

JUL - 8 2015
E CRF
Ronald R. Carpenter
Clerk

SUPREME COURT or COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON) COA No. 31540-1-III
Respondent,) Supreme Court No. 91636-5
)
vs.)
)
JOSEPH D. BYRD)
Defendant/Petitioner.)

PETITION FOR REVIEW BY THE WASHINGTON STATE SUPREME COURT

BRIEF OF PETITIONER

JOSEPH DEAN BYRD Appellant/Petitioner

JOSEPH DEAN BYRD #862480 Camus Unit
Coyote Ridge correction center (MSU)
1301 N. Ephrata Ave. P.O Box 769
Connell Washington 99326-0769

0/9

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

- ✓ State v. Adel, 136 Wash.2d, 529, 634965, P.2d, 1072(1978)
- ✓ State v. Adel, 136, Wn.2d, 607, 610, 40, P.3d, 669(2002)
- ✓ State v. Freeman, 153, Wn.2d, 765, 770, 108, P.3d, 273(2005)
- ✓ State v. Fletcher, 113, Wash.2d, 47, 776, P.2d, 114(1989)
- State v. Gram, 153, Wash.2d, 400, 405, 103, P.3d, 1238(2005)
- State v. Herschfelder, 242, P.3d, 876, 170, Wn.2d, 451, 219, P.3d, 686(2009)
- State v. Jacobs, 154, Wn.2d, 596, 115, P.3d, 281(2005)
- State v. Much, 171, Wn.2d, 646, 664, 254, P.3d, 803(2011)
- State v. Nolte, 116, Wn.2d, 831, 842-43, 809, P.2d 1990(1991)
- In re Pers. Restraint of Orange, 152, Wash.2d, 795, 815, 100, P.3d 291(2004)
- State v. Turner, 169, Wn.2d, 448, 454, 238, P.3d.461(2010)
- City of Seattle v. Winebrenner, 167, Wn.2d, 451, 219, P.3d, 686(2009)

Washington State Court of Appeals

- State v. Borshiem, 140, Wn.App., 357, 365, 165, P.3d, 417(2007)
- State v. Clark, 170, Wn.App., 166, 283, P.3d, 1116(2012)
- State v. Evans, 164, Wn.App., 629, 265, P.3d, 179(2011)

United States Supreme Court Decisions

- Brown v. Ohio, 432, U.S, 161, 165, 97, S.Ct., 2221, 53, L.Ed.2d, 187(1977)
- Francis v. Franklin, 471, U.S(1985)
- Strictland v. Washington, 446, U.S, 668, 687, 104, S.Ct., 2052, 80, Ed.2d, 674(1984)

Federal Court Decisions

- Colman v. Butler, 816, F.2d, 1046, 1048(5th Cir.1987)

United States Constitution

Fourth Amendment.....IV
Fifth Amendment.....x2
Sixth Amendment.....
Fourteenth Amendment.....

Washington State Constitutions

Article I§9
Article I§3
Article I§22

Statutes

RCW 9.56.050.....

ASSIGNMENTS OF ERROR

- I. Double Jeopardy arising from same criminal conduct.....
- II. Defense Attorney failed to provide a lesser included instruction to the jury.
- III. Prosecution failed to prove the elements of intent for the Robbery conviction.
- 4. The Court of Appeals misunderstands the Defendant/Petitioner's argument that being convicted for two convictions, arising from one incident, constitutes double jeopardy.
- 5. Division III Court of Appeals, misunderstands, the Petitioner/Defendants argument, that his 3rd degree theft, was not dismissed but in fact was "merged" after his conviction, to avoid the double jeopardy violation.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- I. The Defendant was violated with double jeopardy, when he was convicted of two crimes arising from the same incident.
- II. The Defendant/Petitioner, was violated of his due process protection, when his attorney failed to provide the jury with a lesser included instruction to convict.
- III. The Defendant/Petitioner's trial attorney was ineffective, when she failed to provide the Court with documentation supporting the risk of double jeopardy.
- 4. The Defendant's trial attorney, failed to provide the court with the authority that supports the merger doctrine, and the double jeopardy risk from the courts merger.

STATEMENT OF THE CASE

The Defendant/Petitioner, Joseph D. Byrd, was arrested and charged with Theft in the Third Degree, Assault in the Second Degree, and Robbery in the Second Degree, in the County of Grant Washington. The Defendant/Petitioner, took his charges to trial by jury, and was found guilty for Theft in the Third Degree, and Robbery in the Second Degree, He was found not guilty for the Assault in the Second Degree. The Defendant/Petitioner, appeals his conviction, to the Division III Court of Appeals. The Defendant/Petitioner, contacts his Appeal attorney, and informs him of issues he would like to be addressed. His attorney replies to his letter stating that he would not address those issues in his brief/argument. The Defendant/Petitioner, replies to his Appeal Attorney with a letter, informing him that he wishes for his attorney, to withdraw from further representing him, due to his ineffective assistance. His Appeal attorney, withdraws from further representing the Defendant/Petitioner, after he submits his argument for terminating the Defendants, court costs in his Appeal brief. The Defendant/Petitioner, files with the Division III Court of Appeals, a Motion For Extension of time, to allow the Defendant to file a Motion for a Supplemental Brief, to address the issues that his Attorney, would not address. The Defendant submits his Supplemental Brief, The Division III Court of Appeals, files their opinion, with the Defendants Termination of Court costs that his Attorney had filed with the Court, but failed to address the Defendant/Petitioner's Supplemental Statement of Additional Grounds. The Defendant/ Petitioner, files a Motion for Reconsideration, and contests that the Division III Court of Appeals, address his pro se issues, and give a finding for each of those issues, since it was his Constitutional right to have them addressed, and to be preserved for further argument in the higher Courts. The Division III Court of Appeals observes the error made by them, and agrees that the issues must be addressed, therefore the Division III Court of Appeals, withdraws their opinion, and re- submits a new opinion, addressing his pro se issues.

ARGUMENT

1. Mr Byrd. was charged and convicted for crimes that constitute the same course of conduct.

- a. The Court may not enter multiple convictions for the same criminal conduct.....3
- b. The Court failed to instruct the jury that their verdicts for seperate charges needed to be based on seperate acts...3
- c. The redundant convictions must be vacated.....3

2. The Defense Attorney failed to provide a lesser to convict instruction to the jury, failing to protect Mr. Byrd from double jeopardy and effective assistance of counsel.....4,5,6

- a. A party is entitled to a lesser included offense instruction when each element of the lesser element is a necessary element of the greater offense charged.....4
- b. The rule authorizing juries to to find the defendant guilty of any lesser crime that the evidence supports is procedural safeguard.....4
- c. The Defendants attorney was aware of the the double jeopardy violation, but does not provide any defense to the argument...5
- d. The Defendants attorney had previous knowledge of a case that provided protection from double jeopardy, and a lesser to convict charge.....5,6

3. The State failed to prove the element of intent for Robbery, which is an essential element of the crime.....6

- a. It was abuse of discretion of the Court, and prosecution misconduct, when the State was allowed to charge and convict the Defendant with Robbery, without establishing or proving the element of intent. A person will not presume to act with criminal intention, but the trier of fact, the jury, may find criminal intention upon consideration of the motive or other circumstances.....6

I. INTRODUCTION

On January 18, 2013, the Defendant/Petitioner, Joseph Dean Byrd, entered a Wallmart store, with the intention of purchasing a cell phone. The Defendant/Petitioner, decides against paying for the cell phone(s), and embarks on shoplifting the items. During the commission of the shoplifting, the security camera employee, observes the Defendant/Petitioner Mr. Byrd, behaving in a suspicious manner, and contacts the floor security, to investigate the suspicious individual. The "plain clothed" security officer, locates the suspicious individual (Mr. Byrd), heading towards the store exit. The plain clothed security officer, rushes the Defendant/Petitioner Mr. Byrd, in an attempt to apprehend him. The Defendant/Petitioner Mr. Byrd, dodges the plain clothed individual, in an attempted to flee the store. The plain clothed security officer, identifies himself as being the store security, and identifies that Mr. Byrd, had unlawfully took the two cell phones. Mr. Byrd backs up, then attempts to run past the officer. The officer grabs Mr. Byrd, and throws him to the ground, there is a struggle, the Defendant gets free, and runs out the store. The police arrest Mr. Byrd moments later. The Defendant/Petitioner Mr. Byrd, was booked into county jail for, Third Degree Theft, Assault in the Second Degree, and Robbery in the Second Degree. The Defendant/Petitioner, takes his charges to trial, with a plea of not guilty. He was found guilty for the crimes of Theft in the Third Degree, and Second Degree Robbery, He was found not guilty by the jury fore Assault in the Second Degree. The Defendant/Petitioner, Mr. Byrd, receives 365 days for Theft in the Third Degree, and 50 months for the Robbery in the Second Degree. The Defendant/Petitioner, files for direct appeal, to the Division III Court of Appeals.

The Court of Appeals addressed the Defendant/Petitioners, Appeal Attorneys LFO argument, but fails to address the Defendant/Petitioners pro se Statement of Additional Grounds for Review. The Defendant/Petitioner files with the Division III Court of Appeals, a Motion for Rconsideration, based on the Courts failure to address his pro se Statement of Additional Grounds. The Court agrees with the reconsideration, and withdraws their opinion, and re-enters a new opinion, responding to the Defendant /Petitioners pro se issues for review. The Division III Court of Appeals affirms the Defendant/Petitioner's convictions. The Defendant/Petitioner, files another Motion for Reconsideration, tha was denied by the Court. The Defendant/Petitioner files his Petition for Review with the Washington State Supreme Court.

II. ASSIGNMENTS OF ERROR

- (1) Double Jeopardy arising from same criminal conduct, constituting one singular crime.
- (2) Defense Attorney, failed to provide a lesser included to convict instruction to the jury.
- (3) Prosecution Failed to prove elements of intent for the Robbery conviction.
- (4) The Court of Appeals, misunderstands the Defendant/Petitioner argument , that being convicted for two charges constituting one singular crime, constitutes Double Jeopardy.
- (5) The Court of Appeals, misunderstands, the Defendant/Petitioner's argument, that his Theft in the Third Degree, was not dismissed, but was "merged", into his Robbery conviction, after his conviction, and thus did not alleviate the burden of Double Jeopardy Violation.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) The Defendant/Petitioner, was violated with Double Jeopardy, when he was convicted of two crimes arising from the same incident. The Defendant/Petitioner, argues, that he was prejudiced for receiving multiple punishments, for Theft in the Third Degree, and Robbery in the Second Degree, both occurring from the same incident. The Defendant/Petitioner, also argues, that due to the multiple charges that the prosecution convicted him with, these charges, were tried in a single proceeding, this was a violation of his constitutional protection, from excessive punishment. Brown v. Ohio, 432 U.S 161,165,97 S.Ct. 2221,53 L.Ed.2d 187(1977);State v. Turner, 169 Wn.2d 448,454,238 P.3d 461 (2010);U.S Const. amend 5;Const. art I§9 "It is only in the rare instance that flawed jury instruction permitting jury to convict an accused for multiple counts based on the same act do not violate Double Jeopardy". State v. Much, 171 Wn.2d 646,664,254 P.3d 803(2011) If it is not "manifestly apparent to the jury", that its verdicts for separate charges needed to be based on separate acts, then the "potentially redundant convictions", must be vacated. It violates jury unanimity, when the Defendant is accused of several counts of the same offense, but the jurors were not expressly instructed that each conviction must rest on "separate and distinct act or events". State v. Nolte, 116 Wn.2d 831,842-43,809 P.2d 1990(1991);State v. Borshiem, 140 Wn.App. 357,365,165 P.3d 417 (2007) While the State may charge, and the jury may consider multiple charges arising from the same criminal conduct in a single proceeding, the Court may not enter multiple convictions for the same criminal conduct. State v. Freeman, 153 Wn.2d 765, 770,108 P.3d 273(2005) When an accused person's conduct constitutes a single unit of prosecution, the prosecution, may not divide that count into multiple charges, for which it seeks separate punishment.State v. Adel, 136 Wn.2d 607,610 40 p.3d 669(2002)

(2)

Defense Attorney, failed to provide a lesser included to convict
The Defendants Defense Attorney, failed to provide a lesser
included to convict instruction, and left the jury to convict
the Defendant/Petitioner, to be convicted for the same crime
twice. Without the Defense Attorney's instruction to convict
for a lesser included charge, the Defendant/Petitioner, was
prejudiced with Double Jeopardy, and was convicted for two crimes
that constituted the same incident. State v. Workman, Wash.2d
443,447-48,584 P.2d(1978) Under the "Workman Test", a party
is entitled to a lesser included offense instruction where (1)
each element of the lesser offense is a necessary element of
the greater offense charged (the legal prong), and (2) the
evidence in the case supports an inference that the Defendant
committed only a lesser crime. The rule authorizing juries
to find the Defendant's guilty of any lesser crime that the
evidence supports, is a procedural safeguard, that reduces the
risk of error, in the factfinding process, and that can also
be beneficial to the Defendant, because it affords the jury
a less drastic alternative than the choice between conviction
of the offense, and acquittal.

In the Defendant/Petitioner's, argument, he states that he
was not afforded the effective assistance of counsel, when his
defense attorney failed to instruct the jury with a lesser
included to convict instruction. U.S Const. Amend IV, Wash.
Const. Art.I§22, The Federal and State Constitutions, guarantee
a criminal Defendant the right to effective assistance of counsel
Strickland v. Washington, 466 U.S 668,687,104 S.Ct. 2052,80
Ed.2d 674(1984) "To prove deficient performance fell below an
objective standard of reasonableness. A Defendant claiming
ineffective assistance of counsel, must show that counsel's
performance and resulted in prejudice.

During the Defendant/Petitioner's Superior Court for Grant County
The Defendant's attorney informs the court that theft is an
essential element of robbery, and a conviction on both implicate
double jeopardy (see ~~Attachment~~ ^{Appendix} H page 10 lines 15-17)
The Defense attorney also states on the record that she is aware
of the "merger doctrine", and that it does not overrule double
jeopardy. (see ~~Attachment~~ ^{Appendix} H page 10 lines 18-19). The Defense
Attorney also states that she believes that the Defendant Mr.
Byrd cannot stand convicted of both offenses, the Theft in the
Third Degree, and the Robbery in the Second Degree, and that
running the charges concurrent does not solve the problem under
double jeopardy. (see ~~Attachment~~ ^{Appendix} H pg. 10 lines 18-23). The
Defendant/Petitioner's attorney was aware of this violation,
but failed to protect the Defendant of being convicted twice
for the same crime. The Defendant/Petitioner's attorney also
states on the record that a merger in this case is a double
jeopardy, and that she did not bring any argument of evidence
to support her argument with her. (see ~~Attachment~~ ^{Appendix} H pg.13 lines
22-25. The Defense also states on the record that she had
researched the risk of double jeopardy, but informs the court
that she did not make a brief or copies for the court or counsel,
(see Attachment pg.14 lines 20-25). The Defense attorney
continues to inform the Court that she found a 1901 case that
says Larceny is a lesser included within robbery. (see ~~Attachment~~ ^{Appendix}
H pg.15 lines 23-24.

This evidence supports that the Defendant's attorney had
knowledge of a lesser included charge that the jury should have
had the choice to decide, during trial. Also the Defendant's
defense attorney knew that there was a double jeopardy violation,
for the Defendant being convicted for two crimes that constituted
the same incident.

This was a crime where the Defendant/Petitioner, was charged with Robbery, and also he was charged with Third Degree Theft, and Second Degree Assault. The Theft and Assault charge, are essential elements that constitute Robbery. The Defendant/Petitioner, was charged with Robbery, and the two elements that constitute the Robbery. Without both elements of Theft and Assault, there is no Robbery. The jury found the Defendant not guilty of the Assault, therefore eliminating the threat needed for the Robbery. Due to the Defendants Attorney, failing to provide an adequate defense as to the double jeopardy, arising from the two convictions, for Theft and Robbery, and the Defense Counsels failure to instruct the jury of the lesser to convict instruction to the jury for Larceny, as she stated on the record. This fell below the standard or reasonableness towards the Defendant's effective assistance of Counsel.

(3) The Prosecution failed to prove the element of intent for the charge of Robbery. The Defendant/Petitioner argues, that it was abuse of discretion of the Court, and prosecution misconduct, for the State to be allowed to charge, and convict the Defendant/Petitioner, with Robbery, without proving the essential element of intent to the jury. Francis v. Franklin 471 U.S (1985) A person will not presume to act with criminal intention, but the trier of fact, that is the jury, may find criminal intention upon consideration of the words, conduct demeanor, motive and all other circumstances, connected with the act for which the accused is prosecuted. Colman v. Butler, 816 F.2d 1046,1048 (5th Cir. 1987) Due process prohibited presumption in jury charge that relieved State burden of persuasion on essential elements of charged offense.

The Defendant/Petitioner, was charged, and convicted, without the Federal Constitutional protection, afforded to every criminal Defendant, against conviction, except by proof beyond a reasonable doubt of every fact necessary to constitute a crime with which the Defendant is charged. In the Case of The Defendant/Petitioner, Mr. Byrd, he was charged and convicted for three charges, Theft in the Third Degree, Assault in the Second Degree, and Robbery in the Second Degree. The jury found the Defendant not guilty of the Assault in the second degree. Had the Prosecution proved the element of intent, and told the jury about the two elements that constituted Robbery, which is Theft, and Assault, the jury would have found the Defendant not guilty of the Robbery, based on their finding of not guilty for the assault in the second degree. This was a violation of his Constitutional protection for excessive punishment, and his Constitutional right to due process of the law.

(4) In the Division III Court of Appeals opinion, they claim that the Defendant/Petitioner, Mr. Byrd, misunderstands his sentence, as to his argument for improperly receiving "multiple punishments", for Theft and Robbery. (see ~~Attachment~~ ^{APPENDIX} E COA opinion pg.6). The prosecution argues that the trial Court, had dismissed the Third Degree Theft, at sentencing. This is an incorrect statement from the prosecution.

The Defendant/Petitioner, was in fact charged, and convicted of Third Degree Theft, and Robbery in the Second Degree. The Court "merged the two convictions during sentencing. (see ~~Attachment~~ ^{APPENDIX} A J&S). Here you can see that the court "merges the two charges", to remedy the double jeopardy violation (see ~~Attachment~~ ^{APPENDIX} B pg. 5 lines 15-23) The Court addresses this issue, asking if the State has a response to the merger argument. (see ~~Attachment~~ ^{APPENDIX} H pg.12 lines 17-22)

The State asserts that he believes that the elements of the two charges are sufficiently different, and states on the record that he has not given the double jeopardy violation much thought. This shows that the State never sought out instruction to separate the two charges of Theft and Robbery, and left the jury to figure out what Mr. Byrd was guilty of, if he took merchandise from the store, which constitutes Theft, then he must have robbed the store, because he is ultimately charged with the crime. Because of the States lack of "serious thought", and failure to separate the charges, and attach elements of intent on each instruction to the jury, the Defendant/Petitioner, was charged twice for the same incident, which violates his Constitutional right to be protected from excessive punishment. The State also claims that the Theft and Robbery, are fundamentally the same (see ~~Attachment~~ ^{APPENDIX} H pg.13 lines 16-19) The Court asks the Prosecution "are what?", and the Prosecution says "nevermind, I'll retract my assertion" (see Attachment pg. 13 lines 20-21).

The Prosecution, clearly understands that the Theft in Third Degree, and the Robbery in the Second Degree, are fundamentally the same charge. Therefore the Defendant/Petitioner, Mr. Byrd properly argues his double jeopardy violation, in his Statement of Additional Grounds (see ~~Appendix~~ ^{Appendix} B and in his Supplemental Statement of Additional Grounds (see ~~Appendix~~ ^{Appendix} B)

(5) The Division III Court of Appeals opinion, finds that the Defendant/Petitioner, Mr. Byrd, fails to identify the crime that he believes should have been included in the lesser included instruction to the jury. (see ~~Appendix~~ ^{Appendix} E COA opinion). The Court of Appeals opinion, states that the trial court properly instructed the jury on elements of Third Degree Theft, and state that was a sufficient instruction, for a lesser included to convict instruction for Second degree Robbery. Coleman v. Butler, 816 F.2d 1046,1048 (5th Cir. 1987) "Due process prohibited presumption in jury charge that relieved State burden of persuasion on essential elements of charged crime". The trial Court failed to properly instruct the jury on a lesser to convict instruction of Theft in the Third Degree, but instead left that for the jury to figure out on their own accord. This left the Defendant/Petitioner, at the mercy of the misinformed jury. Had the jury been instructed of the lesser to convict instruction and based on the juries finding of not guilty on Assault in the Second Degree (an essential element) of Robbery, the jury would have found the Defendant not guilty of Robbery. If the jury would have had this instruction, the Defendant/Petitioner, would not have been violated by double jeopardy, that in which is the case here.

CONCLUSION

Based upon the argument herein, and by the laws of the land, the Defendant/Petitioner, respectfully asks this Court to grant the Defendant, a new trial. This is the only remedy, for the Double Jeopardy violation, the trial Court's failure to instruct the jury on a lesser to convict instruction, the prosecutions failure to prove the element of intent for Robbery, and the trial Courts error to merge Theft in the Third Degree, and Robbery in the Second degree, as a remedy for the double jeopardy violation to Mr. Byrd.

Respectfully Submitted this 1 day of July, 2015.

Joseph Dean BYRD
Joseph Dean Byrd, prose
Petitioner/Defendant

Joseph D. Byrd #862480
Coyote Ridge Correction Center
Comas C-B 5 L
P.O. Box 769
Connell, WA 99326

The Division III Court of Appeals, affirms the Trial Courts Decision. The Defendant/ Petitioner, files a Motion for Reconsideration to the Division III Court of Appeals. The Division III Court of Appeals denies the Motion for Reconsideration. The Defendant/Petitioner, files with the Washington State Supre Court a Petition for Review.

COURT OF APPEALS DECISION

The Division III Court of Appeals, addresses his issue on Double Jeopardy (See COA opinion dated 3/5/2015 pg.5-6

The Petitioner, argues that he was violated by double jeopardy, based upon the fact that he was charged and convicted for Theft, and Robbery, that constituted the same crime. There are two elements that constitute Robbery #1 Taking property unlawfully #2 Using threat or violence to obtain property. Mr. Byrd was charged with 3 counts, one count of Theft in the Third Degree, one count of Assault in the second degree, and one count of Robbery in the second degree. It is well in the means of the State to charge the Defendant with every element that constitutes the crime, for plea offer puposes. And even though the State may charge every element of the crime, the State is not permitted to convict the Defendant on all the elements.

This is exactly the Case with the Petitioner, and it constitutes a double jeopardy violation. Here the State charged the Defendant with 3 Counts, all in which all constitute the same crime and scheme. The Robbery, and the two elements that constitute the Robbery, which is Assault and Theft. The Defendant was found not guilty by the jury for Assault in the Second Degree, which eliminates one of the two elements that constitute a robbery. The Assault is the greater offense of the two. The jury did find the Defendant guilty of the Theft, and Robbery, which is not constitutional, since the jury found the Defendant, not guilty of the Assault. It was abuse of discretion of the Court and prosecutorial misconduct, to allow the Defendant to be charged and convicted, of a charge of robbery, and the elements that embody the Robbery. It is clear by the juries finding of not guilty for Assault in the Second degree, that the Defendant did not use threat, nor violence to commit the shoplifting episode, and it is imperative to find Assault in a robbery charge

to satisfy the charge. (see Judgment and sentence showing the defendant not guilty of assault 2).

The State errors in finding that, after the Trial, and during sentencing the Court Merged the Theft, into the Robbery. The State claims that this eliminated the double jeopardy violation, which in fact it does not. Had the Defendant been correctly charged, and put on trial for the correct charges, the Court would not have had to "merge the two charges", after trial. The Defendant wishes this Court to review this issue and determine if the State is incorrect, for allowing the Defendant to be charged in the manner that they did, and to convict him on elements that constitute the same crime, which constitutes double jeopardy.

The Division III Court of Appeals, finds that the Defendants argument for ineffective assistance of counsel, for failure to instruct the jury for a lesser included charge, based on multiple charges arising from the same criminal conduct, fails to show the Defendants Counsels performance was deficient. The Defendant's Counsel new that he was in jeopardy of being convicted of two offenses, and claims that the Courts assertion of a merger of the two crimes, does not alleviate the double jeopardy violation. When asked by the Court is the Defendants Attorney had prepared a Defense for the issue, she claimed that she had not. Had the Defendants, Attorney instructed the jury with a lesser included instruction, there would have never been a need to prepare an argument for the courts merger assertion. The Defendants Attorney states on the record that Larceny was a lesser included in the Robbery. (See the Verbatim transcripts, page 15). The Division III Court of Appeals claims that the Defendant failed to identify the lesser included in his Statement of Additional Grounds.

The Division III Court of Appeals also claims that the jury was properly instructed of a lesser included instruction for theft in the Third Degree Theft, a lesser included offense of second degree robbery. The Court of Appeals is incorrect with their statement, the jury was not instructed properly to have the third degree theft instructed as a lesser included offense. The State merely allowed the elements of robbery to the jury to be the plethora of charges to be compartmentalized, and not specifically instructed. This left the jury with the burden of finding the defendant guilty of some of the charges, and not necessarily all of the charges. The jury found that the Defendant Mr. Byrd did not commit Assault, but did find him guilty of the theft, which left the state to argue that if he committed the theft, then he must have committed the robbery. By not properly instructing the jury that they must find both elements of Theft and assault, the jury was unable to properly asses the charge of Robbery correctly. Had the jury been given the lesser included charge of Larceny by his attorney, he would not had been prejudiced by the double jeopardy violation, of being charged twice for the same crime. The Defendant asks this Court to review this issue.

The Division III Court of Appeals, finds that the Defendant's argument on the State failed to show intent for robbery, is incorrect. The State claims that the element of theft is an element of robbery, and because the store security saw the defendant stealing the cell phones, that is constitutes the theft charge. Though this is correct, the state misunderstands the Petitioners argument of intent of robbery. The Record reflects that the Defendant hid the cell phones in his sweatshirt which is a theft, and because the defendant hid them in his sweatshirt, shows that he was trying to shoplift the items without being seen.

This clearly shows that his intention was to steal, which constitutes Theft. What the State did not prove intent for was for robbery, and even though Theft is an element of robbery, it is not the only element to involve robbery. There is also the assault element that constitutes robbery. This is the element that needed to be proved with intent, one in which the State fails to provide to the jury. The jury found the defendant not guilty of assault in the second degree, and element that is needed to prove robbery. Because the Defendant intended to deprive the store of its property, that constitutes Theft, but it does not constitute robbery. The Petitioner asks this Court to review this issue.

This Court should review is the Defendants Double jeopardy violation, for being convicted twice for the same crime.

This Court should review the Defendants claim of ineffective assistance of counsel for her failure to instruct the jury of a lesser included offence of Larceny in place of Robbery in the Second Degree.

This Court should review the Defendants argument, that the state failed to prove the element of intent for Robbery and to instruct the jury to find.

~~CONCLUSION~~

This Court should grant the Defendant a New Trial, based on the Double jeopardy violation, the ineffective assistance of his counsel, and the States failure to prove the element of intent for Robbery in the Second Degree.

b. The defendant was denied his Constitutional right to due process, by allowing the jury to presume the lesser included, and the Court to allow the State to be relieved of the burden of persuasion on essential elements of charged offense.....6

4. The Court of Appeals misunderstands the Defendant/Petitioner's argument, that his Third Degree Theft, was not dismissed, but was "merged", after his jury trial conviction.....7,8

a. In the Court of Appeals opinion, they say that the defendant's Third degree Theft conviction, was dismissed, which alleviated the double jeopardy violation. This is incorrect and is a not accurate, and needs to be reconsidered.....7,8

b. The States lack of serious thought, and failure to separate the Theft and Robbery charge, violated the Defendants protection from excessive punishment.....7,8

5. The Court of Appeals, misunderstands the defendants argument, that his Third degree Theft charge was not dismissed, but in fact was "merged" after his conviction, to avoid the double jeopardy violation.....8

a. The Court of appeals opinion, states that the defendant failed to identify the crime that he believes that should have been a lesser included offense to Robbery.....8

a. The trial court failed to properly instruct the jury on a lesser to convict instruction, and let the jury decide without the consideration of one.....8

SONIA BLACK
FILED

MAR 25 2013

EMBERLY A. ALLEN
Grant County Clerk



JUDGMENT # 13-9-00487-1

**Superior Court of Washington
County of Grant**

State of Washington, Plaintiff,

vs.

JOSEPH DEAN BYRD,

Defendant.

SID: WA19204389
DOB: 07/14/1982
OIN: MLPD, 13ML00746
PCN: 925902233

No. 13-1-00038-8

Felony Judgment and Sentence --
Prison
(FJS)

Clerk's Action Required, para 2.1, 4.1,
4.3, 5.2, 5.3, 5.5 and 5.7
 Defendant Used Motor Vehicle

I. Hearing

1.1 The court conducted a sentencing hearing this date and present were:
Defendant: JOSEPH DEAN BYRD
Defendant's Lawyer: Susan D. Oglebay
Deputy Prosecuting Attorney: Douglas R. Mitchell

II. Findings

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon a Jury Verdict on March 21, 2013:

Count	Crime	RCW (w/subsection)	Class	Date of Crime
1	Robbery in the Second Degree (Force or Threat of Force)	9A.56.210	B	01/18/2013
3	Theft in the Third Degree	9A.56.050	GM	01/18/2013

Class: A (Felony-A), B (Felony-B), C (Felony-C), GM (gross misd), M (misd), SA (Special Allegation)
(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

Felony Judgment and Sentence (FJS) (Prison)(Nonsex Offender)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2011))

fail
2013-1

- The defendant used a **firearm** in the commission of the offense in Count _____, RCW 9.94A.602, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____, RCW 9.94A.602, 9.94A.533.
- For the crime(s) charged in Count _____, **domestic violence** was pled and proved. RCW 10.99.020.
- Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____, RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.
- Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A. _____.
- The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- In Count _____ the defendant has been convicted of **assaulting a law enforcement officer** or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault, as provided under RCW 9A.36.031, and the defendant intentionally committed the assault with what appeared to be a firearm. RCW 9.94A.831, 9.94A.533.
- Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- In Count _____, assault in the 1st degree (RCW 9A.36.011) or assault of a child in the 1st degree (RCW 9A.36.120), the offender used force or means likely to result in death or intended to kill the victim and shall be subject to a mandatory minimum term of 5 years (RCW 9.94A.540).
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

Crime	Cause Number	Court (county & state)	DV* Yes

* DV: Domestic Violence was pled and proved.

Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	Type of Crime	DV* Yes
1 Bail Jumping	07/07/03	09/09/03	Grant County WA 03-1-00261-8	A	NV	
2 Malicious Mischief in the 2 nd Degree	09/22/04	05/10/05	Grant County WA 05-1-00151-1	A	NV	
3 Burglary in the 2 nd degree Malicious Mischief in the 2 nd degree	03/15/05	05/10/05	Grant County WA 05-1-00187-1	A	NV	
4 Theft 1 st degree (2 counts)	11/13/03	01/09/06	Grant County WA 05-1-00320-3	A	NV	
5 Possession of Methamphetamine	02/12/10	03/31/10	Grant County WA 10-1-00091-0	A	NV	
6 Possession of Methamphetamine	07/15/11	01/09/12	Grant County WA 11-1-00369-1	A	NV	

* DV: Domestic Violence was pled and proved.

Additional criminal history is attached in Appendix 2.2.

The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

The prior convictions listed as number(s) 3, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)

The prior convictions listed as number(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Serious -ness Level	Standard Range (not including enhancements)	Plus Enhancements *	Total Standard Range (including enhancements)	Maximum Term
1	7	IV	43 – 57 mos		43 – 57 mos	10 years
3	Gross Misd	Gross Misd	Gross Misd		Gross Misd	364 days

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude, (ALF) assault law enforcement with firearm, RCW 9.94A.533(12).

Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are attached as follows:

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

below the standard range for Count(s) _____.

above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.

within the standard range for Count(s) _____, but served consecutively to Count(s) _____.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

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

3.2 [X] The jury found him not guilty of the following:

2	Assault in the Second Degree (Intent to Commit Felony)	9A.36.021(1)(e)	B	01/18/2013
---	--	-----------------	---	------------

3.3 *Count 3 is dismissed, having merged into Count 1.*

IV. Sentence and Order

It is ordered:

4.1 **Confinement.** The court sentences the defendant to total confinement as follows:

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

50 months on Count ONE _____ months on Count _____
 _____ months on Count _____ months on Count _____
 _____ months on Count _____ months on Count _____

[] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

[] The confinement time on Count _____ includes _____ months as enhancement for [] firearm [] deadly weapon [] VUCSA in a protected zone
 [] manufacture of methamphetamine with juvenile present.

Actual number of months of total confinement ordered is: _____.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____.

The sentence herein shall run consecutively with the sentence in cause number(s) 11-1-00369-1
 but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____.

(b) **Credit for Time Served.** The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

(c) [] **Work Ethic Program.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon

completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of confinement.

The following firearm(s) shall be forfeited pursuant to RCW 9.41.098:

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for the longer of:

- (1) the period of early release. RCW 9.94A.728(1)(2); or
- (2) the period imposed by the court, as follows:

Count(s) _____ 36 months for Serious Violent Offenses
Count(s) ONE 18 months for Violent Offenses
Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) obey all municipal, county, state, tribal and federal laws; and (10) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

consume no alcohol.

have no contact with: _____

remain within outside of a specified geographical boundary, to wit:

not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.

participate in the following crime-related treatment or counseling services:

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

comply with the following crime-related prohibitions: _____

[] Other conditions:

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

PCV \$ 500.00 Victim assessment RCW 7.68.035
PDV \$ _____ Domestic Violence assessment RCW 10.99.080
CRC \$ 200- Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190
 Criminal filing fee \$ 200.00 FRC
 Witness costs \$ _____ WFR
 Sheriff service fees \$ _____ SFR/SFS/SFW/WRF
 Jury demand fee \$ _____ JFR
 Extradition costs \$ _____ EXT
 Other \$ _____
PUB \$ 1,500 Fees for court appointed attorney RCW 9.94A.760
WFR \$ _____ Court appointed defense expert and other defense costs RCW 9.94A.760
FCM/MTH \$ _____ Fine RCW 9A.20.021; [] VUCSA chapter 69.50 RCW, [] VUCSA
 additional fine deferred due to indigency RCW 69.50.430
CDF/LDI/FCDS \$ _____ Drug enforcement fund of _____ RCW 9.94A.760
NTF/SAD/SDI
 \$ _____ DUI fines, fees and assessments
CLF \$ _____ Crime lab fee [] suspended due to indigency RCW 43.43.690
 \$ 100.00 DNA collection fee RCW 43.43.7541
FPV \$ _____ Specialized forest products RCW 76.48.140
 \$ _____ Other fines or costs for:
RTN/RJN \$ _____ Emergency response costs (Vehicular Assault, Vehicular Homicide,
 Felony DUI only, \$1000 maximum) RCW 38.52.430
RTN/RJN \$ _____ Restitution to: _____
RTN/RJN \$ _____ Restitution to: _____
 \$ _____ Restitution to: _____

(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

\$ 2200 Total

RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

JTB shall be set by the prosecutor.
 is scheduled for _____ (date).

The defendant waives any right to be present at any restitution hearing (sign initials): _____.

Restitution Schedule attached.

Restitution ordered above shall be paid jointly and severally with:

Name of other defendant Cause Number (Victim's name) (Amount-\$)

RJN

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____ . RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

EBS
4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. ~~This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense.~~ RCW 43.43.754.

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

The defendant shall not have contact with Any WAL-Mart property;
Shane Moran (name)
including, but not limited to, personal, verbal, telephonic, written or contact through a
third party until 3/25/2023 (which does not exceed the maximum statutory
sentence).



The defendant is excluded or prohibited from coming within 200 yards (distance)
of: Shane Moran (name of protected
person(s))'s home/ residence work place school (other location(s)) _____
_____, or other location: _____
until 3/25/2023 (which does not exceed the maximum statutory sentence).



A separate Domestic Violence No-Contact Order or Antiharassment No-Contact Order is
filed concurrent with this Judgment and Sentence.

4.6 Other:

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off
limits to the defendant while under the supervision of the county jail or Department of
Corrections: _____

4.8 Sentence and Order as to Misdemeanor/Gross Misdemeanor Counts

Defendant is sentenced to imprisonment in the Grant County jail

for a period of _____ days, with _____ days suspended for _____ years upon the terms and conditions
stated below as to Count two.

for a period of _____ days, with _____ days suspended for _____ years upon the terms and conditions
stated below as to Count _____.

for a period of _____ days, with _____ days suspended for _____ years upon the terms and conditions
stated below as to Count _____.

the term(s) in count(s) _____ is/are concurrent/consecutive
 with each other with count(s) _____ sentenced herein with Cause No.



The defendant shall receive credit, against the sentence stated above, for early release time, if any, earned by the defendant pursuant to the policies of the Grant County jail.

Partial Confinement Defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions:

work crew home detention work release RCW 70.48.210

Alternative Conversion. _____ days of total confinement ordered above are hereby converted to _____ hours of community restitution (8 hours = 1 day, nonviolent offenders only; 30 days maximum) at a rate of _____ hours per month:

Confinement shall commence immediately on or before _____.

You are hereby advised that you have been convicted of one or more of the following crimes committed by one family household member against another: Fourth Degree Assault Coercion Stalking Reckless Endangerment in the Second Degree Criminal Trespass in the First Degree Violation of a Protection Order or No-Contact Order

As a result of the conviction marked above:

You may not own, use or possess any firearm unless your right to do so is restored by a Superior Court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identcard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047. **The prohibitions applicable under Federal Law may be different.**

Conditions for Suspension:

- (a) Defendant shall commit no criminal offenses.
- (b) Defendant shall report to the Superior Court Clerk's Financial Collection Officer within twenty-four (24) sentencing, or if the Defendant is currently in jail, within twenty-four (24) hours of release.
- (c) Defendant shall keep the Superior Court Clerk's Financial Collections Officer advised of his/her current physical and mailing address and telephone number, and not change his/her address without prior written notice to the collections officer. The Superior Court Clerk's Financial Collections Officer's mailing address is Grant County Clerk, POB 37, Ephrata WA 98823. The physical address is 35 C St NW in Ephrata, WA. **All notices required to be provided to the court shall be provided in the same manner to this address.**
- (d) Defendant shall timely pay all legal financial obligations and restitution as ordered herein or as subsequently set by the Superior Court Clerk's Collection Officer.
- (e) Defendant shall abide by any restraining or no-contact order entered in this case.
- (f) Defendant shall not have direct or indirect contact with the victim in this case.
- (g) Defendant shall appear at all court-ordered review hearings.
- (h) Defendant shall consume no alcohol.
- (i) Defendant shall not use, possess or deliver any controlled substance except as prescribed by a physician.

- (j) Defendant shall complete community restitution at a rate of _____ hours per month.
- (k) Defendant shall not associate with any known member of any criminal street gang, specifically, any known member of the _____ criminal street gang, as well as any other Sureno / Norteno / Other _____ street gang.
- (l) Defendant shall not be present in any area known as a criminal street gang gathering of the _____ or Surenos / Nortenos / Other _____.
- (m) Defendant shall not wear, display, use or possess any insignia, emblem, button, badge, cap, hat, scarf, bandana, jewelry, paraphernalia, or any article of clothing which may connote affiliation with, or membership in the _____ or any other Sureno / Norteno / Other _____ criminal street gang.
- (n) Defendant shall participate as follows in any crime-related treatment services:

- (o) _____
- (p) _____
- (q) _____

Mandatory Conditions of Suspension for any Jail Time resulting from a DUI Offense:

You have been convicted of driving under the influence of alcohol and/or actual physical control of a vehicle while under the influence of alcohol and/or drugs. You are not to:

- (i) drive a motor vehicle without a valid license to drive and proof of financial responsibility (SR 22);
- (ii) drive while having an alcohol concentration of .08 or more within two (2) hours after driving;
- (iii) refuse to submit to a test of his or her breath or blood to determine alcohol concentration upon request of a law enforcement officer who has reasonable grounds to believe the person was driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor.

Except for ignition interlock driver's license and device or alcohol monitoring requirements under RCW 46.61.5055(5), violation of any mandatory condition requires a minimum penalty of 30 days' confinement, which may not be suspended or deferred, and an additional 30-day license suspension. RCW 46.61.5055(11). Courts are required to report violations of mandatory conditions requiring confinement or license suspension to DOL. RCW 46.61.5055.

The Court's Jurisdiction with regard to the conditions applicable to DUI Offenses is Five Years.

RIGHTS, CONDITIONS, WARNINGS, ACKNOWLEDGEMENT

1. **PUNCTUAL APPEARANCES.** You must appear in court at any time directed by the court throughout the period of time you have been placed on a deferred sentence or suspended sentence. You must pay all fines, costs and assessments when due. You must appear at the date and time assigned by the court or jail ready to serve your commitment.
2. **ADDRESS CHANGES.** You must keep the court advised of all address changes using the address provided above. If the court orders you to appear at a hearing regarding your compliance with the deferred sentence or suspended sentence and you fail to attend the hearing, your term of supervision is tolled (the time does not count) until you appear on the record.

3. **EMPLOYMENT AND NEW VIOLATIONS.** You must keep the court informed of your employment status and any new violations of the law.

4. **PROOF OF COMPLIANCE.** In each instance where you are requested to file proof of a condition checked on the Judgment and Sentence, the proof must be in writing, signed by the person supervising the required program and written on the agency's letterhead. The proof of completion must be filed with the court.

FAILURE TO MEET CONDITIONS. Failure to meet any of the conditions imposed in the Judgment and Sentence or any of the conditions listed above, to appear as scheduled, and/or to pay financial obligations as scheduled may result in the filing of additional criminal charges, the issuance of a bench warrant for your immediate arrest, the revocation of your deferred sentence or suspended sentence, the imposition of warrant costs, the suspension of your driver's license and the referral of your fines to a collection agency. If the deferred sentence or suspended sentence is revoked because of failure to meet conditions, you are subject to the imposition of the maximum sentence and fine as permitted by law or such portion thereof as the court deems appropriate. This order shall remain in effect through the period of the deferred or suspended sentence until and unless changed by further order of the court.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100.
RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation.

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 Firearms. You may not own, use or possess any firearm, and under federal law any firearm or ammunition, unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047

5.6 Reserved

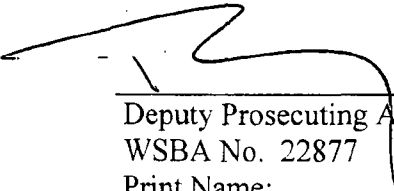
5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other: _____

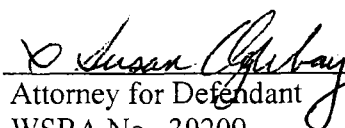
Done in Open Court and in the presence of the defendant this date: 3.25.13



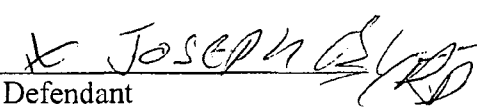
Judge Evan E. Sperline



Deputy Prosecuting Attorney
WSBA No. 22877
Print Name:
Douglas R. Mitchell



Attorney for Defendant
WSBA No. 39209
Print Name:
Susan D. Oglebay



Defendant
Print Name:
JOSEPH DEAN BYRD

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature:

Joseph B. Allen

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

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

Witness my hand and seal of the said Superior Court affixed this date: _____
Clerk of said county and state, by: _____, Deputy Clerk

VI. Identification of the Defendant

SID No. WA19204389
 (If no SID complete a separate Applicant card (form FD-258)
 for State Patrol)

Date of Birth 07/14/1982

FBI No. 168917JB1

Local ID No. 37805

PCN No. 925902233

Other DOC No. 862480

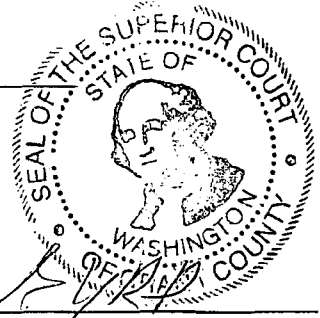
Alias name, DOB:

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

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk,
 Dated: 3.25.13

Jim Prace



The defendant's signature:

Joseph

Left four fingers taken
simultaneously

Left
Thumb

Right
Thumb

Right four fingers taken
simultaneously



STATE OF WASHINGTON)
) ss. WARRANT OF COMMITMENT
 County of Grant)

THE STATE OF WASHINGTON, To the sheriff of Grant County and to the superintendent and officers in charge of the Washington State Correctional Institution at Shelton, Washington.

WHEREAS has been duly convicted in the Superior Court of the State of Washington, for said county, of the crime(s) of

Count	Crime	RCW (w/subsection)	Date of Crime
1	Robbery in the Second Degree (Force or Threat of Force)	9A.56.210	01/18/2013
3	Theft in the Third Degree	9A.56.050	01/18/2013

and judgment has been pronounced against said defendant. Defendant shall receive _____ day(s) credit for time served prior to this date.

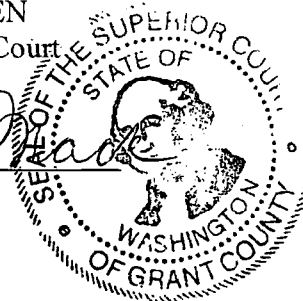
- () YOU, THE SHERIFF, ARE COMMANDED to receive the defendant for classification, confinement, and placement as ordered in the Judgment and Sentence.
- (X) YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement, and placement as ordered in the Judgment and Sentence and these presents are your authority for the same, HEREIN FAIL NOT.

WITNESS THE HONORABLE Evan E. Sperline, Judge of Grant County Superior Court, and the seal thereof, this 3.25.13

KIMBERLY A. ALLEN
 Clerk of the Superior Court

By: 
 Deputy Clerk



**ACKNOWLEDGMENT OF ADVICE OF RIGHT TO APPEAL
AND TIME LIMIT FOR FILING COLLATERAL ATTACK**

The court has entered the Judgment and Sentence to which this form is attached. The undersigned, counsel for the defendant or the defendant, and a qualified or certified interpreter (where applicable) acknowledge that the defendant has read or heard, and has acknowledged understanding, the following rights:

RIGHTS REGARDING APPEAL

If the defendant was convicted after trial and upon the defendant's plea of not guilty or if the defendant was sentenced to a term outside the standard range for confinement, as provided in chapter 9.94A RCW:

1. The defendant has the right to appeal to the Court of Appeals.
2. Unless a notice of appeal is filed with the clerk of this court within thirty (30) days from the entry of the Judgment and Sentence, the right to appeal will be forever lost.
3. The defendant has the right to be represented by a lawyer for the purposes of appeal, including preparation and filing of the notice of appeal. If the defendant cannot afford to hire a lawyer, the court will appoint a lawyer to represent the defendant at public expense.
4. The defendant has the right to have those parts of the trial record necessary for appeal prepared at public expense if the defendant cannot afford to pay for such preparation.

TIME LIMITS FOR COLLATERAL ATTACK

5. No petition or motion for relief from the Judgment and Sentence may be filed after one (1) year has elapsed from the time the Judgment and Sentence becomes final.

The Judgment and Sentence becomes final on the last of the following dates:

- a. when it is filed with the clerk of this court;
 - b. after a direct appeal (see rights above), when an appellate court issues its mandate disposing of such appeal,
 - c. when the United States Supreme Court denies a timely petition for certiorari to review a decision upholding the defendant's conviction on appeal. Filing a motion to reconsider denial of certiorari does not prevent the Judgment and Sentence from becoming final.
6. The time limit stated above does not apply to a petition or motion based solely on one or more of the following grounds:
 - a. newly discovered evidence, if the defendant acted with due diligence in discovering the evidence and filing the petition or motion;
 - b. that the statute the defendant is convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

- c. the conviction was barred by double jeopardy, under Amendment V to the United States Constitution or Article 1, Section 9 of the Washington State Constitution
- d. the defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- e. the sentence imposed was in excess of the court's jurisdiction;
- f. there has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence or other order entered in a criminal or civil proceeding instituted by the state or local government, and either (1) the legislature has expressly provided that the change in the law is to be applied retroactively, or (2) a court, in interpreting a change in the law that lacks such an express legislative intent, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

DEFENDANT'S ACKNOWLEDGMENT

I HAVE READ, OR HAVE HAD READ TO ME, THE FOREGOING STATEMENT; I UNDERSTAND THE RIGHTS ENUMERATED ABOVE AND ACKNOWLEDGE MY RECEIPT OF A COPY OF THESE RIGHTS.

Date: 3/25/2013

x JOSEPH RYR D
DEFENDANT

DEFENSE COUNSEL'S CERTIFICATION

I CERTIFY, AS DEFENDANT'S COUNSEL OF RECORD, THAT THE DEFENDANT HAS READ, OR HAS HAD READ TO HIM/HER, AND HAS ACKNOWLEDGED TO ME HIS/HER UNDERSTANDING OF, THE FOREGOING STATEMENT.

Date: 3/25/2013

x Susan [Signature]
DEFENSE COUNSEL

VOTING RIGHTS STATEMENT: RCW 10.64. I acknowledge that my right to vote has been lost due to felony conviction. I am registered to vote; my voter registration will be cancelled. My right to vote may restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

INTERPRETER'S CERTIFICATION

I AM CERTIFIED, OR HAVE BEEN FOUND BY THE COURT TO BE QUALIFIED, AS AN INTERPRETER IN THE _____ LANGUAGE, AND I HAVE TRANSLATED THE FOREGOING STATEMENT OF RIGHTS AND DEFENDANT'S ACKNOWLEDGMENT INTO THAT LANGUAGE TO THE DEFENDANT. THE DEFENDANT HAS ACKNOWLEDGED THAT HE/SHE UNDERSTANDS BOTH THE TRANSLATION AND THE SUBJECT MATTER OF THIS DOCUMENT. I CERTIFY, UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT THE FOREGOING IS TRUE AND CORRECT.

Date: _____

INTERPRETER

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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON) CAUSE No.31540-1-III
Respondent,)
Vs) STATEMENT OF ADDITIONAL
) GROUNDS FOR APPEAL.
JOSEPH DEAN BYRD)
Appellant)

I IDENTITY OF APPELLANT.

COMES Now, Mr Joseph Dean Byrd, Appellant in the above captioned action number and exercising the rights to present Additional Grounds which I believe those are important and my Counsel failure to present as identify and presented in part II of this brief.

II STATEMENT OF RELIEF SOUGHT.

APPELLANT, Mr Byrd, argues that; The judgment and sentence is constitutionally invalid, due to Double Jeopardy violation U.S.C.A. 5 Const. Art. 1, 2, 9, and 19 of the Washington State Constitution.

III STATEMENT OF FACTS.

On January 18th 2013, Mr Byrd enter to the Store Walmar in 1005 North Stratford, Moses Lake, Grant County, WA. On about 4:00 P.M. Mr Byrd while inside the store grabed "TWO"

1 cell phones with the value of 29.88 without tax. When Mr Byrd
2 intended to leave the store without paying for the cell phones
3 he was intercepted by the store security, Mr Shane Morlan, and
4 by graving the defendant, and thrown to the floor. Mr Byrd hit
5 the ground, stood up, and took off running out the front doors.
6 See Shane Morlan on direct, CP at 72. Later, Mr Byrd was
7 arrested by Mr Brian L. Jones from the City of Moses Lake Poli-
8 ce Department, and Mr Byrd was in possession of TWO cell phones
9 with each value of 29.88 without tax. See CP at 101-111, Mr
10 Jones in direct examination.

11 The State opted to charge Mr Joseph Dean Byrd with
12 Robbery in the second degree, Assault in the second degree, and
13 Theft in the third degree. Allegedly occurred in January 18,
14 2013 at about 4:15 P.M. at Moses Lake Walmart. Pretrial CP at 4.
15 Later, the charge of Second degree assault was dismissed. See
16 CP at 11-12, Merger Doctrine in counts 1 and 2 (Motions in
17 lamine).

18 IV ARGUMENT.

19 Mr Joseph D. Byrd, Appellant, Argues that;
20 The crime of Robbery in the second degree RCW 9A.56.210 states;

- 21 1)-A person is guilty of robbery in the second
22 degree if he commits the robbery.
23 2)-Robbery is a class B felony.

24 The crime of theft in the third degree RCW 9A.56.050 states;

- 25 1)-A person is guilty of theft in the third degree
26 if he or she commits theft of property or service
which (a)-Does not exceed seven hundred fifty
fifty dollars in value, or (b)-Includes ten or
more merchandise pallets, or ten or more beverage
crates, or combination of ten or more merchandise--

1 pallets and beverage crates.

2 2)-Theft in the third degree is a gross misdemeanor.

3 "ANALYSIS OF ROBBERY, THEFT AND STEAL"

4 According to WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY,

5 ROBBERY; An act or instance of ILLEGALLY TAKING
6 another's property by the use of inti-
midation or violent force.

7 At this point that there is no threats or physical contact by
8 the defendant towards Mr Shane Morlan, Mr Morlan is six foot
9 and two inches and a least twice of size. See CP at 72, He sta-
10 ted that He threw the defendant, the defendant hit the ground,
11 the defendant stood up, and took off running out the front door
12 to the eastward direction. Mr Morlan never shows fear of defend.

13 THEFT:The act or an instance of "stealing"

14 STEAL;To take (the property of another without
15 right or permission).

16 Now, if Robbery is the act or instance of illegally taking
17 another's property. And Theft is the act or an instance of
18 "STEALING", and stealing is; To take the property of another..

19 ROBBERY AND THEFT DO THEY SHARE THE SAME ELEMENT?

20 The act or instance of "taking illegally" and "Stealing"?

21 Mr Joseph Dean Byrd argues that the conviction of Second degree
22 Robbery and Theft in the third degree violates the Double Jeo-
23 pardy Clause under the U.S.C.A. 5 Const. Art. 1,2,9 and 19.

24 See State V Clark, 170 Wn App 166, 283 P 3d 1116(2012)

25 (8)66" Where a defendants act supports charges under TWO crimi-
26 nal statutes, a court weighing a DOUBLE JEOPARDY challenge must

1 determine whether in light of the legislature intent, the charged
2 crimes constitute the same offense. In re Pers. Restraint
3 of Orange, 152 Wash. 2d 795, 815, 100 P 3d 291(2004).

4 In order to be the "same offense" for constitutional
5 double jeopardy analysis, the offenses must be the same in law
6 and in fact. Fletcher, 113 Wash. 2d at 47, 776 P 2d 114 (1989).

7 Double Jeopardy protects a defendant from being convicted
8 twice under the same statute for committing just one
9 unit of the crime. State V Adel, 136 Wash. 2d 629, 634, 965 P 2d
10 1072(1978). If the legislature's intent is unclear, we construe
11 the ambiguity in the defendant's favor by applying the "RULE
12 OF LENITY." State V Graham, 153 Wash. 2d 400, 405, 103 P 3d 1238
13 (2005). State v Bauer, 295 P 3d 1227, (2013), Stated:

14 "RULE OF LENITY"

15 (21)-A statute is void for vagueness under the Due
16 Process if either (1)-It does not define the
17 criminal offense with sufficient definiteness that
18 ordinary people can understand what conduct is
19 proscribed, or (2)-It does not provide ascertainable
20 standards of guilty to protect against
21 arbitrary enforcement. U.S.C.A. 6 Const. Amend. 14

19 City of Seattle V Winebrenner, 167 Wn 2d 451, 219 P 3d 686(2009)

20 State v Hirschfelder, 242 P 3d 876, 170 Wn 2d 536 (2010)

21 State V Jacobs, 154 Wn 2d 596, 115 P 3d 281 (2005). State V --

22 Evans, 164 Wn App 629, 265 P 3d 179 (2011) States;

23 (5)-The Due Process Vagueness Doctrine under the
24 Federal and State Constitutions serves Two
25 Important Purposes; 1)-It provides citizens
26 with fair warning of what conduct they must
avoid, and 2)-It protects them from arbitrary
or discriminatory law enforcement. U.S.C.A. 6
Const. Amend. 14 and RCW Const. Art. 1 & 3.

1 The Appellant, Mr Dean Byrd "ANTICIPATES" that;
2 The State it might argues that, the defendant assaulted Mr
3 Morlan, the store security. however, the State charged the
4 defendant with the crime of "Second Degree Assault"and instru-
5 cted the Jury for "THREE" different crimes. See CP in Jury in-
6 struction at 155 through 160, At sentencing in 3/25/13 Pgs 10
7 through 18, the Court, the State, and the dfendant's Counsel
8 Ms Oglebay were weighing the "MERGER DOCTRINE" and "DOUBLE
9 JEOPARDY" in the convictions of Robbery in the second degree,
10 Assault in the second degree, and Theft in the third degree.
11 Ms Oglebay presented its theory as Theft is essential element
12 of Robbery and the conviction of boths implicates double jeop-
13 ardy. In fact, in the realm of robbery, there is not a serious
14 attempt to assault. And by "SERIOUS" mean that serious enough
15 to make it robbery one. The Court agrees to that in pages 17
16 and 18, that Robbery and Theft are in fact the same under the
17 "MERGER DOCTRINE" See State V Lindsay, 288 P 3d 641(2012)::

18 [80] 43-In conclusion, we hold that the second degree
19 kidnapping was incidental to the first degree
20 robbery and therefore, the kidnapping and robbery
21 convictions merge, Additionally the second
22 degree assault was committed with the intent to
23 commit the robbery and therefore, The assault
24 and robbery convictions merge. Remand the sentence

22 However, Mr Dean Byrd stil received TWO sentences. 57 Months
23 for robbery in the second degree plus 364 days in theft in the
24 third degree. See J&S.

25 V CONCLUSION.

26 For the reason set above the Appellant Mr Dean Byrd-

1 Convictions and sentence should be vacated and resentenced on
2 the lesser conviction of Theft in the third degree as applying
3 the "RULE OF LENITY".

4 CERTIFICATE OF MAILING

5 I, Joseph Dean Byrd, Hereby, Certifies under the
6 penalty of perjury and under the laws of the State of Washington
7 that I served by depositing in the mail box of this Institution
an envelope contained my "ADDITIONAL GROUNDS FOR APPEAL" and
sent to the following parties;

8 ONE
9 COURT OF APPEALS DIV. III
North 500 Cedar
10 Spokane, WA. 99201

TWO
GRANT COUNTY PROSEC. OFFICE
P.O. Box 37
Ephrata, WA. 98823

11 THREE

12 DEFENDANT/APPELLANT'S ATTORNEY
13 DAVID N. GASCH, Attorney at Law
P.O. BOX 30339
14 Spokane, WA. 99223-3005

15 I, declare that the above is true and correct to the best
of my knowledge.

16 Respectfully submitted on October 17, 2013 by;

17
18 Joseph Dean Byrd
Joseph Dean Byrd # 862480
19 Coyote Ridge Corr. Center
P.O. Box 769 (EA-47)
20 Connell, WA. 99326

6

FILED

JUL 09 2014

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

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON	)	No. 315401
respondent)	
)	
vs.	)	DEFENDANTS PRO SE SUPPLEMENTAL
	)	STATEMENT OF ADDITIONAL GROUNDS
Joseph D. Byrd)	
petitioner)	

COMES NOW, the Defendant/Petitioner Joseph D. Byrd, in propria persona, and hereby submits this Supplemental Statement of Additional Grounds for review by this Court.

A. IDENTITY OF PETITIONER

Joseph D. Byrd, is the Petitioner in this matter, and asks this Court to accept and review this Supplemental Statement of Additional Grounds, on its merits. The Petitioner is pro se, and this Statement of Additional Grounds is pursuant to RAP 10.10(f)(c).

B. SUPERIOR COURT DECISION

On March of 2013, the Defendant/Petitioner Joseph D. Byrd, went to trial before a jury, and was found guilty, and was convicted of, Robbery in the Second degree, and Theft in the Third degree. The jury found the Defendant/Petitioner, not guilty of Assault in the Second degree. The Defendant was sentenced to 50 months for Robbery in the Second degree, and 365 days for Theft in the Third degree.

C. ISSUES FOR REVIEW

1. The Defendant/Petitioner, argues that he was prejudiced, for multiple convictions for incidents incurred during a single act of a crime committed, at the same place, and same time.

Was the Defendant/Petitioner prejudiced, for receiving multiple punishments for the same criminal conduct, committed during the same time, and place of the commissioned crime?

2. The Defendant/Petitioners counsel, failed to instruct the jury, for a lesser included to convict instruction to the jury.

Did the Defendant/Petitioners trial counsel, fail to instruct the jury fore a lesser included to convict instruction, and was the Defendant/Petitioner prejudiced by the counsel's failure to do so?

3. The prosecution fails to prove the element of intent, for the crime of Robbery in the Second degree, furthermore, the Defendant/Petitioner's counsel failed to address this issue, and instruct the jury to find the intent of the Robbery in the Second degree.

Was the Defendant/Petitioner, prejudiced by the prosecution's failure to present the element of intent to commit Robbery in the Second degree?

Was the Defendant/Petitioner, afforded effective assistance of counsel, when the Defense counsel, failed to present argument to this issue?

D. STATEMENT OF THE CASE

On January 18, 2013, the Defendant/Petitioner Joseph D. Byrd, entered the Walmart store, with the intention to purchase a cell phone. The Defendant/Petitioner, decides against paying for the cell phone(s), and embarks on shoplifting the items. during the commission of the shoplifting, the security camera employee, observes the Defendant/Petitioner Mr. Byrd, behaving in a SUSPICIOUS MANNER, AND CONTACTS THE FLOOR SECURITY, TO INVESTIGATE THE SUSPICIOUS INDIVIDUAL. The (plain clothed) security officer, locates the suspicious individual (Mr. Byrd), heading towards the store exit.

The (plain clothed) security officer, rushes the Defendant/Petitioner Mr. Byrd, in an attempt to apprehend him. The Defendant/Petitioner Mr. Byrd, dodges the (plain clothed) individual, in an attempt to flee the store. The plain clothed security employee, grabs the Defendant/Petitioner Mr. Byrd, and throws him to the ground. There is a struggle, the Defendant gets free, and runs out the store. The Police arrest the Defendant/Petitioner Mr. Byrd moments later. The Defendant Mr. Byrd, was booked into jail for Third degree Theft, Assault in the Second degree, and Robbery in the Second degree. The Defendant/Petitioner Mr. Byrd took his charges to trial, with a plea of not guilty. He was found guilty by the jury, for the crimes of, Third degree Theft, and Second degree Robbery, he was found not guilty by the jury for the crime of Assault in the Second degree.

The Defendant/Petitioner Mr. Byrd, received 365 days for Theft in the Third degree, and 50 months for Robbery in the Second degree.

E. ARGUMENT

Was the Defendant/Petitioner prejudiced, for receiving multiple convictions, and punishments, for incidents that incurred during a single act committed at the same place and the same time?

The Defendant/Petitioner argues, that he was prejudiced for receiving multiple punishments, for Theft in the Third degree, and Robbery in the Second degree. Both occurring from the same incident. The Defendant/Petitioner, also argues, that due to the multiple charges that the prosecution convicted him with, and these convictions were tried in a single proceeding, were a violation of his constitutional protection from excessive punishment. Brown v. Ohio, 432 U.S 161,165,97 S.Ct. 2221,53 L.Ed.2d 187(1977);State v. Turner, 169 Wn.2d 448,454,238 P.3d 461(2010);U.S Const. amend 5;Const. art I§9 It is only in the rare instance that flawed jury instruction permitting the jury to convict an accused person for multiple counts based on the same act do not violate double jeopardy.

Stae v. Much, 171 Wn.2d 646, 664, 254 P.3d 803 (2011) If it is not "manifestly apparent to the jury" that its verdicts for separate charges needed to be based on separate acts, then the "potentially redundant convictions" must be vacated. ID It violates jury unanimity when the Defendant is accused of several counts of the same offense, but the jurors were not expressly instructed that each conviction must rest on "separate and distinct act or events". State v. Nolte, 116 Wn.2d 831, 842-43, 809 P.2d 1990 (1991); State v. Borshiem, 140 Wn.App. 357, 365, 165 P.3d 417 (2007)

While the State may charge, and the jury may consider multiple charges arising from the same criminal conduct in a single proceeding, the Court may not enter multiple convictions for the same criminal conduct. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 273 (2005)

When an accused person's conduct constitutes a single unit of prosecution, the prosecution may not divide that conduct into multiple charges for which it seeks separate punishment. State v. Adel, 136 Wn.2d 607, 610 40 P.3d 669 (2002)

In this argument, the DEfendant/Petitioner Mr. Byrd went to Walmart, committed the act of shoplifting, during this act he was rushed by a plain clothed individual, who grabbed him and threw him to the ground. There was a strugglem the Defendant broke free, and ran out the store exit. All happeningin the act of a single committed crime of shoplift. The Defendant was charged for multiple crimes for this singular act that was not premeditated, nor did he rehearse to do so.

The Defendant argues that due to the multiple charges that the prosecution charged him with, and tried him in a single proceeding, that he was convicted multiple times, for the same criminal conduct. Furthermore the prosecution divided the conduct into multiple charges, which is a violation of his constitutional right to be protected from excessive punishment.

2. Did the Defendants counsel, fail to instruct the jury for a lesser to convict instruction, and was the Defendant/Petitioner prejudiced by the Defense counsels failure to do so?

The Defendant/Petitioner, argues that it was ineffective assistance of counsel, to not instruct the jury for a lesser included to convict instruction. State v. Workman, Wash.2d 443, 447-48, 584 P.2d(1978)

Under the "Workman Test", a party is entitled to a lesser included offense instruction where (1) each element of the lesser offense is a necessary element of the greater offense charged (the legal prong), and (2) the evidence in the case supports an inference that the Defendant committed only a lesser crime.

The rule authorizing juries to find the Defendants guilty of any lesser crime that the evidence supports, is a procedural safeguard, that reduces the risk of error, in the factfinding process, and that can also be beneficial to the Defendant, because it affords the jury a less drastic alternative than the choice between conviction of the offense, and aquittal.

In the Defendants argument, he states he was not afforded the effective assistance of counsel, when his Defense counsel failed to instruct the jury with a lesser included to convict instruction. U.S Const. Amend IV, Wash. Const. Art.I §22, The Federal and State Constitutions guarantee a criminal Defendant the right to effective assistance of counsel. Strickland v. Washington "To prove deficient performance", the Defendant must show that counsels performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S 668, 687, 104 S.Ct.2052, 80 Ed.2d 674(1984) A Defendant claiming ineffective assistance of counsel, must show that counsels performance and resulting prejudice.

Here the Defendant/Petitioner, argues that he was charged for a crime, that he did not premeditate. The Defendant/Petitioner argues that his Defense attorney, failed to instruct

arising from the same criminal conduct. The Defendant/Petitioner was charged for Theft in the Third degree, for unlawfully taking two cell phones from a Wallmart store, two cell phones that fell below the monetary value of a Second degree Theft. The Defendant/Petitioner was also convicted of Robbery in the Second degree, for the same act, the same merchandise, same time, same place. Because the Defense counsel failed to instruct the jury of the lesser included to convict instruction, the Defendant was left without the protection of effective assistance of counsel, and an affirmative defense. Therefore the Defendant/Petitioner was prejudiced, and his due process protection was violated.

3. The prosecution fails to prove the intent of the crime of Robbery in the Second degree, and Theft in the Third degree, nor did the Defense counsel provide any argument, or defense to this issue.

Did the prosecution error in failing to provide essential element of intent, to the jury? Was the Defendant prejudiced, by the prosecutions failure to prove intent by a reasonable doubt?

Was the Defendant afforded the right to effective assistance of counsel, when his public defender failed to present an argument towards this constitutional violation?

Francis v. Franklin 471 U.S (1985) A person will not presume to act with criminal intention, but the trier of fact, that is the jury, may find criminal intention upon consideration of the words, conduct, demeanor, motive and all other circumstances, connected with the act for which the accused is prosecuted. Coleman v. Butler 816 F.2d 1046,1048 (5th Cir. 1987) Due process prohibited presumption in jury charge that relieved State burden of persuasion on essential elements of charged offense.

The Defendant/Petitioner was convicted, without the Federal Constitutional protection, afforded to every criminal Defendant, against conviction, except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the Defendant is charged. In the case of the Defendant/Petitioner Mr. Byrd, he was charged and convicted of two charges, stemming from the same criminal conduct. The essential element of intent, was never established to the jury by the prosecution, therefore leaving the Defendant/Petitioner, to the mercy of the prosecutions ability to pursue a non challenged inference of guilt, without proof of intent.

Defense counsel failed to challenge the prosecutions burden to prove the essential element of intent, leaving the Defendant/Petitioner vulnerable to the jury being persuaded by the prosecutions inference and speculations pertaining to her arguments.

Because of the Defendants counsel's failure to provide protection from such inference from the prosecution, it was a violation of the Defendant/Petitioners 6th amendment of the U.S constitution, to have compulsory process, and to have effective assistance of counsel.

CONCLUSION

Based on the aforementioned arguments and issues, the Defendant/Petitioner respectfully asks this Court to review the Defendants pro se issues presented as supplemental issues attached to the Defendant/Petitioners Statement of Additional Grounds, and to address these issues as this Court sees fit to remedy the issues presented.

Respectfully submitted,
THIS 8, DAY OF July 2014

Tosha D. D. D.

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

FILED

STATE OF WASHINGTON
respondent

) No.315401

) (CLERKS ACTION REQUIRED) JUL 09 2014

vs.

) DECLARATION OF MAILING

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Joseph D. Byrd
Defendant

)
)
)
)
)
)

I Joseph D. Byrd, declare that on July 8, 2014, I deposited the foregoing documents: DEFENDANTS PRO SE SUPPLEMENTAL STATEMENT OF ADDITIONAL GROUNDS, DECLARATION OF JOSEPH D. BYRD, DECLARATION OF MAILING, AFFIDAVIT OF SERVICE BY MAIL, or a copy thereof, in the internal LEGAL MAIL system of Coyote Ridge Correction Center, and made arrangements for postage addressed to the following:

Division 3 Court of Appeals
Division III
N. 500 CEDAR
Spokane WA. 99201

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

Dated this June 8, 2014 at the Coyote Ridge Correction Center,
1301 N. Ephrata Ave. Connell Washington 99326-0769.

Joseph Byrd

Joseph D. Byrd #862480
Coyote Ridge Correction Center
1301 N. Ephrata Ave
P.O Box 769
Connell Washington 99326-0769

FILED

JUL 09 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

)
STATE OF WASHINGTON	) No. 315401
respondent	) (CLERKS ACTION REQUIRED)
)
vs.	) DECLARATION OF JOSEPH D. BYRD
)
Joseph D. Byrd)
defendant)

I Joseph D. Byrd, declare under the laws of the State of Washington, and by penalty of perjury by law, that the foregoing statements are true and correct to the best of my knowledge.

On July 8, 2014, I mailed to the Division 3 Court of Appeals, the following documents: DEFENDANTS PRO SE SUPPLEMENTAL STATEMENT OF ADDITIONAL GROUNDS, DECLARATION OF JOSEPH D. BYRD, DECLARATION OF MAILING, AFFIDAVIT OF SERVICE BY MAIL.

I filed these documents in accordance with the Washington Court Rules, and the rules of the Appellate procedures, to the best of my knowledge and abilities.

Dated this July 8, 2014, at the Coyote Ridge Correction Center, 1301 N. Ephrata Ave. P.O Box 769, Connell Washington 99326-0769

Joseph Byrd

 Joseph D. Byrd
 Coyote Ridge Correction Center
 P.O Box 769
 Connell Washington 99326-0769

FILED

JUL 09 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

)
STATE OF WASHINGTON	) No.315401
respondent	) (CLERKS ACTION REQUIRED)
)
vs.	) AFFIDAVIT OF SERVICE BY MAIL
)
Joseph D. Byrd)
Petitioner)

I Joseph D. Byrd hereby declare:

1. I am over the age of 18 and I am competent to testify herein,
2. On the below date, I caused to be placed in the U.S Mail, pre paid postage to the addressed below listed individuals,

Division 3 Court of Appeals
 Division 3
 N. 500 Cedar
 Spokane WA. 99201

I am a prisoner confined in the Washington Department of Corrections ("DOC"), housed at the Coyote Ridge Correction Center 1301 N. Ephrata Ave, Post Office Box 769, Connell Washington 99326-0769, where I mailed said envelope in accordance with DOC and CRCC Policy 450.100 and 590.500. The said envelope contained a true copy of the below listed documents:

- A. 2 copies of Petitioners SUPPLEMENTAL STATEMENT OF ADDITIONAL GROUNDS.
- B. 2 copies of DECLARATION OF MAILING
- C. 2 copies of AFFIDAVIT OF SERVICE OF MAILING
- D. 2 copies of DECLARATION OF JOSEPH D. BYRD
- E. c copies of DEFENDANTS PRO SE SUPPLEMENTAL STATEMENT OF ADDITIONAL GROUNDS

3. I invoke the "Mail Box Rule", set forth in GR 3.1, the above listed documents are considered filed on the date that I

I Joseph D. Byrd swear under penalty of perjury by law, that
the foregoing is true and correct to the best of my knowledge.

DATED THIS 8 DAY OF 2014

Joseph Byrd

Joseph Dean Byrd #862480

Coyote Ridge Correction Center

1301 N. Ephrata Avenue P.O Box 769

Connell washington 99326-0769

FILED

DEC 10 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	
Respondent,	)	No. 315401
)	
vs.	)	MOTION TO RECONSIDER
)	
Joseph D. Byrd,)	
Appellant.)	

A. IDENTITY OF MOVING PARTY

Joseph D. Byrd moves this Court for relief designated below.

B. STATEMENT OF RELIEF SOUGHT

In the interest of justice and pursuant to RAP 12.4, Mr. Byrd respectfully requests this Court reconsider the decision it entered on November 25, 2014, a copy of which is attached as Appendix A.

C. GROUNDS FOR RELIEF AND ARGUMENT

1. The Court failed to review, and produce findings for his pro se Statement Of Additional Grounds.

It is the Defendant/Petitioners Constitutional right to have all of his arguments addressed by this Court. It is a violation of Mr. Byrds Constitutional Right to due process of the Courts, and to have evidence presented to be heard and judged on its merits.

In able for the Defendant/Petitioner to proceed to the Federal Courts, the Defendant/Petitioner must exhaust all remedies first. It is the Defendant/Petitioner Mr. Byrds intention to "gas up" the Federal vehicle, and proceed to the higher Courts with his arguments and errors he believes were made durring his trial.

The Defendant/Petitioner Mr. Byrd files with the Division III Court of Appeals a Motion to Supplement Statement of Additional Grounds for Review, a copy of which is attached as Appendix A.

The Cort of Appeals Division III granted Mr. Byrd his Motion for Extension of time, in able to properly prepare his Statement of Additional Grounds that was filed in June 16, 2014, a copy of which is attached as Appendix B.

The Defendant in his Supplemental Statement of Additional Grounds for Review argues that he was prejudiced for multiple convictions for incidents incurred during a single act of a crime committed, at the same time and place. This Court finds that Mr. Byrd misunderstands his sentence as to the two convictions for which he is convicted on. It is this Courts misunderstanding as to the argument that the Defendant/Petitioner raises in his Statement of Additional Grounds, and the issues that he is presenting to this Court.

The Defendant/Petitioner, specifically asks this Court to review three issues for review. The first issue was his argument for being convicted for multiple punishments for the same criminal conduct. The second issue was the ineffective assistance of counsel for failing to instruct the jury for a lesser to convict instruction. The third argument was the prosecutions failure to prove to the jury the intent of the crime of Robbery.

These issues were ignored by this Court and were not mentioned at all in this Courts Unpublished Opinion.

In the Defendant/Petitioners Memorandum in support of Motion for Extension of time filed on june 10th and 16th of 2014, he specifically informs this Court of the importance of preservation of arguments, and quotes: "To allow the petitioner to adequately preserve all his legal arguments, he must have all issues presented before this Court, through his appellant attorney, or through his Statement of Additional Grounds".see a copy of this Motion which is attached as Appendix C.

It is the Defendant/Petitioners First Amendment right to "completely" access the Courts, and for this Court to deny review of his pro se issues presented in his Statement of Additional Grounds, is a violation of his Constitutional rights to access the Courts for further review.

It is unconstitutional for this Court to allow the Defendant/Petitioner to file his Supplemental Statement of Additional Grounds for Review, but deny him a response and finding by this Court for each of his issues presented. This Court was adequately given notice of the Defendant/Petitioners Supplemental Statement of Additional Grounds, through his Motion for Extension of time filed June 16, 2014, his Decleration of Joseph D.Byrd filed on June 10 2014, Decleration of Mailing filed on June 10, 2014, Affidavit of service by mail filed june 10, 2014., and a Memorandum in support of extension of Time, a copy of each document is attached as Appendix D.

D. CONCLUSION

For the foregoing reasons, Mr. Byrd respectfully requests this Court to review his Supplemental Statement of Additional Grounds, to make a written finding on each of his arguments to allow the Defendant/Petitioner to proceed to the Higher Courts and to preserve his arguments accordingly.

DATED this ___ day of December 2014.

respectfully submitted:

Joseph D. Byrd

Joseph D. Byrd ç 862480
Coyote Ridge Correction Center
P.O Box 769
Connell Washington 99326-0769

FILED
MARCH 5, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 31540-1-III
)	
Respondent,)	
)	
v.	)	UNPUBLISHED OPINION
)	
JOSEPH DEAN BYRD,)	
)	
Appellant.)	

LAWRENCE-BERREY, J. — Joseph Dean Byrd appeals the legal financial obligations (LFOs) imposed by the trial court during sentencing. He contends the trial court erred by finding he has the ability or likely future ability to pay these obligations. In a statement of additional grounds for review (SAG), he contends that his convictions for second degree robbery and third degree theft violate double jeopardy. In a supplemental SAG, he contends he received multiple punishments for the same crime, trial counsel was ineffective for failing to request a lesser included jury instruction, and insufficiency of the evidence. Finding no error, we affirm.

FACTS

A jury found Mr. Byrd guilty of second degree robbery and third degree theft. At sentencing, the trial court imposed the following legal financial obligations requested by the State: \$500 victim assessment, \$200 criminal filing fee, and \$1,500 court appointed attorney recoupment fee. Boilerplate language within the judgment and sentence stated:

The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

Clerk's Papers (CP) at 24.

At sentencing, neither party made any presentation addressing Mr. Byrd's ability to pay legal financial obligations. Mr. Byrd did not object to the costs imposed or to the boilerplate language in the judgment and sentence related to his ability to pay. The court ordered LFOs as follows:

The total financial obligation is \$2,200. It will bear interest by law from now until it is paid. Mr. Byrd's inmate account will be subject to withdrawals on a percentage basis. After his release he's to make payments as directed by [the Department of Corrections], and after his supervision as directed by the clerk.

Report of Proceedings (Mar. 25, 2013) at 18.

No. 31540-1-III
State v. Byrd

Pursuant to Mr. Byrd's request, the court dismissed the third degree theft, finding it had merged into the second degree robbery conviction. The court imposed a 50-month standard range sentence.

ANALYSIS

For the first time on appeal, Mr. Byrd contends that the trial court erred in finding that he had the ability to pay legal financial obligations without conducting any inquiry into his financial circumstances. Accordingly, he asks us to strike the directive to pay the LFOs.

Whenever a person is convicted in superior court, the court may order the payment of legal financial obligations as part of the sentence. RCW 9.94A.760(1). Courts may impose legal financial obligations if a defendant has or will have the ability to pay. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). Before making such a finding, the trial court must "[take] into account the financial resources of the defendant and the nature of the burden" imposed by the LFOs. *Id.* This court reviews a trial court's determination of an offender's financial resources and ability to pay for clear error. *Id.*

Two of the LFOs at issue here are mandatory. The \$500 victim assessment is required by RCW 7.68.035, irrespective of ability to pay. *State v. Curry*, 62 Wn. App. 676, 681, 814 P.2d 1252 (1991), *aff'd*, 118 Wn.2d 911, 829 P.2d 166 (1992). And the

No. 31540-1-III
State v. Byrd

\$200 criminal filing fee is required by RCW 36.18.020(2)(h). Because these LFOs are mandatory, they do not require the trial court to consider Mr. Byrd's ability to pay.

The only discretionary LFO was the \$1,500 appointed counsel recoupment fee. However, Mr. Byrd did not object at sentencing to the finding of his current or likely future ability to pay. Until our Supreme Court decides otherwise, the rule established that a defendant may not challenge a determination regarding his or her ability to pay LFOs for the first time on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492, review granted, 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, 176 Wn. App. 1, 302 P.3d 509 (2013), petition for review filed, No. 89518-0 (Wash. Nov. 12, 2013); *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013). Consistent with these decisions we decline to allow Mr. Byrd to challenge that finding for the first time on appeal. See also RAP 2.5(a).

We also agree with the State that the issue is not ripe for review. Mr. Byrd may petition the court at any time for remission or modification of the payments on the basis of manifest hardship. RCW 10.01.160(4); *Baldwin*, 63 Wn. App. at 310-11. The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay. RCW 10.01.160(3). Because this determination is somewhat "speculative," the time to examine a defendant's ability to pay

No. 31540-1-III
State v. Byrd

is when the government seeks to collect the obligation. *State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009). Mr. Byrd may challenge the trial court's imposition of LFOs when the government seeks to collect them.

In his pro se statement of additional grounds for review (SAG), Mr. Byrd contends that his judgment and sentence is invalid due to a double jeopardy violation. Specifically, he contends that the convictions for second degree robbery and third degree theft violate double jeopardy and, therefore, the court erred by imposing "57 Months for robbery in the second degree plus 364 days in theft in the third degree." SAG at 5. "We review alleged double jeopardy violations de novo." *State v. Lust*, 174 Wn. App. 887, 890, 300 P.3d 846 (2013).

The state and federal double jeopardy clauses protect a defendant from being punished multiple times for the same offense. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

Mr. Byrd misunderstands his sentence. The trial court dismissed the third degree theft count and imposed a mid-range standard range sentence of 50 months for the second degree robbery conviction. CP at 25. Thus, no double jeopardy issue arises.

Finally, Mr. Byrd raises three additional issues in a pro se supplemental SAG. First, he contends that he improperly received “multiple punishments” for the theft and robbery convictions because they involved the same criminal conduct. Suppl. SAG at 2-3. Our federal and state constitutions prohibit being punished twice for the same crime. U.S. CONST. amend. V; CONST. art. I, § 9; *State v. Freeman*, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005). Mr. Byrd’s argument overlooks the fact that the trial court dismissed his third degree theft conviction at sentencing. The trial court sentenced him solely on the robbery conviction. Thus, his claim fails.

Mr. Byrd next argues that trial counsel was ineffective for failing “to instruct the jury on a lesser included offense, based on multiple charges arising from the same criminal conduct.” Suppl. SAG at 5-6. He argues that he was “charged for a crime, that he did not premeditate” and that defense counsel’s failure to request a lesser included instruction violated his right to due process. Suppl. SAG at 5.

We review de novo a claim that counsel ineffectively represented the defendant. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To establish ineffective

No. 31540-1-III
State v. Byrd

assistance of counsel, Mr. Byrd must show that (1) his attorney's representation fell below an objective standard of reasonableness, and (2) resulted in prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Here, we need only address the first prong.

A defendant charged with an offense has an unqualified right to have the jury pass on a lesser included offense if there is "even the slightest evidence" that he may have committed only that offense. *State v. Parker*, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984) (quoting *State v. Young*, 22 Wash. 273, 276-77, 60 P. 650 (1900)). We apply a two-prong test to determine when a lesser included offense instruction must be given. First, each of the elements of the lesser offense must be a necessary element of the greater offense (legal prong) and, second, the evidence must support an inference that *only* the lesser offense was committed (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Our analysis is compromised by Mr. Byrd's failure to identify the crime he believes should have been included in a lesser included instruction. The trial court properly instructed the jury on the elements of third degree theft, a lesser included offense of second degree robbery. This allowed Mr. Byrd to assert his theory that he simply committed theft, not robbery. Mr. Byrd fails to establish that defense counsel's

performance was deficient.

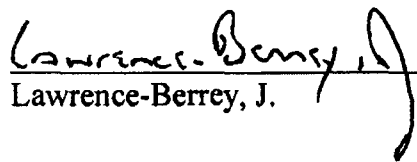
Third, Mr. Byrd contends that the State failed “to prove the intent of the crime of Robbery in the Second degree, and Theft in the Third degree.” Suppl. SAG at 6. Beyond that general assertion, he fails to cite to the record or point to any specific deficiencies in the evidence. Under RAP 10.10(c), we are not required to review a SAG if it fails to adequately describe the nature and occurrence of any alleged errors.

Nevertheless, to the extent we are able to address his argument, it fails. Theft requires proof that a defendant wrongfully obtained property of another “with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). Robbery also includes the nonstatutory element of intent to steal, which our Supreme Court has held is the equivalent of specific intent to deprive the victim of his property. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005). Here, the record shows that a store security officer watched Mr. Byrd take two cell phones from store shelves and hide them in his sweatshirt pocket. Mr. Byrd then left the store without paying for the merchandise. A jury could reasonably infer that Mr. Byrd intended to deprive the store of its property. Viewed in the light most favorable to the State, the evidence sufficiently establishes the intent to steal.

No. 31540-1-III
State v. Byrd

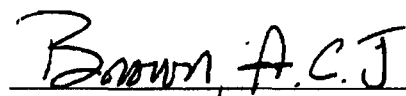
We affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

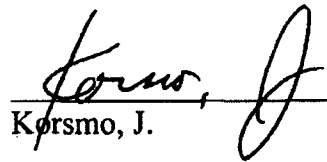


Lawrence-Berrey, J.

WE CONCUR:



Brown, A.C.J.



Korsmo, J.

FILED
MARCH 5, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 31540-1-III
)	
Respondent,	)	ORDER GRANTING
	)	MOTION FOR
v.	)	RECONSIDERATION AND
	)	WITHDRAWING OPINION
JOSEPH DEAN BYRD,)	
)	
Appellant.)	

The court has considered appellant's pro se motion for reconsideration and is of the opinion the motion should be granted. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of November 25, 2014, is hereby granted.

IT IS FURTHER ORDERED the opinion filed November 25, 2014, is hereby withdrawn and a new opinion will be filed this day.

DATED: March 5, 2015

PANEL: Judges Lawrence-Berrey, Brown, and Korsmo

FOR THE COURT:


LAUREL H. SIDDOWAY
CHIEF JUDGE

FILED
MARCH 5, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 31540-1-III
)	
Respondent,)	
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v.)	UNPUBLISHED OPINION
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Pursuant to Mr. Byrd's request, the court dismissed the third degree theft, finding it had merged into the second degree robbery conviction. The court imposed a 50-month standard range sentence.

ANALYSIS

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No. 31540-1-III
State v. Byrd

assistance of counsel, Mr. Byrd must show that (1) his attorney's representation fell below an objective standard of reasonableness, and (2) resulted in prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Here, we need only address the first prong.

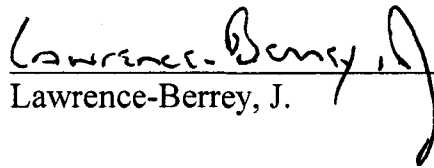
A defendant charged with an offense has an unqualified right to have the jury pass on a lesser included offense if there is "even the slightest evidence" that he may have committed only that offense. *State v. Parker*, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984) (quoting *State v. Young*, 22 Wash. 273, 276-77, 60 P. 650 (1900)). We apply a two-prong test to determine when a lesser included offense instruction must be given. First, each of the elements of the lesser offense must be a necessary element of the greater offense (legal prong) and, second, the evidence must support an inference that *only* the lesser offense was committed (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Our analysis is compromised by Mr. Byrd's failure to identify the crime he believes should have been included in a lesser included instruction. The trial court properly instructed the jury on the elements of third degree theft, a lesser included offense of second degree robbery. This allowed Mr. Byrd to assert his theory that he simply committed theft, not robbery. Mr. Byrd fails to establish that defense counsel's

No. 31540-1-III
State v. Byrd

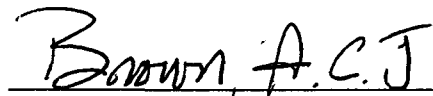
We affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

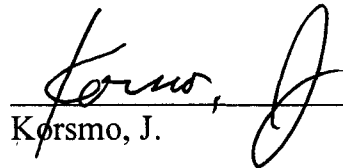


Lawrence-Berrey, J.

WE CONCUR:



Brown, A.C.J.



Korsmo, J.

Appendix G

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

STATE OF WASHINGTON,	)	No. 31540-1-III
)	
Respondent,)	
)	
v.	)	MOTION FOR RECONSIDERATION
	)	RAP 12.4
JOSEPH DEAN BYRD,)	
	)	(CLERKS ACTION REQUIRED)
Appellant.)	

I. **COMES NOW** Joseph D. Byrd, the Plaintiff, *In Propria Persona*, and hereby submits this MOTION FOR RECONSIDERATION.

II. **ARGUMENTS**

The Defendant/Petitioner, files with this Court, many Motions, with the intention of preserving his arguments for the record, and ultimately allowing the Defendant to argue his complaints in the higher Courts. The Defendant Mr. Byrd, had informed his Court appointed attorney, on many occasions, his intention on pursuing his arguments on Double Jeopardy Violation, Failure to Instruct the Jury for a Lesser Included charge by his Attorney and the Courts failure to prove the Intent of the crime of Robbery.

The Defendants Court Appointed Attorney, failed to communicate with the Defendant Mr. Byrd, nor did his Attorney act on his behalf on preserving his arguments. The Defendant/Petitioner Mr. Byrd was Prejudiced by his Attorneys failure to adequately provide competent representation, therefore leaving him to preserve his arguments on his own, without help from his attorney and ultimately left with the choice to have his Attorney withdraw from further representation, in able to have his arguments properly preserved on the record.

The Defendant/Petitioner was prejudiced by this Court, when this Court found that the Defendants pro se argument about his attorneys failure to provide a lesser included instruction was found to have supporting authority, and that it lacked the proper instruction on what the Defendant was seeking as to the resolution to said argument. It is an abuse of discretion of this Court to hold the Defendants pro se issues to the same standard as a true attorney of the State. The Defendant/Petitioner respectfully asks this Court to reconsider their findings for his lesser included argument, and allow the Defendant to preserve this conflict for the higher Courts.

III. REMEDY

Allow the Petitioner/Defendant to be judged on his pro se arguments as a pro se litigant, and to reconsider this Courts findings on his lesser included instruction that his attorney failed to provide, due to the ineffective actions made by his attorney.

DATED this 19th day of March 2015

DECLARATION OF JOSEPH D. BYRD

I Joseph D. Byrd swear by the laws of Washington State, and by penalty of perjury of law that the foregoing is true and correct to the best of my knowlwdge.

Joseph D. BYRD
Joseph D. Byrd

FILED
APRIL 9, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 31540-1-III
)	
Respondent,)	
	)	ORDER DENYING
v.	)	MOTION FOR
	)	RECONSIDERATION
JOSEPH DEAN BYRD,)	
)	
Appellant.)	


The court has considered appellant's pro se motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of March 5, 2015, is denied.

DATED: April 9, 2015

PANEL: Judges Lawrence-Berrey, Brown, and Korsmo

FOR THE COURT:


LAUREL H. SIDDOWAY
CHIEF JUDGE

Appendix H

Court of Appeals No. 315401

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF GRANT

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSEPH DEAN BYRD,,

Defendant.

No. 13-1-00038-8

Hon. John Knodell

Hon. Evan Sperline

March 6, 18 & 25, 2013

VERBATIM TRANSCRIPT OF PROCEEDINGS
From Electronic Recording

APPEARANCES:

For Plaintiff: DOUGLAS MITCHELL
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Ephrata WA 98823-0037

For Defendant: SUSAN D. OLGEBAY
Office of Public Defense
PO Box 37
Ephrata WA 98823-0037

KENNETH C. BECK, TRANSCRIBER
509-326-2438 • drdocument@me.com

TABLE OF CONTENTS

Rule 3.5 hearing 3/6/13 3
Readiness hearing 3/18/13 4
Sentencing 3/25/13 8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

RULE 3.5 HEARING
March 6, 2013

Before the Hon. John Knodell:

MR. MITCHELL: Good morning, your Honor.

THE COURT: Mr. Mitchell, good morning.

MR. MITCHELL: Ms. Oglebay is present on behalf of Mr. Byrd in 13-1-00038-8. Since she's here, she's first. And this is a very short and sweet proceeding. This is on for a 3.5 hearing, and the parties have determined that a stipulation for--

THE COURT: Wonderful.

MR. MITCHELL: --3.5 is appropriate.

THE COURT: Music to my ears.

MR. MITCHELL: If I can approach.

THE COURT: You're filing this; I'm striking this hearing.

MR. MITCHELL: Very good, your Honor.

Hearing ends

1 READINESS HEARING

2 March 18, 2013

3

4 *Before the Hon. Evan Sperline:*

5 MR. MITCHELL: Joseph Byrd, your Honor.

6 Your Honor, Mr. Byrd is -- Very good.

7 Your Honor, there's actually two matters. The first
8 one, Mr. Byrd is present in custody with Ms. Oglebay. And
9 that is 13-1-00038-8. --clerk's already handed you the
10 file.

11 THE COURT (off mic'): Yes.

12 MR. MITCHELL: That matter's on the trial run. It's
13 first. And thanks to the assistance of Off. Rodriguez we
14 got Mr. Byrd up here on the first crew, because we're
15 ready.

16 And I could sit here and look down on the list that the
17 court has just handed out -- memorandum file -- form, and
18 say yeah, we're good.

19 THE COURT: Okay.

20 Ms. Oglebay?

21 MS. OGLEBAY: Your Honor, I can do the same, but I feel
22 the need to say that I'm not obligated to do No. 4.

23 THE COURT: What is No. 4?

24 MS. OGLEBAY: No. 4 is "I provided opposing counsel with
25 my witness' written statements and the substance of their

1 oral statements."

2 I -- Under the rules, not only do I not have to without
3 court order; it's a violation of confidentiality because
4 what's done in the course of investigation without my
5 client's permission I cannot disclose without a court
6 order.

7 THE COURT: Fair enough. I didn't try to distinguish
8 between the prosecutor's and defendant's obligations.

9 MR. MITCHELL: I would dispute the assertion. I think
10 they're reciprocal. I -- My understanding of the rule--

11 MS. OGLEBAY: They are not.

12 THE COURT: No, actually I don't think they are. I
13 think counsel's right, that the obligation to provide that
14 information is included in the prosecutor's obligations,
15 but not in the defendant's obligations.

16 But, let's keep in mind that the state, by declaring
17 ready, declares that there's no outstanding--

18 MS. OGLEBAY: I understand.

19 THE COURT: --discovery. So,--

20 MS. OGLEBAY: With the exception of that -- Well, in
21 this case without the exception of that, I am ready.

22 THE COURT: Okay. What do you anticipate to be the
23 length of the trial?

24 MR. MITCHELL: Two days.

25 MS. OGLEBAY: Two days, maximum, I think, your Honor.

1 And I should advise the court that I am required to travel
2 to Grand Coulee at three -- I have to be there at three
3 o'clock in the afternoon on Friday for a deposition. So in
4 the unlikely event that this trial goes longer I would not
5 be available Friday afternoon.

6 But this is a very, in my opinion, short trial.

7 THE COURT: Number one, I certainly don't want to be
8 understood to say that counsel's obligation to be here for
9 a jury trial would yield to the obligation to be someplace
10 for a deposition. Why wouldn't you reschedule--

11 MS. OGLEBAY: This was an unusual circumstance, your
12 Honor. I had depositions scheduled here, the people did
13 not show up for the depositions, I filed a show cause. In
14 the meantime the officer took -- the prosecutor's office
15 asked the officer to try to contact the witnesses, the
16 officer called Mike Shea and did not call me and thought he
17 was scheduling another deposition for last Wednesday. When
18 this came before Judge Antosz he asked me to pick a date
19 and time, and that was the best I could do, not knowing
20 what my schedule is during the week.

21 THE COURT: All right. Well, you're going to -- In the
22 event that jury deliberations continue into the period
23 where you have to depart, you're going to need to arrange
24 to have a colleague prepared to stand by to take the
25 verdict or to speak to any questions that the jury might

1 have.

2 Okay. We'll show the case as ready, then, and we'll be
3 prepared to call it for trial on Wednesday morning at 8:30.

4 MR. MITCHELL: Yes.

5 MS. OGLEBAY: Thank you, your Honor.

6 *Hearing ends*

1 SENTENCING

2 March 25, 2013

3
4 *Before the Hon. Evan Sperline:*

5 MR. MITCHELL: 13-1-0038-8. The defendant is present in
6 custody and with counsel Ms. Oglebay. This matter comes on
7 for sentencing after verdict at trial last week.

8 And you have an emailed victim impact statement, your
9 Honor, (inaudible), also provided to counsel, (inaudible)
10 form of it. (Inaudible) the victim realized that he left
11 his (inaudible) number on there; (inaudible).

12 THE COURT: Okay.

13 Thank you. I've had an opportunity to consider the
14 victim impact statement.

15 State's recommendation?

16 MR. MITCHELL: Your Honor, the state is going to ask for
17 the top end of the standard range. The range is 43 to 57
18 months, plus the 18 months of community custody that goes
19 with the violent offense.

20 This is Mr. Byrd's first strike. We are also asking for
21 364 on the theft, and I'll explain -- not too simply why.

22 Mr. Byrd, at the time he committed this offense, was
23 under conditions of release on a stayed appeal, a stayed
24 sentence pending appeal, in cause number 11-1-00369-1. And
25 in that matter the state vigorously opposed the stay of the

1 sentence -- obviously to no avail -- and the state then -_
2 showed -- was confirmed that its low expectations was --
3 were correct, apparently, because those conditions
4 mandated, among other things, not committing an offense,
5 any -- criminal offenses. And here we had a new criminal
6 offense.

7 But for that the state's recommendation might not be
8 quite so assertive. Mr. Byrd had gone out of his way to
9 rack up a whole bunch of points, up to this date almost
10 (inaudible) drug-involved property crimes. We have bail
11 jump second, Burglary 2, malicious mischief second,
12 Theft 1, Theft 1, -- possession of methamphetamine.
13 There's also (inaudible) offense.

14 By statute this offense must be consecutive, under
15 9.94A.589(2)(a), to the sentence in the 2011 case, because
16 he was under sentence but it was stayed.

17 Mr. Byrd's conduct is escalating. His lack of respect
18 for society and the orders of the court are increasing.
19 It's a constant battle when the court sets conditions of
20 release, to achieve a reasoned balance that protects the
21 interests of society versus the liberty interests of the
22 defendant pre-trial, pre-conviction. When conditions of
23 release are set for a stayed appeal, or -- to stay a
24 sentence pending appeal, the expectations have to be
25 higher, because a person's already been convicted.

1 My recollection, I will say honestly, is that Mr. Byrd
2 did show up on the review that was set in the conditions of
3 release -- because one of the more arcane statutes dealing
4 with this only allows for a one-year appeal bond, and
5 sometimes appeals take longer. So I do have to say that.
6 That is in Mr. Byrd's favor.

7 Other than that, nothing is in his favor.

8 Based on that, we believe that the appropriate sentence
9 is at the top end of the standard range, in addition to 364
10 on the theft, all of it consecutive to the 2011 case, and
11 then of course the mandatory 18 months of community
12 custody.

13 THE COURT: Thank you.

14 Ms. Olgebay.

15 MS. OGLEBAY: Your Honor, insofar as the theft, I note
16 that theft is an essential element of robbery, and a
17 conviction on both of these implicates double jeopardy.

18 I'm aware of the merger doctrine, and it is somewhat
19 different. And merger doesn't overrule double jeopardy.
20 But clearly, theft is part of robbery. And I don't believe
21 he can stand convicted of both offenses. I ask the court
22 to dismiss the Theft 3rd. Running it concurrent does not
23 solve the problem under double jeopardy. The case law is
24 very clear that the stigma of conviction is sufficient to
25 violate the double jeopardy clause.

1 I agree with the state that his range is 43 to 57.

2 All of his crimes -- and there was a long period of time
3 where there were none -- are (inaudible) in the range.
4 There is nothing extraordinary about this, what we call
5 robbery. In fact, in the realm of robbery that comes
6 before the court, or at least before my eyes, it's rather
7 minimal. There's no serious attempt to assault -- And by
8 "serious" I'm not saying something serious enough to make
9 it a Robbery 1; obviously we would have a different --
10 different offense. But this is a like situation.

11 I also note that Mr. Byrd has never received any sort of
12 drug treatment. He does not qualify for it in the
13 traditional sense with a robbery; he does not qualify for a
14 DOSA. But certainly the prison has programs available that
15 he is eligible to participate in. He has never been given
16 this chance before this court or in any situation, and I
17 think it's well nigh time that we see if that is helpful.

18 I see nothing here that justifies the high end. I ask
19 for the low end. I know that often a taking of
20 responsibility is viewed, although not in the light of
21 failure to accept a plea. And I will note that one of the
22 charges was returned with a not guilty.

23 So I ask the court for the low end in this situation, to
24 give this gentleman an opportunity at rehabilitation. I
25 believe the seriousness of which the state has spoken is

1 already set forth in the guideline range, based on his past
2 conduct.

3 And I have had a chance to review Mr. Moreland's
4 statement. I am sympathetic to the position he's in, but
5 my client is not responsible for the actions of every
6 shoplifter that comes into Walmart, and I don't wish him to
7 be held to that level of accountability.

8 THE COURT: Thank you.

9 Mr. Byrd, is there anything you want to say on your own
10 behalf?

11 DEFENDANT: (Inaudible) I'm ready for sentence, your
12 Honor. And I'm sorry for what I stole.

13 THE COURT: Thank you.

14 Is there anyone who wants to be heard on behalf of the
15 police agency involved?

16 MR. MITCHELL: No, your Honor.

17 THE COURT: Does the state have a response to the
18 suggestion that the theft merges into robbery?

19 MR. MITCHELL: I believe the elements are sufficiently
20 different that we (inaudible) double jeopardy problem. I
21 know -- Ms. Oglebay mentioned it to me before, and I
22 haven't given it serious thought.

23 I do have a response, however, to the assertion of
24 counsel about the range. The range is the range. The
25 court has, as you know, unfettered discretion within that

1 range. There's no presumption for any part of that range
2 that goes with a conviction. We've researched it; we see
3 no indication of a presumption. With that range the court
4 has a 14-month period in which to exercise its discretion
5 based on the offense itself and the offender. And what we
6 have here is not a first time offender.

7 The range itself considers the prior history. But
8 within that range the court can and should consider some of
9 the other characteristics of both the offense and Mr. Byrd,
10 in terms of his behavior while on conditions of release and
11 the continuing criminal conduct in which he engages.

12 THE COURT: Thank you.

13 Is there any reason that sentence should not now be
14 imposed?

15 MS. OGLEBAY: No, your Honor.

16 MR. MITCHELL: Mr. Hill -- I just spoke to Mr. Hill. He
17 concurs that the theft and the robbery are fundamentally
18 the same (inaudible).

19 THE COURT: Are what?

20 MR. MITCHELL: Never mind. I'll retract my assertion
21 (inaudible).

22 THE COURT: Ms. Oglebay, do you have any authority for
23 the merger argument?

24 MS. OGLEBAY: It's a double jeopardy argument. I did
25 not bring any with me.

1 Actually what Mr. Mitchell and I spoke before about was
2 double jeopardy between the assault and the robbery. We
3 had not spoken about the theft.

4 To me, since the essential element of a robbery is to
5 take property from the person or in the presence of
6 another, it's pretty obvious to me that that's a theft. I
7 don't know how it could be construed any other way. We're
8 not dealing with an attempt; we're dealing with an actual
9 robbery. And the first element of robbery is theft.

10 I do believe at merges, but I am relying on a double
11 jeopardy argument.

12 THE COURT: It seems to me that the question of whether
13 or not the theft that was intended to be completed by
14 robbery merges into the robbery is one that should have
15 been answered dozens of times in reported cases. So I'm
16 going to delay sentencing 'til later on today's docket to
17 give counsel an opportunity to answer that question.

18 Yeah. So, we can call the case again once we've had an
19 opportunity to review the authorities.

20 MS. OGLEBAY: Your Honor, I do have a case -- I did
21 research this; I just didn't make -- do a brief or -- or
22 make copies for the court or counsel. And I did bring one
23 with me that basically runs through the elements of both
24 double jeopardy and merger. That is Whelan v. United
25 States. The cite is 445 US 684 (1980).

1 I pulled this case in particular because--

2 THE COURT: I'm going to call that a -- advice to Mr.
3 Mitchell and we can address authority when each of you have
4 had an opportunity to--.

5 MS. OGLEBAY: I will say very quickly, I did not pull
6 this case for the specific elements of robbery and theft; I
7 pulled this case because between the -- the -- or, the
8 concurrence in the majority opinion there is very good
9 definition of what is merger and what is double jeopardy,
10 where they overlap and where they do not.

11 THE COURT: Okay. Thank you.

12 We'll call the case again.

13 MS. OGLEBAY: Thank you, your Honor.

14 *Recess*

15 MR. MITCHELL: And now we're ready to return to the Byrd
16 matter.

17 Mr. Byrd is present in custody and with counsel Ms.
18 Oglebay.

19 The research was actually more interesting, and less
20 productive--. The -- In clawing through the annotations I
21 found this really annoying inconsistency that I can't parse
22 very easily, at least not -- quickly.

23 A 1901 case says that larceny is a lesser included
24 within robbery. A 1994 case says first degree theft isn't.
25 And as I recall there's a definitional statute somewhere in

1 the theft (inaudible) that says that larceny and theft are
2 equated.

3 However, for that -- that aside, given the wording of
4 the information and the facts before the court I -- I
5 determined it's appropriate to stipulate that these are in
6 fact the same offense for double jeopardy purposes and that
7 the theft should be dealt with accordingly.

8 THE COURT: Okay.

9 MR. MITCHELL: Which of course changes my
10 recommendation.

11 THE COURT: Right. Although your recommendation can be
12 sort of compartmentalized in that regard.

13 MR. MITCHELL: Yes, sir.

14 THE COURT: Ms. Oglebay, anything further on behalf of
15 Mr. Byrd?

16 MS. OGLEBAY: No, your Honor.

17 THE COURT: Mr. Byrd, is there anything else you wanted
18 to say on your own behalf?

19 DEFENDANT: Other, I'm -- sorry.

20 THE COURT: Okay.

21 Is there anyone who wants to be heard on behalf of
22 Walmart or the (inaudible) police agency?

23 Is there any reason sentence should not now be imposed?

24 MS. OGLEBAY: No, your Honor.

25 THE COURT: Before I announce the court's sentence, Mr.

1 Byrd, having been found guilty of Count 1 on the verdict of
2 a jury upon your plea of not guilty, you have the right to
3 appeal from the verdict of the jury and the court's
4 sentence. To appeal you must file a written notice of
5 appeal with this court within the next thirty days. Your
6 failure to do that would cause you to forever lose the
7 right to appeal.

8 You have the right if you are indigent to have an
9 attorney appointed for the purpose of appeal and to have
10 other expenses of the appeal provided at public expense.

11 Ms. Oglebay will remain your assigned counsel during the
12 30-day appeal period so that she can assist you in filing a
13 notice of appeal if you wish to do so.

14 This is a -- in my view a relative -- relatively a
15 garden variety robbery, anything but high-profile or
16 especially dangerous or anything of that sort.

17 It was most interesting as a theft case because of the
18 retailer's advanced camera system which allows us all to
19 watch Mr. Byrd, close up, facial expressions, as he steals
20 the phones and secrets them on his person. Any body who's
21 considering stealing property from Walmart -- which is
22 apparently a fairly substantial portion of the public, at
23 least the portion we deal with -- should smile, because
24 you're on camera.

25 In regard to the robbery -- in regard to the theft it is

1 dismissed under the doctrine of merger, having merged into
2 Count 1.

3 In regard to Count 1 Mr. Byrd is sentenced to the middle
4 of the standard range, 50 months of confinement, followed
5 by 18 months of DOC community custody.

6 There is a financial obligation in the case that does
7 not at this point include restitution. I assume there
8 would be restitution in the value of the phones which were
9 removed from their packaging, but I'll leave that to
10 counsel.

11 If Mr. Byrd does not want to come back for a restitution
12 hearing -- He well may not, because it's a simple matter
13 that he may agree to in writing -- then he needs to initial
14 (inaudible) top of page 8.

15 The total financial obligation is \$2,200. It will bear
16 interest by law from now until it is paid. Mr. Byrd's
17 inmate account will be subject to withdrawals on a
18 percentage basis. After his release he's to make payments
19 as directed by DOC, and after his supervision as directed
20 by the clerk.

21 Defendant is ordered not to go to any Walmart property,
22 as I think by other process has been permanently excluded
23 from that property. He is not to have any contact with the
24 individual victim for a period of ten years, nor to go
25 within 200 yards of that person or his home, workplace or

1 school.

2 MR. MITCHELL: Your Honor, with regard to the financial
3 obligations, did I note on there in the usual manner that
4 the DNA has been done?

5 MS. OGLEBAY: Yes, you did.

6 MR. MITCHELL: Thank you.

7 THE COURT: Yeah. Thank you.

8 And -- Well, I don't know if that's the usual manner. I
9 was actually a little confused as to whether you were
10 crossing it out or underlining.

11 MR. MITCHELL: I underlined that portion in the
12 paragraph but I believe I struck the (inaudible)--

13 MS. OGLEBAY: You did, but--

14 THE COURT: (Inaudible). Okay.

15 MS. OGLEBAY: It does look like you're crossing it out.

16 THE COURT: All right. So we don't need DNA. We will
17 need Mr. Byrd's signature and fingerprints.

18 MS. OGLEBAY: Your Honor, if I may, I have no idea if
19 the court is interested but during the break I located the
20 cases, all of them, that I pulled when I was researching
21 whether the Assault 2 was double jeopardy. They're not
22 quite on point because of that, but the language is similar
23 and if the court would like to have them I'm happy to
24 provide them.

25 THE COURT: If I -- If I had time to consider them as an

1 academic exercise, I would, but I don't. So I thank you--

2 MS. OGLEBAY: Uh-huh.

3 THE COURT: That completes the hearing.

4 *Recess*

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



Kenneth C. Beck, Transcriber

July 22, 2013

Appendix I

FILED

FILED

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 3

JUN 16 2014

JUN 10 2014

STATE OF WASHINGTON
respondent

) NO. 315401

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

VS.

) MEMORANDUM IN SUPPORT OF MOTION
) FOR EXTENSION OF TIME

Joseph D. Byrd
Petitioner

) (CLERKS ACTION REQUIRED)
)

I. COMES NOW Joseph D. Byrd, the Plaintiff, In Propria Persona, and hereby submits this MEMORANDUM IN SUPPORT OF MOTION FOR EXTENSION OF TIME.

II. STATEMENT OF THE CASE

On January 18, 2013 I was arrested for the crimes of 3rd degree theft, Robbery in the 2nd degree, and Assault in the 2nd degree. I had a jury trial, that in which I was convicted of Robbery in the 2nd degree, and 3rd degree theft, the Assault in the 2nd degree was dismissed by a verdict of not guilty by the Jury. I was sentenced to 365 days for Theft in the 3rd degree, and 50 months for Robbery in the 2nd degree. A subsequent appeal followed the conviction, that in which is still active, and pending.

III. Facts Relevant to Motion

- A. Petitioner's Constitutional right to access the Courts.
- B. Petitioner's burden of proof in a Federal Court concerning the exhaustion of the State remedies.
- C. Petitioner's Counsel failed to bring up pertinent Constitutional issues.
- D. Petitioner needs to preserve on the record arguments on appeal and/or for later litigation in the higher Courts.

IV. GROUNDS FOR RELIEF and ARGUMENT

To allow the Petitioner to adequately preserve all his legal arguments, he must have all issues presented before this Court through his Appellate attorney, and or through his Statement of Additional Grounds. (citations omitted)

Under the First Amendment of the United States Constitution a petitioner has the right to "completely" access the Courts. (citations omitted)

Therefore, in the direct review phase, the petitioner, called ~~the appellant~~, pursuant to RAP 10.10 has the right to file a pro se statement of additional grounds for review "to identify and discuss those matters which the appellant believes have not been adequately addressed by the brief filed by the appellants counsel." And pursuant to RAP 10.10(f) the appellate court may, in exercise of its discretion, "request additional briefing from counsel to address issues raised in the appellant's pro se statement". And pursuant to RAP 10.10(c) the appellant must "inform the court of the nature of the occurrence of alleged errors." State v. Skuza, 156 Wn.App 886 (2010); State v. Huff, 119 Wn.App 367 (2003); State v. O'Connor, 155 Wn.App 282 (2010)

In the present case, the petitioner, on his statement of additional grounds, "identified and discussed" matters that were NOT addressed by petitioner's counsel. See Statement of Additional Grounds.

The client has the "ultimate authority" to determine the purpose to be served by the legal representation, within the limits imposed by the law and the lawyer's professional obligations. State v. Stenson, 132 Wn.2d 668 (1997) Therefore, it is the lawyer who has the "ultimate authority," according to his/her professional opinion applying the rules of professional conduct.

In the present case despite petitioner's numerous requests to counsel to add his issues in his appellant's opening brief, based on the grounds that the petitioner would be prejudiced if his case were to go to the Supreme Court, as he is well aware that he was not going to be able to present his pro se issues to this court. and therefore, petitioner is being prejudiced tremendously.

Counsel must be willing to advocate fearlessly and effectively on behalf of the client. Smith v. Lockhart, 923 F.2d 1314 (8th Cir. 1991); United States v. Hurt, 543 F.2d 162, 167-68 (1976) The petitioners counsel, in the instant case, in NOT advocating fearlessly and effectively any of the petitioner's mentioned issues, and failed to present them to the Court of Appeals. Therefore in the interest of justice and fairness, this Honorable Court should grant petitioner's motion for extension of time, ~~to allow petitioner to argue his issues, and to preserve thoes~~ arguments for latter litigation in the higher Courts.. This Court should grant petitioner's motion to allow petitioner, to ask this Court to accept review of his pro se issues under RAP 13.4(b)

The consequences of counsel's failure to raise pro se issues to this Court and denial to accept review, would prejudice the petitioner, however, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by his own. The petitioner, pursuant to the 1st, 6th, and 14th amendment of the United States Constitution, should be allowed to ask this Court to accept review, at least, concerning the pro se issues presented and ignored by his appellate attorney. And if this Court denies remedy in favor of the appellant, the petitioner can feel free to gas up the Federal vehicle and file Habeas Corpus.

DATED THIS 6 day of June, 2014

Respectfully submitted,

Joseph BYRD

Joseph D. Byrd, petitioner