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

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STATE OF WASHINGTON,

Respondent,

vs.

WADE WILLIAM PIERCE,

Petitioner/Appellant.

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AMENDED PETITIONER/APPELLANT'S RESPONSE  
TO RESPONDENT'S AMENDED RESPONSE

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ORIGINAL

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	iii
<u>STATEMENT OF THE CASE</u>	1
<u>ARGUMENT</u>	1
A. THE PETITION SHOULD BE REVIEWED IN ITS ENTIRETY BECAUSE PETITIONER HAS SHOWN PREJUDICIAL CONSTITUTIONAL ERROR AND FUNDAMENTAL DEFECTS RESULTING IN A MISCARRIAGE OF JUSTICE WHICH IS ONLY CURABLE BY THE INSTANT PERSONAL RESTRAINT PETITION	3
B. MR. PIERCE'S VEHICLE WAS ILLEGALLY SEARCHED BECAUSE THE POLICE LACKED PROBABLE CAUSE TO SEARCH, THEY WERE NOT PURSUING A COMMUNITY CARETAKING FUNCTION, AND THERE WERE NO EXIGENCIES OF MOBILITY	11
1. <i>No Probable Cause</i>	11
C. PETITIONER HAS SHOWN THAT HIS TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE.	16
D. KIER SHOWS THAT PIERCE'S ASSAULT IN THE SECOND DEGREE CONVICTION SHOULD MERGE WITH THE ROBBERY CONVICTION	18
1. <i>Despite the timing of Kier, its holding applies in the instant case.</i>	22
2. <i>Kier is not distinguishable and Mr. Pierce should be afforded relief.</i>	22

E.	PIERCE'S THEFT AND ROBBERY CONVICTIONS MUST BE REVERSED BECAUSE THE STATE FAILED TO IDENTIFY THE PROPERTY RELIED UPON FOR ITS CONVICTION, AND BECAUSE NO CREDIBLE EVIDENCE WAS OFFERED AS TO VALUE. . . . .	23
F.	PETITIONER'S FIREARM ENHANCEMENT CLAIMS ARE APPROPRIATELY BEFORE THE COURT BECAUSE OF COUNSEL'S INEFFECTIVENESS BY FAILING TO ADEQUATELY PURSUE THE CLAIMS AND BECAUSE ADDRESSING THEM MEETS THE ENDS OF JUSTICE. . . . .	25
G.	THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MR. PIERCE'S CONVICTIONS .	26
H.	PETITIONER OBJECTS TO THE COURT REVIEWING THE STATE'S RESPONSIVE BRIEF . . . . .	26
	<u>CONCLUSION</u> . . . . .	27

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>STATE CASES:</u>	
<u>In Re Brown</u> , 143 Wn.2d 431, 21 P.2d 687 (2001) . . . . .	10
<u>In re Cook</u> , 114 Wn.2d 802, 792 P.2d 506 (1990) . . . . .	3
<u>In Re Hews</u> , 99 Wn.2d 80, 660 P.2d 263 (1983) . . . . .	3
<u>In Re Personal Restraint of Maxfield</u> , 133 Wn.2d 332, 945 P.2d 196 (1997) . . . . .	6, 8
<u>In Re Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004) . . . . .	10
<u>State v. Clark</u> , 13 Wn. App. 782, 537 P.2d 820 (1975) . . . . .	24
<u>State v. Gocken</u> , 71 Wn. App. 267, 857 P.2d 1074 (1993), <u>review denied</u> , 123 Wn.2d 1024 (1994) . . . . .	13
<u>State v. Hutchinson</u> , 56 Wn.App. 863, 785 P.2d 1154 (1990) . . . . .	14, 15
<u>State v. Kier</u> , 164 Wn.2d 798, 194 P.3d 212 (2008) . . . . .	18, 21
<u>State v. Kleist</u> , 126 Wn.2d 432, 895 P.2d 398 (1995) . . . . .	24
<u>State v. Kypreos</u> , 115 Wn. App. 207, 61 P.3d 352 (2002), <u>review denied</u> , 149 Wn.2d 1029 (2003) . . . . .	13
<u>State v. Link</u> , 136 Wn. App. 685, 150 P.3d 610 (2007) . . . . .	14
<u>State v. Morley</u> , 119 Wn. App. 939, 83 P.3d 1023 (2004) . . . . .	24

<u>State v. Thompson</u> , 151 Wn.2d 793, 92 P.3d 228 (2004) . . . . .	13
<u>State v. Wilburn</u> , 51 Wn.App. 827, 755 P.2d 842 (1988) . . . . .	27
<u>Stigall v. Courtesy Chevrolet Pontiac, Inc.</u> , 15 Wn.App. 739, 551 P.2d 763 (1976) . . . . .	26

STATUTES:

RCW 9A.56.030 . . . . .	24
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### STATEMENT OF THE CASE

Petitioner relies upon the statement of the case as articulated in his opening brief.

### ARGUMENT

The previously unpublished Court of Appeals opinion cited by the State for the entirety of its factual recitation is flawed. For example, the facts from the opinion state that Rosita Coble "saw a small black two-door car leaving their long driveway." See State's Response at 5, citing unpublished opinion of the Court of Appeals. While this fact was included in Ms. Coble's testimony, it ignores the fact that on cross-examination she clarified she "didn't know what color it was," and further indicated she only knew it was a dark car, and that it could have been navy blue. RP 46. Furthermore, the State's recitation of facts ignores the testimony of Sargeant McDowell who indicated upon interviewing the Cobles he was unable to obtain any type of description of the vehicle. RP 110-111. In actuality, it was the officers (as opposed to the Cobles themselves) who identified

Mr. Pierce's car by pointing it out and telling the Cobles whose it was. See RP 24-25.

Over objection, an investigating officer (as opposed to a forensic scientist), offered his opinion that a set of work boots recovered had matching features to the footprints outside the Coble house. RP 203-2-4, 216-217. It was not a dispositive match, as the factual recitation in the State's Response would suggest. See State's Response at 7. Testimony actually included the footprints measuring 9 ½ to 10 inches and approximately 8 ½ inches, respectively. RP 125. Testimony, however, included Mr. Pierce's foot size was said to be a size 8 ½. These figures were obviously not comparable. It should be similarly noted that the same investigating officer merely testified to similar features between an unmounted set of tires observed and photographed at the Pierce residence (but never taken as evidence) and tire marks left at the Coble house. RP 223-224. The tires on Mr. Pierce's Ford Probe were not a match to the tire prints left behind at the Cobles. See RP 225.

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A. THE PETITION SHOULD BE  
REVIEWED IN ITS ENTIRETY  
BECAUSE PETITIONER HAS SHOWN  
PREJUDICIAL CONSTITUTIONAL  
ERROR AND FUNDAMENTAL DEFECTS  
RESULTING IN A MISCARRIAGE OF  
JUSTICE WHICH IS ONLY CURABLE  
BY THE INSTANT PERSONAL  
RESTRAINT PETITION.

Petitioner has shown actual prejudice stemming from constitutional error and a fundamental defect resulting in a complete miscarriage of justice. See In Re Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983) (holding a petitioner must show, as to each claimed constitutional error which he did not raise on direct appeal, that he was actually prejudiced by the error.) Id. Additionally, one must show that the claimed error "constitutes a fundamental defect which inherently results in a complete miscarriage of justice." In re Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Throughout his opening brief, Petitioner raises issues that are entirely constitutional and relate to the miscarriage of justice that includes his wrongful conviction and prison sentence.

Mr. Pierce's arguments include allegations specifically articulated to include the

following: Fourth Amendment to the US Constitution, Article 1 §7 of the Washington Constitution, Fifth Amendment to the US Constitution, Article 1 §9 of the Washington Constitution, Sixth Amendment to the US Constitution, Article 1 §22 of the Washington Constitution, along with violations of Constitutional principles of Counsel's ineffectiveness, failure of juror unanimity, unreasonable search and seizure, warrantless search, and double jeopardy. See Petitioner's opening brief. Mr. Pierce has also showed the "ends of justice" will be served by examining the issues in his PRP, and that an intervening change in the law and other justifications exist for addressing every issue in his PRP. Because Mr. Pierce has shown "actual prejudice" in each and every one of the asserted errors, the court must examine and address every argument. Additionally, Mr. Pierce's PRP is well supported.

Mr. Pierce was prejudiced in every instance of alleged error. Both trial and appellate counsel were ineffective for all of the reasons articulated in Petitioner's opening brief. Most

recently Pierce was re-sentenced to the substantial sentence of well over 33 years in prison. The errors articulated should have resulted in virtually all evidence suppressed in the case. Because appellate counsel failed to address the issues related to the trial court's ruling on the suppression issues, Mr. Pierce was prejudiced. He has shown that the case against him would have been extremely limited, or possibly eliminated entirely, and that his potential sentence would have been extremely minimal, if anything, compared to the current term of incarceration he realized after trial on all the issues without the benefit of the suppression to which he was entitled.

Petitioner was prejudiced by trial and appellate counsels' ineffectiveness. Accordingly, this court must examine errors, conduct, and omissions that occurred at trial, find error and find prejudice resulting from appellate counsel's failure to address the error. Petitioner cited several cases in his opening brief addressing the standard required when asserting errors by appellate counsel. The court

illustrated this process in In Re Personal Restraint of Maxfield, 133 Wn.2d 332, 343-344, 945 P.2d 196 (1997). The Maxfield court found that Maxfield's privacy interest in electrical consumption records was violated by a search. Id. That search should have resulted in the suppression of evidence at trial. Id. The court held that because appellate counsel failed to adequately address this issue, appellate counsel was ineffective. Id. In the present case the trial court erred when it failed to suppress evidence resulting from a vehicle search. See Petitioner's opening brief. It is important for this court to see the parallel between what occurred in Maxwell and what Petitioner is encouraging the court to do in the instant case. The following excerpt from Maxwell is included for this reason:

In this case, the PUD had no "authority of law" to contact the Drug Task Force and disclose information about the Maxfields' electric consumption records. The "authority of law" for disclosure of such records may not require the full blown protections of a search warrant; however, some "authority of law" is certainly required. In the absence of any "authority of law," the PUD's action

unreasonably disturbed the Maxfields' private affairs.

. . .

The proper remedy for the violation of the Maxfields' privacy rights in this case is the application of the exclusionary rule. The exclusionary rule in this state has a long history, independent from that of the federal rule. See Sanford E. Pitler, Comment, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 Wash. L. Rev. 459 (1986). When an individual's right to privacy is violated, article I, section 7 requires the application of the exclusionary rule. Boland, 115 Wn.2d at 582; State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); Pitler, supra, at 502.

Here, the disclosure by the PUD of the Maxfields' power consumption levels led directly to the evidence recovered in both searches. Because the original disclosure was in violation of article I, section 7, all of the subsequently recovered evidence must be suppressed.

. . .

The constitutional issue addressed above arose in the context of the Maxfields' personal restraint petitions' claim of ineffective assistance of counsel. They claimed they were denied effective assistance of counsel on their direct appeal when their attorney failed to adequately brief the Gunwall factors. In order to prevail on an appellate ineffective assistance of counsel claim, petitioners must show that the legal issue which appellate counsel failed to raise had merit and that they were

actually prejudiced by the failure to raise or adequately raise the issue. In re Personal Restraint of Lord, 123 Wn.2d 296, 314, 868 P.2d 835 (1994). The discussion above demonstrates the merits of the legal issue underlying the Maxfields' claim. Because the application of the exclusionary rule would have resulted in the suppression of all the evidence seized in both searches, the Maxfields have also demonstrated actual prejudice.

. . .

We hold there is a privacy interest in electric consumption records such that they cannot be disclosed by a public utility district without authority of law. Because no authority of law exists to authorize the disclosure in this case, the disclosure unreasonably disturbed the Petitioners' private affairs. Accordingly, the requests for relief in the Maxfields' personal restraint petitions are granted; the convictions are vacated and the charges dismissed.

Id.

Just as Maxwell presented an issue that should have resulted in suppression at the trial court level, Mr. Pierce has shown that the illegal search of his vehicle should have resulted in suppression as well. See Petitioner's opening brief. Appellate counsel failed to address this extremely important and fundamental issue. The matter was not hidden. In fact an entire section of transcripts and

testimony was dedicated to the pre-trial motion on the subject. Pierce has now briefed for the court the controlling law on the matter, and has shown that the trial court's errors on this subject constituted reversible error. There was no strategic reason for appellate counsel's failure. (As noted in subsequent argument within this brief, the state failed in its responsive briefing to indicate why counsel's failures were merely strategic decisions or immaterial. See, Argument \_\_\_, below.) Because appellate counsel failed to adequately address this matter, the court should now review it under the Personal Restraint Petition filed by Petitioner. The result should be a finding that appellate counsel was ineffective for the reasons articulated in Petitioner's opening brief, and that Mr. Pierce was prejudiced by the ineffectiveness. After finding the trial court's error and appellate counsel's ineffectiveness for failing to address the error, the court must reverse the trial court's failure to suppress the evidence.

Current law allows the court to address this issue despite the fact that Mr. Pierce's

appellate counsel could have earlier brought the matter before the Court of Appeals. Because appellate counsel missed the opportunity, the court should see this as a fundamental defect resulting in the miscarriage of justice curable only by a Personal Restraint Petition.

Proceeding to address this type of defect during a PRP is nothing new. The court has exclaimed its ability and willingness to do so in In Re Brown, 143 Wn.2d 431, 452, 21 P.2d 687 (2001), and In Re Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). The present matter is not a substitute for an appeal, it is an attempt to achieve justice at Mr. Pierce's first opportunity, given appellate counsel's inexcusable oversight.

In accord with the above argument, the court should find that Mr. Pierce was prejudiced because he would not be doing the substantial prison time he is currently serving had the suppression issue been properly addressed by his appellate counsel.

B. MR. PIERCE'S VEHICLE WAS  
ILLEGALLY SEARCHED BECAUSE  
THE POLICE LACKED PROBABLE  
CAUSE TO SEARCH, THEY WERE

NOT PURSUING A COMMUNITY  
CARETAKING FUNCTION, AND  
THERE WERE NO EXIGENCIES OF  
MOBILITY.

1. *No Probable Cause*

The following irrefutable facts surround the search of Mr. Pierce's vehicle (See Petitioner's Opening Brief, 3-9):

- Ms. Hidalgo called dispatch from a friend's home,
- Ms. Hidalgo only reported that she thought Pierce may have appeared on the property,
- Officer Smith arrived at the Hidalgo property,
- Pierce was initially located a "remote" distance from the vehicle,
- Officer Smith entered the backyard twice by the time Officer Kimsey did the same,
- The vehicle was in the back yard,
- The searched vehicle was not within view of the officer at the time Mr. Pierce was contacted,
- Smith saw the vehicle during his searches of the backyard,
- Officers received no answer when they knocked on the door of Wanita Hidalgo's home,
- Wanita Hidalgo was not located during two initial searches prior to Kimsey's third venture into the back yard (nor was she ever contacted on the day Mr. Pierce was detained),
- There was no evidence Ms. Hidalgo was present in her home or in the back yard by the time Kimsey entered the back yard,
- The only evidence was that she was not present as she had called dispatch from her friend's home,

- Detective Kimsey made observations in addition to those made by Smith when he ventured into the back yard,
- Kimsey examined the inside of Mr. Pierce's vehicle while he was located in the back yard during the police force's third visit to the back yard.

Id.

The officer's arrived to a report of Mr. Pierce's possible presence. He was detained during the officer's investigation. There existed no probable cause to go beyond the detention. Nevertheless, officers strayed beyond the curtilage of what was necessary to the detention of Mr. Pierce, and entered the backyard. This occurred without probable cause at the outset. There was no legally justifiable reason for the initial entry into the back yard; there was no legally justifiable reason for two subsequent visits to the backyard. Because the officer's lacked probable cause to be in the back yard in the first place, there was no probable cause to search the vehicle.

No grounds existed to invoke a "community caretaking" function. The officers arrived upon notice that Pierce may be present. This assertion bears no indicia that anybody's safety

was somehow at risk (not to mention the fact that Ms. Hidalgo called dispatch from somewhere other than the place of the search). Any claims of community caretaking are a pretext for their real reason: to contact Wade Pierce as part of a criminal investigation. Further, the court has held as follows, "The community caretaking exception allows for warrantless searches when police (1) make a routine check on health and safety or (2) respond to an emergency in order to render aid or assistance. State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). The community caretaking function must be divorced from a criminal investigation. State v. Kypreos, 115 Wn. App. 207, 217, 61 P.3d 352 (2002), review denied, 149 Wn.2d 1029 (2003). Broadly stated, a law enforcement officer's job is always to serve and protect the community. But where an officer's primary motivation is to search for evidence or make an arrest, this broader purpose does not create an exception to the search warrant requirement. See State v. Gocken, 71 Wn. App. 267, 275-77, 857 P.2d 1074 (1993), review denied,

123 Wn.2d 1024 (1994). State v. Link, 136 Wn. App. 685, 696, 150 P.3d 610 (2007).

The seizure should have ended after Smith checked the backyard. Petitioner asserts that Officer Smith had no right venturing into the back yard to begin with (see above argument). However, if despite that argument the court wishes to address the community caretaking component the court should nevertheless find that subsequent police entry to the back yard and subsequent examination of Pierce's Ford Probe were beyond the contemplation of the community caretaking function. As the state indicated in its responsive brief, "the seizure must end when the reasons for initiating the routine check on safety are fully dispelled. . . ." Respondent's brief, at 14, (citing State v. Hutchinson, 56 Wn.App. 863, 867, 785 P.2d 1154 (1990)). Here any purported safety concerns, however disingenuous they may have been, were fully dispelled once nobody answered the door to the home and the backyard was examined the first time. The state has ineffectively argued that the officer had "reasonable articulable suspicion

of criminal activity." Id. It's briefing appears to cite facts from the previous day's encounter between Hidalgo and Kimsey and bootstraps Detective Kimsey's subsequent and illegal entry to the back yard to support its position. See Respondent's Brief 14-17. This position directly contradicts well settled principles mandating suppressing the fruit of such poisoned activity. Importantly, there was no evidence ever presented that Mr. Pierce was a danger to Ms. Hidalgo on the day in question. And among the very act the state cites for its reasonable articulable suspicion is the very act the court should have suppressed: Detective Kimsey's inspection into Pierce's car following Smith's previous two escapades to the same turf. Simply, Smith failed to accumulate evidence supporting potential "articulable suspicion" that crime was afoot, and the investigation should have appropriately ended there. When the fishing expedition continued, illegal police conduct resulted, which further resulted in fruit obtained from a poisonous tree.

The officers' subsequent conduct does not support the disingenuous claim of community

caretaking. Simply, the purported concern for Ms. Hidalgo's safety ended upon the officers' locating Pierce's vehicle behind the house. No evidence exists articulating any reasons why the officers believed Ms. Hidalgo's safety was even a possible concern. No evidence exists showing the officers made follow-up attempts to contact Ms. Hidalgo at the location from which she called dispatch, or anywhere. Only minimal inferential reasoning causes the conclusion that further community care did not result because there was no care to begin with.

C. PETITIONER HAS SHOWN THAT HIS  
TRIAL AND APPELLATE COUNSEL  
WERE INEFFECTIVE.

This argument is made to refute that which the state has asserted in its brief. See Respondent's brief at 20. However, in its response to more general arguments pertaining to the standards of review, Petitioner has already addressed this issue in some detail in the opening argument of this memorandum. See Argument A, *infra*. Additionally, Petitioner has sufficiently alleged counsel's ineffectiveness in his opening briefing.

Contrary to Respondent's unsupported position, Petitioner has shown deficient performance, resulting prejudice, and a reasonable probability of reversal based on the issues that appellate counsel should have raised. In the instant case, trial counsel did virtually nothing during the course of the trial and that matter has been adequately addressed. The state, however, has failed to cite any particular reasoning justifying counsel's actions in its responsive brief. No justification has been offered as to trial counsel's failures because there is no good reason available for failing to seek additional discovery, failing to engage in meaningful cross-examination, failure to present existing mitigating evidence, and failure to move to dismiss a firearm enhancement. As to appellate counsel's shortcomings, the state only cites appointed counsel's reputation and track record and the efforts made pertaining to the issues she did address at appeal. However, the asserted shortcomings of the instant petition are significant as they have prejudiced Mr. Pierce to the tune of being denied review of substantial

issues that have been shown in opening briefing and supplemented here as issues mandating reversal or a substantially shorter sentence at a minimum. The point is not that appellate counsel failed to address that which Mr. Pierce urged, but that appellate counsel failed to appeal issues materials that would have resulted in relief.

D. KIER SHOWS THAT PIERCE'S  
ASSAULT IN THE SECOND DEGREE  
CONVICTION SHOULD MERGE WITH  
THE ROBBERY CONVICTION

The state mentions State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008) as recent authority regarding the merger issues in Mr. Pierce's case. The facts of Kier are remarkably similar to those of Mr. Pierce's Robbery and Assault charges. However, if anything, the facts of Mr. Pierce's case support reversing the court's merger sentencing decision under the reasoning of Kier. As the respondent has indicated, in Mr. Pierce's case neither the charging documents nor the jury instructions required the jury to determine specific victims of the robbery and the two assaults. See State's Response at 33. A reading

of an excerpt in Kier is essential for the court to see the parallels. In relevant part, it said,

Proof of robbery does not require the specific identity of the victim or victims. State v. Levy, 156 Wn.2d 709, 722, 132 P.3d 1076 (2006). Given that the unit of prosecution allows only one count of robbery where a single taking of property places multiple victims in fear of harm, whether the robbery victim was Hudson or Ellison, or both, was not essential to Kier's conviction. See State v. Tvedt, 153 Wn.2d 705, 719, 107 P.3d 728 (2005). Nonetheless, where the jury heard evidence describing both Hudson and Ellison as victims of the robbery and the instruction did not specify a victim, the basis for Kier's conviction is ambiguous. This is in contrast to the situation in Tvedt, where the defendant was tried on stipulated facts, including that he took separate property from specific victims. Id. Here, given the possibility that the jury could have found Ellison a victim of the robbery and the certainty based on the instructions that it found him the victim of the assault, it is unclear from the jury's verdict whether the assault was used to elevate the robbery to first degree.

The State argues that the possibility that the jury could have considered Ellison a victim of the robbery was eliminated because the prosecutor made a "clear election" of which act supported each charge, as is allowed in a multiple acts case. Specifically, the prosecutor in closing argument identified Hudson as the victim of the robbery and Ellison as the victim of the assault. The problem with this argument is that we cannot consider the closing statement in isolation. The

evidence presented to the jury identified both Hudson and Ellison as victims of the robbery, including Ellison's own testimony that Kier pointed the gun at him in the course of stealing the car. Furthermore, the jury instructions did not specify that Hudson alone was to be considered a victim of the robbery. While the prosecutor at the close of the trial attempted to require this finding, the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel. Accordingly, this is not a situation in which a clear election was made.

The State relies on the Court of Appeals decision in Bland to argue that a clear election can be based on the prosecutor's closing argument. Contrary to the State's assertion, however, the court in Bland did not rely on the closing argument alone. State v. Bland, 71 Wn. App. at 352 (stating, "[i]n addition, during closing argument the State made it clear, once more, that Bland's threatening of Jefferson with the gun was the act the State was relying on for count 1 and Bland's near shooting of Carrington with the gun was the act relied upon for count 2"). Rather, the evidence, jury instructions, and closing argument all supported the election of a specific criminal act. Id. (holding, "from the record in this case, the charging document, and the special verdict form, it is clear that the State elected Bland's actions with the gun").

Here in contrast, the evidence and instructions allowed the jury to consider Ellison a victim of the robbery as well as the assault, notwithstanding the State's closing

argument. As a result, the verdict here is ambiguous. The rule of lenity therefore requires the merger of Kier's second degree assault conviction into his first degree robbery conviction.

Finally, the State argues that even if merger otherwise applies, we should find that the assault on Ellison had a separate and distinct purpose from the robbery, invoking the exception under Johnson. . . see Johnson, 92 Wn.2d at 680. This argument is unavailing because the State offers no facts to support it. We do not rule out the possibility that, in the course of a robbery, a separate assault on a victim may occur; we recognized as much in Tvedt. Tvedt, 153 Wn.2d at 716 n.4. Here, however, the evidence at trial did not identify any purpose or effect of the assault on Ellison other than to effectuate the carjacking.

. . .

Adhering to our analysis of the merger doctrine in Freeman, we hold that Kier's second degree assault conviction merges into his conviction for first degree robbery. Accordingly, we reverse the second degree assault conviction and remand to the trial court for resentencing.

State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008)

(internal cites to briefing references omitted.)

After resentencing, Mr. Pierce's conviction ultimately included one assault victim, one robbery, and no specific victim was identified by the jury for either. The matters should merge for sentencing purposes. Kier used the same

reasoning as Pierce has advocated in his opening argument. That is, that the jury was not required to identify a victim for any of the pertinent offenses. Additionally, in Kier the court applied the rule of lenity, and the same principle should be applied in the case against Pierce.

1. *Despite the timing of Kier, its holding applies in the instant case.*

As the court can see, the Kier decision was based upon the analysis in Freeman. The state has articulated no rationale for its position regarding the Kier decision. Because the Kier decision is not only directly on point to the instant case, but because the principles governing it are well rooted in Freeman, this court should apply Kier to Mr. Pierce's case.

2. *Kier is not distinguishable and Mr. Pierce should be afforded relief.*

In Kier the court was asked to consider the prosecutor's closing statement to determine which victim went with each count. However, the court exclaimed it "cannot consider the closing

statement in isolation." The merger principles present in Kier existed exactly as they do in the instant case. Pierce should be afforded relief because his case included no specified victims in either of the relevant charges. Any efforts the trial court engaged in at sentencing adopting a particular victim were arbitrary. The "rule of lenity" should apply the same to Mr. Pierce's case as it applied in Kier. Thus, the holding from Kier dictates this court must adopt the same reasoning and find double jeopardy applies and Pierce's assault conviction, including the enhancement, should be vacated.

E. PIERCE'S THEFT AND ROBBERY  
CONVICTIONS MUST BE REVERSED  
BECAUSE THE STATE FAILED TO  
IDENTIFY THE PROPERTY RELIED  
UPON FOR ITS CONVICTION, AND  
BECAUSE NO CREDIBLE EVIDENCE  
WAS OFFERED AS TO VALUE.

Petitioner stands behind his arguments articulated in section 6 of his opening brief. Additionally, Pierce notes that the state has failed to address the issue of value.

As to "value", the law is clear. For instance, the court has held, "First degree theft is theft of property having a value greater than

\$ 1,500. RCW 9A.56.030(1). "Value" means market value at the time and place of the theft. RCW 9A.56.010(18)(a)." State v. Morley, 119 Wn. App. 939, 940, 83 P.3d 1023 (2004). The court elaborated as follows, "'Value' means the market value of the property . . . at the time and in the approximate area of the criminal act." RCW 9A.56.010(18)(a). "'Market value" is defined in this state as the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction.'" Citing, State v. Kleist, 126 Wn.2d 432, 435, 895 P.2d 398 (1995) (quoting State v. Clark, 13 Wn. App. 782, 787, 537 P.2d 820 (1975)). State v. Morley, 119 Wn.App. at 943.

The Morley court reversed a conviction that lacked sufficient evidence of value when the only testimony included the price of a new generator when a used generator was the object of the theft. Id. at 943. After analyzing principles of value, the court indicated that the testimony that included a list price failed to address issues of depreciation and that market value was not the appropriate measure. Id. at 944.

The present case is a more dramatic omission of value than Morley presented. The state's case against Mr. Pierce lacked meaningful evidence supporting the requisite value in Mr. Pierce's conviction. Therefore, the conviction must be reversed as the court did in Morley.

F. PETITIONER'S FIREARM  
ENHANCEMENT CLAIMS ARE  
APPROPRIATELY BEFORE THE  
COURT BECAUSE OF COUNSEL'S  
INEFFECTIVENESS BY FAILING TO  
ADEQUATELY PURSUE THE CLAIMS  
AND BECAUSE ADDRESSING THEM  
MEETS THE ENDS OF JUSTICE.

Petitioner relies on the arguments set forth in his opening brief. The court is encouraged to examine the language included in Instruction 36. See Exhibit I, to Petitioner's Opening Brief, Personal Restraint Petition. Then, Petitioner requests the court simply compare Instruction 36 to the language used in the charging instrument. See, Exhibit H, Counts I, VIII, IX, X, XI. The court should then compare those counts with the language used in counts XII and XIII. Id. And finally, the court should review Special Verdict Forms A-F, H, J, K, L, and M. See Exhibit H. The court will note the very inconsistencies Petitioner has identified in his opening

briefing. The court is accordingly asked to vacate the firearm enhancements as previously argued in opening briefing.

G. THE EVIDENCE WAS INSUFFICIENT  
TO SUPPORT MR. PIERCE'S  
CONVICTIONS.

Petitioner relies on arguments set forth in his opening brief of his personal restraint petition. Additionally, he incorporates by reference all further arguments advanced within this Reply brief.

H. PETITIONER OBJECTS TO THE  
COURT REVIEWING THE STATE'S  
RESPONSIVE BRIEF.

Mr. Pierce draws the court's attention to the state's late response to the Petitioner's PRP. It is Mr. Pierce's position that when the state missed its filing deadline under RAP 16.9, the state forfeited its right to file responsive briefings. To remedy the late filing, Mr. Pierce asks this court to strike the subsequently filed responsive brief, and the court should limit its ultimate decisions in this case to an examination of Petitioner's briefings only. See Stigall v. Courtesy Chevrolet Pontiac, Inc., 15 Wn.App. 739,

740, 551 P.2d 763 (1976), and State v. Wilburn,  
51 Wn.App. 827, 828, 755 P.2d 842 (1988).

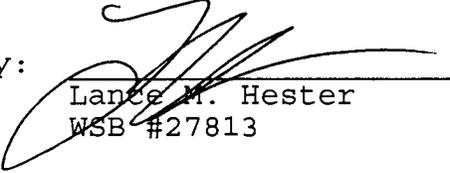
CONCLUSION

Mr. Pierce asks this court to grant his petition, reverse his convictions, dismiss where appropriate to do so, and to remand with instructions to re-sentence consistent iwth the position she has submitted herein.

RESPECTFULLY SUBMITTED this 9 day of  
June, 2009.

HESTER LAW GROUP, INC. P.S.  
Attorneys for Appellant

By:

  
Lance M. Hester  
WSB #27813

FILED  
COURT OF APPEALS  
DIVISION II

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON

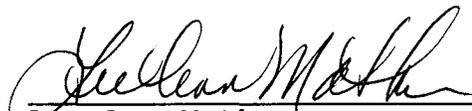
Lee Ann Mathews, hereby certifies By E  
DEPUTY

penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Lewis County Prosecuting Attorney's Office  
345 W. Main Street, Floor 2  
Chehalis, WA 98532-4802

Wade W. Pierce  
DOC #872917  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

Signed at Tacoma, Washington this 9th day  
of June, 2009.

  
\_\_\_\_\_  
Lee Ann Mathews