 (1993) overruled on other grounds by *Smith*, 159 WN.2d  
24 at 787.

25 In a second group of cases, unanimity is required as to guilt, but  
26 not as to the means by which the crime was committed, so long as  
27 substantial evidence supports each alternative means charged. *Kitchen*,

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01 110 WN.2d at 410-11. The Kitchen court stated that, when reviewing an  
02 alternative means case, the court must determine whether a rational trier  
03 of fact could have found each means of committing the crime proved beyond  
04 a reasonable doubt. Kitchen, 110 WN.2d at 410. However, in previous cases,  
05 the court generally required unanimity as to both the crime committed  
06 and the means of commission. State v. Ortega-Martinez, 124 WN.2d 702,  
07 707, 801 P.2d 231 (1994); See Whitney, 108 WN.2d 506; Green, 94 WN.2d  
08 216. In both Ortega-Martinez and Whitney, sufficient evidence existed  
09 of multiple means, and the trial court did not specifically instruct the  
10 jury that it was required to be unanimous as to means, nevertheless, the  
11 reviewing court did not reverse for a lack of unanimity - not because  
12 unanimity as to means was not required, but because unanimity as to the  
13 means could be inferred from the evidence presented and the general  
14 unanimity instruction. (emphasis added) Ortega-Martinez, 124 WN.2d at  
15 707; State v. Arndt, 87 WN.2d 374, 377, 533 P.2d 1328 (1976)).

16 Also, in Whitney, the court quoted with approval the Ninth Circuit  
17 decision in Payseno, which concluded that "(N)ormally, a general  
18 instruction on the requirement of unanimity suffices to instruct the jury  
19 that they must be unanimous on whether specifications form the basis of  
20 the guilty verdict." Whitney, 108 WN.2d at 512 (Quoting United States  
21 v. Payseno, 782 F.2d 832, 835 (9th Cir. 1986); see also United States  
22 v. Schiff, 801, 114 (2d Cir. 1986); United States v. Frazin, 780 F.2d  
23 1461, 1468 (9th Cir. 1986); United States v. Ferris, 719 F.2d 1405, 1407  
24 (9th Cir. 1983); United States v. Murray, 618 F.2d 892, 898 (2d Cir. 1980).

25 Thus, the law has moved from an inference of unanimity as to means  
26 only where each means is supported by substantial evidence to a bright  
27 line rule that "(U)nanimity is not required... as to the means by which  
28

01 the crime was committed so long as substantial evidence supports each  
02 alternative means," Kitchen, 110 WN,2d at 410. In sum, where there are  
03 three alternative means of committing a crime, and the jury is instructed  
04 on all three, either (1) substantial evidence must support each alternative  
05 means on which evidence or argument was presented, or (2) evidence and  
06 argument must have only been presented on one means.

07 Here, both the charging documents and jury instructions included  
08 all three alternative means. See appendix 3. When charging count II, the  
09 State presented evidence that Thomas committed first and second degree  
10 rape and first degree burglary. See appendix II trial verbatim report  
11 volume XVIII at 28-29. The evidence was only sufficient to possibly support  
12 burglary.

13 If one of the alternative methods upon which a charge is based fails,  
14 the verdict must be set aside unless the court can ascertain that it was  
15 based on remaining grounds for which sufficient evidence was presented.  
16 Green, 94 WN,2d at 230; State v. Gillespie, 41 WN,App, 640, 645-46, 705  
17 P.2d 808 (1985), review denied, 106 WN,2d 1006 (1986). Here, the trial  
18 court declined to provide the jury with a special verdict from which would  
19 have shown which of the underlying felonies the jury relied on in reaching  
20 its verdict. Remand is appropriate.

21

## 22 H. ACTUAL AND SUBSTANTIAL PREJUDICE

23 Personal restraint petition standard of review a petitioner may  
24 request relief through a PRP when he is under an unlawful restraint. RAP  
25 16.4 (b).

26 A personal restraint petitioner must prove either a (1) constitutional  
27 error that results in actual and substantial prejudice or (2)

28

01 non-constitutional error that 'constitutes a fundamental defect which  
02 inherently results in a complete miscarriage of justice."  
03 In re Pers. of Monschke, 160 WN,App. 479, 488, 251 P.3d 884 (2010)  
04 (internal quotation marks omitted) (quoting Davis, 152 WN,2d at 672).  
05 Additionally, "to prevail on a PRP alleging constitutional error (the  
06 petitioner) must show by a preponderance of the evidence that the error  
07 has caused him actual prejudice," In re Pers. restraint of LOrd, 152 WN,2d  
08 182, 188, 94 P.3d 952 (2004).

09 Thomas should be entitled to relief because, a conviction based on  
10 insufficient evidence contravenes the due process clause of the Fourteenth  
11 Amendment and thus results in unlawful restraint, U.S.C.A. Amend 14.

12 Furthermore, the United States Supreme Court has held that it is  
13 a fundamental due process violation to convict and incarcerate a person  
14 for a crime without proof of all elements of the crime. *Fiore v. White*,  
15 531 U.S. 225, 228-29, 212 S.Ct. 712, 148 L.Ed,2d 629 (2001). In *Fiore*,  
16 the defendant had been convicted of operating a hazardous waste facility  
17 without a permit. The defendant in fact had a permit, but the state  
18 successfully argued that he violated the relevant statute because he had  
19 acted outside the permit's terms. The Pennsylvania Supreme Court reversed  
20 his codefendant's conviction, construing the statute by its plain terms  
21 to mean that only operating without a permit violated the statute.  
22 Therefore, after the defendant unsuccessfully sought to have his conviction  
23 overturned in state courts and they sought federal habeas relief. The  
24 United States Supreme Court first noted that the Pennsylvania high court  
25 had ruled in answer to a certified question that the interpretation of  
26 the statute in the codefendant's case determined what the statute had  
27 meant at the time of defendant's conviction.

28

01 The Court therefore concluded that the question was whether under  
02 the due process clause Pennsylvania could convict the defendant for conduct  
03 that its criminal statute, as interpreted, did not prohibit. *Id.* at 228.  
04 The Court held that due process was violated by the failure to prove all  
05 of the elements of the crime., i.e., the failure to prove that the  
06 defendant lacked a permit. *Id.* at 228-29; See also *Bunkley v. Florida*,  
07 538 U.S. 835, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (2003).

08 The same analysis applies here. This court's construction of RCW  
09 9A.44.040 in *Maupin* determined that absent evidence of sexual intercourse  
10 there is insufficient evidence of rape. *Maupin*, 63 Wash.App. at 893-894;  
11 *Kitchen* 110 WN.2d at 410. Because, Thomas' conviction under RCW 9A.32.030  
12 (1)(c) is invalid, he is entitled to relief.

#### 13 G. REMEDY

##### 14 I. INTRODUCTION

15 The *Miller* case does not specify the remedy when a juvenile's sentence  
16 of LWOP or de Facto LWOP is overturned. On its face, the ruling would  
17 seem to permit a sentencing hearing. Thomas was convicted of 1st degree  
18 felony murder without premeditation. His sentence is the equivalent of  
19 a conviction for aggravated murder.  
20

21 Washington, however, does not permit judicially created sentencing  
22 schemes.

23  
24 "This Court has consistently held that the fixing of legal punishments  
25 for criminal offenses is a legislative function." *State v. Ammons*,  
26 105 Wash.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). "(It) is  
the function of the legislature and not the judiciary to alter the  
sentencing process." *Id.* (Quoting *State v. Monday*, 85 Wash.2d 906,  
909-10, 540 P.2d 416 (1975) (emphasis added).

27 *State v. Hughes*, 154 WN.2d 118, 149 110 P.3d 192, 208 (2005), abrogated  
28

01 on other grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546,  
02 165 L.Ed.2d 466 (2006). In *Hughes*, this Court found the defendant's  
03 sentence unconstitutional in view of *Blakely v. Washington*, 542 U.S. 296,  
04 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (jury, rather than trial court,  
05 must find existence of aggravating factors). The court declined to remand  
06 for empaneling of a jury because "no procedure is currently in place  
07 allowing juries to be convened for the purpose of deciding aggravating  
08 factors," *Hughes*, 154 WN.2d at 149.

This Court will not create a procedure to empanel juries on remand  
09 to find aggravating factors because the legislature did not provide  
10 such a procedure and, instead, explicitly assigned such findings  
11 to the trial court. To create such a procedure out of whole cloth  
12 would be to usurp the power of the legislature.

13 *Id.* at 151-52. The Court, therefore, remanded for imposition of a standard  
14 range sentence, without aggravating factors. *Id.* at 156.

15 Similarly, this Court cannot create a sentencing scheme that would  
16 permit a judge or jury to impose a discretionary sentence for first degree  
17 felony murder that basically amounts to de Facto LWOP. On the other hand,  
18 as in *Hughes*, it could simply remand for resentencing without the  
19 aggravating factors. As this Court explained, the factors that raise the  
20 penalty of premeditated murder to life without parole are merely sentencing  
21 enhancements rather than elements of the crime.

22 See *State v. Pirtle*, 127 WN.2d 628, 658, 904 P.2d 245, 262 (1995), cert.  
23 denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). Sentencing  
24 procedures are already in place for the crime of murder in the first  
25 degree. On remand the trial court can simply apply the guidelines for  
26 first degree murder in existence at the time of the offense. That would  
27 yield a constitutional sentence in Mr. Thomas' case.

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VI.

REQUEST FOR RELIEF

(1), For the foregoing reasons, this Court should vacate Mr. Thomas' sentence and remand for resentencing within the standard range on one count of murder in the first degree, without aggravating factors. (2), Vacate Mr. Thomas' conviction for count II and remand for new trial.

VII.

OATH

After being first duly sworn on oath, I depose and say that: I am the pro se litigant, I have read the petition, know its contents, and believe the petition is true.

Dated this 4th day of JUNE, 2013.

Respectfully submitted,

Gregory O. Thomas

Petitioner Gregory O. Thomas

SUBSCRIBED AND SWORN TO before me, the undersigned Notary Public, on this 4th day of JUNE, 2013.

Barbara St Louis  
Notary Public of Washington



My Commission Expires: 6-4-16

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

MR. RONALD R. CARPENTER, CLERK  
SUPREME COURT OF STATE OF WASHINGTON  
115 12th AVE. S.W.  
P.O. BOX 40929

Date: JUNE 4, 2013

Gregory Thomas

Gregory Thomas

Appendix 1

HIV/DWA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

FILED

STATE OF WASHINGTON

Plaintiff ) No. 95-1-02081-6  
MAR 11 PM 2:45

JUDGMENT AND SENTENCE

v.

GREGORY O. THOMAS

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA.

Defendant.

CERTIFIED  
COPY

MAR 11 1996

CERTIFIED COPY TO COUNTY JAIL  
COPY TO SENTENCING GUIDELINES COMMISSION MAR 11 1996

I. HEARING

1.1 The defendant, the defendant's lawyer, Eric Lindell and Jim Conroy, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Diane Novicky (Doc), family &

friends of defendant & victims

1.2 The state has moved for dismissal of count(s) \_\_\_\_\_

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on (date): 11-16-95 by jury verdict of:

Count No.: <u>II</u>	Crime: <u>Murder in the First Degree (felony murder)</u>
RCW <u>9A.32.030(1)(c)</u>	Crime Code <u>00128</u>
Date of Crime <u>1-9-95</u>	Incident No. _____
And by guilty plea on <u>10-26-95</u> to:	
Count No.: <u>III</u>	Crime: <u>Attempted Residential Burglary</u>
RCW <u>9A.28.020, 9A.52.025</u>	Crime Code _____
Date of Crime <u>12-21-94</u>	Incident No. _____

Count No.: _____	Crime: _____
RCW _____	Crime Code _____
Date of Crime _____	Incident No. _____
<input type="checkbox"/> Additional current offenses are attached in Appendix A.	

SPECIAL VERDICT/FINDING(S):

- (a)  A special verdict/finding for being armed with a deadly weapon was rendered on Count(s): \_\_\_\_\_
- (b)  A special verdict/finding was rendered that the defendant committed the crimes(s) with a sexual motivation in Count(s): II
- (c)  A special verdict/finding was rendered for Violation of the Uniform Controlled Substances Act offense taking place  in a school zone  in a school  on a school bus  in a school bus route stop zone  in a public park  in public transit vehicle  in a public transit stop shelter in Count(s): \_\_\_\_\_
- (d)  Vehicular Homicide; Violent Offense (D.W.I. and/or reckless) or  Nonviolent (disregard safety of others)
- (e)  Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score (RCW 9.94A.400(1)(a)) are: \_\_\_\_\_

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): \_\_\_\_\_  
(Current offenses not listed here are not encompassed)

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2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
(a)				
(b)				
(c)				
(d)				

- Additional criminal history is attached in Appendix B.
- Prior convictions (offenses committed before July 1, 1986) served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(6)(c)):
- One point added for offense(s) committed while under community placement for count(s)

2.4 SENTENCING DATA:

OFFENDER SCORE	SERIOUSNESS LEVEL	RANGE	MAXIMUM TERM
Count II : Murder 1 1	XIV	250-333 mos.	20 - Life
Count III : Att. Res. Burg. 1	II	4.5 - 9 mos.	5 yrs.
Count :			

Additional current offense sentencing data is attached in Appendix C.

2.4 EXCEPTIONAL SENTENCE:  
 Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) II  
 Findings of fact and conclusion(s) are attached in Appendix B. will be presented 3-15-96 at 8:30 am.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.  
 The Court DISMISSES Count(s)

IV. ORDER

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

4.1 RESTITUTION AND VICTIM ASSESSMENT:  
 Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.  
 Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.142(2), sets forth those circumstances in attached Appendix E.  
 Restitution to be determined at future hearing on (Date) 4-2-96 at 8:30 a.m.  Date to be set.  
 Defendant waives presence at future restitution hearing(s).

Defendant shall pay \$100 Victim Assessment, pursuant to RCW 7.68.035.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:  
 (a)  \$ Court costs;  Court costs are waived;  
 (b)  \$ Recoupment for attorney's fees to King County Public Defense Programs, 2015 Smith Tower, Seattle, WA 98104;  Recoupment is waived (RCW 10.01.160);  
 (c)  \$ Fine;  \$1,000, Fine for VUCSA;  \$2,000, Fine for subsequent VUCSA;  VUCSA fine waived (RCW 69.50.430);  
 (d)  \$ King County Interlocal Drug Fund;  Drug Fund payment is waived;  
 (e)  \$ State Crime Laboratory Fee;  Laboratory fee waived (RCW 43.43.690);  
 (f)  \$ Incarceration costs;  Incarceration costs waived (9.94A.145(2));  
 (g)  \$ Other cost for:

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 100 + restit.. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:  
 Not less than \$ per month;  On a schedule established by the defendant's Community Corrections Officer.  The defendant shall remain under the Court's jurisdiction and the supervision of the Department of Corrections for up to ten years from date of sentence or release from confinement to assure payment of financial obligations.

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing:  Immediately;  (Date): \_\_\_\_\_ by \_\_\_\_\_ m.

999 months on Count No. II  
9 months on Count No. III  
\_\_\_\_\_ months on Count No. \_\_\_\_\_

The terms in Count(s) No. 1 & 2 are concurrent/~~consecutive~~.  
The sentence herein shall run concurrently/consecutively with the sentence in cause number(s) \_\_\_\_\_  
\_\_\_\_\_ but consecutive to any other cause not referred to in this Judgment.

Credit is given for ~~11200~~ days served  days as determined by the King County Jail solely for conviction under this cause number pursuant to RCW 9.94A.120(13), to include custody in King Co. Jail & Juvenile Detention.

4.5  NO CONTACT: For the maximum term of life years, defendant shall have no contact with any witness.  
Violation of this no contact order is a criminal offense under chapter 10.99 RCW and will subject a violator to arrest; any assault or reckless endangerment that is a violation of this order is a felony.

4.6 BLOOD TESTING: (sex offense, violent offense, prostitution offense, drug offense associated with the use of hypodermic needles) Appendix G is a blood testing and counseling order that is part of and incorporated by reference into this Judgment and Sentence.

4.7 COMMUNITY PLACEMENT: Community Placement is ordered for sex offense, serious violent offense, second degree assault, deadly weapon finding, Chapter 69.50 or 69.52 RCW offense, and standard mandatory conditions are ordered. Community placement is ordered for the maximum period of time provided by law.  Appendix H (for additional conditions) is attached and incorporated by reference in this Judgment and Sentence.

4.8  WORK ETHIC CAMP: The court finds that the defendant is eligible for work ethic camp and is likely to qualify under Sec. 4(3), Chap. 338, Laws of 1993 and the Court recommends that the defendant serve the sentence at a work ethic camp. If the defendant successfully completes the program, the Department of Corrections shall convert the period of work ethic camp confinement at the rate of one day of work ethic camp confinement to three days of total standard confinement. Upon completion of the work ethic camp program, the defendant shall be released on community custody for any remaining time of total confinement.

4.9  SEX OFFENDER REGISTRATION (sex offender crime conviction): Appendix J is attached and incorporated by reference into this Judgment and Sentence.

4.10  OTHER: \_\_\_\_\_

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

Date: 3-1-86

Presented by:

K. Richardson  
Deputy Prosecuting Attorney,  
Office WSBA ID #91002

Marjorie Buckner  
Judge, King County Superior Court  
Approved as to form:  
[Signature]  
Attorney for Defendant, WSBA # 18972

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HIV/DNA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON

Plaintiff,

v.

*Gregory Thomas,*

Defendant.

No. 95-1-02081-6

APPENDIX G  
ORDER FOR BLOOD TESTING  
AND COUNSELING

(1)  HIV TESTING AND COUNSELING:

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense committed after March 23, 1988. RCW 70.24.340):

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 296-4848 to make arrangements for the test to be conducted within 30 days.

(2)  DNA IDENTIFICATION:

(Required for defendant convicted of sexual offense or violent offense. RCW 43.43.754):

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

If both (1) and (2) are checked, two independent blood samples shall be taken.

Date: 3-1-96

*Marjorie Buech*  
Judge, King County Superior Court

APPENDIX G

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON

Plaintiff,

v.

*Gregory Thomas,*

Defendant.

No. 95-1-02081-6

APPENDIX H  
COMMUNITY PLACEMENT

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

**COMMUNITY PLACEMENT:** Defendant additionally is sentenced on convictions herein, for each sex offense and serious violent offense committed on or after 1 July 1990 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 offense 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 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:

- (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; and
- (5) Pay community placement fees as determined by the Department of Corrections.
- (6) 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))

**WAIVER:** The following above-listed mandatory conditions are waived by the court: (5) fees & related interest

(b)  **OFF-LIMITS ORDER (SODA):** The Court finds that the defendant is a known drug trafficker as defined in RCW 10.66.010(3) who has been associated with drug trafficking in an area described in Attachment A. Attachment A is incorporated by reference into the Judgment and Sentence and the Court also finds that the area described in Attachment A is a Protected Against Drug Trafficking area (PADT). As a condition of community placement, the defendant shall neither enter nor remain in the PADT area described in Attachment A.

(c) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement:

Date: 3-11-96  
APPENDIX H - COMMUNITY PLACEMENT

*M. O. BUCKS*  
Judge, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON )

Plaintiff, )

v. )

*Gregory Thomas* )

Defendant. )

No. 95-1-02081-6

APPENDIX J  
JUDGMENT AND SENTENCE -  
SEX OFFENDER NOTICE OF  
REGISTRATION REQUIREMENTS

The defendant having been convicted of a sex offense ((a) Violation of Chapter 9A.44 RCW or RCW 9A.64.020 or RCW 9.68A.090 or that is, under Chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes or (b) a felony with a finding of sexual motivation under RCW 9.94A.127, the defendant is hereby notified of sex offender registration requirements of RCW 9A.44.130-.140 and is ordered to register with the county sheriff in accordance with the following registration requirements.

REGISTRATION REQUIREMENTS

1. The defendant must register with the Sheriff of the county in Washington state where he resides. When registering, the defendant shall provide the county sheriff with the following: (a) name; (b) address; (c) date and place of birth; (d) place of employment; (e) crime for which convicted; (f) date and place of conviction; (g) aliases used; (h) social security number; (i) photograph; and (j) fingerprints. The defendant must register immediately upon completion of being sentenced if not sentenced to begin serving a term of confinement immediately upon completion of being sentenced. Otherwise, he must register within 24 hours of the time of his release if sentenced to the custody of the Department of Corrections, Department of Social and Health Services, a local division of youth services, a local jail, or a juvenile detention facility.
2. If defendant does not now reside in Washington, but subsequently moves to this state, he must register within 24 hours of the time he begins to reside in this state, if at the time of the move he is under the jurisdiction of the Department of Corrections, the Indeterminate Sentence Review Board, or the Department of Social and Health Services. If at the time of defendant's move to this state he is not under the jurisdiction of one of those agencies, then he must register within 30 days of the time defendant begins to reside in this state.
3. If defendant subsequently changes residences within a county in this state, he must notify the county sheriff of that change of residence in writing within 10 days of the change of residence. If defendant subsequently moves to a new county within this state, he must register all over again with the sheriff of the new county and must notify the former county sheriff (i.e. the county sheriff of his former residence) of that change of residence in writing, and defendant must complete both acts within 10 days of the change of residence.
4. It is a crime to knowingly fail to register in accordance with the above registration requirements.

I have read and understand these sex offender registration requirements.

X *Gregory Thomas*  
Defendant  
Date: 3/1/96

*Mervyn Bullock*  
JUDGE KING COUNTY SUPERIOR COURT  
Approved as to form:  
*S. D. #1872*  
Defense Attorney

Presented by:  
*K. Richardson*  
Deputy Prosecuting Attorney 91002

APPENDIX J

FINGERPRINTS



Right Hand  
Fingerprints of:

Defendant's Signature: Gregory Thomas  
Defendant's Address: \_\_\_\_\_

Dated: 3-1-96  
[Signature]  
JUDGE, KING COUNTY SUPERIOR COURT

Attested by:  
M. Janice Michels, Superior Court Clerk  
By: [Signature]  
Deputy Clerk

CERTIFICATE

I, \_\_\_\_\_,  
Clerk of this Court, certify that the  
above is a true copy of the Judgment and  
Sentence in this action on record in my  
office.  
DATED: \_\_\_\_\_

CLERK

By: \_\_\_\_\_  
Deputy Clerk

OFFENDER IDENTIFICATION

S.I.D. No. WA 17456436  
Date of Birth: 5/26/79  
Sex: M  
Race: B

# Appendix 2

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

In the Matter of the	)	
Personal Restraint of:	)	No. 58896-6-1
	)	
GREGORY O. THOMAS,	)	ORDER DISMISSING
	)	PERSONAL RESTRAINT
_____	)	PETITION
Petitioner.	)	

Gregory Thomas was charged with murdering his neighbor, 71-year old Ruth Lamere, in 1995. Despite an insanity defense, petitioner was convicted of first-degree felony murder predicated on the underlying felonies of first degree burglary, first degree rape and second degree rape in King County No. 95-1-02081-6. The jury unanimously found petitioner had committed all three predicate crimes. Petitioner's conviction and 999-month exceptional sentence were upheld on direct review in this court and the Washington Supreme Court. See State v. Thomas, 138 Wn.2d 630, 633-34, 980 P.2d 1275 (1999). The conviction became final in 1999.

Thomas now files this personal restraint petition again challenging his exceptional sentence. In his petition, Thomas raises several grounds for relief. The petition, however, is barred under RCW 10.73.090<sup>1</sup> and In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000).

---

<sup>1</sup> (1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

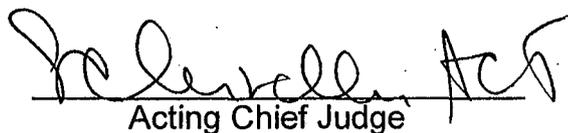
The court in Stoudmire held that to excuse compliance with the one-year statute of limitations in RCW 10.73.090, the petition must be based solely on exceptions to the limitations period set out in RCW 10.73.090 or 10.73.100. 141 Wn.2d at 349. The Stoudmire court went on to hold that "the one-year time limit in RCW 10.73.090 does not apply to a petition or motion based on the ground enumerated in RCW 10.73.100 as long as the petition or motion is based solely on those grounds and not additional ones." Stoudmire, 141 Wn.2d at 345-46.

While Thomas's claims regarding double jeopardy and sufficiency of the evidence to support the predicate rape offenses arguably fall within certain exceptions listed in RCW 10.73.100, Thomas also alleges that sexual motivation and the victim's zone of privacy were improperly used as bases to enhance his sentence. Therefore, the entire petition should be dismissed. In re Pers. Restraint of Hankerson, 149 Wn.2d 695, 697, 72 P.3d 703 (2003); Stoudmire, 141 Wn.2d at 345-46. However, "any claim that is not time barred may be refilled without danger of untimeliness." Hankerson, 149 Wn.2d at 702

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 11<sup>th</sup> day of October, 2005.

  
Acting Chief Judge

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STATE OF WASHINGTON  
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# Appendix 3

OCT 11 1995

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 95-1-02081-6
	)	
v.	)	THIRD AMENDED INFORMATION
GREGORY O. THOMAS	)	
	)	
	)	
Defendant.	)	
_____		

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse GREGORY O. THOMAS of the crime of Aggravated Murder in the First Degree, committed as follows:

That the defendant GREGORY O. THOMAS in King County, Washington on or about January 9, 1995, with premeditated intent to cause the death of Ruth Lamere, a human being, did cause the death of Ruth Lamere while further aggravating circumstances exist, to-wit: that the defendant committed the murder in the course of, in furtherance of, or in immediate flight from the crime of Burglary in the First Degree;

Contrary to RCW 9A.32.030(1) (a) and 10.95.020(9) (a) (b) and (c), and against the peace and dignity of the State of Washington.

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid, do accuse GREGORY O. THOMAS of the alternate crime of Murder in the First Degree, committed as follows:

That the defendant GREGORY O. THOMAS in King County, Washington on or about January 9, 1995, while committing and attempting to commit the crime of Rape in the First Degree, Rape in the Second Degree, and Burglary in the First Degree, and in the course of and in furtherance of said crimes and in immediate flight therefrom, did

1 cause the death of Ruth Lamere, a human being who was not a  
2 participant in the crime, and who died on or about January 9, 1995;

3 Contrary to RCW 9A.32.030(1)(c), and against the peace and  
4 dignity of the State of Washington.

5 And I, Norm Maleng, Prosecuting Attorney for King County in the  
6 name and by the authority of the State of Washington further do  
7 accuse the defendant GREGORY O. THOMAS of commission of this crime  
8 with sexual motivation, that is: that one of the purposes for which  
9 the defendant committed this crime was for the purpose of his sexual  
10 gratification, under the authority of RCW 9.94A.127.

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COUNT III

And I, Norm Maleng, Prosecuting Attorney aforesaid further do  
accuse GREGORY O. THOMAS of the crime of **Attempted Residential  
Burglary**, based on a series of acts connected together with another  
crime charged herein, which crimes were part of a common scheme or  
plan, committed as follows:

That the defendant GREGORY O. THOMAS in King County, Washington  
on or about December 21, 1994, did attempt to enter and remain  
unlawfully in the dwelling of Mary Jo Stout, located at 1235  
Northeast 100th Street, Seattle, in said county and state, with  
intent to commit a crime against a person or property therein;

Contrary to RCW 9A.28.020 and 9A.52.025, and against the peace  
and dignity of the State of Washington.

NORM MALENG  
Prosecuting Attorney

By: K Richardson  
Kristin Richardson, WSBA #91002  
Senior Deputy Prosecuting Attorney