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COURT OF APPEALS  
DIVISION II

2018 SEP -5 AM 11:07

STATE OF WASHINGTON

BY WS  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON  
Respondent

No. 51797-3 / 51517-2

v.

THEODORE RHONE  
Appellant

STATEMENT OF ADDITIONAL  
GROUND, PURSUANT TO  
RAP 10.10

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I, Theodore Rhone, the appellant, have received and reviewed the "BRIEF of APPELLANT", prepared by my attorney, Lise Ellner, WSBA No.20955.

Summarized below are the additional grounds for review that are not addressed or where the Appellant has presented additional argument and case law for the Courts review.

I understand the Court will review this "STATEMENT OF ADDITIONAL GROUND" when my appeal is considered on the merits.

ADDITIONAL GROUND ONE

The Trial / sentencing Court in the appellant's case failed to maintain Subject Matter Jurisdiction over the appellant in order to sustain the verdict rendered by the jury panel.

ADDITIONAL GROUND TWO

The recent decision of City of Seattle v. Erickson,<sup>1</sup> created a significant change in law that should apply to appellant's case and is an exception to the one year time bar for collateral relief.

ADDITIONAL GROUND THREE

The adoption of GR37 creates a significant change in the law that applies to appellant's case and is an exception to the one year time bar for collateral relief.

ADDITIONAL GROUND FOUR

The State committed misconduct when it agreed to the subsequent change in the First Degree Robbery instruction, which related an uncharged alternative means which was not charged in the INFORMATION, AMENDED INFORMATION, or SECOND AMENDED INFORMATION.

ADDITIONAL GROUND FIVE

The appellant's defense counsel provided ineffective assistance of counsel in agreeing to the subsequent change in the First Degree Robbery instruction which related an uncharged alternative means which was not charged in the INFORMATION, AMENDED INFORMATION, or SECOND AMENDED INFORMATION.

ADDITIONAL GROUND SIX

The error in instructing the jury panel on an uncharged alternative means to commit First Degree Robbery cannot be considered harmless error, as it invaded the province of the jury panel

ADDITIONAL GROUND SEVEN

Appellant's petition is not time barred.

Dated this 2 day of Sept, 2018.

  
Theodore Rhone 708234  
Appellant, ProSe  
Stafford Creel Cor.Ctr  
191 Constantine way  
Aberdeen, WA. 98520

<sup>1</sup>City of Seattle v. Erickson, 188 Wn2d 721

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

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IN RE PERSONAL RESTRAINT OF

THEODORE RHONE  
Petitioner

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

Pierce cause No. 03-1-02581-1

The honorable Linda Lee, Judge

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SUPPLEMENTAL BRIEF OF PETITIONER

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON  
Respondent

No. 51797-3 / 51517-2

v.

THEODORE RHONE  
Appellant

APPELLANT'S PRO SE  
SUPPLEMENTAL BRIEF

---

A. IDENTITY OF MOVING PARTY

Come now Theodore Rhone, the appellant, and moves this honorable Court for the relief sought in part B.

B. RELIEF REQUESTED

Appellant is being unlawfully restrained and his petition is not time barred on the basis that (1) the appellant's Trial/Sentencing Court failed to retain Subject Matter Jurisdiction over the appellant; (2) Due to a significant change in the law, due to Erickson and the adoption of GR37, the appellant's Batson issue should be remanded for review and remanded for a new trial; (3) The State had committed error by requesting a change in the First Degree Robbery instruction to relect an uncharged alternative means; (4) The appellant's defense counsel provided ineffective assistance of counsel by agreeing to the State's

request to change the First Degree Robbery instruction to an uncharged alternative means; and that the appellant's petition is not time barred and meets an exception, pursuant to RCW 10.73.100.

C. ASSIGNMENTS OF ERROR

ADDITIONAL GROUND ONE

The Trial/Sentencing Court in the appellant's case failed to maintain Subject Matter Jurisdiction over the appellant in order to sustain the verdict rendered by the jury trial.

ADDITIONAL GROUND TWO

The recent decision of City of Seattle V. Erickson, created a significant change in law that should apply to the appellant's case and is an exception to the one year time bar for collateral relief.

ADDITIONAL GROUND THREE

The adoption of GR37 creates a significant change in the law that applies to the appellant's case and is an exception to the one year time bar for collateral relief.

ADDITIONAL GROUND FOUR

The State committed misconduct when it agreed to the subsequent change in the First Degree Robbery instruction which related an uncharged alternative means which was not charged in the INFORMATION, AMENDED INFORMATION, or SECOND AMENDED INFORMAITON.

ADDITIONAL GROUND FIVE

The appellant's defense counsel provided ineffective

assistance of counsel in agreeing to the subsequent change in the First Degree Robbery instruction which related an uncharged alternative means which was not charged in the INFORMATION, AMENDED INFORMATION, or SECOND AMENDED INFORMATION.

#### ADDITIONAL GROUND SIX

The error in instructing the jury panel on an uncharged alternative means to commit First Degree Robbery cannot be considered harmless error as it invaded the province of the jury panel.

#### ADDITIONAL GROUND SEVEN

Appellant's petition is not time barred.

### D. STATEMENT OF THE CASE

#### 1. PROCEDURAL HISTORY

A brief summary of the procedural history can be located in the appellant's prior briefing titled "MOTION TO RECALL MANDATE," pursuant to RAP 12.9, at pages 2-8, Court of Appeals, Division Two case No. 46960-0-II.

In the appellant's separate appeal to the Court of Appeals, Division Two, by way of unpublished opinion on July 6, 2016, the Court found that the suppression motion of the subsequent motion to suppress should have been granted and that the cocaine and the firearm should have been suppressed. See Court of Appeals Division Two, "UNPUBLISHED OPINION," at pages 1-2. But in regards to the petitioner's Robbery in the First Degree conviction along with it's deadly weapon enhancement, after finding that the

error in failing to suppress was harmless as to those convictions and so affirmed. See Court of Appeals, Division Two, "UNPUBLISHED OPINION" at pages 10-11.

The Court erroneously held that:

"The jury instructions required the jury to find only that (appellant) displayed what appeared to be a firearm in order to convict for first degree robbery, not that he possessed an actual firearm. The unchallenged findings of fact include Miller's statement that the front seat passenger pointed a gun at him when the Camaro proceeded through the drive through, Burg's statement that there was a gun in the car and that (appellant) exited from the passenger door of the vehicle. The State meets its burden and establishes that the untainted evidence necessarily supports a finding that (appellant) displayed what appeared to be a firearm. Thus, the admission of the weapon is harmless error as it relates to (appellant's) conviction for first degree robbery with a firearm enhancement." Citing "OPINION," at pages 10-11. (Citing from "MOTION TO RECALL MANDATE," pursuant to RAP12.9).

## 2. FACTS OF THE CASE

A brief summary of the fact of the case can be located in the Appellant's prior briefing titled "MOTION TO RECALL MANDATE," pursuant to RAP 12.9, at pages 8-9, Court of Appeals, Division Two Case No.46960-0-II.

## E. ARGUMENTS IN SUPPORT

Restraint is "unlawful" only if it fits within the definition listed in 16.4(c), which includes that the decision was entered without personal or subject matter jurisdiction, (Rule 16.4(c)(1)), or in violation of the State or Federal Constitution.(Rule 16.4(c)(2)), or that there is significant material change in the law that should be applied to the case (Rule 16.4(c)(4)). See In re Pers. Restraint of Johnson, 131 Wn2d 558, 933 P.2d 1019 (1997).

### ADDITIONAL GROUND ONE

The Trial/Sentencing Court in the appellant's case failed to maintain Subject Matter Jurisdiction over the appellant in order to sustain the verdict rendered by the jury panel.

The jurisdiction of a Court over the subject matter has been said to be essential, necessary, indispensable and an elementary prerequisite to the exercise of judicial power. C.J.S. "Courts" § 2337 et.seq.. A Court cannot proceed with a trial or make a judgment without such jurisdiction existing.

"It is elementary that jurisdiction of the Court over the subject matter of the action is the most critical aspect of the Court's authority to act. Without it the Court's lack any power to proceed; therefore, a defense based upon this lack cannot be waived and may be asserted at any time." See Matter of Green, 313 S.F.2d 193 (N.C. App 1984).

Subject Matter Jurisdiction cannot be conferred by waiver or consent, and may be raised at any time. See Rodrigues V. State, 441 So.2d 1129 (Fla. App. 1983). The Subject Matter Jurisdiction of a criminal case is related to the cause of action in general, and more specifically to the alleged crime or offense which creates the action. See State V. Golden, 112 Wn.App.68, 47 P.3d 587 (2002); Shop V. Kittitas County, 108 Wash.App. 388, 30 P.3d 529 (2001); RAP 2.5(a).

The Subject Matter of a criminal offense is the crime itself. Subject Matter in its broadest sense means the cause, the object. The thing of dispute. see Stillwell V. Markham, 10 P.2d 15,16, 135 Kan. 206 (1932); See also CR12 Defenses and Objections. See also State V. Eaton, 164 Wn2d 461, 191 P.3d 1270 (2008).



An indictment or complaint in a criminal case is the main means by which a Court obtains Subject Matter Jurisdiction, and is "the jurisdictional instrument upon which the petitioner stands trial." see State V. Chatman, 671 P.2d 531, 538 (Kan.1983). The complaint is the foundation of the jurisdiction of the magistrate or Court. Thus, if these charging instructions are invalid there is a lack of Subject Matter Jurisdiction.

Without formal and sufficient indictment or information, a Court does not acquire Subject Matter Jurisdiction and thus, the petitioner may not be punished for a crime. See Honamich V. State, 333 N.W.2d 797, 798 (S.D.1983).

A formal accusation is essential for every trial of a crime. Without it the Court acquires no jurisdiction to proceed, even with the consent of the parties, and where the indictment or information is invalid, the Court is without jurisdiction. See Ex Parte V. Carlson, 186 N.W. 722, 725, 176 Wis. 538 (1922).

In the appellant's case, on June 2, 2003, the State -by way of "INFORMATION",- had initially charged the appellant with the crimes of possessing crack cocaine with intent to deliver, pursuant to RCW 69.50.401(a)(1)(i), with a firearm enhancement, pursuant to RCW 9.94A.310/ 9.94A.510 and RCW 9.94A.370/9.94A.530. See "INFORMATION," at page 1; See also "DECLARATION FOR DETERMINATION OF PROBABLE CAUSE," (hereafter Probable cause), at page 1, dated June 2, 2003.

The appellant was arraigned and plead not guilty to the charges, seeking to proceed to a jury trial proceeding.

The State on March 4, 2004, sought and was granted to file an "AMENDED INFORMATION," which charged:

COUNT I- Unlawful possession of a controlled substance with intent to deliver, with a firearm sentencing enhancement;

COUNT II- Robbery in the first degree, with a firearm sentencing enhancement; RCW 9A.56.200(1)(a)(i).

COUNT III- Unlawful possession of a firearm in the first degree;

COUNT IV- Bail jumping.

See "AMENDED INFORMATION," at pages 1-3.

The State filed a "SECOND AMENDED INFORMATION," where the State had corrected deficiencies that were relevant in the "AMENDED INFORMATION," but had charged the same counts as were presented in the "AMENDED INFORMATION." See VRP at Vol.III, pages 69-70; See also "SECOND AMENDED INFORMATION," at pages 1-3.

Pursuant to the case of State v. Golden, 112 Wn.App. 68, 47 P.3d 587 (2002), the appellate Court held:

"The Superior Court has original Subject Matter Jurisdiction over all felony criminal proceedings and all proceedings generally, unless jurisdiction has been vested exclusively in some other Court." See Wash.Const. article IV, §6; RCW 2.08.010; State v. Werner, 129 Wn2d 485, 492, 918 P.2d 916 (1996).

In re Pers. Restraint of Dalluge, 152 Wn2d 772 (2004), the Washington State Supreme Court stated:

"It is important to note that Subject Matter Jurisdiction cannot be waived, but personal jurisdiction can be waived." Skagit Surveyors & Eng'rs, LLC v. friends of Skagit County, 135 Wn2d 542, 556, 958 P.2d 962 (1988). "Jurisdictional requirements embodied in statutes can be waived, but waiver should be found only sparingly." Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd., 113 Wn.App. 142, 155, 53 P.3d 44 (200).

In the case of State V. Barnes, 146 Wn2d 74 (2002), the Court Stated: "Jurisdiction means the power to hear and determine." State V. Werner, 129 Wn2d 485, 493, 918 P.2d 916 (1996). "Subject Matter Jurisdiction means a court has the authority to rule over the nature of a case and the type relief sought." See Black's Dictionary 859 (7th ed. 1999). "In order to acquire complete jurisdiction so as to be authorized to hear and determine a cause or proceeding, the court necessarily must have jurisdiction of the parties... and of the subject matter involved." State V. Werner, 129 Wn2d at 493 (quoting State ex. rel. N.Y. Cas. Co. V. Superior Court, 31 Wn2d 834, 839, 199 P.2d 581 (1948)). "Generally, a valid judgment consists of three jurisdictional elements: Jurisdiction of subject matter, Jurisdiction of person, and power or authority to render a particular judgment. Id. at 493." See State V. Golden, 112 Wn.App. 68, 47 P.3d 587 (2002); In re Pers. Restraint of Vehlewald, 92 Wn.App. 197, 201-02, (63 P.2d 903) (1998); See also RCW 10.73.100(5).

Because of the Court of Appeals' decision to suppress both the cocaine and the weapon from the appellant's case, the trial court no longer has the subject matter jurisdiction to hear, determine, nor adjudicate the charges related to the suppressed evidence. The appellant requests this court remand this case for a new trial.

## ADDITIONAL GROUND TWO

The recent decision of City of Seattle v. Erickson created a significant change in law that should apply to the appellant's case and is an exception to the one year time bar for collateral relief.

In Erickson, the State Supreme Court expressly overturned State v. Rhone, 168 Wn2d 645, 229 P.3d 752 (2017) and adopted the dissenting opinion in Rhone to hold that:

"The trial court must recognize a prime facie case of discriminatory purpose when a sole member of a racially cognizable group has been struck from the jury." Erickson, 188 Wn2d at 724, 732

"We now follow our signal in Rhone and adopt a bright-line rule."  
Erickson, 188 Wn2d at 732-36

The court reversed Erickson's conviction and remanded for a new trial.

Appellant requests the court grant his petition and reverse and remand for a new trial under Erickson. Erickson establishes this "significant change" which exempts appellant from the one year time limit for collateral attack under RCW 10.73.100(6) and RAP 16.4.

### i. APPLICATION OF NEW RULES

The irony of happenstance should not work to treat appellants differently than Mr. Erickson, simply because the State Supreme Court was not able to adopt the Rhone dissent until it garnered adequate consensus in Erickson. Erickson, 188 Wn2d 732-36

In griffith v. Kentucky, 479 U.S. 314 (1987), the court expressly articulated that the application of a new rule should not be dependent on the happenstance of timing. Griffith, 479 U.S. at 323.

"As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we can fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that precludes us from simply fishing one case from the stream appellable review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule."

"Second, selective application of new rules violates the principles of treating similarly situated defendants the same. As we pointed out, in United States V. Johnson, the problem with not applying new rules to cases pending on direct review, is the actual inequity that results when the court chooses which of many similarly situated defendants should be the chance beneficiary of a new rule." (citation omitted, emphasis in original) "Although the court had tolerated this inequity for a time by not applying the new rules retroactively to cases on direct review, we noted: 'The time for toleratin has come to an end.'" Ibid.

"It hardly comports with the idea of 'administration of justice with an even hand', when one chance beneficiary -the lucky individual whose case was chosen as the occasion for announcing the new principle- enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine." Griffith, 479 U.S. at 327

This court should accept review under RAP 16.4 and determine that appellant's case fits the time bar exemption in RCW 10.73.100(6) for a significant change in law. This court should also reverse and remand this case for a new trial to apply the "bright-line" rule first raised in his direct appeal and to apply this court's newly adopted GR37.

ii     STANDARD OF REVIEW

When considering a personal restraint petition, a court may grant relief to a petitioner only if the petitioner is under unlawful restraint, as defined by RAP 16.4(c). In re Pers. Restraint of Yates, 177 Wn2d 1,16, 296 P.3d 872 (2013). The collateral relief afforded under a personal restraint petition is limited, and requires the petitioner to show that he was prejudiced by the trial court's alleged error. In re Pers. Restraint of Stockwell, 179 Wn2d 588,596, 316 P.3d 1007 (2014); In re Pers. Restraint of Hagler, 97 Wn2d 818,819, 650 P.2d 1103 (1982).

The petitioner must either make a prima facie showing of a constitutional error that, more likely than not, constituted actual and substantial prejudice, or a non-constitutional error that inherently constitutes a complete miscarriage of justice.

Appellant's case constitutes a complete miscarriage of justice, because he was denied the relief afforded Erickson based on the dissent in appellant's case. Under Erickson the appellant is entitled to a new trial.

Our State Supreme Court requires the petitioner to present specific evidentiary support for each allegation of prejudice. In re Pers. Restraint of Rice, 118 Wn2d 876,886, 828 P.2d 1086 (cert. denied, 506 U.S. 958 (1992)).

Appellant was prejudiced by the trial court failing to recognize that appellant made a prima facie case of racial discrimination in the jury selection process, as described in

specific detail in the investigations and conclusions regarding Wilkin's misconduct.

Appellant meets the criteria because he is unlawfully restrained in the department of corrections due to trial court error that violated his fourteenth amendment right in the United States Constitution which entitles appellant to equal protection of the law.

### ADDITIONAL GROUND THREE

The adoption of GR37 creates a significant change in the law that applies to appellant's case and is an exception to the one year time bar for collateral relief.

Recently, the State Supreme Court accepted review and heard oral arguments in State v. Jefferson, case No. 760114. In the State Supreme Court's order granting review, the court expressly requested briefing on Batson's efficacy and whether a stricter standard was necessary. With the adoption of GR37, the State Supreme Court has now answered this question.

Justice Madsen's concurring opinion is State V. E.J.J., 183 Wn2d 497, 509, 354 P.3d 815 (2015) (Madsen, C.J. concurring). There in, Justice Madsen and two other justices disagree with the majority's holding that the defendant's first amendment rights were violated. Instead, Justice Madsen would have adopted a new common-law rule to address the racially disparate enforcement of the obstruction statute, and she would have applied it in E.J.J..

"Despite the fact that sufficient evidence supports



the conviction under current law, I believe this court must take this opportunity to add a common-law requirement to the obstructing statute, to ensure it's constitutional application as follows: Where the officer's conduct substantially contributed to the escalation of the circumstances that resulted in the arrest for obstruction, the State has failed to meet it's burden to show that the defendant willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of his or her official powers or duties. Under this common-law requirement the State would be required to prove that the defendant's obstructing conduct was not substantially produced by the officer's escalating conduct. This additional requirement is necessary because our system of justice cannot condone the disparate treatment of the people we serve, based on race, through the use of obstructing statutes. Applying this requirement here E.J.J.'s conviction must be reversed. State V. E.J.J., 183 Wn2d 497,509, 354 P.3d 815 (2015) (Madsen, C.J., concurring)

Our courts are familiar with applying new rules to cases on direct review. Id.; Erickson, supra.

GR37 applies to all jury trials. Appellant's case presents the court with it's first opportunity to apply GR37 which took effect April 30, 2018. This court is neither prohibited nor compelled to apply GR37 to the appellant's case, but common sense suggests this court should apply it to this case. See GR9.

In the case of State v. Templeton, 148 Wn2d 193,211, 59 P.3d 632 (2002), for example. The court recognized that rules such as CrRLJ 3.1 (right to counsel) created a procedural rule in which:

"A clear line of demarcation cannot always be delineated between what is substantive and what is procedural" and there is "some mingling and overlapping of powers between the three separate departments of government." Templeton, 148 Wn2d at 213,216.

GR37, like CrRLJ too "creates a procedural rule without a clear line of demarcation between what is substantive and procedural." Templeton,148 Wn2d at 213.

As part of this court's inherent power, it is authorized to apply GR37. "When questions of the State law are at issue, State courts generally have the authority to determine the retroactively of their own decisions." Lunsford v. Saberhagen Holdings Inc.,166 Wn2d 264,279, 208 P.3d 1092 (2009). In the context of announcing a new rule of law in a case, "the decision to apply a new rule prospectively must be made in the decision announcing the new rule of law." Id.

While this court is not required to apply GR37. In the appellat's case it shuold apply this rule for the following reasons. First, as in State V. Lunsford, the court stated GR37 raises issues of State law. Second, the lower courts will necessarily need guidance and direction regarding implementation of GR37 to protect against equal protection violations. Third, during oral argument in Jefferson, suprs, the court suggested that the best way to understand the efficacy GR37 would be to test the rule. This court should apply GR37 to test the new rule, since the appellant's case presents an opportunity. Fourth, and finally, the appellant presents that: "When a statute or rule not explicitly made retroactive is remedial in nature, it can operate retrospectively. A statute or rule is remedial when it relates to practice, procedure or remedies and does not affect a substantive or vested right." Yellam V. Woemer,77 Wn2d 604,607-08, 46 P.2d 947 (1970). GR37 is remedial.

In Yellam, this Court applied CR41(b)(1)<sup>1</sup> retroactively to cases pending on direct review because the rule was procedural and remedial in nature. Yellam, 77 Wn2d at 608. The rule did not involve a substantive right, but rather encouraged the courts to decide cases on their merits. Id. Here too, GR37 is procedural and remedial, in the same sense that it provides a litigant the opportunity to challenge a jury selection that is not free from racial discrimination in violation of the equal protection clause. Since GR37 does not indicate that it is to be applied prospectively only, this Court may in its discretion choose to apply the rule to appellant's case.

Related also, in Erickson, supra, this Court applied a new rule to Mathew Erickson's case recognizing, that since Rhone, the time had arrived to take action to prevent the outgoing and persistent failings of the Batson test. Erickson, 188 Wn2d at 735.

In Erickson, this Court was not concerned with announcing a new rule for the first time in this Court rather than in a trial court. Instead, this Court recognized the urgency in applying its new formulated rule to the case in hand. Id. Here too, this Court should not wait for an unknown period to apply GR37, but should take advantage of the opportunity this case presents to apply GR37.

**1(b) Involuntary Dismissal; Effect.** For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

The federal retroactivity analysis is also useful in determining why new rules should apply to all cases on direct review. The United States Supreme Court in Griffin v. Kentucky explained the value of applying a new rule of law to all cases pending on direct review because the new rule would necessarily embody the court's best understanding of the issue, and to disregard the court's best understanding of an issue defies constitutional norms. Griffith, 479 U.S. at 322-23.

"If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all..." (Emphasis added); Griffith, 479 U.S. at 323.

Even though GR37 was not adopted through the adjudicatory process, and is procedural, it is a new rule where the demarcation between procedure and substance is mingled and the reasoning in Griffith to afford a litigant the court's best understanding of a new rule, should apply to appellant's case which is pending on direct review. Griffith, 479 U.S. at 322-23; Templeton, 148 Wn2d at 213.

The adoption of GR37 with stakeholder input prior to adoption verses adopting a new rule in the context of a case on review permits this Court the opportunity to issue an opinion on the new rule understanding the stakeholder issues in the context of a case. It makes no sense to defer application of a new rule that this Court and the citizens have waited years to unveil. In Griffith, the Court expressly articulated that the application of a new rule was not dependent on the trial court or lower court's having a first attempt at application. Griffith, 479 U.S. at 323.

Appellant respectfully requests this Court exercise it's discretion to apply GR37 to his case on direct review to avoid the inequity of applying it to some other case on direct review when his case presents this Court with its first opportunity to apply GR37 without engaging in selective application of the new rule.

"A significant change in State law occurs where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue." Tsai, 183 Wn2d at 104 (quoting Greening, 141 Wn2d at 697).

"One test to determine whether an intervening case represents a significant change in the law is whether the defendant could have argued this publication of the decision." In re Lavery, 154 Wn2d 249, 258-59, 111 P.3d 837 (2005) (internal citation and other marks omitted).

This Court is authorized to accept review or transfer to the Supreme Court to consider the Batson issue under RAP 16.4(d) as a significant change in law. Matter-of-Johnson, 131 Wn2d 558, 567-68, 933 P.3d 1019 (1997).

#### ADDITIONAL GROUND FOUR

The State committed misconduct when it agreed to the subsequent change in the First Degree Robbery instruction which related an uncharged alternative means which was not charged in the INFORMATION, AMENDED INFORMATION, or SECOND AMENDED INFORMATION.

A review of the appellant's jury trial proceedings the following was stated:

THE COURT: "State's proposed No.14, which is similar to defendant's No.14, proposed 14, I believe agreement was reached that the language -- the state will change the language of instruction proposed 14 to read 'A person commits the crime of robbery in the first degree when in the commission of a robbery he displays what appears to be a firearm.'"

MR. OISHI: "Yes, your honor."

Mr. Mosley: "That's correct, your honor."

(Citing from May 3, 2005, VRP at 888)

The prior proceeding in regards to the jury instructions was held off the record, so there is no verbatim report of proceedings in regards to why the State sought and was granted to amend the instruction to instruct on uncharged alternative means for committing the crime of robbery in the first degree.

"A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the State by breaking the law. A prosecutor also functions as the representative of the people in a quasi-judicial capacity in a search for justice."

State V. Case, 49 Wash.2d 66,70-71, 298 P.2d 500(1956)(quoting

People V. Fielding, 158 N.Y. 542,547,53 N.E. 497 (1899); Monday, 171 Wn2d 667, 227 P.3d 551 (2011).

"Defendant's are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." Id. at 71, 298 P.2d 500.

"Prosecutor misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial."(Citing Monday, 171 Wash.2d at \_\_\_\_, 257 P.3d 551)

"To prevail on a prosecutorial misconduct claim, a defendant must show that in the context of the record and all the trial circumstances, the prosecutor's conduct was improper and prejudicial."

State V. Thorgerson, 172 Wash.2d 438,442, 258 P.3d 43 (2011);

Monday, 171 Wash.2d at 675, 257 P.3d 551; State V. Fisher, 165

Wash.2d 727,747, 202 P.3d 937 (2009); State v. Gregory, 158

Wash.2d 759,858, 147 P.3d 1201 (2006).



Appellant argues that the State's erroneous change of the robbery in the first degree instruction to an uncharged alternative means violated his sixth, eighth, and fourteenth Amendment rights to the Constitution of the United States Constitution, and article I, §3, §14, §21, §22, §29, and §30 rights to the constitution of the State of Washington to a jury panel that receives the correct elements for what the State has charged not an alternate that the appellant was never notified that he would be facing.

#### ADDITIONAL GROUND FIVE

The appellant's defense counsel provided ineffective assistance of counsel in agreeing to the subsequent change in the First Degree Robbery instruction which related to an uncharged alternative means which was not charged in the INFORMATION, AMENDED INFORMATION, or SECOND AMENDED INFORMATION.

When the appellant's defense counsel had agreed with the State to utilize the uncharged alternative means which had referenced "displays what appears to be a firearm," the defense counsel had provided the appellant with ineffective assistance of counsel, (Citing RCW 9A.56.200(1)(a)(ii) in part) an invited an error under the invited error doctrine.

See Strickland V. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State V. Gentry, 125 Wn2d 570, 645-47, 888 P.2d 1105, cert.denied, 516 U.S. 843, 116 S.Ct. 131, 138 L.Ed.2d 79 (1995).

This was due to the fact that the appellant was charged in the AMENDED INFORMATION and SECOND AMENDED INFORMATION with committing the robbery in the first degree pursuant to the alternative means of being "armed with a deadly weapon, at the time of the commission of the crime.

(Citing RCW 9A.56.200(1)(a)(i) in part). See AMENDED INFORMATION at Pages 1-2; SECOND AMENDED INFORMATION at pages 1-3.

The appellant argues that the defense counsel violated the Sixth, Eighth, and fourteenth Amendment rights to the United States Constitution. and the Article I, § 3, § 14, § 21, § 22, § 29, and § 30 rights pursuant to the constitution of the State of Washington which guarantees a criminal defendant a constitutional right to effective assistance of counsel.

"The sixth Amendment right to effective assistance of counsel advances the fifth Amendment right to a fair trial. That right to effective assistance includes a 'reasonable investigation' by defense counsel." (Citing from State v. Boyd, 158 P.3d 54, 160 Wn2d 424 (2007); Strickland, 466 U.S. at 691.)

"Trial counsel's failure to be familiar with the law, research and understand the law, factual or legal issues, fails to provide performance within the competency expected from criminal defense counsel." (Citing Morris v. State of California, 966 F.2d 448 (9th cir. 1991); Turner v. Duncan, 158 F.3d 449 (9th cir. 1998); Harris by and through Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1991)(Trial counsel's failure to investigate and prepare for trial amounted to ineffective assistance of counsel).

Pursuant to the case of State v. Berg, 310 P.3d 866 (2013), the appellate Court stated:

"In reviewing ineffective assistance of counsel claims,

We begin with a strong presumption of counsel's effectiveness. State V. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995). A defendant claiming ineffective assistance of counsel has the burden to establish (1) Counsel's performance was deficient and (2) the performance prejudiced the defendant's case." (Citing Strickland, 466 U.S. at 687) "Failure to establish either prong is fatal to an ineffective assistance of counsel claim." (Citing Strickland, 466 U.S. at 700, 104 S.Ct. 2052) "Trial counsel's performance is deficient if it falls below an objective standard of reasonableness." (Citing State V. Grier, 171 Wash.2d 33, 246 P.3d 1260 ( ) (quoting from State V. Grier, 168 Wn.App. 635, 278 P.3d 225 (2015))).

The appellant's defense counsel was ineffective because of the failure to review the "AMENDED INFORMATION" and the "SECOND AMENDED INFORMATION," to specifically know what charges the appellant was to mount a defense against. See State V. Brietung, 173 Wash.2d 393, 400-01, 267 P.3d 1012 (2011); In re Pers. Restraint of Brett, 142 Wash.2d 868, 873, 16 P.3d 601 (2001).

"Counsel's conduct is not deficient if it can be characterized as legitimate trial strategy or tactics." State V. Kyлло, 166 Wash.2d 856, 863, 215 P.3d 177 (2009) (Citing from Berg, 310 P.3d at \_\_.)

"A criminal defendant can rebut the presumption of reasonable performance by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance." Grier, 171 Wash.2d at 33, 246 P.3d 1260 (quoting State V. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004).)

The appellant's defense counsel caused the invited error that caused the appellant's jury panel to be instructed on an uncharged alternative means which invaded the province of the jury panel and allowed the jury panel to convict the appellant on that uncharged alternative means of committing robbery in the first degree. See State V. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979); State v. Studd, 137 Wn2d 533, 546-47, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn2d 867, 870, 792 P.2d 514 (1990).

Pursuant to the case of State v. Doogan, 82 WnApp 185, 188, 917 P.2d 155 (1966), the appellate Court held:

"The error of offering an uncharged means as a basis for conviction is prejudicial if it is possible that the jury might have convicted the defendant under the uncharged alternative instead of a charged alternative."

Such an erroneous instruction is presumed prejudicial unless it affirmatively appears that the error was harmless. Bray, 52 WnApp 30, 34, 756 P.2d 1332.

The error in regard to the request to change the jury instruction was done by the State, and although the appellant's defense counsel had agreed to the change, it wasn't the defense counsel that sought or proposed the improper instruction.

"Failing to except to an instruction does not constitute invited error." (Citing from State v. Gorn, 95 WnApp 41, 56, 975 P.2d 520 (1999)).

"A criminal defendant must be informed of the charges against him, including the manner of committing the alleged crime." Bray, 52 WnApp at 34, 756 P.2d 1332.

Instructing a jury on an uncharged alternative means violates the defendant's right to be informed of the charges against him or her. See Laramie, 141 WnApp at 343, 191 P.3d 859.

A jury instruction is erroneous if it relieves the State of its burden to prove every element of the crime. See State v. DeRyke, 149 Wn2d 906, 912, 73 P.3d 1000 (2003).

"A to-convict instruction must contain all essential elements of a crime because it serves as a yardstick by which the jury measures the evidence to determine the defendant's guilt or innocence." (Citing State v. Richie, 191 WnApp 916, 925 (2015)).

In the case of State v. Bland, 71 WnApp 345, 860 P.2d 1046 (1993), the defendant's contention was that the convictions for counts 1 and 2 must be reversed because the jury had been

instructed on "alternative means" of committing assault, but that the state failed to prove one of the alternative means as to each count. The appellate court affirmed as to count 1 and reversed as to count 2 based on the defendant's argument that the court's jury instruction 9 covered only two of the three possible ways to commit assault in Washington State.

In the case of State v. Davis, 27 WnApp 498, 506, 618 P.2d 1034 (1980), the defense counsel in that case had "objected to the giving of two instructions defining robbery in the first degree."

"The trial court agreed not to give one of the instructions but did not instruct the jury concerning the definition of robbery in the first degree. Defense counsel did not object to this oversight." Davis, 27 WnApp at \_\_, 618 P.2d 103.

The Davis, supra, court went on to state:

"Here, unlike in State v. Pawling, supra, it cannot be said that the average juror knows, as a matter of common knowledge, the definition of first degree robbery or robbery. The defendant, under the circumstances, may raise the issue of the failure to instruct, for the first time on appeal, since the due process clause protects an accused from conviction except upon proof beyond a reasonable doubt of 'every fact necessary to constitute the crime with which he is charged.'" In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), supra, at 364, 90 S.Ct. at 1072. Accord., State v. McHenry, 88 Wash2d 211, 214, 558 P.2d 188 (1977); State v. Roberts, 88 Wash2d 337, 562 P.2d 1259 (1977).

In the appellant's case, the defense counsel's performance was deficient due to agreeing to an uncharged alternative means in committing robbery in the first degree and this erroneous instruction invaded the province of the jury panel who was never instructed on the sole alternative that the State had charged

through the AMENDED INFORMATION and SECOND AMENDED INFORMATION.

ADDITIONAL GROUND SIX

The error in instructing the jury panel on an uncharged alternative means to commit First Degree Robbery cannot be considered harmless error as it invaded the province of the jury panel.

Pursuant to the case of State v. Fehr, 185 WnApp 505, 514, 341 P.3d 363 (2015), the appellate court stated:

"This court reviews alleged errors of law in jury instructions de novo."

State v. Wanrow, 88 Wash2d 221, 559 P.2d 548 (1977).

"The harmless-error rule of Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, applies to a jury instruction that omits an element of an offense."

Neder v. United State, 527 U.S. 1, 144 L.Ed.2d 35, 119 S.Ct. 1827 (1999).

"The test for determining whether a constitutional error is harmless is, 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"

State v. Brown, 147 Wn2d 330, 341, 58 P.3d 889 (2002)(internal quotation marks omitted)(quoting Neder, 527 U.S. at 15); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)

"When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence."

Neder, 527 U.S. at 18; State v. Brown, 147 Wn2d 330, 340-41, 58 P.3d 889 (2002).

In the case of In re Pers. Restraint of Brockie, 178 Wn2d 532

(2013), the Washington Supreme Court held that:

"Although it was error to instruct the jury on the uncharged alternative means. The error was harmless because the evidence consistently showed that the robber displayed what appeared to be a gun throughout the robberies and there was no indication that the trial included any discussion or claim that the robber was armed with a deadly weapon but did not display it."

The State had previously presented that in regards to the jury trial proceedings that the:

"Conviction for the offense was decided separately from the others and did not depend on proof that an actual firearm was used, let alone the one recovered, or the confiscated cocaine."

(CP580)(Instruction 4)(Citing from State's "COURT ORDERED ANSWER TO PETITION FOR REVIEW," at page 10). But this argument was presenting the uncharged alternative means that was utilized in the appellant's case.

The "DECLARATION FOR DETERMINATION OF PROBABLE CAUSE," (hereafter, probable cause) stated:

"On the above date at 1723 hours Lakewood police were dispatched to the Jack-In-The-Box restaurant, at 8814 South Tacoma way, regarding persons in a car, armed with a gun, demanding money from an employee. This was apparently some form of debt collection."  
(Citing probable cause at page 1)

Isaac Miller, the alleged victim, testified that the appellant had a gun and that it was "sitting in his lap" VRP vol.II (April 28,2005) 486. When the State asked Isaac Miller to "decribe" ... "what the gun looked like," Isaac Miller stated:

"It looked like a gun. I don't really like guns, so I don't know. It looks like a gun. It looks like an old style handgun." (Citing VRP vol.II (April 28,2005)) 486-87.

Bambi Meyers, the witness and a co-worker, testified that in regards to the second time that the red Camaro had come thru the drive through window that she was "standing back behind Isaac (Miller) against the counter," and that she had looked over and "noticed that the passenger had a gun." VRP vol.VIII (April 29, 2005) 591.

In the State's additional questioning, Bambi Meyers testified that:

"The passenger and Isaac (Miller) were discussing whatever issue was between the two of them. And the passenger had the gun in his lap. And when him and Isaac (Miller) were discussing whatever they were discussing, you could tell that the passenger was agitate"...VRP Vol.VIII (April 29,2005)593. "I got a glimpse of it, of course, because I -- I mean, of course. I seen it." ...VRP Vol.VIII (April 29,2005)593.

The appellant argues that there is a difference between the two alternate means regarding robbery in the first degree, as the alternative means of being "armed" and the other alternative of "displayed what appears to be a firearm" are the different ways that it can be committed. RCW 9A.56.200(1)(a)(i),(ii). To be "armed" is defined as, "a weapon" or "to equip with weapons."(Citing Webster's II New Riverside Dictionary, page 39). And "display" is defined as "to put forth for view or the act of displaying."(Citing Webster's II New Riverside Dictionary, page 202).

#### ADDITIONAL GROUND SEVEN

Appellant's Petition is not time barred. Appellant raised the Batson issue in his direct appeal and petition to the Supreme

Court. State v. Rhone,137 WnApp 1046 (2007); State v. Rhone,168 Wn2d 645, 229 P.3d 752 (2010).

Generally, a defendant has one year from the time a judgment becomes final to file a collateral attack against the judgment or sentence imposed. RCW 10.73.090(1). However, under RCW 10.73.100(6), an exception exists to the time bar where there has been (1) a significant change in the law, (2) that is material, an (3) that applies retroactively. In re Pers. Restraint of Tsai,183 Wn2d 687,689, 9 P.3d 206 (2000) (Citation omitted)(Emphasis in original).

This case presents one of these situations.

#### F. CONCLUSION

The appellant respectfully requests that this honorable Court in it's discretion, to rule that the Trial/Sentencing Court failed to maintain subject matter jurisdiction over the appellant and that the jury verdict is without any authority of law, and in regards to an uncharged alternative means, the appellant's Batson issue warrants a remand for a new trial, due to a significant change in the law, and the State had committed misconduct when changing the first degree robbery instruction to an uncharged alternative means, and the appellant's defense counsel provided ineffective assistance of counsel, and that the instruction error cannot be considered harmless error, and finally that the appellant's petition is not time barred and meets an exception to RCW 10.73.100.

The appellant requests any other relief that this Court in it's discretion would find just in appellant's case.

Respectfully submitted this 2 day of Sept, 2018.



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Theodore Rhone 708234  
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H6-A-87L  
191 Constantine way  
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DECLARATION OF SERVICE BY MAIL  
GR 3.1

I, Theodore R. Rhone, declare and say:  
That on the 2 day of Sept, 2018, I deposited the following documents in the Stafford Creek Correction Center Legal Mail System, by first class mail pre-paid postage.

Declaration of service by mail

Statement of additional grounds, pursuant to RAP 10.10

Appellant's Pro Se Supplemental brief

Addressed to the following:

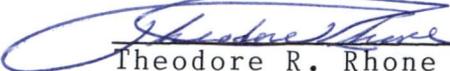
Court of Appeals, Division Two  
Attn: Court Clerk  
950 Broadway, Suite 300  
Tacoma, WA. 98402-4454

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Prosecuting attorney  
930 Tacoma Ave. South  
Tacoma, WA. 98402-2171

Lise Ellner  
Defense attorney  
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Vashon, WA. 98070

Pursuant to the case of Houston v. Lack, 487 U.S. 266, 275, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1998), which is referred to as the "mail box rule," Appellant timely submits his motion and pleadings when delivering it to the prison authority for mailing.

Dated this 2 day of Sept, 2018 in the City of Aberdeen, county of Grays Harbor, State of Washington.

  
Theodore R. Rhone 708234  
S.C.C.C H6-A-87L  
191 Constantine way  
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BY TS DEPUTY  
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