

No. 50172-4-II

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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

KENNETH A. PEEBLES, JR.

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY  
Cause No. 13-1-03732-9

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REPLY BRIEF RE: PERSONAL RESTRAINT PETITION

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## **I. STATEMENT OF THE CASE**

The appellant adopts the statement of facts and procedural history as set forth in his opening brief.

## **II. ARGUMENT**

- 1. This Petition should be granted as this Ineffective Assistance of Counsel Claim was not raised in the Direct Appeal.*

Although the State, generally, sets forth the law when an identical issue is raised on collateral attack, that is not the case in Mr. Peebles's case. Here, Mr. Peebles, in his original appeal, argued ineffective assistance of counsel related to trial counsel's failure to object to improper closing remarks when defense counsel failed to object or seek a mistrial as a result of improper evidence being admitted at trial.

Here, the ineffective assistance of counsel claims surrounds trial counsel's failure to introduce or offer expert testimony, which would have been relevant and admissible, on the effects of intoxication to the offense charged and for trial counsel's failure to request a lesser included fourth degree assault instruction. Respectfully, this Court has held that a new ground for ineffective assistance of counsel claim may be raised for the first time on collateral review. *In Re Personal Restraint of Kahn*, 184 Wn.2d 679, 689, 363 P.3d 577 (2015). As such, the State's argument that the petition should be dismissed because the identical issue was raised on direct appeal is without merit.

2. *Peebles Satisfies the Personal Restraint Standard for Ineffective Assistance of Counsel.*

In a collateral attack challenge, the petitioner bears the burden of showing actual and substantial prejudice. “But to avoid requiring petitioners to show ‘double prejudice’, ‘a personal restraint petitioner who makes a successful ineffective assistance of counsel claim meets the burden of showing actual and substantial prejudice’.” *Kahn* at 688. Here, Mr. Peebles has raised the issue of trial counsel’s failure to propose a lesser included instruction of Fourth Degree Assault and counsel’s failure to call an expert to testify regarding intoxication.

A. Lesser Included Instruction and Expert Testimony

As set forth in petitioner’s opening brief, an assault is defined as “an intentional touching of another person with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.” *WPIC 35.50*. Further, Fourth Degree Assault is defined as follows:

A person commits the crime of assault in the fourth degree when he or she commits an assault.

*WPIC 35.25.*

Here, Mr. Peebles was charged with child molestation, which, indeed, if believed, involves an offensive touching. But, for purposes of the child molestation charge, in order for it to be a crime, the touching has to be done for the sexual gratification of one of the participants. Here, A.P. never testified that she was touched for her sexual gratification, nor did Mr. Peebles. As such, from a factual basis, the Fourth Degree Assault instruction was appropriate and should

have been given. This becomes even more concerning because the trial attorney did not request the testimony of a qualified expert to testify regarding the effects of intoxication. As set forth in petitioner's opening brief, the failure to call an appropriate expert undermines the Court's confidence in the outcome of a trial. *See State v. Thomas*, 109 Wn.2d 222, 232, 743 P.2d 816 (1987).

The State argues that there is no showing or offer of proof as to what an expert witness might have been permitted to testify about in this case. Such argument lacks credulity. As this Court is well aware, an expert, pursuant to ER 702, would be permitted to testify when scientific or specialized testimony would assist the trier of fact to understand the evidence. In Mr. Peebles' case, he raised the issue of intoxication as a defense. As such, the testimony of an expert on the effects of alcohol and the effects intoxication could have on a person's mental state would have been relevant, and admissible, at trial.

Additionally, the State's reliance upon *State v. Lewis*, 141 Wn.App. 367, 166 P.3d 786 (2007) is misplaced. There, the testimony was offered on the effects methamphetamine had on the "victim" as opposed to on the defendant. Because the proposed expert had no personal information regarding the victim's use of methamphetamine, and how it affected him, the expert's testimony would have been speculative. Therefore, his testimony would not have been helpful for the jury. Here, an expert would have had, at his or her disposal, Mr. Peebles. Unlike a deceased victim, the concern of speculation, as noted in *Lewis*, is not present here. As such, the trial counsel's failure to call an alcohol expert was

error, it prejudiced Mr. Peebles opportunity for a fair trial and, overall, trial counsel's performance was deficient.

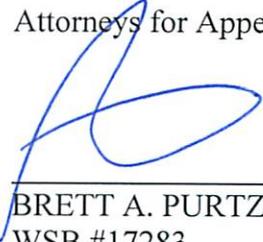
**III. CONCLUSION**

Based upon the aforementioned, Mr. Peebles respectfully urges that this Court grant his personal restraint petition.

DATED this 6<sup>th</sup> day of October, 2017.

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

By:



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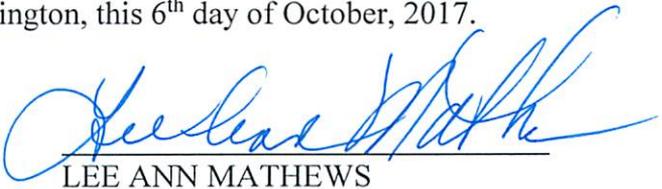
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under 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 the reply brief to personal restraint petition brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Kathleen Proctor  
Deputy Prosecuting Attorney  
930 Tacoma Avenue South, #946  
Tacoma, WA 98402

Kenneth Peebles, Jr.  
DOC #375898  
Washington Correctional Center  
P.O. Box 900  
Shelton, WA 98584

Signed at Tacoma, Washington, this 6<sup>th</sup> day of October, 2017.

  
LEE ANN MATHEWS

**HESTER LAW GROUP, INC., P.S.**

**October 06, 2017 - 11:59 AM**

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**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50172-4  
**Appellate Court Case Title:** In re the Personal Restraint Petition of Kenneth Archie Peebles, Jr.  
**Superior Court Case Number:** 13-1-03732-9

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