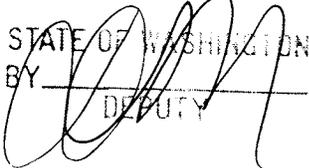


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

*36959-1-II*

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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State of Washington, Respondent

v.

Kirby R. Christopher, Petitioner

---

AMENDED BRIEF OF PETITIONER

Leanne M. Lucas  
Attorney for Petitioner  
WSBA No. 37414

3828 Beach Drive S.W., Suite 303  
Seattle, WA 98116

## Table of Contents

	Page number
I. Assignments of Error	1
No. 1 Under Washington law, did Defendant Kirby Christopher receive a fair trial to which he is constitutionally entitled?	1
No. 2 Under Washington law was Defendant Kirby Christopher denied his sixth amendment right to effective counsel for which he is constitutionally entitled?	1
II. Issues Pertaining to Assignments of Error	1
No. 1 Should the case brought against Defendant Kirby R. Christopher be dismissed for denial of his constitutional rights to a fair trial and effective assistance of counsel?	1
No. 2 Should the evidence be suppressed from the unlawful search of the vehicle?	1
No. 3 Should the trial court have allowed into evidence the defendant's admission to prior drug use two or three years ago?	2
No. 4 Should the trial court have allowed the description of the neighborhood where Christopher was stopped and lived as a SODA area (Stay Out of Drug Area)?	2
III. Statement of the Case	2
IV. Summary of Argument	11
V. Argument	11
A. Standard of Review	11
B. Scope of Review	12
C. Discretionary Review v. Appeal of Right	15
D. Ineffective Assistance of Counsel	19
E. Search Incident to Arrest	24
F. The Handgun and Sufficiency of the Evidence	29
G. The Bail Jumping Charge	35
H. Impeachment of the Officers' Statements	36
I. Civil Forfeiture	38
J. Failure to Call Witnesses	38
V. Trial Court Errors	39

VI.	Personal Restraint Petition	41
VII.	Conclusion	43

**TABLE OF AUTHORITIES**  
**Table of Cases**

<b>Washington Cases:</b>	<b>Page number</b>
<i>City of Seattle v. Slack</i> , 113 Wash.2d 850, 859, 784 P.2d 494 (1989)	33
<i>Department of Ecology v. Campbell &amp; Gwinn, L.L.C.</i> , 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002)	13
<i>Dorsey v. King County</i> , 51 Wn.App. 664, 668-69, 754 P.2d 1255, review denied, 111 Wash.2d 1022 (1988)	12
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970)	33
<i>New York v. Belton</i> , 453 U.S. 454, 460, 101 S.Ct.2860, 69 L.Ed.2d 768 (1981)	26
<i>State v. Alexander</i> , 64 Wash.2d 147, 822 P.2d 1250 (1992)	14
<i>State v. Anderson</i> , 141 Wash.2d 357, 360, 5 P.3d 1247 (2000)	28
<i>State v. Armstead</i> , 40 Wn.App. 448, 698 P.2d 1102 (1985)	14
<i>State v. Baeza</i> , 100 Wash.2d 487, 488, 670 P.2d 646 (1983)	33
<i>State v. Bales</i> , 15 Wn. App. 834, 835, 552 P.2d 688 (1976), review denied, 89 Wn.2d 1003 (1977)	27
<i>State v. Bryant</i> , 89 Wn.App. 857, 869, 950 P.2d 1004 (1998)	33
<i>State v. Eckenrode</i> , 159 Wash.2d 488, 491, 150 P.3d 1116 (2007)	29, 30
<i>State v. Gallo</i> , 20 Wn.App. 717, 582 P.2d 558 (1978)	14
<i>State v. Gurske</i> , 155 Wash.2d 143, 138, 118 P.3d 333 (2005)	31

<i>State v. Hundley</i> , 126 Wash.2d 418, 421, 895 P.2d 403 (1995)	33
<i>State v. Hutton</i> , 7 Wn.App. 726, 728, 502 P.2d 1037 (1972), (citing <i>State v. Carter</i> , 5 Wn.App. 802, 490 P.2d 1346 (1971), review denied, 80 Wash.2d 1004 (1972)	34
<i>State v. Jacobs</i> , 154 Wash.2d 596, 600, 115 P.3d 281 (2005)	13
<i>State v. Johnson</i> , 128 Wash.2d 431, 447, 909 P.2d 293 (1996)	25
<i>State v. Ladson</i> , 138 Wash.2d 343, 359, 979 P.2d 293 (1996)	25
<i>State v. McFarland</i> , 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995)	19, 20, 22, 24
<i>State v. O’Neill</i> , 148 Wash.2d 564, 571, 62 P.3d 489 (2003)	12
<i>State v. Pope</i> , 100 Wn.App. 624, 627, 999 P.2d 51 (2000)	35
<i>State v. Rempel</i> , 114 Wash.2d 77, 82, 785 P.2d 1134 (1990) review denied, 137 Wash.2d 1017 (1999)	35
<i>State v. Richenbach</i> , 153 Wash.2d 126, 130, 101 P.3d 80 (2004)	22
<i>State v. Riley</i> , <u>121 Wash.2d 22</u> , 31, 846 P.2d 1365 (1993)	24
<i>State V. Rupe</i> , 101 Wash.2d 664, 704, 683 P.2d 571 (1984)	31
<i>State v. Schelin</i> , 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002)	29
<i>State v. Stenson</i> , 132 Wash.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998)	20, 21

<i>State v. Stroud</i> , 106 Wash.2d 144, 147, 720 P.2d 436 (1986)	25, 26
<i>State v. Stratton</i> , 130 Wn.App. 760, 764, 124 P.3d 660 (2005)	13
<i>State v. Tarica</i> , 59 Wn.App. 368, 798 P.2d 296 (1990)	23
<i>State v. Theroff</i> , 25 Wn.App. 590, 593, 608 P.2d 1254, <i>aff'd</i> , 95 Wash.2d 385, 622 P.2d 1240 (1980)	33
<i>State v. Valdobinos</i> , 122 Wn.2d 270, 282, 858 P.2d 199 (1993)	29, 30
<i>State v. Wiley</i> , 26 Wash.2d 422, 613 P.2d 549 (1980)	14
<i>State v. White</i> , 135 Wn.2d 761, 770, 958 P.2d 982 (1998) (quoting <i>State v. Montague</i> , 73 Wn.2d 381, 385, 438 P.2d 571 (1968))	27
<b><i>United States Supreme Court Cases:</i></b>	
<i>Chimel v. California</i> , 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 658 (1969)	25
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	20

### **Constitutional Provisions**

U.S. Const. Fourth Amendment  
U.S. Const. Fourth Amendment  
Wash.Const. art.I, § 24

## **Other Authorities**

The Revised Code of Washington

Washington State Rules of Appellate Procedure

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

No. 1 *Under Washington law, did the trial court error in denying Defendant Kirby Christopher a fair trial to which he is constitutionally entitled?*

No.2 *Under Washington law was Defendant Kirby Christopher denied his sixth amendment right to effective counsel for which he is constitutionally entitled?*

B. Issues Pertaining to Assignments of Error

No. 1 *Should the case brought against Defendant Kirby R. Christopher be dismissed for denial of his constitutional rights to a fair trial and effective assistance of counsel?*

No. 2 *Should the evidence be suppressed from the unlawful search of the vehicle?*

No. 3        *Should the trial court have allowed into evidence the defendant's admission to prior drug use two or three years ago?*

No. 4        *Should the trial court have allowed the description of the neighborhood where Christopher was stopped and lived as a SODA area (Stay Out of Drug Area)?*

## II. STATEMENT OF THE CASE

Petitioner Kirby R. Christopher appeals his conviction of violation of the controlled substances act (VUCSA), with enhancements for illegal possession of a handgun and bail jumping. CP at 240. Mr. Christopher is currently an inmate who has served eight months of a 60 month sentence, CP at 240.

### THE STOP

On June 18, 2005, Kirby R. Christopher went to Kelso, Washington with two of his female friends to pick up his brother Timothy Christopher to bring him to Tacoma for a visit. RP at 43. After arriving in Tacoma, Kirby dropped off his female friends and then drove his brother to Kirby's home on 33<sup>rd</sup> and Tacoma Avenue South. Ex. 1, RP at 43. Kirby Christopher enjoyed visiting the Emerald Queen Casino about two to three times per

week and had recently won \$1506.00 on June 16, 2005. RP at 80, 107. At approximately 10:25 p.m., Mr. Christopher was traveling west on Portland Avenue on his way home. Ex. 1. Police Officer Verone, who was on DUI duty, RP at 4; signaled Kirby Christopher to pull off the road. Ex. 1. It took Christopher a minute to find a safe place to park his girlfriend's Dodge Durango. RP at 112, Ex. 1. Mr. Christopher waited patiently in his car while the officer approached his driver's door window. Ex. 1. The officer shone a bright light into Mr. Christopher's eyes and asked to see his license, registration and proof of insurance. Ex. 1. Kirby cooperated with the officer, but he was nervous because he was driving with a suspended license. RP at 33, 254, Ex. 1. Although the Durango was registered to Christopher, the car was new to him, RP at 112; it still had the dealer's temporary license in the back window. Ex. 1. In addition, Kirby's girlfriend was the one who usually drove it, so he had to think about where she stored the registration, and where his proof of insurance was. Ex. 1, RP at 112.

After fumbling a little, Christopher produced the information for the officer. Ex. 1, RP at 6. Verone asked Christopher to step out of his vehicle, and asked

him if he would take a voluntary field sobriety test. Ex. 1, RP at 6. Christopher agreed to the voluntary sobriety test. Ex. 1, RP at 8. Officer Verone noted that Christopher did not smell of alcohol, and was unarmed. Ex. 1, RP at 99.

Kirby knew that he was not driving under the influence of drugs or alcohol. RP at 11, Ex. 1. He believed that he had not been speeding. Ex. 1. He had been travelling about 35 m.p.h. along with the flow of traffic, and had slowed down to turn right onto 38<sup>th</sup> Street, when the Officer saw him and began following. Ex. 1.

Christopher cooperated with Officer Verone. Ex. 1. Kirby Christopher had no prior felony convictions. Ex. 1,3. He had no notion that this "traffic stop" would escalate into an enhanced felony conviction that would cost him five years of his life. CP at 240. He did not know that the search of his girlfriend's Durango would yield crack cocaine, and a handgun. RP at 11, Ex. 1, 3. He did not know that admitting to prior drug use over two years before would be reason enough to convict him of a DUI on June 18, 2005. Ex. 1, RP at 7, CP at 240. He also did not know that this police stop would begin a sequence of professional errors by those around him,

where he would be presumed guilty "**until and if**" he could prove himself innocent. CP at 87, 202, 240; RP at 1-264.

#### THE SEARCH

Officers Heilman (Dura) and Cockcroft, were called to assist, and began searching the vehicle while Officer Verone conducted the voluntary field sobriety tests. Ex. 1, RP at 8, 13, 91, 97, 150. Mr. Christopher had not been arrested, Ex. 1, RP at 8, 91, 97, 150; exigent circumstances did not exist, yet the officers began a premature search of the Durango. Ex. 1,3, RP at 8, 150.

Officer Heilman was the first to search the Durango. RP at 134. She reported to Officer Cockcroft who wrote the report the next day, RP at 132, RP at 134; that one baggie of "crack" cocaine was found under the driver's seat cover and another was found slid between the driver's seat and the console. RP at 134-136. Cockcroft also reported a loaded pistol on the passenger seat. Ex. 3. Officer Verone reported that Christopher was unarmed, RP at 97; Ex. 1; and Christopher denied that a handgun was on the passenger seat. RP at 11. Officer Verone's report did not

mention a handgun until the very end of his report. Ex. 1. In the report, he did not say that he had seen a gun on the seat, but said the other officers "said" there was a gun on the passenger seat. Ex. 1; RP at 98. It appeared that Officer Verone amended his report after discussing with Officer Cockcroft what was entered in Cockcroft's report. Ex. 1, 3, Cockcroft himself did not search the vehicle, therefore, he **did not see a gun** on the passenger seat, either, RP at 134, yet both wrote his report as if he had personally witnessed the handgun. Ex. 1,3. Christopher denies that there was anything on the passenger seat. RP at 11. At trial, defense counsel failed to cross examine the officers on this inconsistency. RP at 3-18, 20-36, 63-118, 128-152, 244-258.

Additionally, Officer Cockcroft's description of the handgun was not clear. Ex. 3. He referred to it as a Jennings Nine (9mm) serial # 1501108 and again as a Kurz Corto Short 9mm. Ex. 3.

Christopher passed the Breath Alcohol Test, and the Horizontal Gaze Nystagmus test St. Ex. 1, RP at 96-97. On the other tests, Christopher had trouble keeping his balance while standing on one leg, swaying back and

forth. Ex. 1, RP at 94-97. Yet, Christopher told Verone that he was suffering from a spinal injury and structurally could not ever have passed these tests. RP at 94-97, 110-111. The officer ignored that fact, and the fact that it was probably well after 11:00 p.m. Ex. 1, 3; and Christopher was simply tired. RP at 89. Verone stated in his report that Christopher had been stopped in "a recognized high drug and prostitution area" as one justification of probable cause, ignoring the fact that Kirby lived about five blocks from where he was stopped. Ex. 1. Verone arrested Kirby Christopher for Driving Under the Influence. RP at 97, Ex. 1.

The officers also found a large sum of cash \$1006.00 in Christopher's possession. Ex. 1, 2, 3. Mr. Christopher told them that he had won it at the casino. RP at 80. Yet the officers concluded that his cash, along with the drugs and the handgun, which Kirby did not know were in the car, RP at 11, and the neighborhood, made him a suspect in the unlawful delivery of a controlled substance, of which he was not convicted. CP at 87, 202; Ex. 1,2,3. They boldly seized the cash and the Durango and turned it over to

the Tacoma Police Department for an order of forfeiture. Ex. 1.

Later at the Police Station, Officer Chell noted that Kirby Christopher was not confused, his vitals were normal, but would "go on the nod." Ex. 2, RP at 29. Like the others, this officer was not concerned that it was very likely after midnight and Christopher had been tired hours before, RP at 67, 89, but instead concluded that Christopher was under the influence of drugs without any scientific proof. RP at 76, Ex. 2. Naturally, Christopher refused a blood test. RP at 254. He had volunteered for the sobriety tests because he was not under the influence, Ex. 1, yet was arrested anyway. Ex. 1. He had no knowledge of drugs or a handgun in the Durango, RP at 11, Ex. 1, so after the drugs were discovered, Ex. 3, and the gun had mysteriously appeared right on the passenger seat, Ex. 3, he was understandably afraid to volunteer for any further "tests" conducted by the Tacoma Police, or to cooperate with them. RP at 33, 254; Ex.1, 2, 3.

#### THE BAIL JUMPING

On the morning of January 18, 2007, Kirby Christopher was late for his hearing, and arrived just

minutes after the court had ordered a warrant for his arrest. CP at 30. On January 25, 2007, the warrant was quashed. CP at 32. During the summer of 2007, nineteen months after Christopher arrived late for the hearing, and after he refused to plea on all the charges brought against him, the Prosecutor vindictively amended the information on August 20, 2007, to add bail jumping to the charges brought against him. CP at 87-89.

#### THE HEARINGS AND TRIAL

During the following hearings and at trial on October 8<sup>th</sup>, 9<sup>th</sup>, and 11<sup>th</sup>, 2007, much of the evidence that should have exonerated Kirby Christopher, and much of the testimony that was necessary to support his case, was ignored by Christopher's defense counsel. In addition, Defense counsel abandoned the appeal causing the petitioner to lose his right of appeal, CP at 272; RP at 293, thereby limiting him to seek and be bound by the rules of a discretionary review CP at 273-292, 293,294-295, 298-320. Defense counsel's abandonment of Kirby Christopher's appeal, along with other errors, jeopardized Christopher's constitutional rights denying him a fair trial. In particular, counsel ignored the following:

- 1) No motion was made to suppress the evidence of the unlawful search conducted before arrest was made.
- 2) Defense counsel failed to provide evidence that the narcotic Vicodin would likely fail to impair Christopher's driving six hours after ingestion which was approximately the time of stop and arrest; RP at 256.
- 3) Christopher's brother, girlfriend and the two female companions were not subpoenaed or called to testify about the gun, the drugs or property in the Durango; RP at 43.
- 4) The usual driver of the Durango, Kirby's girlfriend was not subpoenaed or called to testify about the gun, the drugs, or property in the Durango and when the court brought it up as an issue, counsel failed to answer the court or to resolve the question. RP at 43.
- 5) Counsel failed to request a fingerprint test on the handgun to show that Kirby Christopher's prints were not on it, or to object at trial for TPD's (Tacoma Police Department) failure to test the handgun for fingerprints. RP at 118, 311.
- 6) The owner of the properly registered handgun was not contacted, RP at 115, no further investigation was conducted by Defense counsel to locate him RP at 115, and therefore he was not subpoenaed to testify on Christopher's behalf;
- 7) Defense counsel failed to make a motion to suppress the handgun as evidence when it was misidentified by the state examiner. RP at 158, 157.
- 8) The Officers' conflicting reports about where the drugs and handgun were found were not used to impeach testimony or to suppress the evidence; Ex. 1,3, RP at 158.
- 9) Defense counsel failed to examine police officers about the chain of custody of the handgun in the unsealed container; RP at 156 - 158; RP at 3-18, 20-36, 63-118, 128-152, 244-258.
- 10) The storage of the handgun in an unsealed container, in conjunction with the time lapse between arrest and the forwarding of the handgun to the state laboratory were not

objected to as tainted evidence by defense counsel and no attempt was made to suppress it as evidence; RP at 156.

11) Counsel entered no evidence or provided no testimony to confirm that Kirby Christopher arrived late to the hearing on January 18, 2007, or to confirm that the warrant was quashed as soon as was procedurally possible after it was entered. CP at 30, 32.

12) Defense counsel failed to provide medical evidence to substantiate the back injury, from which defendant Christopher suffered, to confirm the limited scope of his body movements. Ex. 1, RP at 94-97, 110-111.

13) Counsel did not object to the court's ruling to allow the prosecution to enter the description of the location of the stop as a SODA area completely ignoring that Christopher lived only a few blocks away. RP at 49.

14) Defense counsel failed to enter into evidence the receipt for the petitioner's winnings at a local casino to show that the cash petitioner possessed was unrelated to the VUCSA/unlawful delivery charge. RP at 47.

### III. SUMMARY OF ARGUMENT

Kirby R. Christopher appeals his trial court conviction asserting that his sixth amendment right to effective assistance of counsel and his right to a fair trial were denied.

### IV. ARGUMENT

#### A. Standard of Review

The appellate court generally reviews a trial court's decision to determine whether substantial

evidence supports any challenged findings and whether the findings support the conclusions of law. *Dorsey v. King County*, 51 Wn.App. 664, 668-69, 754 P.2d 1255, review denied, 111 Wash.2d 1022 (1988). Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wash.2d 564, 571, 62 P.3d 489 (2003). The court will view questions of statutory interpretation de novo. *State v. Stratton*, 130 Wn.App. 760, 764, 124 P.3d 660 (2005). The court must consider context, related provisions, and the statutory scheme as a whole, when interpreting statutory language. *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). Absent ambiguity, "the court must give effect to plain meaning as an expression of legislative intent." *Jacobs*, 154 Wash.2d at 600 quoting *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002).

#### B. Scope of Review

In general, issues not raised in the trial court will not be considered for the first time on appeal. RAP 2.5; *State v. Wiley*, 26 Wash.2d 422, 613 P.2d 549 (1980). However, where the cumulative effect of all

preserved and non-preserved errors has denied the defendant the constitutional right to a fair trial, the reviewing court can exercise discretion to review all claimed errors. *State v. Alexander*, 64 Wash.2d 147, 822 P.2d 1250 (1992). Under the Rules of Appellate Procedure (RAP) 2.5(a), certain errors may be raised for the first time on appeal. A party may raise the following errors for the first time: 1) lack of trial court jurisdiction; 2) failure to establish facts upon which relief can be granted; and 3) manifest error affecting a constitutional right. RAP 2.5 (a).

In criminal appeals, the most common exception to the general rule that a claim of error not raised in the trial court will not be considered if raised for the first time on review, is the claim of manifest error affecting a constitutional right. *State v. Gallo*, 20 Wn.App. 717, 582 P.2d 558 (1978). However, a review will not pass on a constitutional issue unless absolutely necessary to decide the case. *State v. Armstead*, 40 Wn.App. 448, 698 P.2d 1102 (1985). When a manifest error affecting a constitutional right is found, the appellate court may make an independent evaluation of the evidence.

There are two methods for seeking review of decisions of the superior courts, appeal, which is review as a matter of right, or discretionary review, which is review by permission of the reviewing court. *RAP 2.1(a) 2008.* A criminal defendant may appeal as a matter of right the following common superior court decisions:

- 1) The final judgment entered in the action;
- 2) The disposition decision following a finding of guilt in a juvenile offense proceeding;
- 3) A decision ordering commitment, entered after a sanity hearing or after a sexual predator hearing;
- 4) An order granting or denying a motion for a new trial or amendment of judgment;
- 5) An order granting or denying a motion to vacate a judgment;
- 6) An order arresting or denying arrest of a judgment;
- 7) Any final order made after judgment which affects a substantial right;

*RAP 2.2(a) 2008.*

A party may seek discretionary review of any superior court decision not appealable as a matter of right. *RAP 2.3(a) 2008.* However, discretionary review will only be accepted if:

- 1) The superior court has committed obvious error which would render further proceedings useless;
- 2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; or

3) The superior or district court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for the exercise of supervisory jurisdiction by the appellate court.

RAP 2.3(b) 2008.

C. Discretionary Review vs. Appeal of Right

In this case the defense attorney abandoned the appeal, therefore, Petitioner Kirby Christopher was substantially prejudiced. Christopher was convicted and given a sentence of five years. He was escorted out of the courtroom immediately after trial to begin serving his time. He communicated to his attorney that he desired an appeal. Mr. Christopher was indigent, and therefore relied on his attorney to process the documents to claim his indigency and begin the appeal.

Christopher's attorney filed a Notice of Appeal on November 6, 2007. CP at 272; RP at 254 - 270; but failed to file a determination of indigency.

Christopher was incarcerated and did not know about the letter from the appellate court dated November 16, 2007 requesting a filing fee or determination of indigency by December 3, 2007. CP at 272; RP at 293.

Toward the end of November 2007, Christopher heard nothing from his attorney, he called and left messages for him. He asked friends to call the attorney to try to expedite the appeal process. Nevertheless, counsel did not complete the documents. Finally toward the end of December 2007, after he had been transferred to the Airway Heights Correctional Facility in Spokane, Christopher received notice from the Court of Appeals Division II that he had been required to turn in appeal documents by November 14, 2007. Unfortunately, Christopher received the court notice about one month after the deadline for appeal had passed. His attorney had failed to complete the appeal and indigency documents, and failed to communicate with Christopher. The appellate court issued the mandate of January 11, 2008 RP, at 294, to close the appeal. CP at 294-295, Ex. I.

Christopher was left with only one option. He had to beg the court to recall the mandate, then seek discretionary review. His allegations justifying review do not satisfy those allowed under *RAP 2.3(b) Considerations Governing Discretionary Review in the Washington State Rules of Appellate Procedure*. Christopher's issues for review are better judged

within the scope of appeal rather than discretionary review.

Trial defense counsel's failure to file indigency forms in a timely manner, essentially rendered further proceedings useless. Christopher's issues for review satisfy requirements under "appeal of right", but not "discretionary review." Here, the superior court has not committed obvious error which rendered further proceedings useless, Christopher's attorney did. The superior court did not commit probable error from which the decision substantially altered the status quo or substantially limited the freedom of Christopher to act. The superior court did not depart from the accepted and usual course of judicial proceedings, as to call for the exercise of supervisory jurisdiction by the appellate court. After all, the trial court could not argue the case for the defense.

Therefore, the ineffective assistance of counsel at the trial level led to the denial of Christopher's constitutional right to appeal. Clearly, while Christopher was incarcerated, it was reasonable for him to rely on his attorney to expedite the appeal, and forward, if necessary, all documents to him in prison in a timely manner. The attorney's conduct was

deficient, and it may have cost Mr. Christopher his sixth amendment right to an appeal.

If the Division II Appellate Court, in its discretion, allows Christopher an appeal of right analysis, his constitutional right would be restored, however, this indigent appellant would have been left to pay the cost of private counsel in order to exercise his constitutional right.

In addition to abandoning the appeal process, defense counsel failed to introduce evidence and to allow witnesses to provide testimony to substantiate the Defendant's statements showing his innocence in the bail jumping, the influence of drugs at the time of arrest, and the possession of the handgun. The Washington Supreme Court has held that in order to be entitled to invoke the exception under RAP 2.5(a)(3), the general rule that appellate courts will not consider issues raised for the first time on appeal, the defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually prejudiced the defendant's rights. If the defendant cannot do this, he has not established manifest error. *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995).

The Supreme Court noted in *McFarland* that the law governing appellate procedure in Washington, places the defendant, who is alleging ineffective assistance of counsel, in a predicament. Where no motion to suppress evidence was made, or no attempt to investigate or produce witnesses for the defendant was made, no record exists at the trial court level. It is almost impossible to show actual prejudice to the defendant, because in the appeal process the court may not go outside of the record. Where the court may find such a predicament in this appeal, the defendant Kirby Christopher begs the court to consider a personal restraint petition.

D. Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, Christopher must show that his counsel's performance was deficient, and that the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's performance will be deemed deficient only when it falls below an objective standard of reasonableness. *State v. Stenson*, 132

Wash.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

Under *Strickland*, a defendant was convicted of capital murder, after he had admitted to two of three murders during a two week crime spree of theft, extortion, kidnapping and other crimes. During appeal, the defendant alleged that his attorney had failed to introduce evidence of character, failed to seek a psychiatrist's report, and failed to seek a presentence report. The court found no evidence of prejudice against the defendant under the circumstances.

In *State v. Stenson*, 132 Wash.2d 668, 940 P.2d 1239 (1997), the defendant asserted ineffective assistance of counsel when his attorney failed to make a motion to suppress evidence in his trial for murdering his wife. The defendant/husband had purchased life insurance shortly before his wife was murdered. The court found that where the existence of an insurance policy is relevant to a criminal case, as in showing the accused had a motive for killing in a homicide case, proof of the policy and its relationship to the accused must be shown.

In this case, Mr. Christopher did not desire to keep evidence out of the trial, he wanted to enter

evidence, but was denied that right by his own attorney. He stipulated to driving with a suspended license, but denied all other allegations brought against him. He also had informed his counsel and requested him to assert that he did not bail jump, did not know of the handgun, was not under the influence, and was not using his cash to forward the commission of a crime. Counsel's failure to argue on his behalf and show supporting evidence created unfair prejudice against Mr. Christopher at trial. His attorney's failure to act was not due to a viable trial strategy; his representation was not reasonable.

Under Washington law, there exists a strong presumption that counsel's representation is effective and adequate. *State v. McFarland*, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995). Yet, where there is no conceivable legitimate tactic explaining counsel's performance, there exists sufficient basis to rebut the court's presumption. *State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995); *State v. Richenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004). It seems unlikely that Christopher's counsel's failure to provide witnesses and evidence was a legitimate tactical decision or was reasonable.

To show prejudice, the petitioner/appellant must establish that there was a "reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995).

In *McFarland*, a defendant was convicted for a home invasion and robbery in which an accomplice was killed in the act by the homeowner. Defendant McFarland appealed, alleging ineffective assistance of counsel based upon defense counsel's failure to make a motion to suppress evidence in a warrantless search. Appellate Court, Division II based its ruling on *State v. Tarica*, 59 Wn.App. 368, 798 P.2d 296 (1990). It ruled that the first prong of the *Strickland* test was met because counsel's failure to object to the warrantless arrest at trial waived the defendant's Fourth Amendment right. The court stated that the waiver was per se deficient conduct by counsel because it was neither a tactical decision nor a reasonable trial strategy. The court also concluded that it could not determine prejudice because it was not clear from the record that counsel's failure to move for suppression of evidence resulted in actual prejudice to the defendant. Therefore, the

Appellate Court Division II denied relief and held that MacFarland could only challenge the warrantless arrest in a personal restraint petition.

The State Supreme Court disagreed with the appellate court's conclusion that failure to make a motion to suppress evidence is per se deficient representation under the first prong of the Strickland test. It ruled that "the burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' counsel's representation was effective." *State v. McFarland*, 127 Wash.2d 322, 337, 899 P.2d 1251 (1995).

To determine prejudice, the appellate court concluded, "[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995); *State v. Riley*, 121 Wash.2d 22, 31, 846 P.2d 1365 (1993). The Supreme Court affirmed the appellate court's ruling on this prong of the Strickland test.

In Kirby Christopher's case, he would fail both prongs of the Strickland test, because it is very difficult to show from the record what his attorney **did**

**not do.** Yet, his constitutional rights to a fair trial and effective assistance of counsel depend on it.

E. Search Incident to Arrest

Under the Fourth Amendment to the Constitution, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Fourth Amendment. A well recognized exception to the warrant requirement is search incident to arrest. *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 658 (1969). However, in Washington, this exception is "narrowly and jealously guarded." *State v. Stroud*, 106 Wash.2d 144, 147, 720 P.2d 436 (1986). Under *Chimel*, a valid search incident to arrest requires that the arrest is actually made and that a search is conducted of the area within the immediate control of the individual arrested. *Chimel*, 395 U.S. at 763. The U.S. Supreme Court drew a bright line rule that if a lawful arrest is made of an occupant in a vehicle, officers may search the

passenger compartment because the suspect might grab a weapon or destroy evidence located within the compartment. *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct.2860, 69 L.Ed.2d 768 (1981); *State V. Johnson*, 128 Wash.2d 431, 447, 909 P.2d 293 (1996). Yet, the Washington State Supreme Court has tailored this exception more narrowly and has held that police may search any area of the interior of the vehicle that the driver/suspect may reach without leaving the vehicle. *Johnson*, 128 Wash.2d at 450. In *State v. Ladson*, 138 Wash.2d 343, 359, 979 P.2d 293 (1996), the Washington Court clarified the current law as applied in Washington, "[T]he ultimate teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception."

Another exception to the warrant requirement is the inventory search. Police officers may conduct a good faith inventory search without a search warrant **following** a lawful impoundment. Officers may lawfully impound a vehicle if authorized to do so by statute. *State v. Bales*, 15 Wn. App. 834, 835, 552 P.2d 688

(1976), review denied, 89 Wn.2d 1003 (1977). However, a police officer may not resort to an inventory search as a "device and pretext for making a general exploratory search of the car without a search warrant." *State v. White*, 135 Wn.2d 761, 770, 958 P.2d 982 (1998) (quoting *State v. Montague*, 73 Wn.2d 381, 385, 438 P.2d 571 (1968)).

Officer Verone could have lawfully conducted a search incident to arrest of the area within the Durango which Christopher could reach. However, the officer apparently saw no reason to do so. If a handgun had been in plain sight on the seat, as Officer Cockcroft stated in his report, Ex. 1, he would have seen it and rightfully seized it. If a handgun had been lying on the seat covered with a cloth or piece of clothing, Officer Verone would have been justified in picking the cloth up, to determine what lay beneath. However, Officer Verone did none of these things, he saw no reason to search the immediate area, probably because there was nothing on the passenger seat. In fact he stated in his report, that the suspect was unarmed. Ex. 1.

During the arrest process, including the time immediately subsequent to the suspect being placed

under arrest, handcuffed, and placed in a patrol car, officers are allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. *State v. Stroud*, 106 Wash.2d 144, 152, 720 P.2d 436 (1986). The operative word in *Stroud* is "subsequent," which means "after." The *Stroud* court did not say "before" or "during" arrest.

When Christopher's was stopped, Officer Verone asked Christopher to get out of the car and took him to his patrol car to conduct voluntary sobriety tests. RP at 7. Officer Verone made the stop at 22:26. Ex. 1. Officers Heilman and Cockcroft arrived at 22:32 hours. St. Ex. 3. During the time the voluntary tests were being conducted, Officers Heilman and Cockcroft began searching the Durango. RP 91, 97. Yet, it was not until the sobriety tests were completed that Officer Verone placed Mr. Christopher under arrest. Ex. 1, RP at 8, 91, 97. Both reports by Officer Verone and Officer Cockcroft report that the arrest was made at 23:36. Ex. 1, 3. Therefore, according to the police report statements, Officers Heilman and Cockcroft must have searched the Durango before Christopher was placed under arrest. RP at 91, 97, 98. The officers had no immediate need to search the vehicle after Christopher

was moved to Officer Verone's car. There was no danger to them or others. If contraband or weapons were hidden in the car, they could not have been tampered with. Therefore, after Officer Verone asked Christopher to get out of the car, any issue of officer safety or destruction of the evidence no longer existed. An inventory search could have been lawfully conducted after Christopher was placed under arrest, but the police report statements and other data indicate that search must have occurred shortly after the officers arrived at 22:32 hours, which was one hour and four minutes before the officers stated that Christopher was arrested.

Officers Heilman and Cockcroft conducted a warrantless search of Christopher's vehicle long before Kirby Christopher was placed under arrest. We can only speculate what Cockcroft and Heilman did between 22:32 hours when they arrived, and 23:36 hours when they stated in the report that the arrest was made. Following arrest, they claimed they began the search. Ex. 3. The Defendant disputes this, yet, Defense counsel did not cross examine the officers, nor make a motion to suppress the evidence obtained in this illegal search. The Court should suppress all evidence

from the unlawful search as "fruits of the poisonous tree."

F. The Handgun and Sufficiency of the Evidence

A person commits second degree unlawful possession of a firearm, if he owns, has in his possession, or has in his control any firearm, and this person has previously been convicted of a felony, other than a serious offense, or certain specified gross misdemeanors. *State v. Anderson*, 141 Wash.2d 357, 360, 5 P.3d 1247 (2000); RCW 9.41.040(1)(a). Unlawful possession of a firearm in the second degree is not a strict liability crime, therefore, knowledge of possession is an essential element of the crime. *State v. Anderson*, 141 Wash.2d 357, 360,363, 5 P.3d 1247 (2000). The issue in this case is whether Kirby Christopher knew that he was in possession of a gun at the time of arrest. The State had the burden of proving that Kirby Christopher knew that the gun was in his Durango. *Anderson* at 366.

A court may add time to a sentence if a defendant was found armed with a firearm while committing a

crime. RCW 9.94A.533 (3). A person is armed while committing a crime if he can easily access a weapon and readily use it. However a nexus must exist between him, the weapon and the crime. *State v. Schelin*, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002); *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993).

This nexus requirement is critical because “[t]he right of the individual citizen to bear arms in defense of himself, or the State, shall not be impaired... ” Wash.Const. art.I, § 24. The State may not punish a citizen merely for exercising this right. *State V. Rupe*, 101 Wash.2d 664, 704, 683 P.2d 571 (1984). When a crime is a continuing crime—like a drug manufacturing operation—a nexus obtains if the weapon was “there to be used,” which requires more than just the weapon’s presence at the crime scene. *State v. Gurske*, 155 Wash.2d 143, 138, 118 P.3d 333 (2005).

The nexus tends to be fact specific in Washington. In *State v. Eckenrode*, the defendant called the police because of an intruder in the house. 159 Wash.2d 488, 491, 150 P.3d 1116 (2007). He told them he was armed and ready to shoot the intruder. *Id.* As the police arrived, the defendant was outside, sitting on his porch. *Id.* The police investigation yielded two

firearms and marijuana in the home. *State v. Eckenrode*, 159 Wash.2d 488, 491, 150 P.3d 1116 (2007). The Court affirmed this defendant's firearm enhancement because he informed about the weapon, had two guns, and specifically had a police scanner in the home. The Court reasoned that the defendant had armed himself to protect his criminal enterprise.

In *State v. Valdobinos*, the police arrested a defendant when he offered to sell cocaine to an undercover officer. 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Police found cocaine and an unloaded rifle under the his bed, during the search. *Id.* at 274, 282. The Court reversed the enhancement and held that the jury could not infer from the unloaded rifle near the drug that the defendant was armed. *Id.* The Court distinguished *Eckenrode* from *Valdobinos* because in *Eckenrode* the guns were loaded and the police scanner indicated that the defendant was protecting the drugs, while in *Valdobinos*, the weapon was unloaded even though it was near the drugs.

In Kirby Christopher's case, the defense attorney had information to align the facts toward *Valdobinos* rather than *Eckenrode*. Christopher's brother and two women had been with him in the car that day, and

Christopher's girlfriend usually drove the Durango. Christopher dropped the passengers off before he went to the Emerald Queen Casino and later headed home. Kirby Christopher did not know if his girlfriend, his brother, or the two other women passengers had placed the gun somewhere in his car. He told his attorney all of these facts. At trial, Christopher's attorney knew that the gun was legally registered to a man in Des Moines. Ex. 1. He knew that Kirby did not know the gun was in the vehicle, and had not touched the gun. He knew that Christopher's girlfriend, brother or two passengers could testify to those facts, yet he brought forth no witnesses, no arguments, and no objections. Christopher's Defense attorney merely stated that the State had not taken fingerprints from the weapon, so had not proven that the gun was Kirby's. RP at 310-311.

In this case, Kirby did not touch the handgun, he had no knowledge that the gun was in the Durango, and it was not lying on the passenger seat as Officers Cockcroft and Heilman had reported, covered or uncovered. Ex. 3. Thorough professional investigation could have shown that any fingerprints on the gun were not Christopher's. As discussed above, defense counsel could have called Christopher's brother, girlfriend or

two female passengers to the witness stand to testify that the gun did not belong to Christopher and he did not know that the handgun was in the automobile. Kirby had no known proximity to or intent to use the gun. Yet, defense counsel called no witnesses on Christopher's behalf. He did not cross examine the officers to check the trustworthiness of their statements in their reports, why they did not have the handgun tested for fingerprints, or to check the chain of custody of the weapon..

The defense attorney did not object when the State presented a weapon that did not match the correct serial number on the handgun in evidence. RP at 157. He did not object when the handgun was contained in an unsealed box for over two years before trial. RP at 157-58. He should have made a motion to suppress the handgun as evidence.

Due process requires the State to prove its case beyond a reasonable doubt; therefore, sufficiency of the evidence is a question of constitutional magnitude and can be raised initially on appeal. RAP 2.5(a)(3) 2008; *State v, Baeza*, 100 Wash.2d 487, 488, 670 P.2d 646 (1983); *City of Seattle v. Slack*, 113 Wash.2d 850, 859, 784 P.2d 494 (1989). Due process requires the

State to prove beyond a reasonable doubt all the necessary facts of the crime charged. *State v. Hundley*, 126 Wash.2d 418, 421, 895 P.2d 403 (1995); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Bryant*, 89 Wn.App. 857, 869, 950 P.2d 1004 (1998); *State v. Rempel*, 114 Wash.2d 77, 82, 785 P.2d 1134 (1990) *review denied*, 137 Wash.2d 1017 (1999). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wash.2d 385, 622 P.2d 1240 (1980). Nevertheless, the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972), (citing *State v. Carter*, 5 Wn.App. 802, 490 P.2d 1346 (1971), *review denied*, 80 Wash.2d 1004 (1972)).

In Kirby Christopher's trial, the State misidentified the handgun in evidence. RP at 158. Most of the evidence removed from Christopher's vehicle was

returned to Kirby Christopher's brother Timothy Christopher. Yet, other items entered into evidence were stored in unsealed containers, or were sent to the lab for testing long after they were collected— the handgun in an unsealed container. RP at 158. The State neglected to test one piece of evidence found in a baggy reminiscent of crack cocaine. RP at 188. This, along with the handgun arriving to the lab in an unsealed box, might cause one to speculate about the possibility of tainted evidence. RP at 157-58, 188. Yet, defense counsel failed to question those in the chain of custody, or object to the guessing, speculation or conjecture, that occurred in identifying the gun. The Court should find that the handgun should have been suppressed as insufficient evidence.

G. Bail Jumping Charge

The elements of bail jumping are met if the defendant; 1) was held for, charged with, or convicted of a particular crime; 2) was released by court order or admitted to bail with the requirement of a subsequent personal appearance; and 3) knowingly failed to appear as required. In addition, the statute implies a nexus between the crime for which the

defendant was held, charged, or convicted and the later personal appearance. RCW 9A.76.170; *State v. Pope*, 100 Wn.App. 624, 627, 999 P.2d 51 (2000). In Christopher's case, he was late for the hearing. He arrived at the courthouse and found that a warrant had been issued only minutes before he arrived. He drove directly to his attorney's office to seek a motion to quash the warrant. On January 25, 2007, the court quashed the warrant. CP at 32. Defense counsel knew that his client has been late, and had not failed to appear in court that day. When Kirby Christopher refused to plea bargain to settle his case, the Prosecutor filed an amended information to add bail jumping to the allegations. Defense counsel knew the details, yet failed to show evidence of the issuing and quashing of the warrant, or testify on behalf of his client. CP at 30, 32.

#### H. Impeachment of the Officers' Statements

In Officer Verone's report of 6/18/05, he stated that Kirby Christopher was unarmed. Ex. 1. He did not say that he saw a handgun, and did not refer to it until the end of his report. He did not say that he had seen a gun on the seat, but said the other officers

"said" there was a gun on the passenger seat. Ex. 1. It appeared that Officer Verone amended his report after discussing with Officers Cockcroft and Heilman what was entered in Cockcroft's report. At trial he admitted he had no firsthand knowledge about any of the items that were discovered. RP at 15. How likely would it have been that if there truly was a handgun on the passenger seat that Officer Verone would not have seen it? How likely would it have been that if a piece of clothing or cloth had covered a handgun on the passenger seat, Officer Verone would not have conducted his own search within the arm span of Christopher? Would he have ignored it, or would he have asked Mr. Christopher to show him what was underneath the cloth or clothing?

When Officer Heilman testified, the first thing she said she saw was the protruding seat cover on the driver's seat. RP at 134. Is it likely that she would have ignored a handgun on the passenger seat, covered or uncovered, to be distracted by a protrusion under a seat cover? Kirby Christopher denies that there was anything on the passenger seat. RP at 11. Would a police officer make a misstatement to insure that a suspect is considered armed, to enhance the charge,

conviction, and sentence? Would an officer move evidence from a remote location in the vehicle to a place where the defendant would have had immediate access? Unfortunately, we do not know the answers to these questions, because during trial, defense counsel failed to cross examine the officers on this inconsistency.

I. Civil Forfeiture

When Kirby Christopher was arrested, his personal possessions were confiscated by the officers. Among his property was \$1006.00. He stated that he had recently won \$1506.00 at the Emerald Queen Casino. RP at 80. Ex. 1, 2,3. The officers apparently did not believe him. They took the cash and booked it into property as evidence of unlawful possession with intent to deliver a controlled substance. Defense counsel possessed a copy of the tax receipt, but failed to enter it into evidence.

J. Failure to Call Witnesses and Enter Evidence for the Defense

Most of the personal property in the Durango belonged to Timothy Christopher. CP at 247-252. He was never questioned about the handgun or the contraband.

The car was usually driven by Kirby's girlfriend. She was never questioned about her possessions in her car. The two female passengers could have left behind a couple of their belongings- they were never questioned

When asked to make an opening statement, and to call witnesses for the defense, Christopher's attorney declined. He also declined to enter evidence on his client's behalf. The question to determine effectiveness would be "Was this reasonable under the circumstances?" and "Would the results of this proceeding have been different if witnesses would have been called?" The defendant asserts that the results would have been very different. It is very likely that the drug charge and gun enhancement would have been dropped.

#### V. TRIAL COURT ERRORS

There were few errors of law conducted by the trial court in this case. When the trial court allowed into evidence the defendant's admission to, prior drug use two or three years ago Christopher's attorney should have objected. RP at 7. Under the Washington State Rules of Evidence, ER 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time, relevant evidence may be excluded "if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Christopher admitted to using drugs three years ago, yet admitting to drug use three years before arrest is not probative of possessing drugs today. It creates unfair prejudice, could mislead the jury, and may confuse the issues. ER 404 CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES prohibits evidence of "a person's character or a trait of character for the purpose of proving action in conformity therewith on a particular occasion." An exception is allowed under ER 404(a)(1) where the prosecution may rebut any character evidence offered by the defendant. Here the defense attorney did not offer character evidence, so no exception existed. Defense counsel should have objected on the grounds above.

When the court allowed in the record the description of the neighborhood where Christopher was stopped as a SODA area (Stay Out of Drug Area), counsel should have objected and argued that Christopher lived only five blocks away, and its probative value was

substantially outweighed by the danger of unfair prejudice to the Defendant, ER 403. The court should have found this overly prejudicial. To allow such evidence, renders all people who live in neighborhoods that are high risk for illegal activity, penalized based upon socioeconomic status, because this neighborhood might be the only location they can afford.

The court actually prompted defense counsel on a few issues that would have led to potential testimony or exhibits showing Christopher's innocence. RP at 43. Yet, the trial court could not argue the defense for ineffective counsel. The trial court could not rule on any objectionable tack of the prosecution, without the defense attorney first putting forth an objection.

#### VI. PERSONAL RESTRAINT PETITION

Under the Rules of Appellate Procedure the court will make its ruling by considering only evidence in the record.

Under RAP 16.4 Personal Restraint Petition—Grounds for Remedy (b) Restraint.:

A petitioner is under a 'restraint' if the petitioner has limited freedom because of a

court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case. The appellate court will grant appropriate relief to petitioner if the petitioner is under a restraint, and the restraint is unlawful. RAP 16.4(a).

A restraint is unlawful if a conviction was entered in a criminal proceeding instituted by the state in violation of the Constitution of the United States or the Constitution or laws of the State of Washington. RAP 16.4(c)(2). Also, a restraint is unlawful if "[m]aterial facts exist which have not been previously presented and heard, which is in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding." RAP 16.4(c)(3). Under RAP 16.4(c)(5), a restraint is unlawful if "[o]ther grounds exist for a collateral attack upon a judgment in a criminal proceeding... instituted by the state... ." And, under RAP 16.4(c)(7) if "[o]ther grounds exist to challenge the legality of the restraint of petitioner", the restraint is unlawful.

Restrictions exist under the Rules of Appellate Procedure 16.4(d). The court will grant relief only if

other available remedies are inadequate under the circumstances. Id. In addition, relief will be granted only if it is allowed under RCW 10.73.090, .100, .130, which define the one year limitation for a collateral attack. Lastly, the petitioner is limited to only one petition for similar relief on his behalf. RAP 16.4 (d).

In this case, if the court rules that an appeal or discretionary review do not address the issues raised by Kirby Christopher, and he must file a personal restraint petition, he would satisfy all of the requirements under RAP 16.4 above. His rights were restrained; he has limited freedom and is subject to 60 months of confinement; his constitutional rights to a fair trial were violated; material facts exist which were not previously heard, he received ineffective assistance of counsel; and, this procedure is occurring within the one year collateral attack requirement of RCW 10.73.130.

## VII. CONCLUSION

The Washington Constitution guarantees criminal defendants a fair and impartial trial. Wash. Const. Art. I, § 3 and 22. Inherent in this right is the

presumption of innocence, including the right to "the appearance, dignity, and self-respect of a free and innocent man." *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). The Court will determine what it means in Washington to have a fair trial and effective assistance of counsel. Does it mean that the defense may fail to provide evidence or call witnesses, allowing the jury to hear only the State's version of the facts? Does it mean that effective defense counsel may ignore questionable police procedures? Does it mean that effective defense counsel may fail to provide an expert to contest a police officer's observation of drug influence vs. physical injury? Does it mean that police reports are always truthful and anything the defendant asserts is untruthful? Does it mean that if defense counsel conducts himself in error in the trial process, he may be ineffective, but if defense counsel fails to act at all where he should have acted, he is nonetheless effective? Does it mean that state employees are allowed to misidentify evidence, and fail to safe proof evidence from tampering, but the evidence is still probative for conviction? Does it mean that arriving late for a hearing should add months to a conviction?

Does it mean that any suspect who possesses a large amount of cash has used the cash to further a crime, even when he is not convicted of that specific crime? Does it mean that exercising one's right to refuse a blood test is an automatic admission of guilt? Does it mean that an attorney can carelessly abandon the defendant's appeal, and with it the defendant's constitutional rights?

If the Court determines that the answers to these questions is "yes," then Kirby Christopher received a fair trial in Washington in October of 2007.

The Petitioner Kirby R. Christopher has spent eight months incarcerated and is currently sentenced to another fifty-three months. He begs the Court to correct the violation of his constitutional rights in the superior court trial of October 8<sup>th</sup>, 9<sup>th</sup>, and 11<sup>th</sup>. He respectfully requests the Court to rule in his favor on the issues above, and dismiss the case brought against him. If the Court does not see fit to dismiss the action, the Petitioner begs the Court to grant him any full or partial legal remedy for which he is entitled.

May 30, 2008

Respectfully submitted,

A handwritten signature in cursive script that reads "Leanne M. Lucas". The signature is written in black ink and is positioned above a horizontal line.

Leanne M. Lucas  
Attorney for Petitioner  
Washington State Bar  
Association number 37414

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COURT OF APPEALS  
DIVISION II

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

STATE OF WASHINGTON )  
RESPONDENT, )  
v. )  
KIRBY RANDELL CHRISTOPHER, )  
PETITIONER. )

No. 36959-1-II

**ATTORNEY'S CERTIFICATE  
OF SERVICE BY MAIL**

Pierce County Cause No.  
05-1-04670-0

I certify that I had delivered a copy of PETITIONER'S  
AMENDED APPELLATE BRIEF to:

Kathleen Proctor  
Attorney at Law  
Pierce County Prosecuting Attorney's Office  
930 Tacoma Ave. S., Room 946  
Tacoma, WA 98402

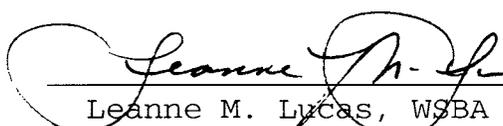
**ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL - 1**

LEANNE M. LUCAS  
3828 BEACH DRIVE S.W.#303  
SEATTLE, WASHINGTON 98116  
(206) 932-3492

1 And mailed to:  
2 Kirby R. Christopher, DOC # 311531  
3 McNeil Island Correctional Facility  
4 P.O. Box 88100  
5 Steilacoom, WA 98388-0900

6 Postage prepaid, on June 11, 2008.

7 June 11, 2008

  
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8 Leanne M. Lucas, WSBA # 37414  
9 Attorney for Petitioner  
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