

No. 72365-1-I

No. 44996 -0 -II

**Washington State Court of Appeals, Division II  
THE STATE OF WASHINGTON**

Aaron Mercedes Johnson,     )  
  Petitioner             )

**PETITIONER'S REPLY TO  
STATE'S RESPONSE TO  
PETITIONER'S PERSONAL  
RESTRAINT PETITION**

**COMES NOW**, Petitioner Aaron Mercedes Johnson, by and through his counsel, Gloria J. Johnson, and respectfully submits this Reply to the State's Response to Personal Restraint Petition, dated March 13, 2017, pursuant to Washington RAP 16.

**A. STATUS OF PETITIONER**

The facts surrounding Petitioner's status have not changed since filing of the Personal Restraint Petition (PRP) in this matter. Thus, Petitioner relies on the Status Statements set forth in the PRP; and hereby incorporates by reference the legal arguments and factual statements set forth in Petitioner's PRP.

Petitioner acknowledges that the facts surrounding circumstances of the convictions in this matter are in dispute in many respects. However, in the State's Response, many of the facts are stated out of context and/or without specific reference to the record. For example, page 10 of the State's Response, provides, in part, as follows:

When Wojdyla would ask to leave, Johnson would say something along the lines of "If I can't have you, no one can." Frightened, Wojdyla asked Johnson if he had a gun with him; he replied, "Actually, I do," and lifted his sweatshirt to display the gun in a holster. RP 800-03.

This statements in this section are out of context. The record reflects that Wojdyla made clear that she did not remember when she had asked Johnson if he had his gun. Wojdyla's request was

not necessarily in the same context as the alleged comment that no one can have her. Nonetheless, the State factually connects this alleged statement with Wojdyla's question whether Johnson had his gun. As characterized by the State, this is out of context. Rather, the record clearly reflects Wojdyla's statement as "I had asked him at one point -- I don't -- I cannot recall exactly when." RP 802.

## **B. GROUNDS FOR RELIEF**

### **FIRST GROUND**

#### **Evidence Presented at Trial was Insufficient to Support the Alternative Means of Kidnapping in the First Degree Presented to the Jury**

Regarding this **First Ground for Relief** and the State's Response thereto, Petitioner continues to reiterate the arguments set forth in the PRP, but offers the following specific Replies to some of the State's Responses:

For the reasons set forth in the PRP, Petitioner continues to maintain that there was insufficient evidence to support kidnapping in the first degree by the alternative means of an abduction with the intent to facilitate the commission of rape in the first degree.

Also, for the reasons set forth in the PRP, and as discussed below, Petitioner continues to maintain that there was insufficient evidence to support kidnapping in the first degree by the alternative means of an abduction with the intent to impose extreme mental distress upon the alleged victim.

The State concedes in its Response that "it was stress resulting from the abduction which involved the threat of deadly force, and so by itself could not be sufficient to constitute the extreme mental distress required for kidnapping in the first degree." State's Response, page 24. Nonetheless, the State argues that extreme mental distress occurred when Petitioner allegedly made various threatening statements to Wojdyla; Ms. Wojdyla believed Petitioner was going to follow through with the alleged threats; Petitioner allegedly continued to keep Wojdyla in the apartment while a gun was also present; and Wojdyla allegedly had no way of preventing the Petitioner from doing those things he allegedly had threatened to do. State's Response, pp. 24-25. These beliefs and behaviors even if true, would not be sufficient to constitute extreme mental distress.

In its Response, the State alleges that the facts of the instant case are comparable to *State v. Harrington*, 181 Wn. App. 805, 333 P.3d 410 (2014), and as such, the court should find that the

Petitioner intended to inflict extreme mental distress upon Wojdyla. Petitioner disagrees. In *Harrington*, the alleged perpetrator used a gun by pointing it at the victim and holding the victim at gunpoint. Further, the alleged perpetrator shoved the gun into the alleged victim's forehead, and made the alleged victim ingest alcohol. See *Harrington*, pp. 413-417I. In the instant case, the Petitioner never pointed a gun at Wojdyla nor committed acts like those that occurred in *Harrington*. In Petitioner's case, the gun was shown to Wojdyla only after she asked Petitioner if he had his gun with him. Further, Petitioner removed the gun from his person and offered to give it to Wojdyla, who refused to accept it. Rather than constituting actions intended to inflict extreme mental distress on Wojdyla, Petitioner's actions were more in line with seeking to convince Wojdyla that he had no intent to cause her any mental distress or harm. The facts in Petitioner's case are different from those in *Harrington* and do not constitute evidence sufficient to find extreme mental distress.

Further, the State argues that, based upon *State v. Harrington*, even if the Petitioner had threatened to kill himself and not the alleged victim, this threat alone was sufficient to support a rational juror finding sufficient evidence to convict the Petitioner of first-degree kidnapping based on an intent to inflict extreme mental distress. Petitioner disagrees. In *Harrington*, the court stated that severe distress follows from one announcing he will kill himself in front of another. *Harrington*, p. 418. In Petitioner's case, a search of the record does not reflect testimony properly before the jury where Petitioner threatened to kill himself in front of Ms. Wojdyla.

The court should find that evidence was insufficient to convict the Petitioner of first-degree kidnapping based on an intent to inflict extreme mental distress.

## **SECOND GROUND**

### **The Kidnapping Merged into The Rape Charge and should be Dismissed based upon the Theory of Merger**

Regarding this **Second Ground for Relief** and the State's Response thereto, Petitioner continues to reiterate the arguments set forth in the PRP. In the instant case, the offence of kidnaping was incidental to the allege offence of rape in the first degree. The crime of kidnaping was one of the offences that must have been proven if the Petitioner was to be convicted of the crime of rape. The jury did not find the Petitioner guilty of committing the crime of Rape. Further, based upon the record in this case, any restraints or use of force resulted in no injury greater than what was allegedly encompassed by the crime of first degree rape. As the jury found that the Petitioner was not guilty of the crime of first degree rape, the crime of kidnaping should also fail, as a matter of law.

Petitioner request the court to consider its arguments on this ground, as set forth in the PRP.

### **THIRD GROUND**

**The Trial Court Erred in Failing to Suppress Evidence Seized in Violation of Petitioner's Rights under the Fourth Amendment of the U.S. Constitution and Wash. Const. Art. I § 7 because the Resultant use of Such Evidence at Trial Tainted the Entire Trial such that Convictions on all Charges must be Reversed.**

Regarding this **Third Ground for Relief** and the State's Response thereto, Petitioner continues to reiterate the arguments set forth in the PRP, but offers the following specific replies to some of the State's Responses:

The State argues that this issue should not be considered because it has already been reviewed on direct appeal and the stalking charge has been vacated by the appellate court. Petitioner disagrees. The Court of Appeals reversed the felony stalking conviction as a matter of law, ruling that under the applicable statute, felony stalking requires physically following another person on more than one occasion. In Petitioner's case, the court specifically held that it would not consider Petitioner's challenge to the Court's denial of his motion to suppress evidence related to the felony stalking charge. Specifically, the court stated that because it had reversed the felony stalking conviction, it needed not address this argument on appeal. Thus, the court never addressed the issue of tainted evidence at the trial nor fruit flowing from such a poisonous tree, tainting the entire trial. Therefore, this issue was not reviewed by the court on direct appeal and is properly before the court for review via this PRP.

In the PRP, Petitioner sets forth further justification why the challenged evidence should have been suppressed and demonstrates that the ends of justice would be served by consideration of this issue and reversal of the case. Petitioner explains in the PRP how the illegally seized and admitted evidence resulted in actual and substantial prejudice to the Petitioner. Thus, Petitioner respectfully request that the court consider this issue and find in Petitioner's favor.

Given the context of arguments set forth by the prosecutor at trial, Petitioner continues to assert that the prosecutor's comments and arguments throughout tainted the entire trial and justifies reversal and a new trial. Although there may not have been a conscientious effort by the prosecutor to link the various charges and facts, the result was as reflected in Petitioner's PRP, i.e., that linkage did occur and Petitioner suffered actual and substantial prejudice. Consideration of this issue by this court will serve the ends of justice. See *In re personal Restraint of Vandervlugt*, 120 Wn.2d 427, 432, 842 P.2d 950 (1992).

Petitioner continues to maintain as set forth in its PRP, that:

- 1) the search warrant was not supported by probable cause and did not particularly describe the things to be seized;
- 2) the warrant to search petitioner's car was not based on probable cause to believe evidence of a crime would be found therein;
- 3) the search warrant was unconstitutionally overbroad;
- 4) the court erred by admitting items seized from Petitioner's car that were not listed on the warrant and were not admissible under the plain view doctrine; and
- 5) the illegally seized evidence was produced at trial and used extensively by the prosecution in our arguing that Petitioner was generally guilty, i.e., have intent, to commit all charged crimes.

As set forth in the PRP, the prejudicial impact of the illegally seized and introduced items and their taint on the entire trial made it impossible for Petitioner to have received a fair trial.

## FOURTH GROUND

### **Based Upon Unrefuted Facts in the Record, Petitioner was not "Armed" for purposes of Firearm Enhancements**

Regarding this **Fourth Ground for Relief** and the State's Response thereto, Petitioner continues to reiterate the arguments set forth in the PRP, but offers the following specific replies to some of the State's Responses:

For the reasons set forth in Petitioner's PRP, Petitioner continues to maintain that, given the facts and circumstances of the instant case. Petitioner should not have been determined to have been "armed" for purposes of the firearm enhancements for either the burglary or kidnapping convictions or for purposes of sentencing.

Petitioner continues to maintain that, as in *State v. Brown*, 162 Wn.2d 422, 173 P. 3d 245, (2007), the record is undisputed that no evidence exists that Petitioner handled the handgun or any other object defined as a deadly weapon in a manner indicative of an intent on willingness to use them in furtherance of the charged crimes. Further, the statute that the Petitioner was convicted of violating was unconstitutional as applied to Petitioner.

## **FIFTH GROUND**

### **It was Prejudicial Trial Error for the Court to Comment on Evidence Presented at Trial**

Regarding this **Fifth Ground for Relief** and the State's Response thereto, Petitioner continues to reiterate the arguments set forth in the PRP, but offers the following specific replies to some of the State's Responses:

The Court's comment on evidence introduced in the case, namely comments regarding the potential danger of such evidence, constituted a direct comment conveying the court's attitude towards evidence in the case, thus impacting the merits of the case. The court's comment went to the core issues in the case.

Although the court never used the term "deadly weapon," the Court's comment, referring to the evidence as "potentially dangerous," went to the essence of the jury's charge to determine whether the items could be or were in fact used as deadly weapons.

As the state noted in its Response, "The definition of a deadly weapon given to the jury focused on the circumstances in which the item was used, threatened to be used, or attempted to be used. Trial RP 1238." Although the items referred to by the Court as "potentially dangerous" were never used, attempted to be used, not threatened to be used against Ms. Wojdyla, the court's characterization of the items as "potentially dangerous" and the Prosecutor's arguments before the jury that these items were deadly weapons, prejudiced the Petitioner such that Petitioner was unable to receive a fair trial.

In evaluating whether the items referred to by the court were in fact deadly weapons, the jury, based upon the Court's characterization of the items, had no need to determine whether the items were used in ways to constitute deadly weapons. Rather, they could reach a conclusion that because of the court's characterization of the items as potentially dangerous, it need not have gone to the next level of determining if they were in fact used in a way to constitute deadly weapons.

Whether the items mentioned by the court were deadly weapons was a critical element in the burglary charge. With the court commenting on these items, stating and opining them to be potentially dangerous, it cannot be said to have had no impact on the jury's decision-making. These views and statements had a prejudicial impact on the Petitioner, making it impossible for Petitioner to have received a fair trial.

## **SIXTH GROUND**

### **Petitioner was not afforded Effective Assistance of Counsel.**

Regarding this **Sixth Ground for Relief** and the State's Response thereto, Petitioner continues to reiterate the arguments set forth in the PRP, but offers the following specific replies to some of the State's Responses:

#### **a) Regarding Counsel's statement that Petitioner was guilty of harassment**

Petitioner's counsel at trial did not limit his comment regarding harassment to just the stalking charge, as alleged by the State in its Response. Given the context of counsel's statement that Petitioner was guilty of harassment, it became indistinguishable whether he was talking about the stalking charge or the alleged felony harassment charge.

Specifically, when Petitioner's counsel stated that Petitioner was guilty of harassment, he not only talked about the charge of stalking, but he talked about the events of May 14th, the date of the events that prompted the state to bring charges of felony harassment against the Petitioner.

Specifically, Petitioner's counsel stated as follows:

Mr. Johnson was guilty of Harassment and is guilty of Harassment. Because Harassment just requires that you are continually in contact with the person and it is annoying; it is bothersome; okay? So we concede that between April 25th and May 13th, when he's constantly texting her and she's telling him to stop, that's Harassment; okay?

But to get to Stalking, you have to find that it went to another level and that it was designed to cause her -- or she felt fear of injury. And we've already talked about all the issues with her testimony on May 14th. Because remember the testimony of Ms. Wojdyla when I asked her, "Has he ever threatened you before?"

"No."

"Did he threaten you during the text messages?"

"No."

The only threats -- and you have the texts that you can see. She interpreted it as being threats for him to harm himself, even though that's not directly and exactly what he said.

RP pp. 1344.

For the reasons set forth in Petitioner's PRP, Petitioner continues to maintain that Counsel provided ineffective assistance by stating that Petitioner was guilty of harassment and by misstating the elements of the crime of harassment.

**b) Regarding Counsel's statement that the Petitioner was armed with a firearm**

The legal question for the jury was whether the Petitioner was "armed," pursuant to criteria outlined in the court's instructions to the jury. Counsel did nothing to explain the "common" meaning of the term "armed." Counsel's point was that Petitioner was "armed" but the jury had to find "more than that." RP pp. 1342-1343. Then Counsel went on to discuss connection and circumstances. Petitioner continues to maintain that by telling the jury that the Petitioner was "armed," Petitioner's counsel in effect rendered a legal conclusion and diminished the state's burden of proof. The jury agreed with Petitioner's counsel in finding that the Petitioner was "armed," thereby adding an additional 10 years to his base sentence. Petitioner's counsel, by diminishing the state's burden, prejudiced the Petitioner. The jury, after having been told by Petitioner's counsel that the Petitioner was armed, had no need to consider the circumstances surrounding the weapon.

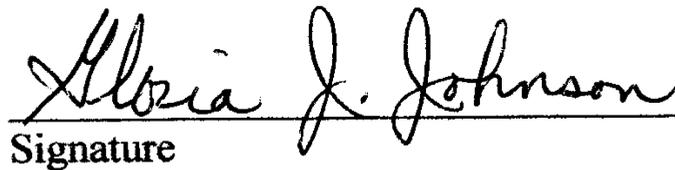
**C. REQUEST FOR RELIEF**

Petitioner respectfully request that this court reverse all convictions and remand for a new trial.

**D. OATH OF ATTORNEY**

I declare under penalty of perjury under the laws of the State of Washington that I am the attorney for the Petitioner, that I have read the petition, know its contents, and I believe the petition to be true.

Respectfully submitted,

  
Signature

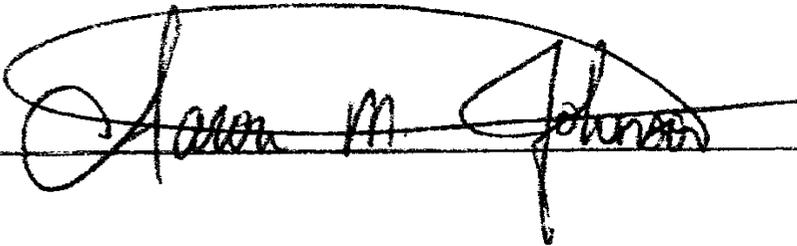
Signed this 12th<sup>h</sup> Day of April 2017, at Tacoma, Washington

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**VERIFICATION OF PETITIONER**

I declare that I have received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

Dated this 12<sup>th</sup> day of April 2017

Signature  Petitioner

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**GLORIA JOHNSON**  
**April 12, 2017 - 2:12 PM**  
**Transmittal Letter**

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Case Name: State v. Aaron Mercedes Johnson

Court of Appeals Case Number: 49712-3

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Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Petition for Review (PRV)

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**Comments:**

No Comments were entered.

Sender Name: Gloria Johnson - Email: [johnson010102@live.com](mailto:johnson010102@live.com)

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