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DIVISION ONE COURT OF APPEALS FOR WASHINGTON STATE

STATE OF WASHINGTON RESPONDENT v MICHAEL LATOURETTE' APPELLANT	No: 66359-3-1 OPENING BRIEF OF APPELLANT (AMENDED)

MOTION

COMES NOW THE APPELLANT MICHAEL LATOURETTE' APPEARING SUI JURIS AND IN PROPRIA PERSONA AND DOES HEREBY MOVE THIS COURT FOR RELIEF AS INDICATED BASED ON THE STATE AND FEDERAL CONSTITUTIONS; THE RULES, CITATIONS, AND AUTHORITIES CITED HEREINAFTER; AND, IN THE INTEREST OF LIBERTY AND THE CORRECTION OF MANIFEST INJUSTICE. APPELLANT RAISES SOME ISSUES PREVIOUSLY RAISED WHEREIN APPELLANTS ARGUMENTS WERE IGNORED OUTRIGHT, DECISIONS CONTRADICT ESTABLISHED CASELAW AND LOGIC, OR WERE OUTRIGHT INJUSTICES.

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COURT OF APPEALS
STATE OF WASHINGTON

STATEMENT OF FACTS

APPELLANT DOES HEREBY INCORPORATE BY REFERENCE THE STATEMENT OF FACTS FROM 59146-1-I; APPELLANTS PRIOR APPEAL IN THIS SAME CASE AND APPENDS THE FOLLOWING TO BRING THIS STATEMENT CURRENT: THE STATE SUPREME COURT DECIDED APPELLANT COULD NOT BE SENTENCED FOR SOMETHING ABSENT

A JURY FINDING - IN THIS CASE A FIREARM - AND RETURNED THE CASE TO DIVISION ONE; DIVISION ONE IGNORED ALL PRIOR WEAPON ENHANCEMENT CASE LAW, DUE PROCESS, AND RIGHT TO BE INFORMED OF CHARGES BY ARBITRARILY DECIDING TO REMAND FOR RESENTENCING WITH UNCHARGED DEADLY WEAPON ENHANCEMENTS; AND APPELLANT WAS SUBSEQUENTLY RESENTENCED BY KING COUNTY SUPERIOR COURT.

THIS APPEAL FOLLOWS.

GROUNDS FOR REVIEW

I. INSUFFICIENCY OF EVIDENCE

II. ABUSE OF DISCRETION

III. DUE PROCESS VIOLATIONS

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

V. PROSECUTORIAL MISCONDUCT

VI. IMPROPER JURY INSTRUCTIONS

VII. MERGER / SAME CRIMINAL CONDUCT

VIII. UNCHARGED ALTERNATIVES

IX. INSUFFICENCY OF INFORMATION

ARGUMENT

I. INSUFFICIENCY OF EVIDENCE

1.) APPELLANT WAS CHARGED IN THE SECOND AMENDED INFORMATION (ORIGINAL CLERK'S PAPERS IN S 9146-1-I, HEREINAFTER O.C.P. 119) WITH TAKING "TWO CELL PHONES AND A DIGITAL CAMERA FROM THE PERSON AND IN THE PRESENCE" OF HEAZI YOHANNES.

THE ESSENTIAL ELEMENTS RULE REQUIRES THE STATE TO INCLUDE IN THE CHARGING DOCUMENT THE ESSENTIAL ELEMENTS OF THE CRIME (CITY OF AUBURN V. BROCKE, 119 WN.2D 623, 627, 836 P.2D 212 (1992)), TO INCLUDE FACTS

SUPPORTING EACH ELEMENT AND TO IDENTIFY THE CRIME CHARGED (STATE V LEACH, 113 WN.2D 679, 689, 782 P.2D 552 (1989)), AND THAT THE STATE MUST PROVE EACH OF THESE CHARGED ELEMENTS BEYOND A REASONABLE DOUBT (STATE V. JOHNSTONE, 96 WN.APP. 839, 844, 982 P.2D 119 (1999)). "ONCE THE STATE ELECTS WHICH SPECIFIC CHARGES IT IS PURSUING AND INCLUDES ELEMENTS IN THE CHARGING DOCUMENT, IT IS BOUND BY THAT DECISION. WE HAVE NOT ALTERED THIS REQUIREMENT." STATE V. RECUENCO, 163 WN.2D 428, 180 P.3D 1276 (2008), QUOTING STATE V THERCEF, 95 WN.2D 385, 392, 622 P.2D 1240 (1980).

THE CHARGING DOCUMENT REQUIRES THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT PERSONALLY TOOK "TWO CELL PHONES AND A DIGITAL CAMERA FROM THE PERSON AND IN THE PRESENCE OF AZALE YOHANNES." NOTE THAT THIS WAS CHARGED IN THE CONJUNCTIVE RATHER THAN DISJUNCTIVE, AND AS SUCH, PURSUANT TO STATE V NAM, 136 WN.APP. 628 (2007) AND UNITED STATES V. JENNINGS, 575 F.3D 980, 992-93 (9TH CIR. 2008), THE STATE MUST PROVE THAT EACH OF THE CHARGED ITEMS WAS TAKEN FROM HIS GRASP OR ATTACHED TO HIS CLOTHING. SEE RP OF 10/20/10, P. 11, HEREINAFTER RP OF 10/20 WILL BE REFERENCED AS RP1, RP OF 11/10/10 AS RP2, AND THE RP FROM TRIAL (USED IN SS146-1-I) SHALL BE REFERRED TO AS ORP.

ORP 118-19; 174-78; 205-08, ALL CONCLUSIVELY DEMONSTRATE THE STATE FAILED TO PROVE - OR EVEN TO PRODUCE ANY EVIDENCE - THAT THE CHARGED ITEMS WERE TAKEN FROM THE PERSON OF THE ALLEGED VICTIM, A FACT OF WHICH THEY ARE CLEARLY AWARE AS IS DEMONSTRATED AT ORIGINAL RESPONDENTS BRIEF - HEREINAFTER CRB - P. 17: "(A SECOND CELL PHONE AND A CAMERA) THAT HAD BEEN IN YOHANNES CAR."

THIS FAILS TO MEET THE BURDEN OF PROOF REQUIREMENTS

ESTABLISHED BY THE STATE AT OCP 119 AND THUSLY FAILS TO MEET SUFFICIENCY OF EVIDENCE STANDARDS ESTABLISHED BY THE CONSTITUTIONS, BOTH STATE AND FEDERAL. SEE IN RE WINSHIP, 397 U.S. 358, 364, 90 S.CT. 1068, 25 L.ED 2D 368 (1970), HOLDING THAT THE STATE IS REQUIRED TO PROVE EVERY FACT NECESSARY TO PROVE THE CHARGED CRIME BEYOND A REASONABLE DOUBT.

"[T]HE STATE ASSUMES THE BURDEN OF PROVING EVERY ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT." STATE V. FISHER, 165 WN.2D 727, 753, 202 P.3D 937 (2009). UNDER THE LAW OF THE CASE DOCTRINE "THE STATE ASSUMES THE BURDEN OF PROVING OTHERWISE UNNECESSARY ELEMENTS OF THE OFFENSE" THAT ARE INCLUDED IN THE INSTRUCTIONS OR CHARGING DOCUMENT. STATE V. O'DONNELL, 142 WN. APP. 314, 324, 174 P.3D 1205 (2007). CITING STATE V. NAM, 136 WN. APP. 698, 706 (2007); STATE V. HECKMAN, 135 WN.2D 97, 101-02 (1998); STATE V. FISHER, 165 WN.2D 727, 753 (2009).

THE REMEDY FOR INSUFFICIENT EVIDENCE IS DISMISSAL WITH PREJUDICE, HECKMAN, SUPRA AT 103, AND COUNT I, ROBBERY IN THE FIRST DEGREE SHOULD BE DISMISSED WITH PREJUDICE.

2.) COUNT II WAS A CHARGE OF ATTEMPTED KIDNAPPING IN THE FIRST DEGREE. THE STATE SUPREME COURT IN STATE V. GREEN, ESTABLISHED A PRECEDENTIAL RULING (94 WN.2D 216, 227, 616 P.2D 628 (1980)) WHICH REQUIRES THE REVIEWING COURT TO CONDUCT AN ANALYSES AND DETERMINE WHETHER THERE WAS AN ACTUAL OR MERELY INCIDENTAL KIDNAPPING. AS ALL ROBBERIES NECESSARILY INVOLVE SOME ELEMENT OF FORCIBLE RESTRAINT, WHERE THIS RESTRAINT INVOLVES THE SAME VICTIM, OCCURS AT THE SAME TIME AND LOCATION, AND SERVES TO FURTHER THE ROBBERY" THERE WAS INSUFFICIENT EVIDENCE OF RESTRAINT IN THAT THE KIDNAP WAS MERELY INCIDENTAL TO THE ROBBERY, AND THUS REQUIRES DISMISSAL UNDER STATE V. GREEN, 94 WN.

2D 216, 227, 616 P.2D 628 (1980)," QUOTING STATE V KORUM, 120 WN. APP. 686, 719, 86 P.3D 166 (2004). THE KORUM COURT GOES ON TO SAY: "ONCE PROPERTY HAD BEEN OBTAINED BY FORCE THE ROBBERY WAS COMPLETED. 'ANY INCIDENTAL ABDUCTION OR RESTRAINT OCCURRING DURING THIS SHORT PERIOD OF TIME WOULD MERGE INTO THE ROBBERY AS A MATTER OF LAW.' STATE V JOHNSON, 92 WN.2D 671, 676, 600 P.2D 1249 (1979). '[T]HE MERE INCIDENTAL RESTRAINT AND MOVEMENT WHICH MIGHT OCCUR DURING THE COURSE A [CRIME] ARE NOT, STANDING ALONE, INDICIA OF A TRUE KIDNAPPING' STATE V GREEN, "(SUPRA).

STATE V LOUIS, 155 WN.2D 563, 571, 120 P.3D 936 (2005) IS CLEARLY DEMONSTRATIVE OF WHY A COMPLETED KIDNAPPING DOES NOT MERGE WITH A ROBBERY AND IS NOT DISMISSIBLE AS INCIDENTAL. IN STATE V. LOUIS, THE VICTIMS WERE BOUND, TRANSPORTED, AND HIDDEN AWAY IN ORDER TO DELAY DISCOVERY.

THE CASE AT BAR IS CLEARLY INCIDENTAL AS IT IS: CHARGED AS AN ATTEMPT; THE VICTIM WAS NEITHER BOUND NOR SECRETED; WAS ABLE TO SIMPLY RUN AWAY, AND THE STATE CONCEDED THE ROBBERY AND THE ATTEMPTED KIDNAPPING TO BE THE SAME CRIMINAL CONDUCT. IN ITS ORIGINAL RESPONDENT'S BRIEF, THE STATE AT ORB 18 ARGUES: "THUS ALL OF THE ACTS HAD THE SAME CRIMINAL OBJECTIVE: TO ROB YOHANNES," AND AT ORB 20: "LATOURETTE AND DERBY'S OVERALL OBJECTIVE WAS TO ROB YOHANNES."

THERE WAS INSUFFICIENT EVIDENCE TO PROVE AN ACTUAL KIDNAP-PING AND COUNT II MUST BE DISMISSED WITH PREJUDICE.

THE STATE ESTABLISHED ITS BURDEN OF PROOF REQUIREMENTS BY VOLUNTARILY ELECTING TO CHARGE APPELLANT IN OCP 119 AS FOLLOWS: "TO FACILITATE COMMISSION OF THE FELONY OF ROBBERY IN THE FIRST DEGREE AND TO INFLICT BODILY INJURY ON AZAZI YOHANNES AND FLIGHT THEREAFTER" (EMPHASIS ADDED) AND THUSLY MUST

PROVE EACH OF THESE THREE DISPARATE ELEMENTS BEYOND A REASONABLE DOUBT, AS THEY WERE CHARGED USING THE CONJUNCTIVE RATHER THAN DISJUNCTIVE.

THE JURY RETURNED A UNANIMOUS FINDING ON ONLY ONE OF THE THREE REQUIRED ELEMENTS THEREBY DEMONSTRATING CONCLUSIVELY AND IRREFUTABLY THE INSUFFICIENCY OF EVIDENCE NECESSARY TO CONVICT THE APPELLANT "AS CHARGED" OF THE CRIME OF ATTEMPTED KIDNAPPING 1°.

AS WASHINGTON'S SUPREME COURT WAS REITERATED IN NUMEROUS CASES FROM STATE V. THARCIF, 95 WN.2D 385, 392 (1980), TO STATE V. HECKMAN, 135 WN.2D 97, 101-02 (1998), TO STATE V. NAM, 136 WN. APP. 698, 706 (2007) TO STATE V. RECUENCO, 163 WN.2D 428, 435-6 (2008), ONCE THE STATE ELECTS SPECIFIC CHARGES AND INCLUDES ELEMENTS IN THE CHARGING DOCUMENT, IT IS BOUND BY THAT DECISION AND BEARS THE BURDEN OF PROVING THE CRIME AS CHARGED.

THE JURY FOUND GUILT ON 2(A) TO FACILITATE ROBBERY, AND FAILED TO FIND GUILT ON 2(B) TO INFLICT BODILY INJURY, THUSLY ESTABLISHING THE STATES FAILURE TO PROVE "EVERY ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT." STATE V. FISHER, 165 WN.2D 727, 753, 201 P.3D 937 (2009). SEE OCP 178 P.2 WHEREIN THE JURY STATES IT DID NOT RETURN A UNANIMOUS VERDICT OF GUILT ON THE SECOND OF THE THREE ELEMENTS MADE ESSENTIAL BY THE CHARGING DOCUMENT "TO INFLICT BODILY INJURY ON AZAZI YOHANNES.

THE THIRD CHARGED ELEMENT OF ATTEMPTED KIDNAPPING, "FLIGHT THEREAFTER" WAS NOT INSTRUCTED, AND THUS WAS NEVER BEFORE THE JURY, WHICH SHOULD IN AND OF ITSELF BE GROUNDS FOR DISMISSAL UNDER INSUFFICIENT

EVIDENCE. HECKMAN, 135 WN. 2D 97 AT 103.

II. ABUSE OF DISCRETION

1.) RP 1 P 2 (10/20/2010 REPORT OF PROCEEDINGS) SHOWS APPELLANTS PROTEST OF BEING IN FRONT OF SHARON ARMSTRONG AND SOME OF THE ESTABLISHED HISTORY OF APPELLANT'S ATTEMPTS TO BE HEARD BEFORE A DIFFERENT JUDGE, AS APPELLANT CONTENDS HAD HE BEEN HEARD BEFORE A DIFFERENT JUDGE PETITIONER WOULD NOT NOW BE IN PRISON. APPELLANT HAS AN ESTABLISHED RECORD OF BIASED DECISIONS; STATEMENTS OF OUTRIGHT BIAS; DECISIONS IN VIOLATION OF COURT RULES; DECISIONS CONTRARY TO RULINGS OF STATE AND FEDERAL CONSTITUTIONS; DECISIONS CONTRARY TO BOTH STATE AND FEDERAL SUPREME COURT RULINGS; CONDONING OUTRIGHT PERJURY; AND DELIBERATE OBSTRUCTION OF MY CONSTITUTIONAL RIGHTS. THIS IS WHY I AGAIN FILED AN AFFIDAVIT OF PREJUDICE AND MOTION TO CHANGE JUDGE PRIOR TO RESENTENCING.

I BELIEVE THIS TO BE CONTRARY TO THE APPEARANCE OF FAIRNESS DOCTRINE AND TO UNDERMINE PUBLIC CONFIDENCE IN THE JUDICIARY.

CP 28, 29 IS APPELLANTS MOTION FOR CHANGE OF JUDGE AND THE APPELLANTS AFFIDAVIT OF PREJUDICE IS CP 30, 31, AND FURTHER ISSUES ARE IN THE NOTICE OF ONGOING VIOLATION AT CP 32-34

2.) IN ABSENTIA RESENTENCING OF APPELLANT WAS ABUSE OF DISCRETION.

THIS ISSUE WAS RAISED ON APPEAL IN 59146-1-I (143 WN.APP. 1046) AND THIS COURT BLATANTLY IGNORED THE SINGLE FACT MOST CRUCIAL AND CENTRAL TO APPELLANT'S ARGUMENT, RESPONDING AT 1055: "[T]HERE WAS NOTHING LATOURETTE COULD HAVE SAID TO CHANGE THE RESULT HAD HE BEEN PRESENT. THEREFORE THIS WAS NOT A CRITICAL

STAGE OF PROCEEDINGS AT WHICH HE HAD A RIGHT TO BE PRESENT."

SOMEHOW THIS COURT COMPLETELY IGNORED THE FACT THAT APPELLANT WAS PRO SE AND THUSLY THE IN ABSENTIA RESENTENCING BLATANTLY VIOLATED THE "RIGHT TO APPEAR AND DEFEND IN PERSON" GUARANTEE OF ARTICLE 1 §22 OF THE WASHINGTON CONSTITUTION; THE VI TH AMENDMENT; AND THE SUPREME COURT'S HOLDING IN FARETTA. SEE RP.2.

AN OUTRIGHT AND BLATANT VIOLATION OF THE RIGHT TO COUNSEL IS UNDENIABLY AN ABUSE OF DISCRETION.

2.) DENIAL OF COUNSEL AT RESENTENCING WAS AN ABUSE OF DISCRETION.

"[A] DEFENDANT IN JAIL IS CONSTITUTIONALLY ENTITLED TO CONDUCT HIS OWN DEFENSE. IF HE ELECTS TO DO SO BY REJECTING THE SERVICES OF AN ATTORNEY TO CONDUCT HIS DEFENSE, HE CANNOT BE CONFINED TO HIS JAIL SIMPLY TO LOOK AT THE FOUR WALLS AND APPEAR ON THE DAY OF {COURT} TO DEFEND HIMSELF. HE MUST BE AFFORDED REASONABLE ACCESS . . . {THE LACK OF WHICH WOULD} RENDER FARETTA MEANINGLESS TO A CONFINED DEFENDANT." MILTON V. MORRIS, 767 F.2D 1443, 1448 (9TH CIR. 1985).

APPELLANT WAS DENIED LEGAL ACCESS, DENIED ACCESS TO THE COURT, DENIED ACCESS TO MATERIALS AND RESOURCES, AND DENIED THE ABILITY TO FILE SENTENCING MEMORANDA AND MOTIONS, WHICH SERVED TO DENY APPELLANTS RIGHT TO SELF-REPRESENTATION THEREBY DENYING HIM COUNSEL.

THE RIGHT TO COUNSEL IS THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. EVITTS V LUCEY, 469 U.S. 387, 393-96 (1985); STRICKLAND, 466 U.S. 668 (1980); CUYLER V. SULLIVAN, 446 U.S. 335, 344 (1980); UNITED STATES V. CRONIC, 466 U.S. 648, 654 (1980).

BY DENYING APPELLANT ACCESS TO ALL NECESSARY RESOURCES AND

MATERIALS APPELLANT WAS DENIED THE OPPORTUNITY TO FULLY BRIEF, PRESENT, AND ARGUE SENTENCING ISSUES THEREBY RENDERING APPELLANT INEFFECTIVE AND DENYING HIM COUNSEL AT BOTH 10/20 AND 11/10 HEARINGS. "[T]HE RIGHT TO REPRESENT ONESELF CANNOT BE SATISFIED UNLESS IT IS MADE MEANINGFUL BY PROVIDING THE ACCUSED THE RESOURCES NECESSARY TO PREPARE AN ADEQUATE PROSE DEFENSE." STATE V SILVA, 107 WN.APP. 605, 27 P.3D 663 (2001).

3.) ADMISSION OF KNIVES AND BATON WAS AN ABUSE OF DISCRETION.

IN RPR (11/10/10) P 15, 16, APPELLANT RAISES THE ISSUE OF ARMSTRONG ADMITTING INADMISSIBLE EVIDENCE TO WHICH SHE REPLIES: "THAT WAS A MATTER OF OPINION, AND THE JURY OBVIOUSLY FOUND OTHERWISE" THEREBY CLEARLY ACKNOWLEDGING THAT THIS ADMISSION PROFOUNDLY EFFECTED THE JURY.

THE COLLOQUY PRIOR TO ADMISSION WAS AS FOLLOWS: ORP 86: 6-10 DONNELLY: UNDER THE CIRCUMSTANCES OF THE CASE, THERE IS NO INDICATION THAT ANY KNIVES OR BATONS WERE USED IN THE CRIME, AND I THINK THE RELEVANCE IS MARGINAL AND THE PREJUDICE COULD POTENTIALLY BE GREAT ... COURT ORP 98: 2 CERTAINLY PEOPLE DON'T WALK AROUND WITH A BATON HOOKED ON THEIR BELT. RP 98: 14-17 ... THE PROBATIVE VALUE OF THE KNIVES MAY BE OUTWEIGHED BY THE PREJUDICIAL EFFECT. THE BATON I THINK IS ANOTHER MATTER, THOUGH, BECAUSE PEOPLE JUST DON'T WALK AROUND ARMED WITH A BATON. COURT AT ORP 99: 3-5 WELL THEY MADE NO REFERENCE TO THE KNIVES. DIDN'T USE THE KNIVES -- IT IS JUST THAT THEY WERE FOUND IN HIS POCKETS WHEN HE WAS ARRESTED?

KARL B. TEGLAND, COURT ROOM HANDBOOK ON WASHINGTON EVIDENCE, (2007 ED.) ER 402 (A) (14): "WEAPONS NOT USED IN A CRIME AND HAVING NO BEARING ARE INADMISSIBLE. STATE V. HANCOCK,

46 Wn. App. 672, 731 P.2d 1133 (1987)." In this case where no evidence of knives - except the knives themselves - was adduced throughout the trial, where the alleged victim was never aware of, let alone in any way threatened with the knives, and where they can not even be placed at the scene, their relevance is negligible at best, and their prejudicial value overwhelming. "Evidence of weapons is highly prejudicial, and the courts have 'uniformly condemned .... evidence of ... dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged.'" State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001), quoting U.S. v. Warledo, 557 F.2d 721, 725 (10th Cir. 1977). See also U.S. v. Peltier, 585 F.2d 314, 327 (8th Cir. 1978); State v. Oughton, 26 Wn. App. 74, 83-84, 612 P.2d 817 (1980) (evidence of a knife totally unrelated to the murder knife found to be of highly questionable relevance; reversed and remanded on other grounds); Moody v. U.S., 376 F.2d 525, 532 (9th Cir. 1967) (evidence a defendant had a gun that had no relation to the charge of smuggling is irrelevant and prejudicially erroneous: '{A} revolver could only be regarded by the jury as indicating that the appellant was a bad man engaged in a criminal enterprise ...'). See also State v. Tupe, 101 Wn. 2d 664, 705, 685 P.2d 571 (1984) (many view guns with great abhorrence and fear; people might believe that the defendant is a dangerous individual just because he owned a guns). Weapons evidence is highly prejudicial as it demonstrates a propensity for violence, an impermissible inference. See State v. Kelly, 102 Wn. 2d 188, 199-200, 685 P.2d 564 (1984); State v. Ra, 147 Wn. App. 868, 881, 175 P.2d 609 (2008).

"THE QUESTION IS WHETHER THE MATTER SHOWN HAS SUCH A CONNECTION WITH THE CRIME FOR WHICH THE ACCUSED IS BEING TRIED AS TO TEND TO SHOW THAT THE ACCUSED COMMITTED THE CRIME." STATE V. OUGHTON, 26 WN. APP. 74, 83-84, 612 P.2D 812, REVIEW DENIED, 94 WN.2D 1005 (1980), QUOTING STATE V. SHADONI, 137 WASH. 684, 243 P. 854 (1926).

CLEARLY THE KNIVES LACK ANY SUCH CONNECTION, AND THEIR ADMISSION WAS BOTH AN ABUSE OF DISCRETION AND HIGHLY PREJUDICIAL, AS THE KNIVES WERE TIP-TIED WITH BLADES HALF-OPEN ~~IN~~ A SHALLOW (1/2 INCH TO 3/4 INCH DEEP) DISPLAY BOX AND HANDED INTO THE JURY BOX EVERY FEW MINUTES THROUGHOUT THE TRIAL.

THIS WAS SUFFICIENT - IN AND OF ITSELF - TO DENY APPELLANT A FAIR TRIAL, TAINT THE JURY, AND PAINT APPELLANT AS A VIOLENT CRIMINAL AND THEREFORE REQUIRES RELITIGATION IN THE INTERESTS OF JUSTICE.

ARMSTRONG STATES AT RP 2, 15-16 "THE JURY OBVIOUSLY FOUND OTHERWISE" WHICH SERVES TO ACKNOWLEDGE THE EFFECT OF THE KNIVES UPON THE JURY DESPITE AN ABSOLUTE DEARTH OF TESTIMONY SUPPORTING ANY CONNECTION WHATSOEVER BETWEEN THE KNIVES AND ANY OF THE CHARGED CRIMES.

4.) SENTENCING APPELLANT FOR UNCHARGED ENHANCEMENTS SERVED TO VIOLATE STARE DECISIS AND WAS AN ABUSE OF DISCRETION

APPELLANT WAS CHARGED SPECIFICALLY WITH A FIREARM ALLEGATION IN EACH COUNT: COUNT I "... A FIREARM AND A DEADLY WEAPON, TO WIT: A HANDGUN"... AND "ARMED WITH A HANDGUN, A FIREARM AS DEFINED IN RCW 9.41.010, UNDER THE AUTHORITY OF RCW 9.94A.510 (3)"; COUNT II "... ARMED WITH A HANDGUN, A FIREARM AS DEFINED IN RCW 9.41.010, UNDER THE AUTHORITY OF RCW 9.94A.510 (3)"; COUNT III "... ASSAULT

AZAZI YOHANNES WITH A DEADLY WEAPON, TO WIT: A HANDGUN" .. AND ..
".. ARMED WITH A HANDGUN, A FIREARM AS DEFINED IN RCW 9.94A.510(3)."
AN "ACCUSATION WHICH LACKS ANY PARTICULAR FACT WHICH THE LAW
MAKES ESSENTIAL IS ... NO ACCUSATION WITHIN THE REQUIREMENTS
OF THE COMMON LAW, AND IT IS NO ACCUSATION WITHIN REASON."
BLAKELEY V. WASHINGTON, 542 U.S. 296, 301-02, 124 S.CT. 2531 (QUOTING
JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE §87 AT 55 (2ND ED. 1872)).
WASHINGTON COURTS HAVE MADE THIS ABUNDANTLY CLEAR: SENTENCING
ENHANCEMENTS MUST BE CHARGED IN THE INFORMATION. SEE STATE V.
NASS, 76 WN.2D 368, 456 P.2D 347 (1969); STATE V. ERRICO, 81 WN.2D 628, 635, 503 P.2D 1076
(1972); STATE V. COSHER, 85 WN.2D 45, 501, 530 P.2D 317 (1975); STATE V. SMITH, 11 WN.APP. 216,
225, 521 P.2D 1197 (1974); STATE V. MIMS, 9 WN.APP. 213, 219, 511 P.2D 1383 (1973); STATE V. CRAWFORD,
159 WN.2D 86, 94, 147 P.3D 1288 (2006).
WHERE THE STATE DOES NOT GIVE NOTICE OF THE SPECIFIC ENHANCED
PENALTY IT ULTIMATELY SEEKS TO INVOKE, THE COURT MAY NOT
IMPOSE THAT ENHANCED PENALTY. STATE V. RECUENCO, 163 WN.2D 428,
433-37 (2008), CITING STATE V. THEROFF, 95 WN.2D 385, 392-93, 622 P.2D 1240 (1980).
NOT ONLY DOES ARMSTRONG HAVE A DUTY UNDER HER OATH OF
OFFICE AND THE LAW TO MAINTAIN AWARENESS OF SUCH CASES
AND HOLDINGS, BUT SHE ALSO HAS A DUTY UNDER STARE
DECISIS DOCTRINE TO FOLLOW THE RULINGS OF HIGHER
COURTS. IN THIS CASE SHE WAS PUT ON NOTICE BY CASE,
CITATION, AND QUOTATION OF THESE RULINGS AT RP1:5, 13, 14, 19
AND RP2:p12, 13 AND 14, YET CHOSE TO PLACE HER DISCRETION OVER
THAT OF THE STATE AND FEDERAL SUPREME COURTS AND THE
NINTH CIRCUIT IN A CLEAR AND MANIFEST ABUSE OF DISCRETION.
"CONSTITUTIONAL DUE PROCESS RIGHT TO BE INFORMED OF CHARGES IS
VIOLATED WHEN A PERSON IS CHARGED WITH A SENTENCING ENHANCEMENT

UNDER ONE STATUTE, THEN HAS HIS SENTENCE ENHANCED UNDER A SECOND, DIFFERENT STATUTE. GAUTT V. LEWIS, 487 F.3d 993, 997-98 (9th CIR. 2007).

III. DUE PROCESS VIOLATIONS

AT NO TIME PRIOR TO HIS TRANSPORT WAS APPELLANT EVER ADVISED HE WOULD BE TRANSPORTED TO KING COUNTY FOR RESENTENCING, AND IN POINT OF FACT, AS PETITIONER'S PRIOR RESENTENCING HAD BEEN CONDUCTED WITHOUT HIS PRESENCE (6/12/2007), APPELLANT HAD NO REASONABLE EXPECTATION OF BEING TRANSPORTED.

APPELLANT ARRIVED IN KING COUNTY JAIL 10/19 AND WAS GIVEN NO ACCESS TO ANY LEGAL RESOURCES, WAS NOT SERVED ANY SENTENCING MEMORANDA OR MOTIONS BY THE STATE, AND THEN WAS DRAWN INTO COURT THE NEXT DAY FOR AN IMMEDIATE RESENTENCING WITH NO OPPORTUNITY TO FILE MOTIONS OR PREPARE. WHEN APPELLANT ADVISED JUDGE ARMSTRONG OF THIS AND THAT DUE PROCESS DEMANDS THAT A PRO SE APPELLANT HAVE NOTICE OF PENDING MATTERS, OPPORTUNITY TO PREPARE, AND RESOURCES TO PREPARE AND PRESENT A DEFENSE, SHE INSISTED ON PROCEEDING TO SENTENCING.

1.) APPELLANT'S DUE PROCESS RIGHT TO PRESENT A DEFENSE WAS VIOLATED.

APPELLANT WAS DENIED ALL ACCESS TO RESOURCES UNTIL THE DAY BEFORE SENTENCING, 11/9/10, WHEN HE RECEIVED ONE HOURS ACCESS TO A LEGAL COMPUTER. THIS PREVENTED APPELLANT FROM PREPARING BRIEFS FOR THE COURT ON SENTENCING ENHANCEMENTS ON

MERGER AND SAME CRIMINAL CONDUCT; ON INEFFECTIVE ASSISTANCE; FROM SEEKING EVIDENTIARY HEARING ON THE POLICE REPORTS, DEPOSITION, AND PROBABLE CAUSE STATEMENT, WHICH ARE CRUCIAL TO ESTABLISH APPELLANTS CLAIMS OF INEFFECTIVE ASSISTANCE, PROSECUTORIAL MISCONDUCT, PERJURY, AND NUMEROUS OTHER ISSUES, FOR WHICH REASON PETITIONER HAS SOUGHT TO GET THEM - THE AFOREMENTIONED DOCUMENTS - ON THE RECORD SINCE 2006; AND, PREVENTED APPELLANT FROM PRESENTING AND PREPARING A BRIEF ON MITIGATING FACTORS WHICH WOULD HAVE SUPPORTED A REQUEST FOR A MINIMUM SENTENCE. EACH OF THESE FACTORS WAS CRUCIAL, AND BY DENYING APPELLANT THE OPPORTUNITY TO PRESENT THEM TO THE COURT AND GET THEM ON THE RECORD THE APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE.

THE RIGHT TO PRESENT A DEFENSE IS A FUNDAMENTAL ELEMENT OF DUE PROCESS OF LAW. WASHINGTON V. TEXAS, 388 U.S. 14, 19, 87 S.CT. 1920, 18 L.ED.2D 1019 (1967).

2.) APPELLANT WAS DENIED PROCEDURAL DUE PROCESS.

HAD APPELLANT BEEN AN ATTORNEY IN FACT, HE WOULD HAVE BEEN SERVED SENTENCING MEMORANDA OR BRIEFS, AND BEEN GIVEN THE OPPORTUNITY TO RESPOND BY FILING HIS OWN BRIEFS UPON THE STATE AND THE COURT. DENIAL OF THIS RIGHT DEPRIVED APPELLANT OF NOTICE AND OPPORTUNITY.

AT A BARE MINIMUM, PROCEDURAL DUE PROCESS "REQUIRES NOTICE AND AN OPPORTUNITY TO BE HEARD". SOUNDGARDEN V. EIKENBERRY, 123 WN.2D 750, 768, 871 P.2D 1050 (1994).

3.) SENTENCING PETITIONER TO UNCHARGED ENHANCEMENTS VIOLATED

APPELLANTS DUE PROCESS RIGHTS.

"[D]UE PROCESS OF LAW REQUIRES THAT THE INFORMATION CONTAIN SPECIFIC ALLEGATIONS... PUTTING THE ACCUSED PERSON UPON NOTICE THAT ENHANCED CONSEQUENCES WILL FLOW WITH A CONVICTION" STATE V. COSNER, 85 WN. 2D 45, 50, 530 P.2D 317 (1975). STATE V MIMS, 9 WN. APP. 213, 219, 511 P.2D 1383 (1973), "DUE PROCESS OF LAW REQUIRES NOTICE IN THE INFORMATION OF A POTENTIALLY GREATER PENALTY." "EVEN BEFORE THE COURT DECIDED APPRENDI (V NEW JERSEY, 530 U.S. 466, 476, 120 S.CT. 2348, 147 L.ED. 2D 435 (2000)) WE PROVIDED SIMILAR PROTECTIONS. IN STATE V FRAZIER (81 WN. 2D 628, 633, 503 P.3D 1073 (1972)) WE HELD: WHERE A FACTOR AGGRAVATES AN OFFENSE AND CAUSES THE DEFENDANT TO BE SUBJECT TO A GREATER PUNISHMENT THAN WOULD OTHERWISE BE IMPOSED, DUE PROCESS REQUIRES THAT THE ISSUE OF WHETHER THAT FACTOR IS PRESENT, MUST BE PRESENTED TO THE JURY UPON PROPER ALLEGATIONS AND A VERDICT RENDERED THEREON BEFORE THE COURT CAN IMPOSE THE HARSHER PENALTY. STATE V. WILLIAMS-WALKER, 167 WN. 2D 889.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

THIS GROUND WAS RAISED PREVIOUSLY HOWEVER DIVISION ONE - AFTER HAVING ACCEPTED APPELLANTS RAP 9.11 MOTION AND STATING IT WOULD BE RULED ON AT THE SAME TIME AS THE APPEAL - RULED THAT MOST ISSUES 'RELIED ON MATTERS OUTSIDE THE RECORD' DESPITE HAVING ALL EVIDENCE SUPPORTING THESE ISSUES IN THE 9.11 MOTION.

THE ISSUES RAISED HEREINAFTER ARE CLEARLY SUPPORTED ON THE RECORD, REQUIRE LITIGATION IN THE INTEREST OF JUSTICE, AND ARE LIKELY TO HAVE AFFECTED THE OUTCOME OF THE PROCEEDING.

1.) DEFENSE COUNSEL ACTING AS WITNESS FOR THE STATE WAS CLEARLY AGAINST THE INTERESTS OF APPELLANT.

IN ORP 148:3, WHILE "CROSS-EXAMINING" HOYT, DEFENSE COUNSEL KEVIN DONNELLY POINTED TO APPELLANT AND SAID "~~SO~~ NOW THE DRIVER YOU SAW CARRYING STUFF, CORRECT" THEREBY IDENTIFYING THE DEFENDANT AS THE PARTY CARRYING ON AN ACT OF THIEVERY, AND VIRTUALLY CONCEDING HIS GUILT. THIS IS ESPECIALLY PREJUDICIAL WHEN YOU TAKE INTO CONSIDERATION THE FACT THAT HOYT CLEARLY IDENTIFIED DERBY IN POLICE REPORT AND PROBABLE CAUSE STATEMENT AS THE ONE 'MOVING BACK AND FORTH' WHICH DONNELLY CONVERTED TO A STATEMENT OF GUILT. OCP 1, PROBABLE CAUSE STATEMENT, P2-3: "HOYT SAID THAT DERBY WAS WALKING AROUND VERY QUICKLY AS IF HE WAS LOOKING FOR SOMETHING ON THE GROUND."

NOTE THAT UNTIL DONNELLY GAVE THE STATE THIS WINDFALL NO EVIDENCE WAS BROUGHT OF ANYTHING ACTUALLY BEING TAKEN. HOWEVER, ONCE THIS WAS DROPPED IN THEIR LAPS THE STATE TOOK FULL ADVANTAGE. NOTE ALSO THAT HOYT'S TESTIMONY VARIES IN NEARLY EVERY PARTICULAR FROM HIS IN THE PROBABLE CAUSE STATEMENT.

NO COMPETENT COUNSEL WOULD ACCUSE THEIR CLIENT AT TRIAL, IDENTIFY HIM AS THE TRANSGRESSOR, AND IMPLY HIS GUILT, YET THIS IS PRECISELY WHAT KEVIN DONNELLY DID AT TRIAL AND BEFORE THE JURY. BY STATING THAT THE APPELLANT WAS SEEN CARRYING STUFF DONNELLY CLEARLY AND DIRECTLY LINKED HIS CLIENT TO THE CRIME; PROVIDED A DIRECT IMPLICATION OF GUILT; ASSURED A CONVICTION ON THE ROBBERY CHARGE; AND, DID MORE DAMAGE TO THE APPELLANT THAN THE STATE HAD ACHIEVED THROUGHOUT THE COURSE OF THE TRIAL, ALL IN ONE FELL SWOOP.

ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS (2008) STATES: "THE DUTY OF A LAWYER, BOTH TO HIS CLIENT AND TO THE LEGAL SYSTEM, IS TO REPRESENT HIS CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW . ." (FOOTNOTES OMMITTED).

THERE IS NO CONCEIVABLE STRATEGIC OR TACTICAL REASON WHY A REASONABLY COMPETENT DEFENSE COUNSEL WOULD DO THIS, AND CLEARLY DONNELLY MADE NO EFFORT TO IN ANY WAY DIMINISH THE IMPACT OF HIS STATEMENT.

2.) DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO BRING OFFER OF PROOF.

APPELLANT'S DEFENSE WAS BASED ON THREE SIMPLE ALLEGATIONS AND IN POINT OF FACT, THE JURY'S ACCEPTANCE OF APPELLANTS VERSION OF EVENTS WAS PREDICATED ON THESE THREE FACTS: A.) THAT AZAZI YOHANNES WAS A DRUG DEALER; B) THAT AZAZI YOHANNES WAS A THIEF (NOT ON RECORD); AND C) THAT YOHANNES ATTEMPTED TO SUCKER PUNCH (ASSAULT) HIM WHEN CONFRONTED.

PROOF OF ANY OF THESE ELEMENTS WOULD HAVE GREATLY ENHANCED APPELLANTS CREDIBILITY, AND SERVED TO COUNTER PROSECUTOR SOLSENO'S PERJURIOUS STATEMENTS. AS SUCH, THERE IS NO LEGITIMATE STRATEGIC OR TACTICAL REASON FOR DONNELLY'S FAILURE TO BRING AN OFFER OF PROOF OF YOHANNES DRUG DEALING.

ORP:39:1-2 ". . BASICALLY MR. YOHANNES TESTIFIED IN HIS DEPOSITION THAT HE SOLD WEED" ORP:39:4-6 "I WOULD LIKE TO RESERVE THE RIGHT TO BRING UP EVIDENCE OF DRUG DEALING IN OUR CASE IN CHIEF AND PROBABLY ADDRESS IT WITH THE COURT SHOULD MR. LATOURETTE TESTIFY" ORP:87 ". . I WOULD AT THAT TIME MAKE AN OFFER OF PROOF."

SOLSENO FOR THE STATE, ORP 269:10-11 "BECAUSE PEOPLE WHO ARE INVOLVED

IN DRUGS DON'T CALL THE POLICE, DO THEY?" ORP 324:2 "PEOPLE INVOLVED IN THE DRUG TRADE DON'T USE POLICE" ORP 316:5-6." BLINDLY ACCUSE SOMEONE ... SOF3 BEING A DRUG DEALER."

HAD DONNELLY BROUGHT AN OFFER OF PROOF AND ESTABLISHED BEFORE THE JURY THE FACT THAT YOKANNES WAS IN FACT A SELF-CONFESSED DRUG DEALER THE OVERWHELMING PREJUDICE ENGENDERED BY SOLSENOS PERJURIOUS AND BLATANTLY FALSE STATEMENTS TO THE JURY WOULD HAVE BEEN NEGATED, AND TO A SIGNIFICANT DEGREE UNDERMINED THE ENTIRETY OF THE STATES CASE AND THE CREDIBILITY OF THE COMPLAINING WITNESS, LIKELY CHANGING THE OUTCOME OF THE TRIAL.

"[No] REASONABLY COMPETENT ATTORNEY WOULD HAVE OVERLOOKED THE VALUE OF THIS EVIDENCE. COUNSEL DID NOT STRATEGIZE, HE COMMITTED ERROR." NIXON V. NEWSOME, 888 F.2D 112 (11TH CIR. 1989)

A CRIMINAL DEFENDANT RECEIVES CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL WHERE NO LEGITIMATE STRATEGIC OR TACTICAL EXPLANATION CAN BE FOUND FOR A PARTICULAR TRIAL DECISION. STATE V. RAINEY, 107 WN. APP. 128, 135-36, 28 P.3D 10 (2001), CITING STATE V. MC FARLAND, 127 WN.2D 322, 336, 899 P.2D 1251 (1995).

V. PROSECUTORIAL MISCONDUCT

WHILE THIS GROUND CLEARLY REQUIRES RELITIGATION, AS PROSECUTORIAL MISCONDUCT, SUBORNATION OF, AND OUTRIGHT PERJURY, FALSE EVIDENCE AND IMPROPER ARGUMENT SERVED TO DEPRIVE APPELLANT OF A FAIR TRIAL, APPELLANT DOES NOT FEEL THIS CAN BE ARGUED ADEQUATELY BASED SOLELY ON THE RECORD AND THUSLY WILL RESERVE THIS ARGUMENT FOR CRR 7.8 WHEN IT CAN BE BACKED WITH POLICE REPORTS, DEPOSITION, AND AFFIDAVITS, AND ARGUED

PROPERLY AND IN FULL.

VI. IMPROPER JURY INSTRUCTIONS

1.) FAILURE TO INSTRUCT ON ESSENTIAL ELEMENTS SERVED TO IMPERMISSIBLY LOWER THE STATE'S BURDEN OF PROOF.

AT OCP 119 APPELLANT IS CHARGED CLEARLY AND SPECIFICALLY WITH TAKING "TWO CELL PHONES AND 1 DIGITAL CAMERA" FROM ALAZI YOHANNES. LAW OF THE CASE DOCTRINE HOLDS "THE STATE BEARS THE BURDEN OF PROVING OTHERWISE UNNECESSARY ELEMENTS OF THE OFFENSE" THAT ARE INCLUDED IN THE INSTRUCTIONS OR CHARGING DOCUMENT. STATE V. O'DONNELL, 142 WN. APP. 314, 324, 174 P.3D 1205 (2008); WHERE THE STATE VOLUNTARILY ELECTS TO ADD OR OMIT ELEMENTS "THE STATE ASSUMES THE BURDEN OF PROVING THE ELEMENTS AS INSTRUCTED OR CHARGED". STATE V. NAM, 136 WN. APP. 698, 706, 150 P.3D 1205 (2007) QUOTING STATE V. HICKMAN, 135 WN. 2D 97, 101-02, 954 P.2D 900 (1998); WHEN THE STATE CHARGES SPECIFIC ADDITIONAL ELEMENTS, TO CONVICT INSTRUCTIONS MUST REFLECT THESE ELEMENTS". STATE V. JAEH, 151 WN. APP. 117, 210 P.3D 1061 (2009). THUS THE STATE WAS REQUIRED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT PERSONALLY TOOK EACH OF THE CHARGED ITEMS.

IN ACTUAL FACT THE SOLE TESTIMONY IN ANY WAY SUPPORTING THIS ALLEGATION IS DEFENSE COUNSEL KEVIN DONNELLY'S IDENTIFICATION MADE FOR HOYT AT ORP 148: 3 "NOW, THE DRIVER (POINTING AT DEFENDANT) YOU SAW CARRYING STUFF, CORRECT?" IT SHOULD BE NOTED THAT AT NO POINT THROUGHOUT HOYT'S TESTIMONY, ORP 130 - 148, ON THIS SUBJECT DID HE IDENTIFY LATOURETTE AS HAVING BEEN SEEN CARRYING ANYTHING, AND INDEED IN RB THE STATE'S SOLE BASIS FOR REFUTING APPELLANTS INSUFFICIENT EVIDENCE CLAIM WAS DONNELLY'S TESTIMONY, SEE RB 5: 18-19 "HOYT SAW THE DRIVER CARRYING STUFF TO

THE CAR, BUT COULD NOT MAKE OUT WHAT THE ITEM OR ITEMS WERE. RP 148"; RB 12:8-11 "A REASONABLE INFERENCE FROM HOYT'S TESTIMONY WAS THAT IT WAS LATOURETTE WHO PICKED UP YOHANNES CELL PHONE AND RETRIEVED OTHER ITEMS FROM YOHANNES CAR" THUSLY THE ONLY EVIDENCE WHICH WOULD SUPPORT A CLAIM OF APPELLANT TAKING THIS PROPERTY WAS PUT ON NOT BY THE STATE, BUT BY THE DEFENSE.

IN RB THE STATE REPEATEDLY ESTABLISHES THAT IT DID NOT FULFORT TO SHOW AT TRIAL THAT APPELLANT TOOK EITHER CELL PHONE OR THE CAMERA: RB 4 "[YOHANNES] THREW HIS CELL PHONE AND KEYS TO THE GROUND" RB 7:11-12 "ANOTHER CELL PHONE AND CAMERA THAT YOHANNES SAID HAD BEEN IN HIS CAR."

THE SIMPLE BLIND ASSERTION THAT BASED ON DONNELLY'S IDENTIFICATION - AND HOYT'S ACCEPTANCE - A 'REASONABLE INFERENCE' COULD BE MADE IN NO WAY COMPRISES 'PROOF BEYOND A REASONABLE DOUBT' THAT APPELLANT TOOK "TWO CELL PHONES AND A DIGITAL CAMERA" AND LEAVES A SUBSTANTIAL MARGIN OF DOUBT AS TO WHETHER THE JURY WOULD HAVE RETURNED A GUILT FINDING ON THE SPECIFIC ITEMS CHARGED RATHER THAN THE GENERIC 'PROPERTY OF ANOTHER' THAT WAS INSTRUCTED.

"[O]NCE THE STATE ELECTS WHICH SPECIFIC CHARGES IT IS PURSUING AND INCLUDES ELEMENTS IN THE CHARGING DOCUMENT, IT IS BOUND BY THAT DECISION. WE HAVE NOT ALTERED THIS REQUIREMENT." STATE V RECUENCO, 163 WN.2D 428, 432, 180 P.3D 1276 (2008)

CP 131:7 INSTRUCTS THE JURY THEY NEED ONLY FIND APPELLANT TOOK "PERSONAL PROPERTY OF ANOTHER," A SUBSTANTIALLY LOWER BURDEN OF PROOF THAN THAT ESTABLISHED IN THE CHARGING DOCUMENT.

"A CONVICTION CAN NOT STAND IF THE JURY WAS INSTRUCTED IN A MANNER

THAT WOULD RELIEVE THE STATE OF ITS BURDEN," STATE V. JACKSON, 137 WN.2D 712, 727, 976 P.2D 1229 (1999) (NOTING THAT "THE STATE MUST PROVE EVERY ESSENTIAL ELEMENT OF A CRIME BEYOND A REASONABLE DOUBT FOR A CONVICTION TO BE UPHELD" QUOTING STATE V. BYRD, 125 WN.2D 707, 713-14, 887 P.2D 396 (1995)).

2.) IMPROPER JURY INSTRUCTIONS ON COUNT I AND II SERVED TO IMPERMISSIBLY LOWER THE STATE'S BURDEN OF PROOF.

WHEN THE INFORMATION ALLEGES ONE SPECIFIC MEANS OF COMMISSION "IT IS ERROR TO INSTRUCT THE JURY THAT THEY MAY CONSIDER OTHER WAYS OR MEANS BY WHICH THE CRIME COULD HAVE BEEN COMMITTED." STATE V. BRAY, 52 WN. APP. 30, 34, 756 P.2D 1332 (1988), "THE MANNER OF COMMITTING A CRIME IS AN ELEMENT AND THE DEFENDANT MUST BE INFORMED OF THIS ELEMENT IN THE INFORMATION IN ORDER TO PREPARE A PROPER DEFENSE."

A) AT OCP 119 APPELLANT WAS CHARGED IN COUNT I WITH TAKING "TWO CELL PHONES AND A DIGITAL CAMERA FROM THE PERSON AND IN THE PRESENCE OF MZAZI YOHANNES," WHICH WOULD REQUIRE THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT EACH ITEM - TWO CELL PHONES AND A DIGITAL CAMERA - WERE TAKEN FROM THE PERSON OF MZAZI YOHANNES. "AND" IS AN INCLUSIVE TERM AND BY USING THIS TERM THE STATE ESTABLISHED THE LEVEL OF PROOF IT MUST MEET: THAT EACH ITEM WAS EITHER IN THE GRASP, OR ATTACHED TO THE CLOTHING OF YOHANNES. SEE STATE V. NAM, 136 WN.APP. 698, 706, 150 P.3D 617 (2007); UNITED STATES V. JENNINGS, 575 F.3D 980, 992-93 (9TH CIR. 2009).

THE STATE IN NO WAY PROVED THIS AND, DESPITE CHARGING APPELLANT IN THE INCLUSIVE THE JURY WAS INSTRUCTED IN THE ALTERNATIVE, WHICH IMPOSED A SUBSTANTIALLY LESSENED BURDEN OF PROOF.

STATE V STEPHENS, 93 WN.2D 186, 607 P.2D 304 (1980) AND STATE V KETCHEN, 110 WN.2D 403, 410, 756 P.2D 105 (1988) BOTH SUPPORT THE REQUIREMENT THAT

WHERE 'AND' IS CHARGED, THE JURY INSTRUCTIONS MUST ALSO REQUIRE AN INCLUSIVE FINDING.

THE COURTS SEEM TO BE GOING IN TWO WIDELY DISPARATE, IF NOT TOTALLY CONTRADICTORY DIRECTIONS AS REGARDS THE LEVEL OF CLARITY REQUIRED OF A CHARGING DOCUMENT. ON THE ONE HAND, THE JURY IS REQUIRED TO FIND THE ACCUSED 'GUILTY AS CHARGED' AND THE COURTS HAVE LONG REQUIRED 'PROOF BEYOND A REASONABLE DOUBT OF EVERY ELEMENT OF THE CRIME CHARGED.' SEE IN RE WINSHIP, 397 U.S. 358, 364, 90 S.CT. 1068, 25 L.ED. 2D 368 (1970); STATE V. FISHER, 165 WN.2D 727, 753, 207 P.3D 837 (2009), WHICH SUPPORTS THIS HOLDING, AND IN EVERY OTHER FACET OF LAW THE CONJUNCTIVE AND DISJUNCTIVE ARE HELD TO BE DISTINCT AND MUTUALLY EXCLUSIVE; I.E. IF THE WORD USED IS 'AND' THEN IT IS NOT SUBJECT TO FURTHER INTERPRETATION. THE TERM IS INCLUSIVE.

IT IS A WIDELY RECOGNIZED TENET OF LAW THAT THE COURT GAINS PERSONAL AND SUBJECT MATTER JURISDICTION OVER AN ACCUSED ONLY BY THE FILING OF A PROPER AND SUFFICIENT CHARGING DOCUMENT. THIS IS THE MEANS BY WHICH THE STATE ASSUMES THE AUTHORITY TO ARREST, DETAIN, ARRAIGN, AND TRY AN ACCUSED, AND THUS LY MUST BE DEEMED TO BE THE MOST SINGULARLY CRITICAL AND IMPORTANT DOCUMENT IN THE ENTIRETY OF THE CRIMINAL LEGAL PROCESS.

"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." EX PARTE CARLSON, 186 N.W. 722, 725, 176 WIS 538 (1922). THIS IS CLEARLY DEMONSTRATIVE THAT THE SOLE SUPPORT FOR THE CHARGING AUTHORITY IS THE INFORMATION FILED AGAINST AN ACCUSED, AND AS THE ENTIRETY OF THE STATE'S AUTHORITY AND JURISDICTION IS BASED ON THIS DOCUMENT; AND AS AN ACCUSED IS DETAINED, FORCED TO POST BOND OR BE IMPRISONED, FORCED TO UNDERGO PHYSICAL, MENTAL, AND FINANCIAL DURESS

BASED SOLELY ON THE STRENGTH OF THIS DOCUMENT; AND AS THIS IS THE DOCUMENT WHICH MEETS THE CONSTITUTIONAL STANDARDS OF NOTIFYING THE ACCUSED OF THE NATURE AND CAUSE OF ACCUSATION; AND NOTICE AND OPPORTUNITY REQUIREMENTS; THE STATE SHOULD BE REQUIRED TO PROVE THE CRIME AS CHARGED AND THEREBY MEET THE STANDARD OF PROOF THEY VOLUNTARILY ELECTED TO SET FOR THEMSELVES.

THE STRINGENCY OF OF LANGUAGE USED IN A CHARGING DOCUMENT HAS BEEN HELD TO A HIGH STANDARD SINCE BEFORE STATEHOOD: "UNDER OUR LAWS AN INDICTMENT MUST BE DIRECT AND CERTAIN, BOTH AS REGARDS THE CRIME CHARGED AND AS REGARDS THE PARTICULAR CIRCUMSTANCES THEREOF, WHEN THEY ARE NECESSARY TO CONSTITUTE A COMPLETE CRIME." LEONARD V TERRITORIUM, 2 WASH. TERR., 381, 392, 7 P 872 (1885).

STATE V RYAN, 103 WN 2D 165, 174, 691 P. 2D 197, 204 (1984) HELD "THE WORD 'AND' IS CONJUNCTIVE ... [T] HE LEGISLATURE WOULD HAVE USED THE WORD 'OR' HAD IT INTENDED THE DISJUNCTIVE." THIS IS HOW THE STATE SUPREME COURT ADDRESSED THIS MATTER, HOWEVER, THE ONLY EXCEPTION OUR COURTS SEEM TO MAKE TO THE 'PLAIN MEANING' RULE IS FOR CHARGING DOCUMENTS. THIS IS CONTRARY TO COMMON SENSE, TO THE ACTUAL MEANINGS OF THE WORDS, AND CONTRARY TO THE USAGE OF THE TERMS IN EVERY LEGAL FORUM AND COMMON ENGLISH.

SEE STATE V METCALF, 14 WN. APP. 232, 540 P. 2D 459 (1975), HOLDING THE STATE IS ONLY REQUIRED TO PROVE DISJUNCTIVE DESPITE CHARGING IN THE CONJUNCTIVE.

THIS RULING IS CONTRARY TO REASON AND IS BOTH INCORRECT AND HARMFUL; AS WELL AS VIOLATIVE OF THE RULE OF LENITY.

PURSUANT TO STATE V BRAY, 52 WN. APP. 30, 34, 756 P. 2D 1332 (1988), "WHEN THE INFORMATION ALLEGES ONE SPECIFIC MEANS OF COMMISSION "IT

IS ERROR TO INSTRUCT THE JURY THAT THEY MAY CONSIDER OTHER WAYS OR MEANS BY WHICH THE CRIME COULD HAVE BEEN COMMITTED" AND "THE MANNER OF COMMITTING A CRIME IS AN ELEMENT AND THE DEFENDANT MUST BE ~~ADVISED~~ INFORMED OF THIS ELEMENT IN THE INFORMATION IN ORDER TO PREPARE A PROPER DEFENSE."

APPELLANT WAS CHARGED WITH COMMITTING ROBBERY 1° IN A SPECIFIC MANNER: BY TAKING TWO CELL PHONES AND A DIGITAL CAMERA FROM THE PERSON AND IN THE PRESENCE OF AZAZI YOHANNES, THEREFORE, INSTRUCTING THE JURY IT NEED ONLY PROVE APPELLANT TOOK PERSONAL PROPERTY OF ANOTHER IMPOSED A SUBSTANTIALLY LOWER BURDEN OF PROOF AND DENIED HIM A FAIR TRIAL.

THE WORD "AND" IS CONJUNCTIVE. STATE V CARR, 97 WN.2D 436, 439, 645 P.2D 1028 (1982); THE WORD "OR" IS USED WHEN THE DISJUNCTIVE IS INTENDED. CHILDERS V CHILDERS, 89 WN.2D 592, 575 P.2D 201 (1978); STATE V DIXON, 78 WN.2D 796, 479 P.2D 931 (1971).

THE RULE OF LENITY APPLIES ABSENT LEGISLATIVE INTENT TO THE CONTRARY. IN RE PERS. RESTRAINT OF SIETZ, 124 WN.2D 645, 657, 880 P.2D 34 (1994). UNDER THE RULE OF LENITY, THE COURT MUST ADOPT THE INTERPRETATION MOST FAVORABLE TO THE CRIMINAL DEFENDANT. STATE V ROBERTS, 117 WN.2D 576, 586, 817 P.2D 855 (1991).

A 'PROPER ALLEGATION' IS REQUISITE FOR ANY CRIMINAL CHARGE, AND THE STATE - BY WHICH ELEMENTS AND WHAT LANGUAGE IT VOLUNTARILY ELECTS TO USE - ESTABLISHES THE BURDEN OF PROOF IT MUST MEET. WHERE THE STATE VOLUNTARILY ADDS ELEMENTS - THE TWO CELL PHONES AND DIGITAL CAMERA - AND CHARGES A CLEARLY SPECIFIED MANNER OF COMMISSION - TAKING FROM THE PERSON

AND IN THE PRESENCE OF THE VICTIM - TO FAIL TO HOLD THE STATE TO THAT BURDEN OF PROOF IS TO IMPERMISSIBLY LOWER THE STATE'S BURDEN; TO SUBJECT THE ACCUSED TO CONVICTION ON UNCHARGED ALTERNATIVE CRIMES; TO VIOLATE PLAIN ENGLISH, COMMON SENSE, AND THE RULE OF LENITY; AND TO LOWER THE STANDARD FOR CHARGING DOCUMENTS, ALLOWING FREE AND OPEN REINTERPRETATION TO THE JURY OF AN ENTIRELY DIFFERENT CRIMINAL SCENARIO THAN THAT PRESENTED IN THE INFORMATION.

THE COURT IN THE CASE AT BAR MAY STATE WITH CERTAINTY THAT, HAD THE STATE BEEN REQUIRED TO PROVE THE CRIME AS CHARGED THE RESULT WOULD HAVE BEEN DIFFERENT. THIS IS PROVEN BY REVIEW OF THE JURY VERDICTS.

"[T]HE INFORMATION MUST STATE THE ACTS CONSTITUTING THE OFFENSE IN ORDINARY AND CONCISE LANGUAGE." STATE V. ROYSE, 66 WN.2D 552, 557, 403 P.2D 838 (1965). THE MEANING OF THE TERM "AND" IN ORDINARY LANGUAGE CLEARLY AND INARGUABLY IS CONJUNCTIVE.

THE HOLDING THAT A DISJUNCTIVE JURY INSTRUCTION FOLLOWING A CONJUNCTIVE CHARGING DOCUMENT IS ACCEPTABLE IS BOTH INCORRECT AND HARMFUL AND SHOULD BE CHANGED.

THIS WOULD PLACE THE CHARGING DOCUMENT ON A PAR WITH OTHER LEGAL DOCUMENTS, WHERE IT SHOULD BE.

NOTE THE COURT'S HOLDING IN STATE V. MCCARTY, 140 WN.2D 420, 426, 428, 998 P.2D 296 (2000) WHERE THE DISSENT HELD THAT THERE IS A CRUCIAL DIFFERENCE BETWEEN JURY INSTRUCTIONS, WHICH MUST BE "EXACTINGLY PRECISE" AND CHARGING DOCUMENTS, WHICH REQUIRE

ONLY A "SIMPLE ALLEGATION". THE MAJORITY DISAGREED, HOLDING "[S]INCE BOTH CHARGING DOCUMENTS AND JURY INSTRUCTIONS MUST IDENTIFY THE ESSENTIAL ELEMENTS OF THE CRIME FOR WHICH THE DEFENDANT IS CHARGED AND TRIED, THE DISSENT'S DISTINCTION IS WITHOUT A DIFFERENCE." McCARTY, ID AT 426 n.1.

BOTH CHARGING DOCUMENTS AND JURY INSTRUCTIONS SHOULD BE HELD TO THE SAME STANDARD: CONCISE LANGUAGE. AND WHERE THE STATE VOLUNTARILY ELECTS TO ADD OR OMIT ELEMENTS BY ITS LANGUAGE IN THE CHARGING DOCUMENT OR JURY INSTRUCTIONS IT SHOULD BE REQUIRED TO MEET THE STANDARD OF PROOF THEY THEMSELVES ESTABLISHED.

PARDON THE MIXED PRONOUNS.

(B) IN OCP 119 THE CHARGING DECISION BY THE STATE WAS TO CHARGE APPELLANT AS FOLLOWS: "DID INTENTIONALLY ATTEMPT TO ABDUCT... WITH INTENT TO FACILITATE COMMISSION OF THE FELONY OF ROBBERY IN THE FIRST DEGREE AND TO INFLICT BODILY INJURY ON AZAZE YOHANNES, AND FLIGHT THEREAFTER," THE JURY, HOWEVER WAS INSTRUCTED THAT THESE WERE ALTERNATIVE.

THE JURY RETURNED A FINDING OF GUILT ON ONLY ONE OF THESE, WHICH IS A SUBSTANTIALLY LOWER BURDEN OF PROOF THAN SHOULD BE MANDATED BY CHARGING APPELLANT IN THE CONJUNCTIVE, AND ALL APELLANTS ARGUMENTS RAISED IN 2A APPLY AS WELL AND ARE HEREDY INCORPORATED BY REFERENCE.

3.) IMPROPER UNANIMITY INSTRUCTION ON ENHANCEMENTS SERVED TO DEPRIVE APPELLANT OF A VALID JURY FINDING

JURY INSTRUCTIONS GIVEN IN APPELLANTS CASE (OCP 131:) WERE PRECISELY THE SAME AS THOSE FOUND TO BE ERROR IN STATE V. KENNETH OLELL CAMPBELL, 66732-7-I (8/6/11)

4.) IMPROPER JURY INSTRUCTIONS PRECLUDE A VALID DEADLY WEAPON FINDING.

IN ORDER FOR A JURY TO RETURN A VALID DEADLY WEAPON FINDING WPIC 2.06.01 REQUIRES THE JURY TO BE INSTRUCTED ON AND FIND THAT UNDER THE CIRCUMSTANCES IN WHICH IT IS USED THE WEAPON IS READILY CAPABLE OF CAUSING DEATH OR SUBSTANTIAL BODILY HARM. THIS INSTRUCTION WAS NOT GIVEN IN THE CASE AT BAR.

THE ANALYSIS OF "CIRCUMSTANCES" MUST INCLUDE "THE INTENT AND PRESENT ABILITY OF THE USER, THE DEGREE OF FORCE, THE PART OF THE BODY TO WHICH IT WAS APPLIED, AND THE PHYSICAL INJURIES AFFLICTED." STATE V SORENSON, 6 WN. APP. 269, 273, 492 P.2D 233 (1972) (QUOTING PEOPLE V FISHER, 234 CAL. APP. 2D 189, 193, 44 CAL. RPTR. 302 (1965)). READY CAPABILITY IS DETERMINED IN RELATION TO SURROUNDING CIRCUMSTANCES, TO POTENTIAL SUBSTANTIAL BODILY HARM. RCW 9A.04.110(6); STATE V COBB, 22 WN. APP. 271, 273, 589 P.2D 297 (1978) REVIEW DENIED, 92 WN.2D 1011 (1979); STATE V CARLSON, 65 WN. APP. 153, 159, 828 P.2D 30, REVIEW DENIED, 119 WN.2D 1022 (1992).

IN APPELLANTS CASE THE ALLEGED VICTIM TESTIFIED THAT UPON BEING STRUCK IN THE HEAD THE WEAPON BROKE UPON IMPACT; NOT STUNNING HIM; NOT REQUIRING MEDICAL ATTENTION; AND, IN FACT LEAVING ONLY WHAT WAS DESCRIBED VARIOUSLY AS "A BUMP AND A SMALL LACERATION" (OCP/P2); AND A "VISIBLE INJURY -- WITH A TINY LACERATION"; WHICH PROVED TO BE IN THE PHOTOGRAPHS A BARELY VISIBLE BUMP WITH A 'LACERATION' OF APPROXIMATELY 1/16TH TO 1/32ND OF AN INCH, SAID INJURY BEING SO INSIGNIFICANT THAT THE OFFICER HAD "CHANNES POINT" WITH HIS RIGHT FINGER TO HIS HEAD WHERE HE CLAIMED TO HAVE AN INJURY." ORP 209: 11-12.

THIS IN NO WAY MEETS THE STANDARD OF PROOF OF A WEAPON READILY CAPABLE OF CAUSING DEATH, AND LACKS THE TRAUMA OF A SHAVING NICK, LET ALONE SUBSTANTIAL BODILY HARM, AND THE VERDICT MUST BE DEEMED PRESUMPTIVELY UNRELIABLE. THE ONLY WEAPONS THE STATE PRODUCED WERE NOT USED IN THE

CHARGED CRIMES, COULD NOT BE PLACED AT THE CRIME SCENE, AND WAS NEITHER BEARING NOR RELEVANCE.

AN ESSENTIAL ELEMENT OF A VALID DEADLY WEAPON ENHANCEMENT IS THE JURY'S DETERMINATION THAT THE WEAPON WAS USED IN A MANNER WHICH SHOWS THAT IT WAS READILY CAPABLE OF CAUSING DEATH. SEE STATE V. SULLIVAN, 47 WN. APP. 81, 82, 733 P.2D 578 (1987); STATE V. SKENANDORE, 99 WN. APP. 494, 498, 994 P.2D 291 (1984). HERE, WHERE THE ALLEGED VICTIM CLAIMS THE 'WEAPON' BROKE UPON IMPACT LEAVING SO MINIMAL AN INJURY THAT THE OFFICER FELT IT NECESSARY TO HAVE YOHANNES PUT HIS FINGER ON IT IN THE PHOTOS TO ENSURE IT WOULD BE NOTICED, THE EVIDENCE FALLS FAR SHORT OF THAT REQUIRED FOR A VALID DEADLY WEAPON FINDING, AND LACKING A VALID DEADLY WEAPON INSTRUCTION UNDER THE LAW THE STATE'S BURDEN OF PROOF WAS IMPERMISSIBLY LOWERED.

A JURY INSTRUCTION WHICH OMITS AN ESSENTIAL ELEMENT OF A CRIME RELIEVES THE STATE OF ITS BURDEN OF PROVING EACH ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT AND IS A VIOLATION OF DUE PROCESS. STATE V. DAVIS, 27 WN. APP. 498, 506, 618 P.2D 1034 (1980). THE JURY IS NOT REQUIRED TO SUPPLY THE OMITTED ELEMENT BY SEARCHING THE OTHER INSTRUCTIONS "TO SEE IF ANOTHER ELEMENT ALLEGED IN THE INFORMATION SHOULD HAVE BEEN ADDED TO THOSE SPECIFIED IN [THE] INSTRUCTION." STATE V. EMMANUEL, 42 WN.2D 799, 819, 259 P.2D 845 (1953). IN ADDITION, A DEFENDANT IS DENIED A FAIR TRIAL "IF THE JURY MIGHT ASSUME AN ESSENTIAL ELEMENT NEED NOT BE PROVEN." DAVIS, SUPRA, AT 506.

VII MERGER / SAME CRIMINAL CONDUCT

AS A THRESHOLD MATTER, THIS ISSUE WAS BEEN

RAISED PREVIOUSLY, HOWEVER, THE COURTS PRIOR DECISION IS MANIFESTLY UNJUST, IS CONTRARY TO THE FACTS, IS CONTRARY TO THE LAW, AND APPEARS TO IGNORE THE FACT THAT IN RB THE STATE VERTUALLY CONCEDES THAT - IF ALL THREE CRIMES DON'T MERGE - ALL CRIMES ENCOMPASS THE SAME CRIMINAL CONDUCT, AND THEREFORE REQUIRES RE-LITIGATION.

1.) THE COURT ERRED BY NOT MERGING APPELLANTS ROBBERY 1° AND ATTEMPTED KIDNAPPING 1° CHARGES.

A) TWO CRIMES MERGE IF IN ORDER TO PROVE A PARTICULAR DEGREE OF A CRIME ANOTHER CRIME MUST BE PROVEN. IN THE CASE AT BAR THE CHARGING DOCUMENT ITSELF ARGUES FOR MERGER, CHARGING THE APPELLANT WITH "ATTEMPTED KIDNAPPING IN THE FIRST DEGREE, A CRIME OF THE SAME OR SIMILAR CHARACTER AND BASED ON THE SAME CONDUCT AS ANOTHER CRIME CHARGED HEREIN, WHICH CRIMES WERE PART OF A COMMON SCHEME OR PLAN AND WHICH CRIMES WERE SO CLOSELY CONNECTED IN RESPECT TO TIME, PLACE, AND OCCASION THAT IT WOULD BE HARD TO SEPARATE PROOF OF ONE CHARGE FROM PROOF OF THE OTHER," WHICH VIRTUALLY MIRRORS MERGER ARGUMENT.

"THAT ALL ROBBERIES NECESSARILY INVOLVE SOME DEGREE OF FORCIBLE RESTRAINT, HOWEVER, DOES NOT MEAN THAT THE LEGISLATURE INTENDED PROSECUTORS TO CHARGE EVERY ROBBER WITH KIDNAPPING." STATE V KORUM, 120 WN. APP. 686, 707, 86 P.3D 166 (2004)

"ONCE PROPERTY HAD BEEN OBTAINED BY FORCE THE ROBBERY WAS COMPLETED. ANY INCIDENTAL ABDUCTION OR RESTRAINT OCCURRING DURING THIS SHORT PERIOD OF TIME WOULD MERGE INTO THE ROBBERY AS A MATTER OF LAW." STATE V JOHNSON, 92 WN. 2D 671, 676, 600 P.2D 1249 (1979).

THE CHARGES OF ROBBERY 1° AND ATTEMPTED KIDNAPPING 1° SHOULD

MERGE AND THE ATTEMPTED KIDNAPPING 1° CHARGE SHOULD BE VACATED.

B.) THE STATE ARGUED IN RB THAT THE ASSAULT 2° AND ROBBERY 1° CHARGES DO NOT MERGE, CLAIMING 'THE ASSAULT DID NOT FURTHER THE ROBBERY.' THIS STATEMENT IS BELIED THROUGHOUT THE RB AS THE STATE'S OWN ARGUMENTS OVERWHELMINGLY SUPPORT APPELLANT'S ARGUMENTS FOR MERGER: RB 12 "LATOURETTE'S USE OF FORCE INDUCED YOHANNES TO PART WITH HIS PROPERTY"; RB 14 "LATOURETTE STRUCK YOHANNES WITH HIS GUN. UNDER THESE CIRCUMSTANCES A REASONABLE JURY COULD CONCLUDE THAT YOHANNES PARTED WITH HIS CELL PHONE AND HIS KEYS BOTH AGAINST HIS WILL AND AS A RESULT OF LATOURETTE'S USE OF FORCE." RB 36 "INARGUABLY YOHANNES WOULD NOT HAVE SURRENDERED HIS CELL PHONE AND HIS KEYS AGAINST HIS WILL, BUT FOR THE USE OF FORCE BY LATOURETTE." THE STATE'S ARGUMENT IS OVERWHELMINGLY PROBATIVE OF THE ASSAULT NOT ONLY FURTHERING THE ROBBERY, BUT BEING A CRUCIAL AND INTEGRAL PART OF THE ROBBERY, AS WITHOUT THE USE OF FORCE YOHANNES WOULD NOT HAVE PARTED FROM HIS PROPERTY.

WASHINGTON'S SUPREME COURT HELD IN STATE V FREEMAN, 153 WN.2D 765, 771, 108 P.3D 753 (2005) ".. WE FIND NO EVIDENCE THAT THE LEGISLATURE INTENDED TO PUNISH SECOND DEGREE ASSAULT SEPARATELY FROM FIRST DEGREE ROBBERY WHEN THE ASSAULT FACILITATES THE ROBBERY" AND THUSLY "WHEN FIRST DEGREE ROBBERY AND SECOND DEGREE ASSAULT CONVICTIONS MERGE, THE REMEDY IS TO VACATE THE ASSAULT CHARGE." ID AT 775.

2.) THE COURT ERRED BY NOT FINDING ALL OF APPELLANTS CRIMES AS CONSTITUTING THE SAME CRIMINAL CONDUCT.

RCW 9.94A.400 (1)(A) AND RCW 9.94A.589 (A) DEFINE SAME CRIMINAL CONDUCT AS "TWO OR MORE CRIMES THAT REQUIRE THE SAME CRIMINAL INTENT, ARE COMMITTED AT THE SAME TIME AND PLACE, AND INVOLVE THE SAME VICTIM" AND CRIMINAL INTENT AS FOLLOWS: "THE DEFENDANTS CRIMINAL INTENT AT THE TIME EACH OFFENSE WAS COMMITTED WAS THE SAME IF (1) THE DEFENDANTS INTENT

VIEWED OBJECTIVELY, DID NOT CHANGE FROM ONE OFFENSE TO THE NEXT, AND (2) THE COMMISSION OF ONE CRIME FURTHERED THE OTHER." AT RB18 THE STATE ARGUES "THUS, ALL OF THE ACTS HAD THE SAME CRIMINAL OBJECTIVE: TO ROB YOHANNES. THE ACTS OCCURRED OVER A VERY SHORT PERIOD OF TIME, IN THE SAME APPROXIMATE PLACE, AND THE ACTS INVOLVED THE SAME AGGRESSORS AND THE SAME VICTIM," AND AT RB20 "LAFOURETTE AND DERBY'S OVERALL OBJECTIVE WAS TO ROB YOHANNES."

THE STATE'S LANGUAGE AT RB18 DESCRIBING THE CRIME NEARLY CITES THE LAW ON SAME CRIMINAL CONDUCT VERBATIM AND CONCLUSIVELY REQUIRES ALL THREE COUNTS TO BE SENTENCED AS THE SAME CRIMINAL CONDUCT

OFFENSES CONSTITUTE THE SAME CRIMINAL CONDUCT FOR PURPOSES OF STATUTE IF THEY ARE COMMITTED (1) WITH THE SAME CRIMINAL INTENT; (2) AT THE SAME TIME AND PLACE; AND, (3) AGAINST THE SAME VICTIM. STATE V VERE, 125 WN.2D 407, 410, 885 P.2D 824 (1994); CRIMINAL INTENT IN THIS ANALYSES IS NOT THE MENS REA ELEMENT OF THE PARTICULAR CRIME, BUT RATHER IS THE OFFENDERS OBJECTIVE CRIMINAL PURPOSE IN COMMITTING THE CRIME. STATE V ADAME, 56 WN. APP. 803, 811, 785 P.2D 1144 (1990); WE CONSIDER MULTIPLE FACTORS TO DETERMINE INTENT, INCLUDING: (1) HOW INTIMATELY RELATED THE CRIMES ARE; (2) WHETHER THE CRIMINAL OBJECTIVE SUBSTANTIALLY CHANGED BETWEEN THE CRIMES; AND (4) WHETHER THE CRIMES ARE PART OF A RECOGNIZABLE SCHEME OR PLAN. STATE V. HEWES, 115 WN.2D 294, 302, 797 P.2D 1141 (1990); STATE V BURNS, 114 WN.2D 314, 318, 788 P.2D 531 (1990).

AGAIN, APPELLANT REFERS THE COURT TO OCP 119, THE STATE'S AMENDED INFORMATION, AND TO ORB (OCTOPUS RESPONDENTS BRIEF) PAGES 18 AND 20 WHICH CLEARLY AND INCONTRAVERTIBLY ESTABLISH THAT ALL OF APPELLANTS CRIMES CONSTITUTE THE SAME CRIMINAL CONDUCT.

~~VIII~~ UNCHARGED ALTERNATIVES

THE COURT ERRED BY SENTENCING APPELLANT FOR UNCHARGED ALTERNATIVE CRIMES.

APPELLANT WAS CHARGED SPECIFICALLY IN EACH COUNT WITH COMMISSION "WHILE ARMED WITH A HANDGUN, A FIREARM AS DEFINED IN RCW 9.41.010," YET AT NO TIME WAS THE JURY INSTRUCTED IN A MANNER THAT WOULD ALLOW THEM TO RETURN A VALID FIREARM FINDING, AND LACKING SUCH AN INSTRUCTION, APPELLANT COULD ONLY HAVE BEEN FOUND GUILTY OF UNCHARGED ALTERNATIVE CRIMES.

RCW 9.41.010 DEFINES 'FIREARM' AS "A WEAPON OR DEVICE FROM WHICH A PROJECTILE MAY BE FIRED BY MEANS OF AN EXPLOSIVE SUCH AS GUNPOWDER." HOWEVER, AS NO SUCH INSTRUCTION WAS GIVEN, THE JURY COULD NOT FIND A FIREARM.

NEITHER WAS THE JURY INSTRUCTED IN SUCH MANNER AS TO ALLOW THEM TO RETURN A FINDING OF A DEADLY WEAPON, A WEAPON WHICH IN THE MANNER IN WHICH IT WAS USED WAS READILY CAPABLE OF INFLICTING DEATH OR SUBSTANTIAL BODILY HARM.

WHEN AN INFORMATION ALLEGES ONLY ONE ALTERNATIVE MEANS OF COMMITTING A CRIME, IT IS CONSTITUTIONAL ERROR TO INSTRUCT THE JURY ON A DIFFERENT, UNCHARGED MEANS. STATE V SEVERNS, 13 WN.2D 542, 548, 125 P.2D 659 (1942). IN THE CASE AT BAR APPELLANT WAS CHARGED WITH COMMISSION OF EACH CRIME WHILE ARMED WITH A FIREARM; THE JURY WAS INSTRUCTED ON A DEADLY WEAPON, AN UNCHARGED MEANS OF COMMISSION.

WHERE INFORMATION ALLEGES A FIREARM BUT NO FIREARM WAS FOUND BY THE JURY, THE JURY COULD NOT FIND EITHER THE CRIME CHARGED OR THE MANNER

OF COMMISSION CHARGED.

"WHEN AN OFFENSE MAY BE COMMITTED BY ALTERNATIVE MEANS IT IS ERROR TO INSTRUCT THE JURY ON A MEANS THAT WAS NOT ALLEGED IN THE INFORMATION REGARDLESS OF THE RANGE OF EVIDENCE ADMITTED AT TRIAL." STATE V. CHENG, 117 WN. APP. 531, 540, 72 P.3D 256 (2003). "THE MANNER OF COMMITTING AN OFFENSE IS AN ELEMENT, AND THE DEFENDANT MUST BE INFORMED OF THIS ELEMENT IN THE INFORMATION." STATE V. BRAY, 52 WN. APP. 30, 34, 756 P.2D 1332 (1988).

IX INSUFFICIENCY OF INFORMATION

THE INFORMATION FILED IN APPELLANTS CASE FAILED TO APPRISE HIM OF THE AGGRAVATING FACTOR ON WHICH THE JURY WAS INSTRUCTED AND THEREFORE WAS INSUFFICIENT UNDER THE VI AMENDMENT. TO CITE THIS COURTS HOLDING IN STATE V. SIERS, 63697-9-I (2010):

"[T]HE TWO JUSTICE CONCURRENCE IN POWELL COMBINED WITH THE THREE JUSTICE DISSENT YIELDS A MAJORITY HOLDING AFFECTING THE PROCEDURE IN POST-BLAKELY CASES: NOTICE OF AGGRAVATING FACTORS MUST BE GIVEN IN THE CHARGING DOCUMENT. STATE V. POWELL, 167 WN.2D 672, 690, 223 P.3D 493 (2009) (STEPHENS, J., CONCURRING); POWELL, 167 WN.2D AT 695 (OWENS, J., DISSENTING); SEE ALSO STATE V. ZAKEL, 61 WN. APP. 805, 806, 812 P.2D 512 ('WHERE THERE IS NO MAJORITY AGREEMENT AS TO THE RATIONALE FOR A DECISION, THE HOLDING OF THE COURT IS THE POSITION TAKEN BY THOSE CONCURRING ON THE NARROWEST GROUNDS') (CITING MARKS V. UNITED STATES, 430 U.S. 188, 193, 97 S.CT. 990, 993, 51 L.ED.2D 260 (1977)), AFF'D, 119 WN.2D 563, 834 P.2D 1046 (1992)."

FAILURE TO CHARGE AN AGGRAVATING FACTOR IN THE CHARGING DOCUMENT

"CANNOT BE LIMITED TO PROCEDURAL DUE PROCESS UNDER THE FIFTH AMENDMENT, THE REQUIREMENT THAT AGGRAVATING FACTORS BE CHARGED IN THE INFORMATION 'INHERES IN THE SIXTH AMENDMENT JURY TRIAL RIGHT' AND THUS 'APPLIES TO THE STATES AND BINDS US IN THIS CASE' STATE V. POWELL, 167 WN.2D AT 690 (STEPHENS, J., CONCURRING)." STATE V. SIERS, # 63697-9-I (DIVISION ONE 11/29/2010).

THIS COURT BASED ITS DECISION ALSO ON WEAPON ENHANCEMENT CASELAW, CITING TO: STATE V FRAZIER, 81 WN.2D 628, 629, 503 P.2D 1073 (1972); IN RE PERS. RESTRAINT OF BUSH, 95 WN.2D 551, 554, 627 P.2D 953 (1981); AND STATE V. THEROFF, 95 WN.2D 385, 393, 622 P.2D 1240 (1980), AND THEIR REQUIREMENT THAT THE STATE ALLEGE THE SPECIFIC ENHANCEMENT SOUGHT.

HERE, AS IN SIERS, THE INFORMATION ALLEGED ONE AGGRAVATING FACTOR (FIREARM) AND THE JURY WAS INSTRUCTED ON A DIFFERENT, UNCHARGED AGGRAVATOR, AS SUCH, THE REMEDY IS DISMISSAL WITHOUT PREJUDICE.

RELIEF REQUESTED

FOR THE AFOREMENTIONED REASONS AND PURSUANT TO THE RULES, CITATIONS, CASELAW, AND PRECEDENTS HERETOFORE ENUMERATED, AND IN THE INTERESTS OF STARE DECISIS, JUDICIAL ECONOMY, AND THE CORRECTION OF CONSTITUTIONAL ERROR AND MANIFEST INJUSTICE APPELLANT DOES HEREBY MOVE THIS COURT FOR APPROPRIATE RELIEF.

DONE BY MY HAND ON THIS ELEVENTH DAY OF NOVEMBER, 2011

WITHOUT PREJUDICE UCC1-207

MICHAEL LATOURETTE

AFFIDAVIT OF SERVICE

I MICHAEL LATOURETTE: DO HEREBY SWEAR, AVOW, AND ATTEST UNDER PENALTY OF PERJURY PURSUANT TO RCW 9A.72.095 AND THE LAWS OF WASHINGTON THAT I DID CAUSE TO BE SERVED ON THE PARTIES BELOW A TRUE AND CORRECT COPY OF PETITIONERS/ APPELLANTS AMENDED OPENING BRIEF BY MAILING SAME TO THEM - POSTAGE PAID AT THEIR RESPECTIVE ADDRESSES, AS FOLLOWS:

DIVISION ONE COURT OF APPEALS	KING COUNTY PROSECUTOR
600 UNIVERSITY ST	516 THIRD AVE W-554
SEATTLE WASHINGTON NEAR 98101	SEATTLE WASHINGTON NEAR 98104

ON THIS 14TH DAY OF NOVEMBER OF 2011.

DONE BY MY HAND,

WITHOUT PREJUDICE UCC1-207

MICHAEL LATOURETTE:

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 NOV 18 AM 10:40