

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)

Respondent,)

v.)

Tramaine Gregory Miles
(your name)

Appellant.)

No. 37458-7-11

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Tramaine G. Miles, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

FILED
COURT OF APPEALS
DIVISION II
OCT 29 2008
STATE OF WASHINGTON
BY: [Signature]

Additional Ground 1

SEE

*approved for 6-11
w/ page limit -
appellant includes
table of authorities
in pro se brief (10 pages)
can several formatting
issues that result
in blank pages or
position 2 pages*

Additional Ground 2

Pro Se
Brief

If there are additional grounds, a brief summary is attached to this statement.

Date: 10,27,08

Signature: Tramaine G. Miles

37458-7-11

Case No. ~~02-2-3900-0~~

In the Washington State Court of Appeals
Division Two
Direct of Appeal
TRAMAINE G. MILES
Petitioner
Pro Se

TRAMAINE G. MILES #299340

~~R-Units~~

~~P. O. Box 900~~

~~Shelton, WA 98585 98584~~

Booking No # 2007328040

Pierce County

910 Tacoma Ave So

Tacoma WA 98402

Table of Contents:

Jurisdiction and Venue:

Status of Petitioner:

Issue Presented for Review:

Statement of the Case:

Argument:

Conclusion:

Table of Authorities

State Case Law

In re McCready, 100wash.app259.2000

State v. Cameron, 30wn.app.229,232,633P.2d901.1981

State v. Davis, 119wn.2d657,835P.2d1039.1992

State v. Freeman, 153wn.2d765.2005

State v. Holm, 91wn.app.429,435.1998

State v. James, 48wn.app353.362.1987

State v. Jeffries, 105wn.2d398,418,717P.2d722,cert. denied
479u.s.922,93L.ed.2d301,107S.Ct.328(1986)

State v. Osborne, 102wn.2d87,99,684P.2d683.1984

State v. Thomas, 190wn.2d,222,225-26.743P.2d816 (1987) (quoting Strickland,
446,U.S.at687)

Thomas, 109.wn.2dat226 (citing Strickland, 446.U.S.at693)

State v. O'Connell, 137wn.app.81,152P.3d.349,2007 wash. Lexis.915
(Wash.Dec.5.2007)

State v. Thieffault,160wn.2d409.158P.3d580.2007

State v. Liden, 138wn.app110.156P.3d.259.2007

State v. Sanchez, 122wn.app.579,94P.3d384.2004

State v. Ledford (quoting)

State v. Baldwin (quoting)

State v. Sweeney, 125wash.app.77.104P.3d46.2005

State v. Jones, 33.2n.app865,658P.2d1212.1983
State v. Price,94wn.2d870,620P.2d994.1980
State v. Shriner, 101.wn.2d576.681P.2d237.1984
State v. Blanchey,
454P.2d841,75wash.2d926,certioraridenied90s.ct694.396U.S.1045.24L.ed.2d.688
State v. Chamroeumnarn,136wn.app698,150P.3d617.2007
State v. Davis, 618P.2d1034,27wash.app498
State v. Norby, 579P.2d1358,20wash.app378
State v. Wright, 444P.2d676,74wash.2d355,cert denied
89.s.ct1305394u.s.961,22L.ed.2d.562
State v. Pavelich, 279P.1102,153wash.379
State v. Miles, 601P.2d359,25 wash.app134
State v. O'Dell, 279P.2d1084.46.wash.2d206
State v. Green, 227,P.2d.318,38 wash.2d240,23A.L.R.201397
State v. Hunter, 102wn.app.6309.P.3d.872.2000
State v. Shuey, 181P.890,107 wash 437.1919
State v. Furth, 144P.907.82.wash.665
State v. Maynes, wash.app.579.1978
State v. Levery, 154wn.2d.249.111P.3d.837.2005
State v. Kjorsvik, 117wn.2d93,98,812P.2d86.1991
State v. Hicks, 102wn.2d.182.184.683P.2d186.1984
State v. Boyd, 21wn.app465,586.P.2d87.1978
State v. Thamert, 45.wn.app143.723P.2d1204.1986
State v. Davis, 27wn.app498,618P.2d1034.1980
State v. Tyler, 77wn.2d726.466P.2d120.1970 vacated in part 408u.s.937.1972
State v. Nguyen.129P.3d.821,131wn.app.815.2006
State v. Kinneman,122wn.app850,95P.3d1277.2004
State v. Myles, 75.wn.app.643,879P.2d968,1994 wash.app.Lexis 389
Ford 137wn.2d at 480 (quoting in re Pers. Restraint of Williams
111wn.2d353,357,759P.2d436.1988
State v. Workman, 90wn.2d443,447-48,584P.2d382.1978

State v. Ward, 125.wn.app243,104.P3d.670.2004
State v. Berlin, 133wn.2d541,947P.2d.700.1997
State v. Roche, 75wn.app500,878P.2d497.1994
State v. Lucky, 128wn.2d727,912P.2d483.1996
State v. Knight, 54wn.app143,772P.2d1042 review denied
133wn.2d1014,779P.2d730.1997
State v. Fernandez-Medina, 141wn.2d448,456,6P3d1150.2000
State v. Harris, 121wn.2d317,321-23,325-26,849P.2d1216.1993
State v. O'Connell, 116wn.app.1010.2003.wash.appLexis1024
State v.
Stevens,127wn.app.269.110P.3d1179,2005wash.Lexis860.2005,158,wn.2d304,143P.3d.8
17.2006wash Lexis731.
State v. McDonald,123wn.app85,96.P.3d468.2004
State v. Barnes,153wn.2d378,382,103P.3d1219.2005
State v. Linehan,147wn.2d638,643,56P.3d542.2002
State v. Fowler, 114wn.2d59,67.785P.2d.808.1990
State v. Speece,115wn.2d360,363,798P.2d.294.1990
State v. Dengel,63P.1104,24.wash49wash.app.1973
State v. Smith, 511P.2d.1032,9wash.app.279
State v. Malone, 138wn.app.587.157.P.3d.909.2007
State v. Russell, 104wn.app.422.16P.3d.664.2001
State v. Jacobs, 154wn.2d596,600,115P.3d.281.2005
P.R.P. of Allen Ray Williams, 111wn.2d.353,759P.2d436.1988
State v. Marsh, 47wn.app291
State v. Harper, 50.wn.app.578.580.346.749P.2d.722.1988
State v. Chavez, 52wn.app.796.798,764P.2d.659.1988
In re Bush.26wn.app.486.616P.2d.666.1980.aff'd, 95wn.2d551.627P.2d953.1981at497-
98.
P.R.P. of Lavery, 154wn.2d249.111P.3d.837.20005
P.R.P. of Thompson, 141wn.2d712.10.P.3d.380.2000
State v. Bailey, 52wn.app.42,47.757P.2d541.1988.aff'd 114wn.2d340.787P.2d1378.1990

State v. Hodgson, 44wn.app592,599-600,722P.2d1336.1986.aff'd
1083wn.2d662.740P.2d848.1987
State v. Ortega, 120wn.app.165,84P.3d935.2004,wash.appLexis 220
State v. Ortega, 154wn.2d1031,119P.3d852.2005wash Lexis 702,2asyh Aug 24, 2005.
State v. Delgado, 148wn.2d723,726-27,63P.3d792.2003
State v. Garza, 150wn.2d360,366,77P.3d.347.2003
State v. McCorkle, 88wn.app485,492-93,945P.2d736.1999 aff'd
137wn.2d490.973P.2d46p1.1999
State v. Carpenter, 117.wn.app.673,679.72P.3d784.2003
State v. Keller, 98wn.app.381,383.990P.2d423.1993 aff'd,
143wn.2d267.19P.3d.1030.2001.cert denied, 534u.s.1130.2002
State v. Gunwall, 106wn.2d.54.720P.2d808.1986
State v. Chaney, 423so.2d14-19
State v. Shelton, 621so2d769 (La 1993)
State v. Hollins, 99.278 (La.app.5cir8-31-99)742so.2d671,685.
State v. Jones, 101wn.2d.113,122,677P.2d.131.1984
State v. Brown, 111wn.2d.124,716P.2d588.1988 adhered to on reh'g
113wn.2d520,782.P.2d.1013..80A.L.R. 4th 989 corrected 787P.2d906.1989.
State v. Gomez, 75wn.app.648.651.880P.2d65.1994
State ex. Rel.Banker v. Clausen, 142wash450,454.253P.805.1927
State ex rel. O'Coonnell v. Slavin, 75wn.2d554.721.452.P.2d943.1996
Boeing Aircraft Co. v. Reconstruction Fin
Corp.25wn.2d652.171P.2d838.168A.L.R.539.1946
State v. Torres.111wn.app.323,330,44P.3d903.2002
State v. Flinn, 154wn.2d193,199-200,110P.3d748.2005
State v. Woods, 143wn.2d561,579,23P.3d1046.2001
State v. Adamski, 111wn.2d574,580,761,P.2d,621.1988
State v. Kelly, 52wn.2d676,678.328P.2d36p2.1958
State v. Murdock, 91wn.2d336,340,588P.2d1143.1979
State v. Furth, 5wn.2d1,11,104P.2d925.1940
State v. Holsworth, 93wn.2d148,159,607P.2d.845.1980

State v. Ammons, 105wn.2d175,713P.2d719,718P.2d796 cert denied,
479u.s.930.93Led.2d351,107S.ct 398.1986
State v. Findling, 123Minn.413,415,144N.W.142.1913
Blackburn v. State, 50 Ohio st. 42j8,432,36N.E.18.1893
People v. Stanley, 47Cal.113,117.1873
Sheppard v. Steele, 43N.Y.52
Wynebamer v. People, 13.N.Y.378,447,12How Pr.238,2Park.(r.421)
People v. Sickles, 146N.Y.541,547-48,51N.E.288,13N.Y.(r.277.1898)
State v. Dale, 110wash.181,184,188P.473.1920
State v. Tongate, 93wn.2d751,754,613P.2d121.1980
State v. McKim, 98wn.2d111,117,653P.2d1040.1982
State v. Nass, 76wn.2d368,370,456P.2d347.1969
State v. Magnusson, 128washS41,223P.325aff'd,130wash.706.226P.1119.1924
State v. Harkness, 1wn.2d530,96P.2d,460.1939
State v. Rivers, 129wn.2d697,921P.2d495.1996
State v. Knight, 134wn.app103,138P.3d1114.2006
State v. Becker 59wn.app.848,801P.2d1015.1990
State v. Johnson,46wn.app302,730P.2d.1986
State v. Bembry, 46wn.app288,730P.2d115.1986
State v. Cabrera, 73.wn.app165,868P.2d179.1994
State v. Jones, 159wn.2d231149P.3d636.2006
State v. Hern, 111wn.app.649,45P.3d1116.2002
State v. Larkin, 70wn.app349,853P.2d451.1993
State v. Herzog, 48wn.app831,740P.2d380.1987
State v. Wiley, 124wn.2d.679,880P.2d983.1994
P.R.P. of LaChapelle, 153wn.2d1.100P.3d805.2004
State v. Hall, 45wn.app.766,728P.2d616.1986
State v. Swecker, 154wn.2d660115P.3d297.2005
State v. Labarbera, 128wn.app343,115P.3d1038.2005
State v. Williams, 98-651 (La.app.5cir.2-10-99),729so.2d14,19
State v. Ford, 137wn.2d472,479-80.973P.2d452.1999

State v. Morley, 134wn.2d588.952P.2d167.1998
State v. Freeburg, 120wn.app120wn.app192,84P.3d292.2004
State v. Lavery, 154wn.2d783,787.727864P.2d912.1993
State ex rel. Royal v. Board of Yakima County Comm'rs
123wn.2d451,459,869P.2d56.1994
State v. Wilson, 125wn.2d212,217.883P.2d320.1994
Davis v. Dept. of Licensing, 137wn.2d957,964,977P.2d554.1999
State v. Chester, 133wn.2d15.21.940P.2d1374
State v. Mallich, 132wn.2d80.87.936P.2d408.1997
State v. Smith, 117wn.2d.263,814P.2d.652.1991
In re Det. Of Williams, 147wn.2d476,491.55.P.3d.597.2002
State v. Smith, 144wn.2d.665,673,30P.3d1245.2001
State v. Cruz, 139wn.2d.186,190,985P.2d384.1999
State v. Taylor, 97wn.2d.724,728.649.P.2d.633.1982
State v. Aho, 137wn.2d.736.975P.2d512.1999
State v. Alexis, 95wn.2d15.19.621.P.2d1269.1980
In re. Lynch 8 cal.3d410,503P.2d921,930,105cal.Rptr.217 (Cal. 1972)
Brown and Bray Jr. 283f.3d1019.2002u.s.applexis1834.2002 cal Daily op service
1222,.2002 vacated by remanded by.Mayle v. Brown
2003u.s.Lexis1958(u.s.Mar.10.2003)
Wanstreet v. Bordenkircher,166w.va.523.276S.E.2d,205,212(W.Va. 1981)
State v. Miller, 184W.Va462.400S.E.2d897,898 (W.Va.1990)
State v. Lewis, 191W.Va635,447S.E.2d570,575(W.Va.1994)
State v. Deal, 178W.Va.142.142,358S.E.2d226,231(W.Va1987)
State v. Butler, 601so.2d649,650 (La.1992)
State v. Corry, 610so.2d142,147 (La.ct.app.1992)
State v. Dorthey, 623so.2d1276(La.1993)
State v. Johnson, 97-1906(La.3-4-98),709, so.2d672.11
State v. Medious,98-419(La.app.5cir.11-25-98,722so.2d1086,1093 writ denied 98 3201
(La127.4-23-99), 742so.2d876
State v. Claborn, 95wn.2d.629,623,628.P.2d.467(1981)

Ohnstad v. Tacoma, 64wn.2d904,907,395.P.2d97.1964
State v. Guloy,104wn.2d412,425,705P.2d1182.1985 cert denied 475U.S.1020.1986
P.R.P. of Powell, 117wn.2d175,184,814.P.2d635.1991
P.R.P. of Cook, 114wn.2d802,792P.2d.506.1990
State v. Ward, 123wn.2d488,497,869P.2d1062.1994
State v. Willis, 151wn.2d.255,87P.3d1164.2004
State v. Henning, 129wn.2d.512,524-25.919P.2d.580.1996
State v. Smith, 144wn.2d.665.30P.3d.1245.2001
State v. Whitaker, 112wn.2d.341,771P.2d332.1989
In re Personal Restraint of Stan Phill, 134wn.2d.165,169,949P.2d.365.1998
State v. Aho, 137wn.2d736,975P.2d.512.1999

FEDERAL CASE LAW:

Aeid v. Benneth, 296F.3d58,63,64.2004.2nd cir.
Boria v. Keane, 99F.3d492,496.19962n.cir
Hill v. Lockhart, 474U.S.52.88L.ed.2d203.1985
Moore v. Bryant, 348F.3d238,242.2003
Strickland v. Washington, 466U.S.668.687,80L.ed.2d.29.674.104S.ct 2052.1984
United States v. Booze, 293F.3d.516,518.2000
United State v. Gaviria, 116F.3d.1498,1512.1997
United States v. Gordon, 156F.3d.376,380.1998.2nd cir.
United States v. Leonti, 326F.3d.1111,117.2003.9th cir.
Younger v. Harris, 401U.S.3p7,91S.ct746.1971
United States v. Tucker, 404U.S.443,30Led.2d.592,92S.ct.589.1972
Burgett v. Texas, 389U.S.109.19L.ed.2d.319.88.sct.1967
Boykin v. Alabama, 395U.S.238,89S.ct1709.23Led.2d.274.1969
United States v. Booker, 543U.S.220.160Led.2d.621.125.sct738.756.2005
Andrade v. Attorney General of the State of California, 3\270F.3d743 (9th cir 2001)
Vasquez v. Hillery, 474U.S.254,106S.ct617.88L.3d.2d598.1986
Tumey v. Ohio, 273U.S.510,535.1927
Davis v. Georgia, 429U.S.122.1976

Sheppard v. Maxwell, 384U.S.333,351-352.1966
Strauder v. West Virginia, 100U.S.303,308.1880
Neal v. Delaware, 103U.S.370,396.1881
Bush v. Kentucky, 107U.S.110.1883
Gibson v. Mississippi, 162U.S.565.1896
Carter v. Texas, 177U.S.442.1900
Rogers v. Alabama, 192U.S.226.1904
Pierr v. Louisiana, 306U.S.354.1993
Smith v. Texas, 311U.S.128.1940
Hill v. Texas, *Sopra*
Cassell v. Texas, 339U.S.282.1950
Reece v. Georgia, 350U.S.85.1955
Eubanks v. Louisiana, 356U.S.584.1958
Arnold v. North Carolina, 376,773.1964
Alexander v. Louisiana, 405U.S.625.1972
Rose v. Mitchell, 443U.S.545.1979
United States v. Batchelder, 442U.S.114,125.N9.1979
Arizona v. Rumsey, 467U.S.203,212.1984
Garcia v. San Antonio Metropolitan Authority, 469U.S.528,559.1985
Calborn, 95wn.2d629.623,628P.2d467.1981
Harrington v. California, 386U.S.18,21,17L.ed.705,87Sct824,24.A.L.R.3d1065,reh'g
denied,386U.S.987.1967
In Bezell v. Ohio, 269U.S.167,46S.ct68.70Led.216.1925
Dobbert v. Florida, 432U.S.282,294,97.Sct2290,53L.ed.2d344.1977
California Dept of Correction v. Morales,
514U.S.499,509,115Sct1597,131L.ed.2d588.1995
Nulph v. Faatz,27F3d451,456 (9th 174 cir.1994)
Johnson v. Gomez, 92.F.3d967(9th cir1996)cert denied
117.sct.1884.137L.ed.2d1050,520U.S.1242.1997
Miller v. Florida,482U.S.423,430,96L.ed.2d351.107S.ct2446.1987
Watson v. Estelle, 886,F.2d1093,1094 (9th cir.1984)

Wallace v. Christensen, 802,F.2d1539,1553-54(9th cir.1989)
United States v. Sweeten, 933,F.3d.765,772(9th cir 1991)
Weaver v. Graham, 450U.S.24,33,67Led.2d.17.101.sct960.1981
Chatman v. Marquez, 754F.2d1531.1535(9th cir) cert denied
474U.S.841,88L.ed.2d101,106,s.ct124.1985
Calder v. Bull, 3U.S.386.3Dall.386,391,392,1Led648.1798
Lindsey v. Washington, 301U.S.397,401,81Led.1182,57.Sct797.1937
Miller v. Florida, 482U.S.423,96L.ed.2d.351,107S.ct2446.1987
United States v. Rewald, 835F.2d215,216(9th cir 1987)
United States v. Wabaunsee, 582F.2d1,3(7th cir 1975)
In Henderson v. Morgan, 426U.S.637,49Led.2d108,96s.ct2253.1976
Smith v. O'Grady, 312U.S.329,334,85Led.859.62S.ct572.1941

United States Constitution

6th Amendment Violation

State Constitution

Article 1 §22 Violation

Following a jury trial, the sentencing court imposed a life sentence plus 29 months plus 24 months flat time, plus 18 to 36 months community custody.

I am now appealing the decision of the trial court. My attorney on this case is
Filing my opening brief [REDACTED]

Issues presented for review:

My attorney, Edward J. Decosta, WSBA#21673, performance was deficient in the plea bargaining process where he failed to properly advise me of the consequences of accepting or rejecting the plea offer thus preventing me from making an informed decision on whether or not to plead guilty.

Statement of the facts:

On November 24, 2007, Marshalls Department Store ” employees reported that a man later identified as Mr. Miles was observed cutting the security wire with wire cutters and exiting the store without paying for the coat. When contacted by a security agent outside the store, Mr. Miles fled to a red truck:”

Argument: Facts

When my attorney calculated my points at the plea bargaining failed to tell me how much time I faced if I lost at trial. He did not add the points I would receive if found guilty, so he grossly miscalculated my sentencing exposure. My attorney never explained concurrent and consecutive sentencing and how they would affect me due to my multiple counts. My attorney’s performance fell below well established norms, where he did not advise me of the fact that the prosecutors’ attorneys would be looking into a charge when Mr. Miles was under the old parole board guideline. My attorney advised me that the prosecutor’s attorney was looking into a 1980 attempted second degree robbery from New York. (see Exhibit (1) and (2). At no time was Mr. Miles advised about a © Felony third degree rape from when Mr. Miles was on parole board (1983). Had I known all of these facts and been advised properly of the sentence to be received if I lost at trial, I would never have went to trial. I would have accepted the plea bargain. The plea was 179 months plus 24 months flat time. Mr. Miles was sentenced to life without the possibility

of parole. The United States Supreme Court set the standards for determining when a defendant conviction must be reversed because of ineffective assistance of council in Strickland v. Washington 466u.s.668, 180LED2nd 674,1041 ^{5 ct} ~~1041~~ 2052(1984) stating: “first the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the 6th amendment.

Second, the defendant must show the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable unless a defendant makes both showing it cannot be said that the adversary process that renders the result unreliable. This test was adopted by the Washington State Supreme Court in State v. Jeffries, 105wn.2d398,717P.2d722(1986) and reiterated in State v. Davis, 119wn.2d657,835P.2d1039 (1992). In this case the attorney’s performance was clearly questionable when ^{Hc} failed to take in account the fact that if I was convicted at trial, the (1983) old parole board charged the © felony would be used against me and sentenced to life, see Aied v. Bennet, 296F.3d58 (2002) during plea bargaining stage defense counsel gave erroneous advice regarding the term of incarceration faced if convicted on the indicted charges which he relied upon when rejecting the prosecution plea bargain Also see State v. James, 48wn.app353,362. In a plea bargaining context, effective assistance of counsel requires that counsel “actually and substantially [Assist] his client in deciding whether to plead guilty.” State v. Osborne, 102wn.2d8799,684.P.2d901 (1984).

State v. Osborne, 102wn.2d87.99,684P.2d901(1984)(quoting State v. Cameron, 30wn.app229,232,633P.2d901(1981). This must include not only communicating actual offers, but discussion of tentative plea negotiations and the strengths and weaknesses of defendant case so that the defendants know what to expect and can make an informed judgment whether or not to plead guilty. The standard is whether there is a reasonable probability that, ~~but for an~~ ^{but if not for} attorney’s error, a defendant would have accepted a plea agreement. Hill v. Lockhart, 474U.S.52,88L.Ed203,106s.ct366,370(1985). See State v. Holm, 91wn.app.429,435(1998) defense counsel has an ethical obligation to discuss plea negotiations with a client. James, 48wn.appat362 also Boria, 99F.3dat496 says the ABA’s standard stated in its model code of

Professional Responsibility, Ethical consideration 7-7(1992): a defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable. In U.S.V.Booze, 293F.3d516,518(2002), this circuit has held that a lawyer who advises his client whether to accept a plea offer falls below the threshold of reasonable performance if the lawyer makes a “plainly incorrect” estimate of the likely sentence due to ignorance of applicable law of which he “should have been aware”. United States v. Gaviria, 116F.3d1498,1512(1997).

Also in this case the attorney in question, Edward J. Decosta, WSBA#21673, also failed to discuss and advise the pros and cons of the plea bargain by failing to inform the petitioner MR. MILES that the prosecuting attorney was going to use the (1983) old parole board charge third degree rape against MR. MILES To give him life. See In Re McCready, 100wash.app.259,263(2000), Because counsel did not inform Mr. McCready of the maximum and the minimum sentences that could be imposed for the offenses charged by the State, he did not make an informed decision regarding the plea offer. Also see U.S.V. Leonti, 326F.3d1111,1117, 9th Circuit, holds that if it is ineffective assistance of Counsel to fail to inform a client to enter a plea bargain when it is clearly in the client’s best interest. This certainly meets the first prong of the (two) part test set out in Strickland since the attorney’s performance was so deficient that it seriously prejudiced the defense of Mr. Miles.

Argument Continued:

Regarding the second part of the test in this case, MR. MILES rights were severely abused violating Washington State Constitution Amendment (6) when it was denied competent legal advice and representation due to the ineffectiveness of his counsel. Had MR. MILES had adequate legal aid, he would have understood that maybe the (1983) third degree rape charge could be used against him. Had MR. MILES known all of this, he never would have gone to trial. He would have accepted the plea bargain. See U.S. V. Gordon, 156F3d,376,380, Under most circumstances a convicted felony self-serving statement is not likely to be credible. This does not relieve Habeas courts of their responsibility to actually make a credibility finding in each case, even absent objective evidence. In Moore v. Bryant, 348F.3d238,242, they have noted that the deficient performance prong is met where the inaccurate advise “resulted from the attorney’s

failure to undertake a good faith analysis of all the relevant fact and applicable legal principles.”
Due to my statement and the disparity of sentences offered and received, I have met the
prejudice prong set out in the second part of the Strickland test.

MR. MILES has shown that he was prejudiced by Counsel for not examining all of his prior
conviction and for not advising him that if convicted he could be facing a life sentence because
(1) the prosecutor was willing to offer MR. MILES the option of pleading guilt to a non-strike
offense, (2) See paperwork from prosecutor’s office, (3) at not time did MR. MILES’ attorney,
Edward J. Decosta, WSBA#21673, tell or explain to MR. MILES anything about a (1983) third
degree rape. See State v. Crawford, 159wn.2d86,147P.3d1288(2006). MR. MILES also claim
that his attorney was ineffective for failing to object to the trial Court’s comparability statute of
his (1983) third degree rape RCW9.79.190 comparability to RCW9.94A.030 (32)(33)(b)(i) State
v. Thiefault, 160wn.2d409,158P.3d580(2007); Also see State v. Liden,
138wn.app110.156P.3d259(2007).

For the reason stated above MR. MILES ask this Court to find
His conviction invalid and reverse and remand for a new trial.

Issue (2) Rev. Code Wash. (ARCW) §9A.56.190 (2007)
§9A.56.190, Robbery....Definition

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence or fear injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that although the taking was fully completed without the knowledge of the person from whom taken such knowledge was prevented by the use of force or fear.

RCW9.94A.525

Theft was already completed because defendant had left the store. Defendant did not take by force or threat. Defendant left under duress in a state of panic.

Younger v. Harris, 401U.S.37,91S.ct746 (1971)

Trial Court failure to read a jury instruction was a manifest error affecting a Constitutional right under RAP2.5(a)(3) Where instruction defined assault and contained the essential element of specific intent and omitting the instruction orally was an error of constitutional magnitude because it relieved the State of its burden of proving every essential element of the crime beyond a reasonable doubt. State v. Sanchez, 122wn.app.579,94P.3d384(2004) Wests keys digest-criminal law-key 26 State v. Ledford, when a statute defining a crime states that certain things must be done before the crime be deemed complete, that crime is not committed until designated acts are accomplished.

State v. Baldwin, an affirmed judgment in (2002) the defendant argued from statement that trial courts reasons did not justify exceptional sentence as a matter of law because the legislature considered her type of conduct in setting the standard range. MR.MILES was never informed that the Class (C) felony third degree (~~assault~~^{rape}) was going to be used against him. Affirmative, misleading information from a government entity is a violation of due process [in a narrowly defined class of cases] State v. Sweeney, 125wash.app.77.104P.3d46(2005) Constitutional Law Key 257 Criminal Law 32. The State failure to disclose requested, discoverable information

violates due process if there is a reasonable possibility that the evidence would have affected the outcome of the trial. State v. Jones 33,2n.app865,658P.2d1212(1983)

7th Amendment Article 1§10 administration of justice in all

Cases should be administered openly and without unnecessary delay.

If the State inexcusably fails to act with due diligence and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible that either defendant's right to a speedy trial or his right to be represented adequately by Counsel may be impermissibly prejudiced, State v. Price 94wn.2d870,620P.2d994(1980).

State v. Shriner, 10wn.2d576,681P.2d237(1984) When criminal conduct satisfies the elements of both a general crime and a specific crime, only the specific crime may be charged. Criminal coercion – intended to restrict another's action by (1) threatening to commit a criminal act against that person – “malicious prosecution”, (2) threatening to accuse that person of having committed a criminal act, (3) threatening to expose a secret that either would subject the victim to hatred, contempt, or ridicule or would impair the victim's credit or good will, or (4) taking or withholding official action or causing an. See [Extortion and threats-key 1,25.1 (JS. Threats and unlawful communications §§2-20]

Estoppel – an affirmative defense alleging good faith reliance on a misleading representation and injury or detrimental change in position resulting from that reliance.

Equal Protection – The 14th Amendment guarantees that the government must treat a person or class of persons the same as it treats other persons or classes.

Strict Scrutiny – The standard applied to suspect classifications (such as race) in equal protection analysis and to fundamental rights such as voting rights in due process analysis.

In labor relations there is a term used that represents MR. MILES' position perfectly. It is called illegal strike – A strike using unlawful procedure. The prosecution maliciously “struck out” MR. MILES simply because MR. MILES did not feel that the punishment fit the crime and exercised his right to a jury trial. MR. MILES waged law, not war. Mr. Miles should not have been struck out by a malicious prosecutor who acted in spite because MR. MILES did not entertain the criminal coercion of said prosecutor who threatened to take MR. MILES' life using the law. When his threat did not work, he found out that his threat was based on an unstriking offense

and without warning or notice, dug through MR. MILES history with the sole purpose of taking the life of MR. MILES. The prosecution's best efforts revealed a third degree (~~robbery~~^{YDPE}) that was twisted and molded, maliciously, into a strike. This is not only malicious prosecution, it is legal murder.

State v. Blanchey, 454P.2d841,75wash.2d926 certiorari denied
90S.ct.694396U.S.1045,24L.ed.2d.688

“Statutes which give prosecution discretion to charge either felony or misdemeanor upon same facts violate equal protection clause”.

United States Constitutional of America Amendment 14th

How much more so life or death.

Clearly this as only a theft in the third degree that MR. MILES committed. The property was not taken by force; it was taken, and then afterwards, the keeping of the property was done under duress in a state of panic without intention

PERSON

“Person” in Washington’s Robbery Statute, RCW 9A.56.190 means something on or attached to a person’s body or clothing
State v. Chamroeumnam,136wn.app.698,150P.3d617(2007)

MR. MILES was no longer taking or acting with intent to take. MR. MILES had completed the theft, Robbery requires that MR. MILES to intend to deprive owner of property by force.

Therefore, there was no robbery; by leaving this intention out of the jury instruction the State relieved itself from proving every element of a crime. State v. Davis,

618P.2d1034,27wash.app498 Criminal act done under duress is legally justified or excused.

State v. Norby, 579P.2d1358,20wash.app378 intent to do a particular act is a necessary element of an attempt, and (knowledge is necessary to intention)

State v. Wright, 444P.2d,676,74wash.2d355 certiorari denied

89.S.ct1305,394U.S.961,22Led.2d562. “State in prosecution for attempted crime must prove that defendant actually intended to commit target crime and that he performed overt act directed toward its commission and there must be coinciding unity of intent and overt act. MR. MILES did not even attempt to take by force. Intention is a determination to act in a certain way or do a certain thing; it is clear that MR. MILES committed a theft.

Furthermore, a constitutional right, in this case – due process, cannot be taken away by a court rule, in this case C.R.3.3; the defendant was placed on a rocket docket and forced to make life or death decisions without the proper time for thought or defense. This also violates due process, See State v. Pavelich, 279P.1102,153wash379. MR. MILES is also entitled to the workman decision, decided when a defendant’s case was on appeal, holding that where a defendant is convicted of first degree robbery that defendant cannot also be subjected to enhanced penalty provision for committing an offense while armed with a firearm or deadly weapon. See West’s Keys Digest Criminal Law Key 100(1) CRWA9.41.025, RCWA9A.56.200 State v. Miles, 601P.2d359,25wash.app.134. In conclusion, the State is required to prove every element of its case and defendant is not required to call attention to deficiencies in State case, “State v. O’Dell 279P.2d108746wash.2d206; see also State v. Green 227,P.2d318,38wash.2d240,23A.L.R.20.1397”. Illegal or erroneous sentence may be challenged for the first time on appeal “State v. Hunter, 102wn.app.630,9P3d872(2000). Also State v. Shuey, 181P.890,1078wash,437(1919) that a criminal “statute can reach no further than the limitations prescribed by the words of the statute”. How then can a person who did not take by force be convicted of robbery “if the statute is capable of two constructions, one of which makes a given act criminal, and the other innocent, it will be given the construction which favors innocence.” State v. Furth, 144P.90782wash665 “all are entitled to be informed as to what the state commands or forbids”. State v. Maynes, wash.app579(1978), The overt act in a robbery is the action of taking by force. There was not coinciding unity between the taking and force in this case, therefore Robbery (in no mine) in that name occurred, and because robbery did not occur and neither mere mental attitude nor presence at the scene of the crime is sufficient to sustain a conviction in the absence of some overt act. State v. Levery, 154wn.2d.249,111P.3d837; (2005) requires specific intent to steal as an essential non-statutory elements. See State v. Kjorsvik, 117wn.2d93,98,812P.2d86 (1991). Also see State v. Hicks, 102wn.2d182,184,683P.2d186(1984). Among the defenses that have recognized by Washington Courts in robbery cases which may not be available to a general intent crime are (1) intoxication, State v. Boyd,21wn.app465,586.P.2d878(1978); (2) diminished capacity, State v. Thamert, 452n.app143,723P.2d1204(1986); (3) duress, State v. Davis, 27wn.app498,618P.2d1034(1980); (4) insanity, See State v. Tyler, 77wn.2d726,466P.2d120(1970) vacated in part on other grounds 408U.S.937(1972) and (5) claim of right, see Hicks,102wn.2d182. Robbery require the use of

force; the coat stolen from the department store MARSHALL's was not taken by force, but the keeping of the coat was done under duress in a state of panic without intention. State v. Davis, 27wn.app498,618P.2d1034(1980) in State v. Nguyen,129P.3d821,131wn.app.815(2006) defendant convictions for burglary and robbery were dismissed, as defendants right to a speedy trial were violated when the trial court granted a continuance over defendant's objection so the State could track defendants' case with other home invasion trial as not evidence existed linking the case. MR. MILES claim that the court erred when it failed to sentence MR. MILES within (40) days after a jury convicted MR. MILES on January 28, 2008. MR. MILES was scheduled for sentencing on February 29, 2008. On the date of sentencing the Court granted the prosecutor an continuance over MR. MILES objection giving the State time to dig up evidence against MR. MILES; See State v. Nguyen, 129P.3d,821,131wn.app815(2006). MR. MILES was sentenced on March 14, 2008 to life imprisonment as a persistent offender (POAA). Prior to the date of November 23, 2007, MR. MILES had been using drugs and was on drugs that day, "methamphetamine". MR. MILES is a known drug user. The State can not say that the department store Marshall's is a victim, see State v. Kinneman, 122wn.app850,95P.3d1277(2004); who did MR. MILES rob? MR. MILES do claim that (1) he was under duress and the keeping of the coat was in a state of panic, State v. Davis,27wn.app498,618P.2d1034(1980), and (2) MR. MILES was intoxicated on drugs, State v. Boyd, 21wn.app465,586P.2d878(1978), and (3) diminished capacity, State v. Thamert,45wn.app143,723P.2d1204(1986). MR. MILES did explain all of this to his lawyer, but for whatever reason only known to the lawyer, he chose not to talk about it doing the trial, See ineffective counsel, Strickland v. Washington, 466u.s.668,80L.ed2nd674,104sct2052(1984). Since robbery requires an element of force, and MR. MILES did not take the coat by force or kept the coat by force, but under duress and in a state of panic, see State v. Davis, 27wn.app498,618P.2d1034.1980, the omission on an essential is more than just a technicality and therefore requires reversal, United States v. Wabaunsee,582F.2d1,3,7th cir. 1975. This is especially true where the missing element to men's re in *Henderson v. Morgan*, *426U.S.637,49Led.2d108,96S.ct2253, 1976*, the Court invalidated a guilty plea where the defendant was never informed that intent to cause death was an element of second degree murder [55]. The court noted that the defendant's attorney was "certainly" familiar with the intent

requirement, and the court assumed the defendant would have pleaded guilty, even if he had been told of the element, 426U.S.at644n.1. Nonetheless, the Court overturned the guilty plea.

Because real notice of the true nature of the charge against him is the first and most universally recognized requirement of due process (quoting Smith v. O'Grady, 312U.S.329,334,85L.ed.859,6p1Sct572.1941.)

And for the reason stated above MR. MILES ask this Court to dismiss his conviction with prejudice.

Issue (3) Mr. Miles did not have a knife in his possession

Trial court convicted Mr. Miles of being armed with a dangerous weapon violation RCW9A.56.190 and 9A.56.200(r)(a)(ii) and in commission thereof the defendant, or an accomplice, was armed with a deadly weapon other than a firearm to-wit: knife that being a deadly weapon as defined in RCW.9.94A.125/94A.602. Mr. Miles challenged the constitutionality of 9.41250 as being vague as applied to him when the knife was only a three inch pocket knife.

The term “deadly weapon”, defined in Wash. Rev. Code Ann §9.94A.125 as an implement which has the capacity to inflict death, used in a way such that it is likely to produce or may easily and readily produce death, has been held to include a pocket knife of similar length.

A fixed-blade paring knife of whatever length is sufficiently like the specific objects “dagger” and “dirk” named in Wash.Rec.CodeAnn §9.41.250 that neither an ordinary citizen nor a police officer would have trouble understanding that under certain circumstances, such a knife may be a “dangerous weapon”.

Mr. Miles, have repeatedly stated to the police office and to his attorney, Edward J. Decosta, WSBA#21673, that at no time did he have a knife or was in possession of a knife. When Mr. Miles was arrested and searched by officer Ken Devaney #LD04068, on November 24, 2007, no knife or any other weapon was found on Mr. Miles. See ORIGINAL POLICE ARREST POLICE incident No. 073280744.1pg.(016). Officer Ken Devaney “write in report UNARMED”, but yet Mr. Miles was convicted of being armed with a deadly weapon to-wit: knife. Also, se Officer Briam Wurts LD04040 said in the original report (quoting he heard officer Devaney asked Mr. Miles, where is the knife and I heard Mr. Miles say he don’t have a knife”. Mr. Miles had repeatedly asked his attorney, Mr. Decosta, before trail and during trial to have the knife fingerprinted for Mr. Miles prints. The deputy prosecuting attorney Patrick Hoishi, WSD#26045 nor Mr. Decosta would have the knife fingerprinted. In a three strikes case, and because Mr.

Miles was facing a life sentence, every step necessary should have been taken in Mr. Miles case, especially since officer Devaney made it clear in his report pg. (016) that Mr. Miles was unarmed. Mr. Miles challenges his conviction on four grounds (1) Mr. Miles did not have a knife, (2) Mr. Miles was not in possession of a deadly weapon, see State v. Myles 75wn.app.643;879p.2d968;1994 wash.appLexis389; (3) the knife was never fingerprinted for Mr. Miles prints, and (4) Officer Ken Devaney said in his original report (016) that Mr. Miles was unarmed.

This is a violation of Mr. Miles constitutional right of the Fifth Amendment due process right.

“as said in Ford it is inconsistent with the principles underlying our system of justice to sentence a person on the basis of a crime that the State either could not or chose not to prove”. Ford 137wn.2d.at.480(quoted in re Pers.Restraint of Williams 111wn.2d353,357,759p.2d.436(1988).

For the reason stated above, Mr. Miles ask this court to find his conviction invalid and dismiss his conviction with prejudice.

Issue (4) LESSER INCLUDED

Mr. Miles claim that there was no lesser included offense in his jury instruction.

A defendant is entitled to an instruction on a lesser-included offense if two conditions are met: each of the elements of the lesser offense must be elements of the offense charged (the legal prong) and the evidence must support on inference that only the lesser crime was committed (the factual prong)

See State v. Workman, 90wn.2d443,447-48,584P.2d382(1978), also see State v. Ward 125wn.app243;104p.3d670(2004). Elements of any lesser included offense must necessarily be included-included in the elements of the offense as charged. Mr. Miles was arrested for shoplifting, the state turned the shoplifting into first degree robbery. See State v. Berlin,1332n.2d541,947P.2d700(1997). A lesser included offense instruction is required when: (1) each of the elements of the case supports an inference that the defendant committed the lesser offense, State v. Roche, 75wn.app500,878P.2d497(1994), State v. Lucky, 128wn.2d727,912P.2d483(1996); State v. Berlin, 80wn.app734.911P.2d414(1996) rev'd on other grounds 133wn.2d541,947P.2d700(1997) also see State v. Knight, 54wn.app143,772P.2d1042 review denied 133wn.2d1014,779P.2d730(1997) as the United States Supreme Court stated:

(It is no answer to petitioner's demand for a jury instruction on lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charge, and if no lesser offense instruction...precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charge remains in doubt, but the defendant is plainly guilty of some, the jury is likely to resolve its doubts in favor of conviction.

The trial court could properly decline to give a lesser instruction, however, the court must consider all of the presented evidence when deciding whether or not to give a lesser included instruction. See *State v. Fernandez-Medina*, 141wn.2d448,456,6P3d1150(2000) stated another way, the element of the lesser offense must “necessarily” and “invariably” be included in the elements of the great offense. Porter 150wn.2dat736 (quoting *State v. Harris*,121wn.2d317,321-23,325-26,849,P.2d1216(1993); Mr. Miles ask the court to reverse the judgment against him and remand his case back for further proceedings, holding that trial court erred by refusing to give to the jury lesser included offense of Robbery and attempting to elude a police vehicle *State v. O’Connell*, 116wn.app.1010,(2003) wash.appLexis1024, lesser included offense:

Robbery in the second degree

Attempted Robbery in the First degree

Attempted Robbery in the Second degree

Theft in the third degree, third and the Fourth degree

Theft instruction as a lesser included offense, *State v. Stevens*, 127wn.app.269,110.P.3d1179(2005) wash.applexis860(2005); 158wn.2d304;143P.3d817;(2006)wash.Lexis731; *State v. McDonald*, 123wn.app85,96P.3d468(2004) Instructions are adequate if they allow a party to argue its theory of the case and not mislead the jury or misstate the law *State v. Barnes*, 153wn.2d378,382103P.3d1219(2005). Whether the jury instruction state the applicable law is a question of law which review do novo *State v. Linehan*,147.2n.2d.638.643.56P.3d.542(2002). The evidence must support an inference that the lesser crime was committed *State v. Gamble*, 154wn.2d457.462-63,114P.3d646 (2005)

Both a defendant and the State have a statutory right to have lesser included offenses presented to the jury, Wash.Rev.Code §10.61.006.

Defense counsel proposed an instruction on second degree Robbery as a lesser included offense, but he erred by not giving the lesser included offense instruction to the jury and Mr. Miles was found guilty of first degree Robbery. See State v. Fowler, 114wn.2d59,67.785.P.2d808(1990) and State v. Speece, 115wn.2d360,363,798.P.2d294(1990). A lesser included offense instruction is proper only if each element of the lesser offense is necessarily included in the charged offense and “there is sufficient evidence to support an inference that the lesser crime was committed”. State v. Speece, supra at 362; See State v. Fowler, Supra at 67-68; State v. Harris, 121wn.2d317,849P.2d1216(1993). As further explained in Fowler and Speece, it is not enough that the jury might simply disbelieve the State’s evidence”. State v. Fowler, Supra at 67; State v. Speece, supra at 363. “Instead some evidence must be presented which affirmatively establishes the defendant’s theory on the lesser included offense before an instruction will be given.”. Fowler, at 67; Speece at 363.

Wash. 1901 Larceny is a lesser included offense of robbery, and a conviction thereof may be had on information charging accused with the latter offense, State v. Dengal, 63P.1104,24.Wash.49, where defendant in prosecution for robbery admitted taking \$20, but denied the use of force and violence, and putting in fear and asked the court whether he would instruct on the subject of larceny, it was ERROR for the court to omit to instruct that the defendant might be convicted of larceny, since larceny is a lesser offense included in robbery, and conviction thereof may be had on an information for the latter State v. Dengel.63P.1104,24wash.49.wash.app.1973. Assault which occurred after completion of robbery of a credit union when defendant and his partner herded eight credit [union employees into a back room PRIOR To DEPARTURE to ensure escape was SEPARATE AND DISTINCT FROM AND NOT INCLUDABLE in the offense of ROBBERY. RCWA9.11.020,9.75.010 State v. Smith, 511 P.2d.1032,9wash.app.279.

Since the elements of the lesser offense must “necessarily” and “invariably” be included in the elements of the greater offense Porter 250wn.2dat736 (quoting State v. Harris 121wn.2d317,321-23-325-26849P.2d1216(1993))

And for the reason stated above, MR. MILES ask the Court to find his conviction invalid and reverse it and remand him for a new trial.

Issue (5)

NO EVIDENTIARY HEARING

MR MILES claim that the court erred by not giving him a evidentiary hearing on his prior conviction and the Court sentenced MR. MILES to life imprisonment without the possibility of parole, as a Persistent Offenders Accountability ACT (POAA) Wash.Rev. Code §9.94A.570 MR MILES,(1983) third degree rape under RCW9.94A.525 Washout State v. Malone,138wn.app.587 157.P.3D909(2007)State V. Russell, 104wn.app.422.16.P.3d664(2001) and MR. MILES (1984) Robbery RCW9.94A.030(29) Washout.

Wash, Rev. Code §9.94A.110 provides in part, that before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend time period for conducting the sentencing hearing. The court shall consider the presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed. If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record Wash.Rev.Code §9.94A.110.

Wash.Rev.Code§9.94A.370(2) acknowledgement includes not objecting to information stated in the presentence report. Where the defendant disputes material facts, the court must either now consider the face or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence Wash.Rec. Code §9.94A.370(2).

MR. MILES did object to his prior conviction being used against him, without first giving MR. MILES a evidentiary hearing in order to know whether or not MR. MILES prior offense are even strikeable offenses State v. Jacobs, 154wn.2d596,600,115P.3D.281(2005). Personal Restraint Petition of Allen Ray Williams 111,wn.2d353;759P.2d436 (1988) WashLexis163. The State is not required to prove the constitutional validity of facially valid prior convictions used calculating the defendant's

criminal history for sentencing purposes. (*State v. Marsh*, 47wn.app291 is overruled insofar as it is inconsistent)

Class A prior felony convictions are always included in the offender score. Class B prior felony convictions are not included if the offender has spent ten years in the community and has not been convicted of any felonies since the last date of release from confinement pursuant to a felony conviction (including full-time residential treatment), if any, or entry of judgment and sentence. Class C prior felony convictions and serious traffic convictions as defined in RCW9.94A.330 are not included if the offender has spent five years in the community and has not been convicted of any felonies since the last date of release from confinement pursuant to a felony conviction (including full-time residential treatment), if any, or entry of judgment and sentence. This subsection applies to both adult and juvenile prior convictions. (Italics ours>) See former RCW9.94A.360(12); LAWS of 1984, ch.209§19(12),p.1069. MR. MILES, received a probationary type order of community supervision as a first-time offender, then his “date of sentencing” would have been in 1983 and the subsequent conviction would not be counted as a prior conviction, furthermore, the focus of the SRA’s provisions for determining minimum sentences has been on the fact of prior convictions and the nature of those convictions and not on the sentence *State v. Harper* 50wn.app.578,580 [*346]749.po.2d722(1988). Thus, the focus in the supporting case law under the SRA has been to look back at a deferred sentence and ask whether the deferred sentence should be counted as a prior conviction. The court have held that a deferred sentence is treated as a “conviction served” for purposes of the SRA *State v. Chavez*,52wn.app.796,798,764p.2d659(1988); *Harper*, at580. At issues is whether a trial court, in revoking probation and fixing a minimum term, may count as a prior conviction under the SRA an intervening conviction which is prior to the revocation but subsequent to the original offense. MR. MILES, should have been given a evidentiary hearing on this matter, even though MR. MILES committed the original offense before the SRA, the SRA applies to the revocation proceeding for that offense. RCW9.95.011, the minimum term provision provides: when the court commits a convicted person to the department of corrections on or after July 1, 1986, for an offense committed before July 1, (1984) the court shall, at the time of sentencing or revocation of Probation fix the minimum term –

The court shall attempt to set the minimum term reasonably consistent with the purposes, standards, and sentencing ranges adopted under RCW9.94A.040. MR. MILES, ask this question, because the court sentenced MR. MILES to (5) years probation for (1983) third degree rape offense, which at the time was a Class (C) Felony which is a non-violent offense: Why now in (2008)(28) years later the court is claiming that MR. MILES (1983) third degree rape offense is a violent offense (or) a most serious offense in order to sentence MR. MILES, as a persistent offender.

SUPERIOR COURT RULES:

These offenses is a most serious offense or strike as defined by RCW9.94A.030 and if a person have at least two prior conviction for most serious offense, whether in this State, in federal court, or elsewhere, and the offense for which a person is charged carries a mandatory sentence of life imprisonment without the possibility of parole. In addition, if this offense is: (1) rape in the first degree, rape of a child in the first degree, rape in the second degree, rape of a child in the second degree, indecent liberties by forcible compulsion, or child molestation in the first degree or (ii) murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, or burglary in the first degree, with a finding of sexual motivation, or (iii) any attempt to commit any of these offenses listed in this sentence and if a person have at least one prior conviction for one of these listed offenses in this state, in federal court, or elsewhere, the offenses for which a person is charged carries a mandatory sentence of life imprisonment without the possibility of parole.

SUPREME COURT OF WASHINGTON

“We hold that the State does not have the affirmative burden of proving the constitutional validity of a prior conviction before it can be used in a sentencing proceeding. However, a prior conviction which as been previously determined to have been unconstitutionally obtained or which is constitutionally invalid on its face may not be considered. See *In re Bush*, [[26wn.app.486.616P.2d666\(1980\)](#)],

aff'd, 95wn.2d551, 627P.2d953(1981) at 497-98; United States v. Tucker, 404u.s.443, 30Led.2d592, 92SCT.589(1972); Burgett v. Texas, 389U.S.109, 19Led, 88SCT(1967) constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude. In Burgett v. Texas, 389U.S.109, 19LED.2d319, 88SCT.258 (1967) the Supreme Court held a record of conviction which is facially invalid cannot be used to establish recidivism and to justify a mandatory sentence. MR. MILES, in (1983) was sentenced to probation for the charge of third degree rape, RCW9.79.190, which to my understanding was a Class (C) felony which is not "comparable" to those designated in RCW9.94A.030(33) first degree rape. See In re Personal Restraint of Lavery 154wn.2d249, 111P.3d837(2005) In re Personal Restraint of Thompson, 141wn.2d712, 10P.3d380(2000) also division one has held it is not. See State v. Bailey, 52wn.app42, 47, 757P.2d541(1988) aff'd 114wn.2d340, 787P.2d1378(1990); State v. Hodgson, 44wn.qpp592, 599-600, 722P.2dv336(1986), aff'd, 108wn.2d662, 740P.2d848(1987). The qualifying prior convictions for Persistent Offender Accountability Act must strictly comply with the list of offenses found in former Wash.Rev. Code §9.9.4A.030(27)(b)(i)(1998). The former statute did not contain the comparability language found in Wash.Rev. Code §9.9.4.A.030(31)(b)(ii)(former) of the amendment that was effective July 22, 2001. (recodified as RCW9.94A.030(32)(b),(i) the issued of whether the defendant's prior rape offense counts as a strike for purposes of persistent offender sentencing is determined under the amended version of the statute, which allow for comparability analysis. State v. Ortega, 120wn.app.165; 84P.3d, 935:2004wash.app Lexis220 also see State v. Ortega, 154wn.2d1031, 119P.3d8522005.wash Lexis702(Wash, Aug. 24, 2005), [**938] Former RCW9.94A.030(31)(b)(Law of 2001, ch.7, §2)(effective July 22, 2001). The trial court concluded that the State failed to prove that Mr. Ortega had a prior conviction for an offense comparable to those listed in former RCW9.94A.030(31)(b)(i). Court of appeals of Washington, Division Three "we first address Mr. Ortega's contention that consideration of his 1991 *Texas conviction is precluded by State v. Delgado, 148wn.2d723, 726-27, 63P3d792(2003)* which held that the qualifying prior convictions for POAA must strictly comply with the list of offenses found in RCW9.94A.030(27)(b)(i)(1998). This former statute did not contain the comparability

language found in former RCW9.94A.030(31)(b)(ii)[***7] of the amendment that was effective July 22, 2001. If Mr. Ortega's criminal acts had been confined to the period of time before July 22, his prior Texas conviction for indecency with a child could not have been counted because it was not on the list of qualifying offenses in former RCW9.94A.030(31)(b)(i)(2000) (which was effective in (2001) before July 22) Delgado,148wn.2dat726-27. But the charging document and Mr. Ortega's statement on plea of guilty specified that his acts of molestation occurred between April 1 and July 31, 2001. Because some of his criminal acts occurred in the period from July 22 to around July 31, the July 22 amendment adding the comparability language authorizes the trial court to determine whether [*171] the (1991) Texas conviction is comparable to any of the qualifying crimes in former RCW9.94A.030(31)(b)(i)(2001)”[2][3][4][5] consequently, we next determine the standard of review. In general, the de novo standard is best applied when the appellate court stands in the same position as the trial court and may make a determination as a matter of law, while the abuse of discretion standard is applied [8888] when the trial court is in the best position to make a factual determination. State v. Garza,150wn.2d360,366,77P.3d347(2003), In determining an offender score, the trial court determines whether prior convictions exist by a preponderance of the evidence and then establishes the offender score as a matter of law. State v. McCorkle, 88wn.app.485,492-93,945P.2d736(1997), aff'd 137wn.2d490,973P.2d461(1999). We review the trial court's factual determination for abuse of discretion, and its calculation of the offender score de novo. Garza,150wn.2dat366; McCorkle 88wn.app.at493. The trial court's decision whether to consider a prior conviction a first strike for the purposes of (POAA) is also reviewed d novo. State v. Carpenter 117wn.app.673,679,72P.3d784(2003); State v. Keller, 98wn.app.381,383,990P.2d423(1999), aff'd, 143wn.2d.267,19P.3d1030(2001), cert. denied,534U.S.1130(2002)”. Just as in State v. Ortega, 120wn.app165;84P.3d935;2004 was.app.Lexis220 MR. MILES (1983) third degree rape is not comparable to (recodified as RCW9.94A030(32)(b)(i) or comparable to those listed in former RCW9.94A.030(31)(b)(i). Also see State v. Gunwall, 106wn.2d54,720P.2d808(1986), Boykin v Alabama, 395u.s.238,89 sct1709,23L.ed.2d274(1969). “To prove that a

defendant is a persistent offender (POAA), the State must establish by competent evidence that there is a prior felony [**5]. State v. Chaney, 423so.2d14-19 when a predicate conviction was obtained pursuant to a plea of guilty, the State must meet the burden of proof outlined by the Louisiana Supreme Court in State v. Shelton, 621so2d769(LA1993) if anything less than a “perfect” transcript is presented, the trial court must weight the evidence submitted by the State to determine whether the State proved that defendant’s prior guilty plea was informed and voluntary, and made with an articulated waiver of the three Boykin rights Shelton, 621so.2dat779-780; See also State v. Hollins, 99279(LA.app.5cir8-31-99)742so.2d671-685.

FACTUAL AND PROCEDURAL HISTORY

On January 28, 2008, a jury convicted MR. MILES of first degree robbery while armed with a deadly weapon to-wit knife, MR. MILES was scheduled to be sentenced on February 29, 2008, but was continued to March 14, 2008 because prosecutor felt that the state of New York was not cooperate. On March 14, 2008 sentence date the prosecutor stated that he did not need any information from New York and that he could strike MR. MILES out on using two of his prior convictions. MR. MILES objected to the use of his two prior convictions and asked the court to give him an evidentiary hearing. The court did not, and MR. MILES was sentenced to life as a persistent offender (POAA).

On March 18, 2008 without MR. MILES presence the court entered finding of facts and conclusions of law the reason for giving MR. MILES a life sentence. This is a violation of MR. MILES due process rights.

7th Amendment, Article 1310, administration of justice in all cases should be administered openly and without unnecessary delay.

MR. MILES claim that the sentencing court erred when it failed to hold an evidentiary hearing and instead sentenced MR. MILES to life imprisonment without determining if his prior convictions were strikeable offenses. Once the defense “dispute material facts, the sentencing court either must not consider the facts, or it must grant an evidentiary hearing on the matter”, Cadwallader, 155wn.2dat874 (citing

RCW9.94A.530(2), 5.24.010(Uniform Judicial Notice of Foreign Law Act). Every court of this state shall take judicial notice of the constitution common law, civil law, and statutes, of every state, territory and other Jurisdiction of the United States. In *State v. Alexis*, 95wn.2d15,19621P.2de1269(1980) this court held that a trial court exercising its discretion under ER609(a)(i) must not only weigh the prejudicial effect of the prior conviction against the probative value of the evidence but must additionally consider and weigh the following factor:

- (1) the length of the defendant's criminal record;
- (2) remoteness of the prior conviction;
- (3) nature of the prior crime;
- (4) the age and circumstances of the defendant;
- (5) centrality of the credibility issue and,
- (6) the impeachment value of the prior crime.

[*706] In exercising its discretion, the trial court is required to follow the balancing procedure in a meaningful way. Further, the trial court must articulate for the record, [***10] the factors which favor admission or exclusion of prior conviction evidence under ER609(a)(i). *State v. Jones*, 101wn.2d113,122,677P.2d131(1984), overruled on other grounds by *State. V. Brown*, 111wn.2d124,716P.2d588(1988), adhered to on reh'g 113wn.2d520.782P.2d1013,80A.L.R.46989, corrected 787P.2d906(1989); *State v. Gomez*, 75wn.app.648,651,880P.2d65(1994).

[4][5] The responsibility of the trial court to state the factors considered app.at651 failure to engage in this process on the record is an abuse of discretion *Jones* at 122-23. Admission of a felony as "unnamed" is not a substitute for balancing process required under *Alexis.Gomez*,75wn.app.at655. Although the trial court was aware of defendant River's prior criminal history, and the nature and dates of prior conviction, the court did not complete the required analysis of the Alexis factors on the record. [***11] Its failure to do so constituted an abuse of discretion. *Jones*,101wn.2dat122-23;*Gomez*,75wn.app.at656n.11;

THOMAS PAINE, dissertation on first principles of government, in common sense and other political writings, Thomas Paine, 174(W.F.Adkins ed.1953)

As our state constitution absolutely prohibits “Cruel punishment”, const.art.I§14, and “the provisions of this constitution are mandatory, unless by express words they are declared to be otherwise”, const.art.I§29. I conclude this statute strikes out as unconstitutionally cruel punishment when judged against fundamental principles, CONST.art.I,§32.

Article I, Section 14, of the Washington State Constitution prohibiting “cruel [***35] punishment” was adopted in (1889). It has not been amended. It means the same now as it meant then. It was written for the ages and was intended to guide future generations. Lebbeu J. Knapp, *The Origin of the Constitution of the state of Washington*, 4WASH.HISTORICAL Q.227.251 (Oct. 1913) (hereinafter “Knapp”). Our constitution arose from a profound distrust of the Legislature and a large part was designed to strictly limit the Legislature. Knapp at 250 (“of all oppressive and unjust instruments of government the legislature is the greatest and most irresponsible”.) The founders understood circumstances and political climates my change but principles and human nature do not.

Constitutions do not change with the varying tides of public opinion and desire. The will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and therefore the courts should never allow a change in public sentiment to influence them in giving a construction to a written constitution not warranted by the intention of its founders. 6R.C.L.46.

[***36] State ex rel. Banker v. Clausen, 142wash,450,545,253P.805(1927). See also State ex rel. O’Connell v. Slavin, 75wn.2d554, [*721]452P.2d943(1969). (The court should never allow a change in public sentiment to influence it to give a construction to the written constitution not warranted by the intention of the founders); Boeing Aircraft Company v. Reconstruction Fin. Corp.,

25wn.2d652,171P.2d838,168A.L.R.539(1946)(The meaning of the state constitution was fixed at the time it was adopted and must be construed in the sense in which the Framers understood it). MR. MILES claim that the court erred when the court grant a continuance on MR. MILES sentence. See State v. Nguyen, 131wn.app815;129P.3d821(2006) Wash.app.Lexis289. The decision to grant a continuance under Wash. Super.Ct.(rim.R.3.3 rests in the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. See State v. Torres, 111wn.app.323,330,44P.3d903(2002); State v. Flinn, 154wn.2d193,199-200,110P.3d748(2005); State v. Woods, 143wn.2d561,579,23P.3d1046(2001) as the Supreme Court has observed in another context, if “administration of justice” can be invoked at any time to grant a continuance, then “there is little point in having the speedy trial rule at all”. State v. Adamski, 111wn.2d574,580,761P.2d7\621(1988). MR. MILES was deprived of his right to be sentenced within (40) days based on mere speculation that the city of New York might after waiting for four months send the prosecutor some information in order to “Strike” MR. MILES out as a persistent offender (POAA) which the state of New York never did.

And for this reason stated above MR. MILES ask this court to dismiss his conviction with prejudice.

Issue (6) PRIOR FELONY OFFENSES:

MR MILES was given a life sentence on his two prior felonies (1983) third degree rape RCW9.94A.9.79.190 and a (1984 Robbery RCW9.94A.030(29) as a Persistent offender (POAA) RCW9.94A.570 (RCW9.94A.030(28) and RCW9.94A.030(32). MR. MILES is challenging the use of his two prior felonies....to MR. MILES understanding the prior conviction has washout under the old Parole Board Guidelines. MR. MILES was charged with shoplifting. The State turned the shoplifting charge into first degree Robbery, then used MR. MILES past offenses to charge MR. MILES as a persistent offender. MR. MILES was convicted of Robbery in the first degree and sentenced to life under the Persistent Offender Accountability Act (POAA).

The State is required to prove the Constitutional validity of a prior conviction beyond a reasonable doubt. See State v. Kelly, 52wn.2d676,678,328,P.2d362(1958); State v. Murdock, 91wn.2d336,340,588P.2d1143(1979); State v. Furth, 5wn.2d1,11,104P.2925(1940); State v. Holsworth, 93wn.2d148,159,607P.2d845(1980); Kelly, 52wn.2dat678, Furth, 5wn.2dat18-19(citing cases); See also Murdock, 91wn.2dat340-41 Holsworth, 93wn.2dat159. The Supreme Court of Washington have long ago recognized that the right to an information alleging ground for sentence enhancement and the right to a jury determination based on proof beyond a reasonable doubt of those allegations are guaranteed by the Washington State Constitution. State v. Furth, 5wn.2d.1,104P.2d925(1940). As [*686] recently as (1986), this court recognized these rights when the sentence to be imposed exceeds the statutory maximum, State v. Ammons, 105wn.2d175,713P.2d719,718P.2d796, cert denied, 479u.s.930,93LED.2d351,107S.ct.398(1986). The constitutionality of recidivist laws was challenged [*689] on various grounds in State Court. The primary grounds for challenge were that enhanced penalties [***59] based on prior convictions violated the prohibition against being put twice in jeopardy and that the law was ex post facto, State v. Findling, 123Minn413,k415,144N.W.142(1913)(collecting cases). Many of the challenges were brought under the various states' constitutions. Idat415 (comparing the text to Minnesota Constitution with other State Constitution); Blackburn v. State, 50OhioSt.428,432,36N.E.18(1893)(challenging recidivist law on State and Federal

constitutional grounds). Other State court challenges were brought under the federal constitutional, People v. Stanley, 47Cal.113,117(1873).

In Washington, the first constitutional challenge to the recidivist law came in State v. LePitre, 54 Wash. 166, 103 P.27 (1909) (Challenging the 1903 habitual offender law). MR. MILES was denied his due process right.

It is fundamental that due process requires the court to review the fairness of a governmental decision-making process. 2. RONALD D. ROTUNDA and JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE³ AND PROCEDURE §14.6 (2d.ed1992). This review is required whether procedures are prescribed by the Legislature, or whether the statute is silent regarding procedures.

“Due process of law” has been well defined to be “law in its regular course of administration through courts of justice”. (Kent’s com.13). It is provided for if the statute, under judicial examination, provides for the regular administration of its provisions by the courts of the State. Sheppard v. Steele, 43 N.Y. 52. it [***65] means that every citizen shall have his day in court and that he shall have the benefit of those rules of the common law, generally deemed to be fundamental in their nature because sanctioned by reason, by which judicial trials are governed. These rules, which secure to the accused a judicial trial, it is beyond the power of the legislature to subvert. Wynebamer v. People, 13 N.Y. 378, 447, 12 How. Pr. 238, 2 Park. (r.421). It is beyond its power to deprive a person of his liberty, or to deprive him of his property, by mere legislation... [These rights} are preserved to all persons by the Constitution of the State and it is the duty of the judicial branch [***493] the government to uphold them whenever brought into question. People v. Sickles, 156 N.Y., 541, 547-48, 51 N.E. 288, 13 N.Y. (r.277 (1898) (cited in State v. Dale, 110 Wash. 181, 184, 188 P. 473 (1920)). When the use of the preponderance standard meets constitutional concerns when the sentence being imposed is within the statutory maximum, it does not suffice when the sentencing enhancement results in a sentence which exceeds the statutory maximum available for the crime. State v. Ammons, 105 Wn. 2d 175, 185-86, 713 P. 2d 719, 718 P. 2d 796 (recognizing the right to proof beyond a

reasonable doubt when sentence is beyond the statutory maximum), cert. denied, 479U.S.930,93LED.2d351,1075.ct.398 (1986). In Ammons, the court stated:

We recognize that in some proceeding we have required that the state prove the existence of prior convictions beyond a reasonable doubt went a sentence beyond the statutory maximum or a mandatory additional sentence could be imposed. See State v. Tongate, 93wn.2d751,754,613P.2d121(1980)(deadly weapon enhancement); State v. McKim, 98wn.2d111,117,653P.2d1040(1982) (knowledge that co-defendant armed with a deadly weapon); State v. Mudrock,91wn.2d336,340,588P.2d1143(1979), (proof of prior convictions in habitual criminal proceedings); [***67] State v. Nass, 76wn.2d368,370,456P.2d347(1969) (proof of sale of narcotics to a minor to impose a greater sentence).

Due process requirements for imposition of enhanced sentence are based in the Washington Constitution in State v. Nass,76wn.2d368,456P.2d347(1969) this court stated:

It is the rule that, where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, the issue of whether that factor is [***69] present must be [**494] presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty.

Id.at370 In support of this rule, the NASS court cited State v. Dereiko, 107wash.468,182P.597(1919), State v. Dale, 110wash.181,188P.473(1920), State v. Magnusson, 128wash541,223P.325,aff'd,130wash.706.226P.1119(1924), and State v. Harkness,1wn.2d530,96P.2d460(1939). Both Dericho and Dale rely on opinions from other jurisdictions in which those court relied on their own state constitutions, See State v. Findling, 123Minn.413,144N.W.142(1913) (decided on Minnesota Constitution) (cited

in Dereiko, 170washat470); People v. Sickles, 156N.Y.541,51N.E.288,13N.Y.(v.277(1898) (decided on New York Constitution) (cited in Dale, 110wash.at184); Also see State v. Rivers, 129wn.2d697,921P.2d495(1996), State v. Knight, 134wn.app.103,138P.3d1114;(2006)wash.app.Lexis1504 “Robbery in the second degree is a class (B) felony – RCW9.456210(2). Accordingly, conspiracy to commit second degree robbery is not a violent offense under the definitional provision of the SRA form RCW9.94A.030(45). However, the offender score statute specifically crimes provides that prior convictions for felony anticipatory offenses are scored as completed crimes RCW9.94A.525(4),(6). Ms. Knight contends the offenders score statute conflicts with the definitional statute, which should override the offender score provisions due to principle of statutory construction and the rule of lenity. Similar arguments were raised in State v. Becker, 59wn.app.848,801P.2d1015(1990). In Becker, the sentencing court counted a prior conviction for attempted second degree robbery as two point pursuant to former RCW9.94A.360(1990), recodified as RCW9.94A.525. Mr. Becker argued an appeal that the attempted robbery was not subject to the doubling provision because it [***6] was not defined as a violent offense Becker,59wn.app.at850. Noting that apparent conflicts in statutes should be reconciled so that each is given effect, Becker concluded that the definitional statute and the doubling provision could be harmonized by reading the plain language of each statute: MR. MILES also assert that his (1983 third degree rape under RCW9.94A.525 is not subject to the doubling provision because it is not defined as a violent offense. State v. Jacobs,154wn.2d596,60115P.3d281(2005) [***7] a statute’s plain meaning is considered an expression of that intent Id.IF, after examining the ordinary meaning of the statute’s language as well as its context in the statutory scheme, there is more than one reasonable interpretation we will treat the statute as ambiguous, id.at 600-01. When truly ambiguous, the statute will be interpreted in favor of the defendant pursuant to the rule of lenity. ID.at601.

(P12) “Finally, Becker noted that if we were to accept the defendant’s argument that the definition [***8] in RCW9.94A.030 controlled, then RCW9.94A.525(4) would be rendered meaningless or superfluous, Id.at854. To give a meaningful interpretation to the SRA as a whole, [RCW9.94A.525(4)] must supersede the general definition of

violent offense” MR. MILES (1983) charge of third degree rape is not a violent offense or a most serious offense or a “(strikes)” under Washington persistent offender statute. The Supreme Court has repeatedly noted that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt, United States v. Booker, 543U.S.220,160LED.2d621,125Sct.738,756(2005) attacking validity State v. Johnson, 46wn.app302,730P.2d(1986) review denied 108wn.2d1005(1987) State v. Bembyr, 46wn.app288,730,P.2d115(1986). State v. Cabrera, 73wn.app.165,868P.2d179(1994), State v. Jones, 159wn.2d231,149P.3d636(2006), Nothing in the 1995 amendment indicated that the amendment should be applied retroactively the amendment could not be applied to resurrect one of the defendant’s prior felony convictions for purposes of the persistent offender sentencing State v. Hern,111wn.app.649,45P.3d1116(2002). State v. Larkin, 70wn.app349,853P.2d451(1993), When defendant, convicted of first degree rape in 1986, had a prior 1978 class (C) felony conviction and a prior 1981 rape conviction, the 1978 conviction could not be used in computing defendant’s offender score after the 1981 conviction was deemed constitutionally invalid for sentencing purposes. State v. Herzog,48wn.app831,740P.2d.380(1987). A crime elements, not its maximum punishment determine whether a crime is comparable. State v. Wiley, 124wn.2d679,880P.2d983(1994), State v. Bembyr,46wn.app.288,730P.2d115(1986).

WASHED OUT CONVICTIONS

The 2002 amendment to the Sentencing Reform Act, RCW9.94a.525 and RCW9.94A.030 clearly stated legislative intent to define “criminal history” in a new way to be applied prospectively. Under the (2002) amendment, offenders had no vested right in prior wash out provisions and they were subject to the criminal history statute in effect at the time of the offense, such that the washed out offenses applied to defendants could not be counted in calculating offender scores for offenses which occurred before the effective date of the (2002) amendment to the SRA . In re Pers. Restraint of LaChapelle, 153wn.2d1,1200P.3d,805(2004). Also see State v. Hall, 45wn.app.766.766,728P.2d616(1986). Prior convictions were not a retroactive

application of the 1997 amendment. State v. Swecker, 154wn.2d660, 116P.3d297(2005); also see State v. Labarbera, 128wn.app.343, 115P.3d1038(2005).

Boykin v. Alabama, 395u.s.238, 89s.ct.1709, 231Led.2d274(1969), “To prove that a defendant is a persistent offender (POAA), the State must establish by competent evidence, that there is a prior felony. [**5] State v. Chaney, 423so.2d1092, 1103(La1982); State v. Williams, 98-651(La.app.5cir.2-10-99), 729so.2d14, 19”. When a predicate conviction was obtained, pursuant to a plea of guilty, the State must meet the burden of proof outlined by the Louisiana Supreme Court in State v. Shelton, 621so.2d769(La1993). If anything less than a “perfect” transcript is presented, the trial court must weigh the evidence submitted by the State to determine whether the State proved that defendant’s prior guilty plea was informed and voluntary, and made with an articulated waiver of the three Boykin right, Shelton, 621so.2dat779-780l. See also State v. Hollins, 99-278(La.app.5Cir.8-31-99), 742so.2d671.685:

Persistent Offender Accountability Act form Wash.Rev. Code §9.94A.030(32)(b)(2005) recodified as WashRev.Code§9.94A.030(b) and 9.94A.570 requires a life sentence upon the second (or third) conviction for certain designated crimes that are deemed “comparable” to those designate Wash.lRev.§9.94A.030(33).

MR. MILES (1983) third degree rape RCW.9.79.190 is not comparable to RCW9.94A.030(33). Personal Restraint Petitioner of Leonard B. Lavery 154wn.2d249;111P.3d837, (2005) in the context of the Rule in Apprend v. New Jersey and the application of the Washington Persistent Offender Accountability Act (POAA), former Wash. Rev. Code §9.94A120 (1998). The court did not give MR. MILES a chance to examine whether or not the offense was factually comparable to RCW9.94A.030(33). There was no incentive for MR. MILES to attempt to prove that he did not commit the offense. In State v. Freeburg changed the comparability analysis State v. Ortega 120wn.app.165,84P.3d935(2004). MR. MILES was convicted and sentenced to life in prison as a persistent offender. MR. MILES claim that a prior (c) felony

conviction should not have counted as a strike because it was not comparable to RCW9.94A.030(33). A Class (C) felony is not a (strike). MR. MILES was sentenced to life as a Persistent Offender under RCW.9.94A.030(28) and (32)(b)(I). MR. MILES Class (C) felony third degree rape can not be comparable to RCW9.94A.030(33)(28)(32) because the elements of third degree rape do not have the same elements of a first degree rape. See State v. Freeburg, 120wn.app120wn.app192,84P3d292(2004). The State need to prove by a preponderance of the evidence that the conviction would be a strike offense under the (POAA) State v. Ford, 137,wn.2d472,47980,973P.2d452(1999) to determine [**840] whether or not MR. MILES prior third degree rape CRW9.79.190 offense is comparable to a Class (A) felony first degree rape RCW9.94A.030(33)(28). See State v. Morley, 134wn.2d588.952P.2d167(1998), the elements of the crime Morley,134wn.2dat605-06 must be compared to the elements of the criminal statute in effect when MR.MILES committed his offense ID.at606 because the elements of first degree rape and third degree rape are not legally comparable. See Personal Restraint of Thompson 141wn.2d71210.P.3d380(2000), also see State v. Bailey, 52wn.qpp42,47,757P.2d541(1998) aff'd 114wn.2d340787P.2d1378(1990); State v. Hodgson,44wn.app592.599-600,722P.2d1336(1986)aff'd 180wn.2d662,740P.2d848(1987). Also see State v. Lavery,154wn.2d249;111P.3d837;(2005) in State v. Delgado, 148wn.2d723;63P.3d792(2003); A court will not add words or clause to an unambiguous statute when the legislature have chosen not to include that language, the legislature is presumed to mean exactly what it says.

The legislature has since amended this statute to include a comparability clause to three strike statue not requires the offender to have:

SUPERIOR COURT RULES:

These offenses is a most serious offense or “strike” as defined by RCW9.94A.030 and if a person have at least two prior conviction for most serious offense, whether in this State, in federal court, or elsewhere and the offense for which a person is charged carries

a mandatory sentence of life imprisonment without the possibility of parole. In addition, if this offense is:

(A) rape in the first degree, rape of a child in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or child molestation in the first degree, or (ii) murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, or burglary in the first degree with a finding of sexual motivation, or (iii) any attempt to commit any of these offenses listed in this sentence and if a person have at least one prior conviction for one of these listed offenses in this state, in federal court, or elsewhere, the offenses for which a person is charged carries a mandatory sentence of life imprisonment without the possibility of parole.

Before the commission of the offense [listed above] been convicted as an offender on a least one occasion whether in the State or elsewhere, of an offense [above] or an Federal or out-of-state offense, or offense under prior Washington law that is comparable to the offense listed [above]RCW9.94A.030(32(b)(iii) Laws of 2001, ch.7§2.

As you can see that third degree rape is not on the list in Morley 1332n.2dat605-06 the elements of the crime must be compared to the elements of the criminal statute in effect of (1983) when MR. MILES was charged with the offense ID.at606. Because the element of first degree rape and third degree rape are not legally comparable.

ELEMENT OF THIRD DEGREE RAPE

(1) A person is guilty of rape in the third degree when circumstances, not constituting rape in the first or second degree such person engages in sexual intercourse with another person, not married to the perpetrator: (a) where the

victim did not consent as defined in RCW9A.44.010(7) to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's word or conduct, or (b) where there is threat of substantial unlawful harm to property right of the victim, rape in the third degree is a class (c) felony.

ELEMENT OF FIRST DEGREE RAPE

A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months old than the victim rape of a child in the first degree is a Class (A) felony.

ELEMENT OF SECOND DEGREE RAPE

A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty six months older than the victim. Rape of a child in the second degree is a Class (A) felony.

ELEMENT OF THIRD DEGREE RAPE

A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim. Rape of a child in the third degree is a Class (C) felony.

Language is unambiguous when it is not susceptible to two or more interpretations State v. McGee 122wn.2d783,787 [*727864.P.2d912(1993). See also ambiguity exists if the language of the enactment is susceptible to more than one reasonable interpretation State ex rel. Royal v. Board of Yakima County Comm'rs 123wn.2d451,459,869P.2d56(1994). This statute is unambiguous, because there is only one interpretation a person can draw from the statute expressly lists those qualifying prior convictions which expose an offender to a sentence to life without parole

as a persistent offender. The statute end with the limiting language “of an offense listed in (b)(i) of this subsection” third degree () is not on the listed, Plain language does not require construction State v. Wilson, 125wn.2d212,217883P.2d320(1994) also see Davis v. Dept. of Licensing 137wn.2d957,964,977P.2d554(1999) Also see State v. Chester, 133wn.2d15,21.940P.2d1374(1997) (Statute defining “sexual exploitation of a minor” not subject to construction beyond plain language). State v. Mallich, 132wn.2d80,87,936P.2d408(1997)(statute requiring restitution to be given at juvenile’s disposition hearing is unambiguous and not subject to construction beyond the plain language); State v. Smith, 117wn.2d.263,814P.2d652(1991). Also see In re Det. Of Williams, 147wn.2d476,491.55P.3d597(2002) one must not ignore the strong presumption against retroactive application of statutory amendments that is deeply rooted in our jurisprudence and is an essential thread in the mantle of protection that the law affords the individual citizen. State v. Smith, 144wn.2d665,673,30P.3d1245(2001) (quoting State v. Cruz, 139wn.2d186,190,985P.2d384(1999)). Also see State v. Taylor, 97wn.2d724,728,649P.2d(633)(1982). In State v. Aho, the court held that an individual cannot be convicted of a crime under s statute that legislature had not enacted at the time the conduct allegedly constituting the offense occurred, State v. Aho, 137wn.2d736.975P.2d512(1999). The constitutional principle is generally formulated in terms of due process, i.e. accused’s right to be informed with reasonable certainty of the nature of the charges in order to prepare a defense and to plead a judgment as a bar to any further prosecution for the same offense given the harsh consequences of a violation, however, it is evident that the essential elements rule constitutes a category sui generic and rests on principles other than notice alone. Even in situations where the notice function has been satisfied, i.e., the defendant has actual notice of the elements of the charged crime and has not been prejudiced at trial by the defective charging document, the Holt rule mandates automatic dismissal in State v. Alexis, 95wn.2d15,19.621P.2d1269(1980). The Supreme Court of Washington held that:

A trial court exercising its discretion under ER609(A)(1) must not only weigh the prejudicial effect of the prior conviction against the probative

value of the evidence but must additionally consider and weigh the following factors:

- (1) the length of the defendant's criminal record;
- (2) remoteness of the prior conviction;
- (3) nature of the prior crime;
- (4) the age and circumstances of the defendant;
- (5) centrality of the credibility issue;
- (6) the impeachment value of the prior crime.

Although the trial court was aware of defendant MILES prior criminal history, and the nature and dates of prior convictions, the Court did not complete the required analysis of the Alexis factors on the record. [***11] its failure to do so constituted an abuse of discretion Jones, 101wn.2dat122.23; Gomez, 75wn.app.at656n.11.

For the reasons stated above MR. MILES ask this court to find that his conviction is invalid and reverse and remand him for a new trial.

Issue (7) Violate of the Eighth Amendment's Prohibition against cruel and unusual punishment

MR. MILES was arrested for shoplifting a coat worth a small amount of money, \$99, from a department store, an offense ordinarily punishable by a maximum of six months in jail, not a life sentence. MR. MILES sentence do violate the Eighth Amendment – cruel and unusual punishment, and because the error affected the length of th sentence, it clearly had a substantial and injurious effect, See Brecht, 507u.s. at 637. Clearly the penalty is so disproportionate to the crime that is inflicted shocks the conscience and offend fundamental notions of human dignity. In re see.Lynch,8cal.3d410,503P.2d921,930,105cal.Rptr.217(Cal. 1972). The Eight Amendment to the United States Constitution bars cruel and unusual punishment. The State constitution bars cruel punishment Wash.Const. Art I. *and 22*

Four factors are considered in analyzing claims of cruel punishment. Those factors are (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction.

See Brown and Bray Jr.283F.3d1019(2002,S appLexis1834(2002(al Daily op Service 1222;(2002) vacated by Remanded by Mayle v. Brown, 2003usLexis1958 (U.S. Mar.10,2003) A. Rhode Island “Like Andrade, Bray and Brown were convicted of Stealing merchandise worth less than \$100 an offense that cannot count as a felony in Rhode Island, even with prior theft convictions. R.I. Gen.Laws016711-41-20(d); See also 270F.3dat763. Thus, the additional 25-year penalty for three-time felons, R.I. Gen. Laws§12-19-21, would not have applied to either Bray or Brown, and the maximum term that Rhode Island could have imposed on them would be one year, id.§11-41-20(d). (B) Texas if two prior theft convictions were counted for each of them, Bray and Brown could have received up to 20 years in prison for a petty theft conviction under Texas Habitual Offender Law, Tax Penal Code Ann.§§31.03(e)(4)(D0, 12.42(a)(2) and(3),

12.33, but they would have been eligible for parole in five years, or even less with good time credits. Tex.Gov't code Ann.§508.145(F)—a distinctly less onerous sentence than the mandatory 25-year sentence they will have to serve in California. [**33] (c). West Virginia, West Virginia allows for a life sentence upon a third felony conviction W.Va.Code §61-11-18(c). West Virginia, however, provides by statute that offenders sentenced to life under the recidivist statute are eligible for parole in 15 years. Id. §62-12-13 Even if West Virginia would have allowed a life sentence for Bray or Brown, they would have been eligible for parole ten years earlier there than in California. Further while Andrade concluded that West Virginia does not allow life sentence for none violent recidivists, 270F.3dat765 West Virginia also precludes life sentence for some recidivists with violent prior felonies.

[**34][*1031] Under West Virginia constitutional proportionality law, the principal offense, not preceding felony convictions, is the central, albeit not exclusive focus, “since it provides the ultimate nexus to the sentence”. Wanstreet v. BordenKircher, 166w.va.5231.276S.E.2d205,212 (W.Va.1981)(holding that a life sentence for check forgery violated the State Constitution, even though one of the prior felonies was for arson); See also State v. Miller, 184w.va462,400S.E.2d897,898(W.Va.1990)(finding life sentence disproportionate for an assault conviction that involved a firearm, with prior felonies of breaking and entering, forgery, and false pretenses); State v. Lewis, 191w.va.635,447S.E.2d570,575(W.Va.1994)(holding that a provision of the criminal code requiring a sentence of one year in prison for a third shoplifting offense violated the State constitutional prohibition against cruel and unusual punishment). Using this approach, the West Virginia Supreme Court has, on at least one occasion, held a life sentence in violation of State proportionality standards when the offender had a violent prior offense. [**35] Stressing the remoteness in time of the violent offense. State v. Deal, 178w.va.142,358S.E.2d226,231(W.Va.1987)(finding a life sentence disproportionate for possession of a controlled substance where the record revealed a violent prior felony conviction 16 years earlier).

Three of Bray's violent felony convictions occurred 15 years earlier, while the other was eight years before. It is therefore possible that, focusing on the non-violent nature of his petty theft offense and acknowledging that his prior violent felony convictions were dated, Bray's sentence would have been considered excessive in West Virginia. Brown's prior violent felony convictions occurred 13, 19, and 24 years prior to his petty theft offense. His sentence might well have been considered excessive in West Virginia, based on the age of the violent offenses.

(d) Louisiana, finally, under Louisiana's habitual offender statute, at the time the last offenses in these cases were committed, Bray could not have received a comparable sentence, although Brown could have received a higher one.

I Bray

Before August 15, 1995, the Louisiana habitual offender statute required that [**36] both the third or fourth strike triggering life imprisonment and two of the prior felonies by a "crime of violence....a sex offense, or...a violation of the uniformed controlled substances law punishable by imprisonment for ten years or more or any other crime punishable by imprisonment for twelve years or more." See 1995 La.sess.Law.serv.1245§1 (west) (amending La.Rev.Stat.Ann.§14:67(b)(3), is not within any of these special categories of felonies, Bray could not have received such a sentence had he committed his offense in Louisiana at the time he committed his petty theft in California.

Footnotes. Bray committed his petty theft on March 28, 1994, and the court sentenced him on April 5, 1995.

Rather, the applicable Louisiana law when Bray committed his offense and received his sentence would have allowed him to be sentenced [**37] to a maximum of four years for his current offense: that offense could only have been charged as a third felony in Louisiana because Louisiana considers only offenses tried separately. [*1032] Bray was convicted of three of his four robberies in one trial, so he had – and has—at most three

strikes under Louisiana law. See Andrade, 270F.3dat764n.22,765 (citing State v. Butler 601so.2d.649,650 (La.1992); State v. Corry, 610so.2d142,147(La. Ct.App.1992)). The petty theft offense, with two prior theft offenses, could be treated as a second or third subsequent felony, in which case the maximum sentence for Bray would have been twice the two-year maximum for a first-time offender. La.Rev.Stat.Ann.§§14:67(BX3) 15:529.1(A)(1)(b)(i); See also Andrade, 270F.3dat764n.22. Mayle v. Brown, 2003usLexis1958(usmar.10.2003)(quoting if we focus particularly on the fact that Bray and Brown had violent prior convictions that conclusion does not change. Several Supreme Court cases decided before the California decisions in these cases stated that using sentencing enhancements as an “additional penalty for the earlier crimes” as opposed to a “stiffened penalty for the latest crime” could violate the Double Jeopardy clause Witt,515u.s.at400; see also Solem, 463u.s.at297n.21; Gryger334.u.s.at732Moore,159u.s.at677 ex parte Lange 85u.s.(18 wall) at 173. Thus, the principles that we apply in analyzing the California courts of appeal decisions [***57] have been clearly established by the united States Supreme Court. Second, if petty theft is committed after multiple prior convictions for non-theft offenses including serious and violent offenses, then the petty theft must be charged as a misdemeanor and cannot trigger three strikes enhancements. See §666 so for example [***5] if Bray’s or Brown’s prior convictions had all been for assault or manslaughter neither could have been sentenced to 25 years to life for his petty theft conviction; only a six-month misdemeanor sentence would have been possible. See §409,666. The Court recently held in Andrade v. Attorney General of the State of California, 270F-3d743(9th cir(2001) “that a (50) years-to life sentence for two petty theft convictions violated the Eighth Amendment’s prohibition against cruel and unusual punishment, also see State v. Rivers, 129wn.2d697,921P.2d495(1996). See State v. Rivers, 129wn.2d697,921P.2d495(1996)

Recidivist Statute

“There are two possible theories upon which a recidivist statute can maintain the relationship between the current crime and past conviction so as to avoid Double Jeopardy concerns about imposing a new punishment for past offenses: A harsher sentence for a new crime can be warranted either (1) because a defendant’s repeated

violations of the criminal law reveal his incapability of conforming to society's norms in general. The interest in recidivist statutes is in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply lawless, (2) because a defendant's current offense involves repetition of a particular offense characteristic, indicating that the defendant remains prone to that specific kind of antisocial activity. If neither of these theories serves to justify the sentencing enhancement for the principal offense, then it is heard to escape the conclusion that the enhancement is simply an additional punishment for the previous offenses, in violation of the Double Jeopardy Clause.

MR. MILES Criminal History:

- (1) Robbery First Degree 6-17-1984 #sentenced 12-20-1984#Violent
- (2) Third Degree Rape, Sentenced 1-26-1984#Non Violent
- (3) UPCWID 4-3-1991 #sentenced 5-29-1991 #Non-Violent
- (4) Bail Jumping 11-13-1990#sentenced 5-30-1991#Non-Violent
- (5) Comm Custody Violation #3-22-1995, Sentenced 5-22-1995 #Non-Violent
- (6) Unl. Poss. Fa 3-22-1995, #sentenced 5-22-1995 #Non-Violent

The United States Constitution is designed as much to prevent a criminal from being twice punished for the same offense as from being twice tried for it. It is for this reason that in upholding recidivist sentencing schemes, that the priors can be relevant only as they aggravate a defendant's culpability for the crime of conviction. If that connection between the prior conviction and present one is lost, then the Double Jeopardy clause concerns re-emerge. As you can see from MR. MILES criminal History, it does not show repetition of a particular offense which can be characteristic or indicating that MR. MILES remains prone to a specific kind of antisocial activity. The Eight Amendment of the United States Constitution may still be reviewed for constitution excessive State v. Dorthey, 623so.2d1276(La.1993); State v. Johnson, 97-1906(La. 3-4-98),709So.2d672 [**11] A court may only depart from the minimum sentence if it finds that there is clear and convincing evidence in the particular case before it which would rebut

this presumption of constitutionality. “State v. Johnson, 709so.2dat676; State v. Medious, 98-419(La.app.5(ir.11-25-98, 722so.2d1086,1093, writ denied 98.3201(La[**1274-23-99], 742so.2d876.

[Pg9] State v. Johnson further stated that:

To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that: [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the Legislature’s failure to assign sentences that are meaningfully tailored to the culpability of the offense, and the circumstances of the case. Young 94-1636atpp.5-6,663so.2d525at528.

For the reason stated above MR. MILES ask this court to find his conviction invalid and reverse it and remand him for a new trial.

Issue (8)

SUPREME COURT #Rule by 7-2 one 3-24-08

Excluding Black Jurors

Clear Error; Court Rules

MR. MILES assert that his jury selection had been tainted by racial bias, clearly discrimination went against MR. MILES in selecting juries, Vasquez v. Hillery, 474.U.S.254,106S.Ct617.88L.3d.2d598 (1986). See Tumey v. Ohio, 273U.S.510,535 (1927), Davis v. Georgia, 429U.S.122(1976), Sheppard v. Maxwell, 384U.S.333,351-352(1966)

During jury selection there was only one black woman in the whole jury pool. I asked my attorney, Edward J. Decosta, WSBA#21673, to pick the only black person from the jury pool. He said “there is no way you are going to get her”. I then asked, is there any way we could get a different jury pool with more black people; the answer no “no”.

Discrimination in juries selection is a violation of my constitution rights: discrimination on the basis of race in the selection of grand jurors strikes at the fundamental values of the judicial system and society as a whole, and the criminal defendant’s right to equal protection of the laws has been denied from which members of a racial group purposely have been excluded. Intentional discrimination in the selection of a jury is a grave constitutional trespass, possible only under color of State authority, and wholly within the power of the State to prevent. Thus, the remedy the court has embraced for over a century is not disproportionate to the evil that it seeks to deter. Federal law provides a criminal prohibition against discrimination in the selection of jurors 18U.S.C.S.§243

(V) Amendment – Trial and punishment, compensation for takings. Ratified 12-15-1791: No person shall be held to answer for capital, or other wire infamous crime, unless on a precedent or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia when in actual service in time of war or public danger; nor shall any person be subject, for the same offense to be twice put in jeopardy of life or

limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In 1880, this court reversed a State conviction on the ground that the indictment charging the offense has been issued by a grand jury from which blacks had been excluded. We reasoned that deliberate exclusion of black “is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others”. Strauder v. West Virginia, 100U.S.303,308(19\880). Thereafter, the court has repeatedly rejected all arguments that a conviction may stand despite racial discrimination in the selection of a jury. See, e.g. Neal v. Delaware, 103U.S.370,396(1881); Bush v. Kentucky, 107U.S.110(1883); Gibson v. Mississippi, 162U.S.565(1896); Carter v. Texas, 177U.S.442(1900); Rogers v. Alabama, 192U.S.226(1904); Pierr v. Louisiana, 306U.S.354(1993); Smith v. Texas, 311U.S.128(1940); Hill v. Texas, *Supra*; Cassell v. Texas, 339U.S.282(1950); Reece v. Georgia, 350U.S.85(1955); Eubanks v. Louisiana, 356U.S.584(1958); Arnold v. North Carolina, 376.773(1964); Alexander v.Louisiana, 405U.S.625(1972). Years ago, the Court explicitly addressed the question whether this unbroken line of case law should be reconsidered in favor of a harmless – error standard, and determined that it should not. Rose v. Mitchell, 443U.S.545(1979), the court reaffirmed the conviction that discrimination on the basis of race in the selection of a jury “strikes at the fundamental values of our judicial system and our society as a whole”, and that the criminal defendant’s right to equal protection of the laws has been denied when he is found guilty by a jury from which members of a racial group purposefully have been excluded. Nor are we persuaded that discrimination in the jury has no effect on the fairness of the Criminal Trials that result from the jury actions. The jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the jury lies the power to charge a greater offense or lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense all on the basis of the same facts. Just as a conviction is void under the equal protection clause if the prosecutor deliberately charged the defendant on

account of his race, see United States v. Batchelder, 442U.S.114,125,n9(1979), a conviction cannot be understood to cure the taint attributable to a charging body selected on the basis of race. Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted. The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal. In Vasquez, Warden v. Hillery, 474.U.S.254;106S.ct617;88Led2d598; 1986 U.S.

Lexis40;54U.S.L.W.4068 “the court nevertheless decides that discrimination in the selection of juries potentially harmed respondent, because the jury is vested with broad discretion in deciding whether to indict and in framing the charges, and because it is impossible whether this discretion would have been exercised differently by a properly selected of juries. The point appears to be that an all white jury from which blacks are systematically excluded might be influenced by race in determining whether or not a person is guilty, and for what charge since the State may not imprison respondent for a crime if one of it elements is his race, the argument goes, his conviction must be set aside. The opinion of the court in Mitchell ably presented other justifications, based on the necessity for vindicating fourteenth amendment rights, supporting a policy of automatic reversal in cases of juries discrimination. That analysis persuasively demonstrated that the justifications retain their validity in modern times, for “ 114 years after the close of the war between the states and nearly 100 years after Strauder, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole”. Since then, Mitchell have given us no reason to doubt the continuing truth of that observation. “Any departure from the doctrine of stare decisis demands special justification” Arizona v. Rumsey, 467U.S.203,212(1984); Garcia v. San Antonio Metropolitan Authority, 469U.S.528,559(1985). When constitutional errors call into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired. See Tumey v. Ohio,

273U.S..510,535(1927) (reversal required when judge has financial interest in conviction, despite lack of indication that bias influenced decisions). Similarly, when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained, See Davis v. Georgia, 429U.S.122(1976)(percuriam); Sheppard v. Maxwell, 384U.S.333,351-352(1966). Like these fundamental flaws, which never have been thought harmless, discrimination in juries undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review. A reviewing court should not pass on constitutional matters unless absolutely necessary to its determination of the case State v. Claborn, 95wn.2d629.623,628P.2d467(1981); Ohnstad v. Tacoma, 64wn.2d904,907,395P.2d97(1964). Because it is well established that constitutional errors may be so insignificant as to harmless. State v Guloy, 104wn.2d412,425,705P.2d1182(1985), cert denied 476U.S.1020(1986); Harrington v. California, 395U.S.250,251-52,23Led.2d284,89S.CT82424A.L.R.3d1065, reh'g denied, 386U.S.987(1967).

For the reason stated above MR. MILES ask this court to find his conviction invalid and reverse it and remand him for a new trial.

ISSUE (9)**EX-POST-FACTO**

United States of America, Plaintiff-Appeller v. Raymond Joseph Johns, United States Court of Appeals for the Ninth Circuit 5.3d1267 (1993).

The mere fact that the guidelines have changed will not cause their application to violate the ex-post facto clause. The ex-post facto clause forbids both the punishment for acts not punishable at the time the offense was committed and the imposition of an additional punishment beyond that permitted at the time of the offense. Violation of the ex-post facto clause occurs where there is retroactive application of a criminal law, and such application disadvantages the defendant is (1) retroactive application of a criminal law, and (2) such application disadvantages the defendant this is really a restatement of long standing law declared by the Supreme Court. In Beazell v. Ohio, 269U.S.167,46.SCT.6870Led216(1925), the Court said: it is settled, by decisions of this Court so well known that their citation may be dispensed with that any statute which punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed is prohibited [*1271] as ex-post facto. The Constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment after the fact, to the disadvantage of the accused. [**71] Id.at169-70, 46S.ct.at68-69. MR. MILES was sentenced under the old guidelines Parole Board 1983 and 1984. In 1983 MR. MILES was sentenced to (5) years probation for Third Degree Rape, a maximum of (5) years with a minimum of (1) year, which was a Class (C) felony, and in (1984) sentenced to (20) years for Robbery, the court erred by sentencing MR. MILES under the Persistent Offender Accountability Act (POAA) and violated his constitutional right and a violation of the ex-post facto law. By using the 1983 third degree rape, RCW9.79.190, which is a

class (C) felony which is not a strike, and the 1984 robbery conviction as a reason for making MR. MILES a Persistent Offender.

In order to prevail in an ex-post facto challenge, the petitioner must show with certainty that the sentence is harsher. The change in the law can not result in more speculation that the punishment is more severe.

The sole determination of whether a law is “disadvantageous” whether the law alters the standard of punishment which existed under prior law.

An increase in a sentencing range is not necessarily an ex-post facto violation the defendant must still establish the change altered his punishment in some way. In other words, the “Defendant” must show more punishment. MR. MILES cannot get a more HARSHER punishment than LIFE.

MR. MILES had showed by a preponderance of evidence that the constitutional error has caused him actual HARM. In re Personal Restraint of Powell, 117wn.2d175,184,814P.2d635(1991); In re Personal Restraint of Cook, 114wn.2d802792P.2d506(1990; In re Powell, 17wn.2dat188; State v. Ward, 123wn.2d488,297,869P.2d1062(1994). Also see Dobbert v. Florida, 432US282,294,97.S.ct2290,53Led2d344(1977); California Dept of Corrections v. Morales, 514US499,509,115.S.Ct.1597,131Led, 2d588(1995); Nulph v. Faatz, 27F.3d451,456(9th[*174]cir.1994); Johnson v. Gomez, 92.F.3d967(9th cir. 1996); Cert denied 117S.ct1884, 137L.Ed.2d1050,520U.S.1242(1997). As you can see, MR. MILES is able to meet this burden. George William Nulph, Petitioner-appellant, v. Very Faatz Chairman, Oregon State Board of Parole, Respondent-appellee,27F.3d451; 1994U.S.AppLexis 15461.

[*455] “A penal law which is applied retrospectively to the disadvantage of an offender is an unconstitutional ex-post facto law.US.const.,art I§9,cl.3;art.I§10,cl.1; See

Miller v. Florida, 482U.S.423,430,96Led.2d351,107Sct.2446(1987); Watson v. Estelle, 886F.2d1093,1094(9th cir 1989). Although the Supreme Court has held only that defendants must show retrospectively and detriment to make out an ex-port facto claim, we had added a third requirement that the challenged state action be a “law”. See Wallace v. Christensen802,F.2d1539,1553-54(9th cir 1989). However, as used in our ex-post facto jurisprudence, “laws” is a far broader term than “statutes”. The sentencing guidelines for example are generally considered “laws”, for purposes of the Ex-Post Facto clause. See United States v. Sweeten,933F.2d765,772(9th cir1991)(per curiam). Moreover, the ex-post facto clause applies to all retrospective laws which increase an offender’s actual punishment, regardless of whether the laws affect par [***11] of the offender’s sentence “in some technical sense”. Weaver v. Graham, 450U.S.24.33,67Led2d17.101.sct960(1981) United States Court of Appeals for the ninth circuit. “We have specifically held that the ex-post facto clause applies to retrospective changes in parole qualifications. See Chatman v. Marquez,754F.2d1531,1535(9th cir) cert denied 474US841,88Led.2d101,106sct124(1985).

“MOST SERIOUS OFFENSE”

as defines in RCW.9.94A.030 (29) and RCW.9.94A.030(33) and CRW 9.94a.570

The offense is a most serious offense or strike as defined by RCW.9.94A.030 “is” (1) rape in the first degree, rape of a child in the first degree, rape in the second degree, rape of a child in the second degree, indecent liberties by forcible compulsion, or child molestation in the first degree, or (ii) murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree, with a finding of sexual motivation, or (iii) any attempt to commit any of the offenses listed in this sentence and a person have at least one prior conviction for one of these listed offenses in this state, in federal court, or elsewhere the offenses for which a person charged carries a mandatory sentence of lie imprisonment without the possibility of

parole. Third degree rape is not on this list, See State v. Willis, 151wn.2d255,87P.3d1164(2004). MR. MILES can not be a PERSISTENT OFFENDERS, because the persistent offenders accountability (POAA) statute did not come into effect till (1993). MR. Miles prior conviction, third degree rape, RCW9.79.190(1983) and a (1994) robbery was committed under the old parole board guidelines (10) years before the Persistent Offenders Accountability ACT (POAA) was ever thought of.

The test the Court follows when analyzing whether a law violates the ex-post facto clause is well established and consists of three inquiries. The FIRST FACTOR considers whether the law in question is substantive or procedural. The SECOND FACTOR is whether the law was enacted after the criminal act took place. A law is retrospective if it changes the legal consequences of acts completed before its effective date. The THIRD FACTOR asks the Court to determine if the defendant is DISADVANTAGED. The sole determination of whether a law is “disadvantageous” is whether the law alters the standard of PUNISHMENT which existed under prior laws.

**CLEARLY MR.MILES HAD MET ALL
THREE (PRONGS)**

The United States Constitution and the Washington Constitution prohibit the enactment of ex-post facto laws. U. S. Const. Art I016710,cl.1²; const.artI§23³, the Supreme Court have repeatedly stated, the ex-post facto clause forbids Congress and the States from enacting laws which impose punishment for an act which was not punishable when committed, or which increases the quantum of punishment after the crime was committed, State v. Henning, 129wn.2d.512,524-25919P.2d580(1996). MR. MILES do claim that under the constitutional prohibitions of ex-post facto laws U.S. const.Art.I§10,cl2; const.art.I§23 forbid the State from enacting any law that impasses punishment for an act that was not punishment when committed or that increase the

quantum of punishment for the offense after the crime was committed (citing Calder v. Bull, 3U.S.3863Dall386,391,392,1Led648(1798) (opinion of Chase, J); Bezell v. Ohio, 269U.S.167,169-170,70Led216,46S.ct68(1925)). Legislature may not stiffen the “standard of punishment” applicable to crime that have already been committed, See Lindsey v. Washington, 301U.S.397,401,81Led1182,57Sct797(1937), Miller v. Florida, 482U.S.423,96Led.2d351,107.S.ct2446(1987), Weaver v. Graham,450U.S.24-67,L.ed.2d17,101Sct960(1981). The removal of discretion can indeed implicate the ex-post facto clause is further illustrated by reflecting on the undeniable fact that application of the guidelines to offenses already committed do constitute a violation of that clause. (F. Castro, 972F.2dat1112 amended guidelines cannot be applied to offense which have already been completed, United States v. Rewald, 845F.2d215,216(9th cir 1987)).

WASHED OUT CONVICTIONS

One of MR. MILES, prior conviction, the 1983 third degree rape, RCW9.79.190, the (2002) amendment to sentencing Reform Act RCW9.79.190 and 9.94A.030 clearly stated legislative intent to define “criminal history” in a new way to be applied prospectively. Under the (2002) amendment, offenders had no vested right in prior wash out provisions and they were subject to the criminal history statute in effect at the time of the offense, such that the washed out offenses applied to defendants could not be counted in calculating offender scores for offenses which occurred to before the effective date of the (2002) amendment to the SRA. In re Pers. Restraint of LaChapelle, 153wn.2d.1,100P.3d805(2004). The (1997) amendment of RCW9.94A.030 which ended the juvenile felony washout provisions, now allowing consideration of all juvenile convictions as part of persistent offender’s criminal history, was not retroactive, State v. Smith, 144wn.2d665,30P.3d1245(2001). Because prior conviction did not disappear, consideration of defendants’ prior convictions was not retroactive application of the (1997) amendment. State v. Swecker, 154wn.2d660,115P.3d297(2005)

To give a meaningful interpretation to sentencing Reform Act of 1981 as a whole, Wash. Rev. Code §9.94A.525(4) must supersede the general definition of violent offense.

MR. MILES (1983) third degree rape RCW9.79.190, which is a class (C) felony is being treated as a most serious offense, the trial court erred in sentencing MR. MILES as a persistent offender based upon his (1983) third degree rape conviction of the three strikes provision of the (POAA), in effect at the time MR. MILES was charged specifically listed predicate offenses. Former RCW9.94A.030 (33)(b)(i)(ii)(1983) third degree rape was not included. (33) "Persistent Offender" is an offender who:

(a)(i) has been convicted in this State of any felony considered a most serious offense; and (ii) has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions whether in this state or elsewhere, or felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted; or (b)(i) has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection (33)(b)(i). For purposes of sentencing an offender to life imprisonment as a persistent offender, the only offenses that count as "strikes" under form RCW9.94A.030(33)(b)(i)(ii) are those that are specifically listed in the Statute. The statute does not allow for any other offenses to be counted as "strikes" even if they are factually comparable to a specifically listed offense. MR. MILES persistent offender notice is charging him under

RCW9.94A.030(28), RCW9.94A.030(32), and RCW9.94A.570. See a copy of persistent offender notice #CAUS No#07-1-05900-0. MR. MILES was sentenced to (5) years probation for his (1983) third degree rape charge, trial court revoked MR. MILES probation in (1984), and the Parole Board gave MR. MILES a fixing minimum term of (one) year. A fixing minimum term could not count as a prior conviction under the Persistent Offender Act (POAA), an intervening conviction which was prior to the revocation but subsequent to the original offense, State v. Whitaker, 112wn.2d341,771P.2d.332(1989). The enactment of ex-post facto laws is prohibited by the federal and state constitutions. U.S.Const.Art.I,§10,cl.1 (“no state shall...pass any...ex-post facto law”); Const. Art. I,§23 (“no..ex-post facto law...shall ever be passed...”). The ex-post facto clauses prohibit the Legislature from enacting laws that alter the definition of criminal conduct or increase the punishment for a crime, Lynce v. Mathis,519U.S.433,441,117S.ct891,137Led.2d63(199?); In re Personal Restraint of Stanphill,134wn.2d.165,169,949P.2d365 (1988). “To fall within the ex-post facto prohibition, a law must be retrospective – that is it must apply to events occurring before its enactment...Lynce,519U.S.at441(quotng Weaver v. Graham, 450U.S.24,101sct.960,67L.ed.2d17(1981). Categories of ex-post facto laws are recognized: “(1) every law that makes an action done before the passing of law, and which was innocent when done, criminal; and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was, when committed; (3) every law that changes the punishment, and inflicts a greater punishment, that the law annexed to the crime, when committed; (4) every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender”, Lynce v. Mathis, 519U.S.433,441n.13.117Sct.891,137L.Ed.2d63(1997)(quotng Calder v. Bull, 3U.S.93 Dall.)386,390,1L.ed.648,3Dall.386(1798)).

FACTS:

On Jan. 24 (1984) MR. MILES plead guilty to the charge third degree rape, a class (C) felony and was sentenced to (five) years probation.

Giving MR. MILES a life sentence for a crime which MR. MILES did not receive when the crime was committed, the penalty violates the ex-post facto In re Powell. The court stated "the sole determination of whether a law is DISADVANTAGEOUS is whether the law alters the standard of punishment which existed under prior law". In re Powell, 117wn.2dat188, State v. Ward, 123wn.2d488,497,869P.2d1062 (1994). Because of the use of the (1983) charge of third degree rape, MR. MILES was sentenced to life as a persistent offender. Therefore, MR. MILES have demonstrated an increase in punishment, Johnson v. Gomez, 92F.3d964,969(9th cir. 1996) cert denied 117s.ct.1848,137L.3d.2d1050,520U.S>1242(1997).

House Bill SSB6184, Passed March 4, 2008

Summary of Bill:

The following type of offense is added to the list of most serious offense: any out-of-state conviction for a felony offense with a finding of sexual motivation if the minimum sentence imposed was 10 years or more. The out-of-state felony must be comparable to a felony offense in Title 9 or Title 9A RCW and the out-of-state definition of sexual motivation must be comparable to Washington's definition of sexual motivation. House Bill report passed on March 4, 2008 enacted a number of statutes, which will come into effect July 1, 2008.

MR. MILES was sentenced on March 14, 2008 (90) days before the enacted date; See State v. Aho, 137wn.2d736;975P.2d.512,1999wash.Lexis20.

And for the reason stated above, MR.MILES asks this court to find his conviction invalid and reverse it and remand him for a new trial.

Date this 27 day of October, 2008
Respectfully Submitted
Signed of Trammaine G. Miles
LU

Exhibit (1)

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

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-05900-0

vs.

TRAMAINE GREGORY MILES,

PERSISTENT OFFENDER NOTICE
(THIRD CONVICTION)

Defendant.

YOU, the above named defendant, TRAMAINE GREGORY MILES, are hereby given NOTICE that the offense of ROBBERY IN THE FIRST DEGREE, with which you have been charged, is a "**Most Serious Offense**" as defined in RCW 9.94A.030(28). If you are convicted at trial or plead guilty to this charge or any other most serious offense, and you have been convicted on two previous occasions of other "most serious offenses," you will be classified at sentencing as a "**Persistent Offender**," as defined in RCW 9.94A.030(32) and your sentence will be life without the possibility of parole as provided in RCW 9.94A.570.

DATED this 2nd day of January, 2008.

GERALD A. HORNE
Pierce County Prosecuting Attorney

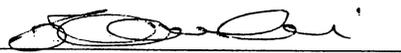
By: 
PATRICK H. OISHI
Deputy Prosecuting Attorney
WSB # 26045



Exhibit (2)

From: Patrick Oishi
To: Ed DeCosta
Date: 12/13/2007 3:55:35 PM
Subject: Tramaine Miles

Ed,

- 1) Your client is facing 84 months on his Escape 1 and UPS sentencings. It is my understanding that Bill Horney wants to sentence your client ASAP.
- 2) Your client's offender score on the Robbery case is 13.
- 3) Standard range sentence on Robbery 1 (w/ DWSE) is 129-171 + 24 mos flat-time.
- 4) Two of your client's priors: 1980 Attempted Robbery 2 and 1984 Robbery 1. Clearly the Robbery 1 (Pierce County) qualifies as a strike. I will be looking into the 1980 Attempted Robbery 2 from New York. If that conviction had come out of Washington it would also be a strike and your client would be facing life in prison without parole as a 3rd Striker / Persistent Offender. If based on my research the 1980 case is a strike offense, I will be filing a Persistent Offender notice in this case.
- 5) My pretrial offer for your client was to plead guilty to Robbery 1 (w/DWSE) and Attempt to Elude. The proposed agreed rec would be for 171 mos + 24 mos flat-time on the DWSE. I would agree to run that sentence concurrent to the 84 mos for the Escape & UPCS cases.
- 6) Your client could be facing 279 mos if he received consecutive sentences on his cases.
- 7) Worst case scenario, your client could be facing life in prison without the possibility of release if he is convicted as a Persistent Offender.

Your client is set to be sentenced on the Escape & UPCS cases on 1/11/08. If your client would like to accept my pretrial offer, he must plead and sentence on the Robbery 1 case prior to the 1/11/08 sentencing date.

Thanks,

Pat Oishi

CC: Bill Hurney

Lakewood Police Department Arrest Report	Incident No. 073280744.1	Page 3 of 30
---	---------------------------------	--------------

Exhibit (3)

Aliases:									
DOB:	1/16/1961	Age:	46	Sex:	Male	Race:	Black	Ethnicity:	Non-Hispanic
Height:	5' 11"	Weight:	210	Hair Color:	Black	Eye Color:		Brown	
Address:	5904 N 15 St #A102			County:			Phone:	253 759-2039	
City, State Zip:	Tacoma, WA 98406			Country:			Business Phone:		
Other Address:			Occupation/Grade:		UNEMPLOYED		Employer/School:		
Resident:	Nonresident		DOC No:		299340		FBI No:		
SSN:	416-04-1770		Local CH No:						
State ID:	WA12457053		Driver License State:		Washington		Driver License Country:		United States of America
Driver License No:	MILESTG399BW		Glasses:				Facial Hair:		
Hair Length:	Short		Teeth:				Facial Shape:		
Hair Style:			Speech:				Complexion:		
Hair Type:			Right/ Left Handed:				Facial Feature Oddities:		
Appearance:			Distinctive Features:				Body Build:		HVY - Heavy
SMT:			Tribe Affiliation:				Identifiers:		
Attire:	BLACK JACKET, WHITE TANK TOP SHIRT, BLUE JEANS, WHITE SHOES								
Gangs:			Modus Operandi:						
Significant Trademarks:			Custody Status:						
Suspect Pretended to Be:			Place Of Birth:						
Habitual Offender:			Date/Time Arrested:		11/24/2007 16:21:00		Booked Location:		Pierce County Jail Tacoma, WA
Booked Location:			Released Location:				Held For:		
Arrest Location:	5200 Blk 108 St Ct Sw Lakewood, WA		Arrest Offense:		1202 - Robbery - Business - Weapon 5450 - Traffic - Pursuit - Eluding		Date/Time Released:		
Arrest Type:	On-view Booked - New Probable Cause		Armed With:		Unarmed		Juvenile Disposition:		
Miranda Read:	Yes		Miranda Waived:		Yes		Adult Present Name:		
No. Warrants:	3		Mult. Clearance:		Not Applicable		Detention Name:		
Fingerprints:			Photos:		No		Notified Name:		
Type of Injury:			Previous Offender:				Fire Dept Response:		
Hospital Taken To:			Medical Release Obtained:				Taken By:		
Attending Physician:			Hold Placed By:						

New Charges

Arrest #	Book/Cite	Charge Description - RCW/Ordinance	Free Text Charge Description	Court	Bail	Count
00000	Book	F - - Robbery 1st - RCW - 9A.56.200		Pierce County Superior Court	50000	1
00000	Book	F - - Felony Eluding - - 46.61.024		Pierce County Superior Court		1
00000	Book	M - TACSO - Driving While License Is Suspended Or Revoked/DWLS - RCW - 46.20.342		Pierce County Superior Court	500	1

Warrants

Arrest #	Warrant #	Free Text Charge Description	Agency	Court	Bail
00000	299340	ESCAPE COMMUNITY CUSTODY	DOC OLYMPIA	SUPERIOR	NONE

I swear under the Penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 27 day of October, 2008

FILED
COURT OF APPEALS
DIVISION II
08 OCT 31 PM 12:40
STATE OF WASHINGTON
DEPUTY

Respectfully submitted

Signed of Lorraine G. Miso