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DIVISION II

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DIVISION II OF THE COURT OF APPEALS BY *JM*  
STATE OF WASHINGTON  
DEPUTY  
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

WADE W. PIERCE,

Petitioner.

APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR LEWIS COUNTY

Cause No. 04-1-00323-1

AMENDED PERSONAL RESTRAINT PETITION

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TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u> . . . . .	iv
I. <u>STATEMENT OF THE CASE</u> . . . . .	1
A. <u>Procedural History</u> . . . . .	1
B. <u>Facts</u> . . . . .	4
II. <u>ARGUMENT</u> . . . . .	17
1. MR. PIERCE WAS DENIED HIS RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT AND ARTICLE 1, § 7 OF THE WASHINGTON CONSTITUTION BECAUSE THE WARRANTLESS SEARCH OF HIS CAR WAS NOT JUSTIFIED UNDER THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT. . . . .	17
2. MR. PIERCE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL BY THE FAILURE OF HIS APPOINTED COUNSEL ON APPEAL TO RAISE THE MERITORIOUS CHALLENGE TO THE TRIAL COURT’S DENIAL OF HIS MOTION TO SUPPRESS PHYSICAL EVIDENCE. . . . .	26
3. MR. PIERCE’S SEPARATE CONVICTIONS FOR SECOND DEGREE ASSAULT AND ROBBERY DENIED HIM HIS STATE AND FEDERAL CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY UNDER THE FIFTH AMENDMENT TO THE U.S.	

	CONSTITUTION AND ARTICLE 1, § 9 OF THE WASHINGTON CONSTITUTION . . . . .	29
4.	MR. PIERCE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL BY THE FAILURE OF HIS APPOINTED COUNSEL ON APPEAL TO RAISE THE MERITORIOUS ISSUE THAT MR. PIERCE’S DECEMBER 31, 2003 ASSAULT CONVICTIONS SHOULD MERGE WITH HIS ROBBERY CONVICTION ON THAT DATE. . . .	33
5.	MR. PIERCE WAS DENIED HIS RIGHT UNDER THE SIXTH AMENDMENT AND ARTICLE 1 § 22 TO HAVE A JURY UNANIMOUSLY DETERMINE THAT HE COMMITTED THE THEFT WITH WHICH HE WAS CHARGED IN COUNT XII. . . . .	35
6.	MR. PIERCE WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BY HIS TRIAL ATTORNEY’S FAILURE TO OBJECT TO INADEQUATE JURY INSTRUCTIONS OR TO THE FAILURE TO GIVE A UNANIMITY INSTRUCTION. . . .	38
7.	MR. PIERCE’S FIREARM ENHANCEMENTS SHOULD BE REVERSED BECAUSE THE JURY WAS NOT PROPERLY INSTRUCTED ON THE FIREARM ENHANCEMENT. . . . .	39
8.	MR. PIERCE WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL BY THE FAILURE OF HIS APPOINTED COUNSEL ON APPEAL TO FILE A PETITION FOR REVIEW TO PRESERVE HIS FIREARM ENHANCEMENT ISSUE OR ADVISE HIM OF THE NECESSITY OF	

	PRESERVING THE ISSUE IN HIS PRO SE PETITION. . . . .	45
9.	MR. PIERCE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL BY THE FAILURE OF HIS APPOINTED COUNSEL TO CALL WITNESSES ON MR. PIERCE’S BEHALF, HIS FAILURE TO DILIGENTLY SEEK ESSENTIAL DISCOVERY, HIS FAILURE TO COMPETENTLY CROSS-EXAMINE WITNESSES, HIS FAILURE TO PRESENT MITIGATING EVIDENCE, AND HIS FAILURE TO PROPERLY MOVE TO DISMISS REGARDING THE FIREARM ENHANCEMENT FOR COUNT XIII. . . . .	46
10.	MR. PIERCE WAS DENIED A FAIR TRIAL BECAUSE THE EVIDENCE USED TO CONVICT HIM WAS INSUFFICIENT TO SUPPORT A CONVICTION. . . . .	53
III.	<u>OTHER REMEDIES INADEQUATE</u> . . . . .	55
IV.	<u>CONCLUSION</u> . . . . .	56

TABLE OF AUTHORITIES

	<u>Page</u>
<u>STATE CASES:</u>	
<u>In re Brown</u> , 143 Wn.2d 431, 21 P.3d 687 (2001) . . . . .	27
<u>In re Pers. Restraint of Rice</u> , 118 Wn.2d 876, 828 P.2d 1086 (1992) . . . . .	25
<u>In re Personal Restraint of Maxfield</u> , 133 Wn.2d 332, 945 P.2d 196 (1997) . . . . .	27, 28
<u>In re Restraint of Hegney</u> , 138 Wn.App. 511, 158 P.3d 1193 (2007) . . . . .	44
<u>In re Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004) . . . . .	28
<u>In re Restraint of Taylor</u> , 150 Wn.2d 683, 717 P.2d 755 (1986) . . . . .	43
<u>In re Restraint of Vandervlugt</u> , 120 Wn.2d 427, 842 P.2d 950 (1992) . . . . .	43
<u>Kalmas v. Wagner</u> , 133 Wn.2d 212, 943 P.2d 1369 (1997) . . . . .	21
<u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999) . . . . .	31
<u>State v. Coleman</u> , 159 Wn.2d 509, 150 P.3d 1126 (2007) . . . . .	37
<u>State v. Crawford</u> , 159 Wn.2d 86, 147 P.3d 1288 (2006) . . . . .	42, 44
<u>State v. Freeman</u> , 153 Wn.2d 765,	

108 P.3d 753 (2005) . . . . .	30, 31, 33
<u>State v. G.S.</u> , 104 Wn.App. 648, 17 P.3d 1221 (2001) . . . . .	55
<u>State v. Gocken</u> , 71 Wn.App. 267, 857 P.2d 1074, rev. denied, 123 Wn.2d 1024 (1994) . . . . .	22
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998) . . . . .	55
<u>State v. Kinzy</u> , 141 Wn.2d 373, 5 P.3d 668 (2000) . . . . .	21, 23
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988) . . . . .	36, 37
<u>State v. Korum</u> , 80876-7 (stayed pending the decision in Recuenco on February 5, 2008) . . . . .	45
<u>State v. Kypreos</u> , 115 Wn.App. 207, 61 P.3d 352 (2002), rev. denied, 149 Wn.2d 1029 (2003) . . . . .	21
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999) . . . . .	20
<u>State v. Link</u> , 136 Wn.App. 685, 150 P.3d 610 (2007) . . . . .	21-23
<u>State v. Loewen</u> , 97 Wn.2d 562, 647 P.2d 489 (1982) . . . . .	23, 24
<u>State v. Lynd</u> , 54 Wn.App. 18, 771 P.2d 770 (1989) . . . . .	24
<u>State v. Mance</u> , 82 Wn.App. 539, 918 P.2d 527 (1996) . . . . .	25

<u>State v. Mills</u> , 80 Wash.App. 231 (Div. II 1995) . . . . .	45
<u>State v. Morse</u> , 156 Wn.2d 1, 123 P.2d 832 (2005) . . . . .	19, 20
<u>State v. Muir</u> , 67 Wn.App. 149, 835 P.2d 1049 (1992) . . . . .	23
<u>State v. Pam</u> , 98 Wn.2d 748, 659 P.2d 454 (1983) . . . . .	40
<u>State v. Parker</u> , 139 Wn.2d 486, 987 P.2d 73 (1999) . . . . .	20
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984) . . . . .	36, 37
<u>State v. Pierce</u> , _____ Wn.2d _____, 171 P.3d 1056 (2007) . . . . .	2
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008) (No.74964-7; filed 4/17/08) . . . . .	41-45
<u>State v. Schelin</u> , 147 Wn.2d 562 (2002) . . . . .	53
<u>State v. Schlieker</u> , 115 Wn.App. 264, 62 P.3d 520 (2003) . . . . .	22, 23
<u>State v. Smith</u> , 137 Wn.App. 262, 153 P.3d 199 (2007) . . . . .	23
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980) . . . . .	36
<u>State v. Thompson</u> , 151 Wn.2d 793, 92 P.3d 228 (2004) . . . . .	21
<u>State v. Vladovic</u> , 99 Wn,2d 413,	

662 P.2d 853 (1983) . . . . .	30
<u>State v. White</u> , 135 Wn.2d 761, 958 P.2d 982 (1998) . . . . .	19
<u>State v. Womac</u> , 160 Wn.2d 643, 160 P.3d 40 (2007) . . . . .	32
 <u>FEDERAL CASES:</u>	
<u>Albernaz v. United States</u> , 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981) . . . . .	30
<u>Blakely v. Washington</u> , 542 U.S. 296 (2004) . . . . .	45
<u>Cady v. Dombrowski</u> , 413 U.S. 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) . . . . .	22
<u>Cal. v. Acevedo</u> , 500 U.S. 565, 111 S.Ct. 1982; 114 L.Ed.2d 619 (1991) . . . . .	19
<u>Chapman v. California</u> , 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065 (1967) . . . . .	37
<u>Illinois v. Rodriguez</u> , 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) . . . . .	20
<u>In re Winship</u> , 397 U.S. 359, 25 L.Ed.2d 560, 99 S.Ct. 628 (1980) . . . . .	38
<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L.Ed.2d 560, 999 S.Ct. 2781 (1979) . . . . .	55
<u>Johnson v. United States</u> , 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948) . . . . .	20

Katz v. United States, 389 U.S. 347,  
19 L.Ed.2d 576, 88 S.Ct. 507 (1967) . . . . . 20

Mincey v. Arizona, 437 U.S. 385,  
57 L.Ed.2d 290, 98 S.Ct. 2408 (1978) . . . . . 19

Payton v. New York, 445 U.S. 573,  
63 L.Ed.2d 639, 100 S.Ct. 1371 (1980) . . . . . 20

Strickland v. Washington, 466 U.S. 668,  
104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) . . . . . 27

United States v. Dunbar,  
470 F.Supp. 704 (D.Conn. 1979) . . . . . 21

Washington v. Recuenco, 126 S.Ct. 2546,  
165 L.Ed.2d 466 (2006) . . . . . 17, 42, 44-46

Whitely v. Warden, 40 U.S. 560,  
91 S.Ct. 1031, 28 L.Ed.2d 306 (1971) . . . . . 25

**CONSTITUTIONAL PROVISIONS:**

Article 1, § 7 . . . . . 17, 19, 25, 29, 35, 36

Fifth Amendment . . . . . 29, 30

Fourth Amendment . . . . . 17, 19, 20, 25

Sixth Amendment . . . . . 35, 36

**STATUTES:**

RCW 9.94.010 . . . . . 40

**REGULATIONS AND RULES:**

CrR 3.6 . . . . . 4, 6

CrR 7.5 . . . . . 2, 56

CrR 7.8 . . . . . 2, 56

I. STATEMENT OF THE CASE

A. Procedural History

1. Status of Petitioner

Petitioner Wade Pierce, by and through his attorney Lance Hester, respectfully files this Personal Restraint Petition and applies for relief from confinement. Mr. Pierce is currently incarcerated at the Department of Corrections, Stafford Creek Correctional facility, serving sentences after criminal convictions.

a. Mr. Pierce was convicted in Lewis County Superior Court, Cause No. 04-1-00323-1, after a jury trial.

b. Mr. Pierce was convicted of first degree burglary (two counts); theft of a firearm (5 counts); possession of a stolen firearm, first degree robbery, second degree assault (two counts), first degree theft, and possession of a controlled substance with the intent to deliver. Seven of Mr. Pierce's convictions were originally enhanced with a firearm enhancement. See Exhibit "A", Judgment and Sentence.

c. Mr. Pierce was sentenced on January 7, 2005. The judge who imposed sentence was the Honorable David R. Draper. The court imposed sentences totaling 495 months. Exhibit "A".<sup>1</sup>

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<sup>1</sup> All referenced exhibits are found in petitioner's original Personal Restraint Petition.

d. Mr. Pierce's trial lawyer was Kenneth G. Johnson of Williams & Johnson, P.S., 57 W. Main Street Suite 200, P.O. Box 1185, Chehalis, WA 98532.

e. Mr. Pierce appealed his conviction and sentence. The Court of Appeals, Division II, affirmed all of his convictions except the possession of a firearm conviction, which was reversed because the information charging that crime was deficient, COA No. 32788-1-II. See Exhibit "B", Unpublished Opinion. Mr. Pierce's appointed counsel on appeal were Manek Mistry and Jodi Backlund, of Backlund & Mistry, 203 East Fourth Avenue, Suite 404, Olympia, WA 98501.

f. Mr. Pierce filed a *pro se* Petition for Review. Review was denied on October 2, 2007. State v. Pierce, No. 79454-5, 171 P.3d 1056 (2007).

g. Mr. Pierce filed motions for post trial relief under CrR 7.5 and CrR 7.8 when his case was returned to the trial court on remand. See Exhibits "C" and "D", Defendant's Motion for New Trial under CrR 7.5, Defendant's Reply Brief and Motion for Relief from Judgment Under CrR 7.8. His motions were denied and an order was entered to that effect on September 12, 2008. See Exhibit "E",

Findings of Fact and Conclusions of Law Re: Denial of Motion for  
New Trial.

h. The trial court re-sentenced Mr. Pierce on remand. The Judgment and Sentence was signed on September 17, 2008, by Judge Nelson Hunt. At sentencing, the court granted some relief when it dismissed one of several convictions because the alleged victim, Mr. Coble, never stated that an actual gun was pointed at him, which had the effect of eliminating a firearm enhancement as well. The court failed to find that counts VIII and XI were the same criminal conduct. Mr. Pierce believes that the judge should have made this finding as the original sentencing court made such a finding at the original sentencing. The judge, at resentencing, separated counts VIII and X. This shows that he did not accept the double jeopardy argument and grant the relief requested. Had the judge accepted that argument, he wouldn't have counted the assault separate and added two more points to Mr. Pierce's offender score. See Exhibit "F", Judgment and Sentence.

i. Mr. Pierce has not filed any petition or motion requesting relief, other than those listed above, in state or federal court.

B. Facts

1. *The CrR 3.6 Hearing and Ruling:*

On April 20, 2004, the police made a warrantless arrest of Mr. Pierce outside his mother's home. RP (11/3/04) 33-34, 38<sup>2</sup>. After arresting him, the police walked around behind the house and looked through the window of his car, which was parked there, to obtain information for a search warrant for the car and a metal cabinet found near the car. RP (11/3/04) 5-6, 39, 48. Lewis County Sheriff's Det. Bruce Kimsey explained at the CrR 3.6 hearing that Mr. Pierce was a suspect in a robbery-burglary investigation. RP (11/3/04) 19. Mr. Pierce's mother, Wanita Hidalgo, knew that Det. Kimsey had talked to Mr. Pierce about these crimes. RP (11/3/04) 20, 25-26, 69.

On April 19, 2004, Mrs. Hidalgo contacted the police. RP (11/3/04) 68. Mrs. Hidalgo, her husband, and others had removed all of the property that Mr. Pierce's wife did not want from Mr. Pierce's house (which was located next to his mother's house), after his wife had him evicted from it. RP (11/3/04) 14, 27, 76; RP (11/5/04) 93, 101. Because she was aware of the accusations against Mr. Pierce, Mrs. Hidalgo contacted the police to ask whether she could be in trouble if there was any stolen property among the things she removed

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<sup>2</sup> The "RP" references are to the verbatim report of proceedings filed in Mr. Pierce's direct appeal. Mr. Pierce is moving separately to transfer the verbatim report of proceedings and clerk's papers from his direct appeal to this case.

from Mr. Pierce's house and stored in her spare bedroom and garage. RP (11/3/04) 15-16, 28, 68-69. Kimsey learned of the contact with the police and, with Det. Stacy Brown, went to Mrs. Hidalgo's home. RP (11/3/04) 12-13, 24. With Mrs. Hidalgo's written consent, Kimsey and Brown located some items that were possibly stolen after searching the bedroom and garage; they returned later the same day and received further items which Mr. Hidalgo had found in the crawl space above the garage. RP (11/3/04) 16, 30-31, 83-85. During the conversations with Mrs. Hidalgo, the detectives discussed with her that she could call 911 if Mr. Pierce came to her home. RP (11/3/04) 18, 30, 85.

On the following day, April 20, 2004, Mrs. Hidalgo believed she saw Mr. Pierce's car drive up behind her house. RP (11/3/04) 72. She left the house, called the police from a friend's home and told the operator that she was going to work and could be contacted there if necessary. RP (11/3/04) 72. Det. Inspector Smith, at the request of Kimsey, went to Mrs. Hidalgo's property. RP (11/3/04) 33. Smith met up with Mr. Pierce who was coming from the direction of his own house. RP (11/3/04) 5. It was stipulated at the CrR 3.6 hearing that Smith was standing near the corner of the rear of the attached garage when he saw Mr. Pierce. RP (11/3/04) 5. Smith interviewed Mr.

Pierce and then, when he arrived, Kimsey interviewed Mr. Pierce in the back of Smith's patrol car. RP (11/3/04) 33-36. The officers then arrested Mr. Pierce. RP (11/3/04) 38.

After Mr. Pierce was arrested, Smith advised Kimsey that there was a car in the back of the house; Smith then walked behind the house again, looked at the car and returned to confirm to Kimsey that there was a car in back and a metal cabinet near it. RP (11/3/04) 5-8.

Kimsey testified that Mr. Pierce told him that he had parked behind the house because he did not want his ex-wife to know he was there. RP (11/3/04) 35, 40. The car could not be seen from the front of the house, nor was it visible from the point where Smith first contacted Mr. Pierce. RP (11/5/04) 99, 105. Kimsey then went behind the house, looked through the window of the car and saw a suitcase from a set of luggage taken in a burglary. RP (11/3/04) 44. Based on this sighting, Kimsey impounded the car, had it towed, and eventually the next day applied for and obtained a search warrant for the car and the metal box near the car. RP (11/3/04) 48, RP (12/1/04) 187-189.

Kimsey testified that he had not looked for Mrs. Hidalgo in the twenty minutes he was at her home before the arrest because he was "dealing with" Mr. Piece, not looking for her. RP (11/3/04) 43. He

testified that he had also seen Smith knock on the front door. RP (11/3/04) 44; RP (11/5/04) 116<sup>3</sup>. He claimed he was looking for Mrs. Hidalgo when he went back to look inside Mr. Pierce's car. RP (11/3/04) 46.

In denying Mr. Pierce's Motion to Suppress, the court found that the consent to search granted by Mrs. Hidalgo on April 19, "did not carry over after April 19, 2004"; that Mrs. Hidalgo left her house after she thought she saw Mr. Pierce arrive at her property and called 911 from a friend's house; that Smith went to the property to contact Mr. Pierce; that Smith could not see Mr. Pierce's car from the spot where he met up with Mr. Pierce, that the car could only be seen if the observer walked to the rear of the residence; that, after knocking on the door and receiving no answer, Smith or Kimsey walked around the property to see if Mrs. Hidalgo was there and Smith confirmed that Mr. Pierce's car was parked behind the house; that Mr. Pierce had his mother's permission to be on the property; and that:

At a later point Mr. Pierce was arrested. The location of Mr. Pierce's arrest was remote from the location of his vehicle at the rear of his mother's residence. Det. Kimsey went to the rear of 1471 Centralia Alpha Rd to make observations, in addition to Insp. Smith's

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<sup>3</sup> Det. Kimsey made no note or reference in his report to trying to contact Mrs. Hidalgo.

observations, of the defendant's vehicle. Det. Kimsey could see from outside of Mr. Pierce's vehicle a black suitcase which matched two suitcases recovered from his mother's residence the prior day.

Based on these findings of fact, the court concluded that Mr. Pierce had standing to challenge the search, both because of the nature of the charges and his permission to be on the property; the search of the car was not incident to arrest; but that the observations of Smith and Kimsey were proper under the community safety exception to the general search warrant requirement. Given the concern she expressed on the previous day, he properly walked around her residence to secure it and determine if she was present. See Exhibit "G", Findings of Fact Conclusions of Law and Order Denying Motion to Suppress.

Detective Kimsey's trial testimony, however, was inconsistent with his suppression hearing testimony. The inconsistencies were significant and bear on this Personal Restraint Petition. Upon reviewing the differences, this court will see his true motivation for going to the back yard; said reason would have resulted in the trial court suppressing the evidence requested. See RP 19-65 and 167-227.

At trial, defense counsel did not put on a defense case. RP 237. This obviously meant that trial counsel did not call any witnesses nor did he submit any exhibits on Mr. Pierce's behalf. Additionally,

regarding the only critical evidentiary exhibits, boots and tire tracks, trial counsel failed to engage in any meaningful cross-examination by failing to measure the soles and compare the tire marks for the jury. RP 215-229.

Trial counsel also failed to obtain any of the 911/dispatch records pertinent to this case. The only acquisition of such records came by Mr. Pierce's mother, Wanita Hidalgo, which occurred after sentencing. See Exhibit "C", Affidavit of Wanita Hidalgo and accompanying dispatch records (attached to motion as Exhibits B & C). Mr. Pierce previously requested that his counsel acquire such documentation but he did not meet this request. See Exhibit "C", Affidavit of Wade Pierce (attached to motion as Exhibit A).

Appellate counsel never challenged the court's finding that the warrantless search of Mr. Pierce's car was justified under the community care taking exception on appeal. See Exhibit "B".

*2. The charges and jury instructions:*

Lewis County Prosecutor's Office charged Mr. Pierce, by way of Second Amended Information, with thirteen counts for crimes which were alleged to have occurred during four different charging periods:

On or about and between February 2, 2004 and February 8, 2004-first degree burglary while armed with a deadly

weapon, "to wit: rifle, that being a firearm as defined in RCW 9.94A.510" (Count I), theft of a firearm (Counts II through VI).

On or about or between April 9, 2004 and April 20, 2004-possession of a stolen firearm, to-wit: shotgun.

On or about December 31, 2003-first degree robbery, while being armed with a deadly weapon, to wit: pistol (Count VIII); burglary in the first degree which being armed with a deadly weapon (pistol) (Count IX); assault in the second degree with a deadly weapon (pistol) (Counts X and XI); theft in the first degree while armed with a firearm (Count XII).

On or about April 20, 2004 - possession of a controlled substance with intent to deliver, while armed with a firearm (pistol) (Count XIII).

See Exhibit "H", Second Amended Information. None of the charges named a location other than Lewis County, and none named a victim.

The theft of a firearm counts did not identify a particular firearm.

None of the "to-convict" instructions specified any location, victim or property taken. See Exhibit "I", Court's Instructions to the Jury.

For the firearm special verdict the jury was instructed only that:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Counts I, VIII, IX, X, XI, XII and XIII, A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive

use. The State must prove beyond a reasonable doubt that there is a connection among the defendant, the crime and the deadly weapon.

A pistol, revolver, or other firearm, is a deadly weapon whether loaded or unloaded.

Exhibit "I".

3. *Trial evidence:*

Jerry and Rosita Coble testified at trial that on December 31, 2003, at approximately 5:00 a.m., someone entered their bedroom, shone a flashlight in their eyes and had them cover their heads while property was taken from the house by two people, one a female. RP 14-17, 27, 35. The Cobles identified several items taken from them: a jewelry box, pieces of jewelry, a money clip, three pieces of luggage, and a satellite receiver, a VCR. RP 19-24, 36. Mrs. Coble identified a garnet ring, but was not positive that it was hers. RP 36-39. She testified that the most valuable things taken were her wedding ring and engagement ring. RP 40. When asked the value of the wedding ring, Mrs. Coble replied, "I really didn't know ... I can tell you that the - it was white gold wedding band, 18 karat, and it was a diamond solitaire, so roughly I would think \$6,000.00." RP 41. She could not recall the original price of the ring and had not had it appraised. RP 43. (It is important to note that the alleged wedding ring was never seen nor was

it in anyway introduced at trial. The jewelry that was introduced at trial was said, by Mr. Coble, to have been mostly junk.) RP 22. Neither could identify a suspect, nor could be positive that the person who entered their bedroom had a gun. RP 14, 28, 30, 42, 43.

Jack Cartwright testified that on February 7, 2004, he had gone out dancing with his ex-girlfriend Norma Woodard. RP 47, 49. While he was gone, someone entered his home and taken six guns, including a Mosburg shotgun, which he kept under his bed. RP 51-52. A rug from his living room and his daughter's rug with pictures of horses on it were also taken. RP 57-58. Mr. Cartwright knew Wade Pierce and his girlfriend and had seen him briefly at the Paul Bunyan Tavern where he had gone dancing. RP 49.

Mr. Pierce's mother, Wanita Hidalgo explained to the jury that on April 9, 2004, she, her husband, a friend of Mr. Pierce's, Mr. Pierce's ex-wife and his ex-wife's sister removed all of the property from his home that his ex-wife didn't want. RP 70, 145-147. Some of the property they removed belonged to others besides Mr. Pierce. RP 72. Mr. Pierce had rented rooms to other people before his eviction and had frequent visitors at his house, including Mr. Cartwright's ex-girlfriend Norma Woodard. RP 47, 140-142. Mrs. Hidalgo identified

items of property taken from Mr. Pierce's house to be stored in her house and garage, including three pieces of luggage, a shotgun, rug, satellite receiver, VCR, and a rug with a horse print on it. RP 78-84, 132-133. A jewelry box was recovered by the police from inside a red toolbox found near Mr. Pierce's car along with mail to persons other than Mr. Pierce. RP 114-115.

Over defense objection, police witnesses were permitted to opine that tire tread marks in the snow and mud matched the treads of snow tires found at Mr. Pierce's house and that the prints of his boots matched prints found at the scene. RP 96-97, 122-123, 202-204. The larger of two footprints in the snow outside the Cobles' house, from cross trainer type shoes, were 12 inches long; the smaller hiking boots were 10 inches long. RP 102-103. One set of prints found in the mud at Mr. Cartwright's house was an estimated 9 ½ inches to 10 inches tennis shoe and a smaller 8½ inches. RP 125. Mr. Pierce's shoes were size 8 ½ (as opposed to inches). RP 217. The boot ultimately found in Mr. Pierce's car were a size 7½. RP 267. The actual tires on Mr. Pierce's car were not a match. RP 225.

The police found a pistol, drugs and drug paraphernalia during the search of Mr. Pierce's car and the metal box next to the car

pursuant to the warrants obtained after observing a piece of luggage in the car. RP 188-198. Specifically, a search warrant for Mr. Pierce's car was obtained and inside the car the police found a gun wrapped in newspaper, zipped inside of a zip-lock plastic bag and stuffed inside the working mechanisms of the passenger seat compartment. RP 192. This was not easily accessible by any means, therefore, the gun was not readily accessible and available for offensive or defensive use.

Accessed from the outside, in the hatchback, police found a duffel bag containing 81.6 grams of methamphetamine, along with paraphernalia used to ingest it and a small scale. RP 195-197, 200.

4. *The prosecutor's closing arguments:*

The prosecutor argued only that there was no dispute that the crimes took place and the only issue was who committed them. RP 240-241. At no time did the prosecutor elect which items of property it was relying on for each count of the theft of firearm charges, the robbery charge or the first-degree theft charge.

5. *The direct appeal:*

On appeal, appellate counsel challenged the following: the sufficiency of the information charging possession of a stolen firearm; the sufficiency of the evidence that Mr. Pierce was armed with a deadly

weapon, participated in the Cartwright burglary, assaulted the Cobles or intended to deliver methamphetamine; the denial of a unanimous verdict on the means with which the Coble assault was committed; the correctness of the jury instruction defining "knowledge"; the failure to determine whether Mr. Pierce's prior convictions were the same criminal conduct; the decision not to count the Cobble robbery and assault as the same criminal conduct as the Coble burglary and theft; and the imposition of a firearm enhancement where the jury was not properly instructed on firearm enhancements, only deadly weapon enhancements. The court affirmed "all of the convictions except the possession of a stolen firearm conviction, which was reversed without prejudice because the information on that charge was deficient." Exhibit "B".

The Court of Appeals held that there was sufficient information to understand the special verdict forms, "Was the defendant, Wade William Pierce, armed with, or in possession of a firearm at the time of the commission of the crime?" even though the jury was instructed that it had only to find he was armed with a deadly weapon to return the special verdict and that a firearm was a deadly weapon. The Court of Appeals relied on the decision of the United States Supreme Court in

Washington v. Recuenco, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), in upholding the firearm enhancements in Mr. Pierce's case. Exhibit "B".

## II. ARGUMENT

1. MR. PIERCE WAS DENIED HIS RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT AND ARTICLE 1, § 7 OF THE WASHINGTON CONSTITUTION BECAUSE THE WARRANTLESS SEARCH OF HIS CAR WAS NOT JUSTIFIED UNDER THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT.

The court found that the warrantless search of Mr. Pierce's car behind his mother's house, which provided the basis for a search warrant for the car and a nearby metal box, was not justified as a search incident to arrest and was not a consensual search. See Exhibit "G". RP (1/5/2004) 146. Although the court found that the search was justified pursuant to the police's community caretaking function, the court's undisputed findings establish that the primary motivation for the search was to further the criminal investigation Insp. Smith and Det. Kimsey was undertaking. See Exhibit G. RP (11/5/2004) 146-147. These findings alone place the search outside of the community caretaking function because the community caretaking function must be divorced from a criminal inquiry. Further, the fact that the police did

not attempt to enter the house to look for Mrs. Hidalgo when she did not respond to their knocking at the door, the place where Mrs. Hidalgo would be expected to be; and the further fact that Inspector Smith had already walked behind the house twice to confirm the car was there demonstrates that concern for Mrs. Hidalgo was a pretext for searching the car. What the police were interested in was the car. Moreover, if Mrs. Hidalgo had been behind the house or near the car, Inspector Smith presumably would have seen her. When he went behind the house, Kimsey scrutinized the interior of the car, where he had no expectation of finding Mrs. Hidalgo.

Finally, Mrs. Hidalgo had phoned from a friend's house and alerted the 911 operator that she was going to work and could be reached there. RP (11/3/04) 72. There was no reason to suppose that she would be at her home when the police arrived there.

A warrantless search and seizure is per se unreasonable under both Art. 1 § 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. Under Art. 1 § 7, warrantless searches are presumed unreasonable. State v. Morse, 156 Wn.2d 1, 7, 123 P.2d 832 (2005); State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). As the United States Supreme Court stated

in Cal. v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982; 114 L.Ed.2d 619 (1991), "It remains a "cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions'." Mincey v. Arizona, 437 U.S. 385, 390, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978), *quoting* Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967) (footnotes omitted).

The Fourth Amendment to the United States Constitution also generally prohibits the warrantless entry to a person's home to conduct a search. Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), *citing* Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980); Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948). The state bears a heavy burden to show that a warrantless search and seizure falls within one of the jealously-drawn exceptions to the warrant requirement. Morse, 156 Wn.2d at 7; State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). To fit within an exception, the entry must be limited to the reason for the exception; exceptions are not devices to undermine the warrant

requirement. State v. Ladson, 138 Wn.2d 343, 356, 979 P.2d 833 (1999).

The community caretaking exception applies only under two circumstances: (1) when the police are making a routine check on health or safety; and (2) when necessary for police officers to render aid or to respond to an emergency in order to render aid or assistance. State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004); State v. Kinzy, 141 Wn.2d 373, 385, 5 P.3d 668 (2000). Because routine checks on health are less urgent than emergencies, admission of evidence under this exception requires "balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform the community caretaking function'." Kinzy, at 387 (*quoting* Kalmas v. Wagner, 133 Wn.2d 212, 216-217, 943 P.2d 1369 (1997)). "The balance ought to be struck on the side of privacy." Kinzy, at 392 (*quoting* United States v. Dunbar, 470 F.Supp. 704, 408 (D.Conn. 1979).)

"The community caretaking function must always be divorced from a criminal investigation." State v. Link, 136 Wn.App. 685, 696, 150 P.3d 610 (2007) (*citing* State v. Kypreos, 115 Wn.App. 207, 217, 61 P.3d 352 (2002), rev. denied, 149 Wn.2d 1029 (2003).) "Broadly

stated, a law enforcement officer's job is always to serve and protect the community. But where an officer's primary motivation is to search for evidence or make an arrest, this broader purpose does not create an exception to the search warrant requirement." Link 136 Wn.App. at 696 (citing State v. Gocken, 71 Wn.App. 267, 275-277, 857 P.2d 1074, rev. denied, 123 Wn.2d 1024 (1994)); Cady v. Dombrowski, 413 U.S. 441, 443, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) (upholding the police investigation of a traffic accident involving a police officer and search of the trunk of his car to secure his service weapon was pursuant to the community caretaking function because it was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute").

In Link, the reviewing court held that although the officer was concerned about the safety of the children when he entered the apartment, his primary purpose was to investigate a possible methamphetamine lab and therefore the officer's entry did not fall within the community caretaking exception to the warrant requirement. Link at 696.

In State v. Schlieker, 115 Wn.App. 264, 62 P.3d 520 (2003), the police responded to a domestic violence call. When the police

arrived, the people at the residence explained why there had been yelling at the house and told the police of suspected drug activity in a trailer on the property. Schlieker at 267. The police saw someone leaving the trailer and entered to find the defendant hiding there. The court held that the intrusion was not justified under the community caretaking function, noting that there was no information that someone had been injured inside and they did not inquire about the defendant's well being before handcuffing him. Schlieker at 272.

The decisions in Link and Schlieker are consistent with the criteria set forth by the Washington Supreme Court for when the exception applies: (1) "the community caretaking function may not be a pretext for criminal investigation"; (2) the invasions of privacy by the officers acting as community caretakers must be necessary and strictly relevant to a non-criminal investigation; and (3) the investigation must end when reasons for initiating the encounter are dispelled. Kinzy 141 Wn.2d at 394-395.

An emergency exists, justifying a warrantless entry, only where the police reasonably believe there are persons in "imminent danger of death or harm, or where there are objects likely to burn or explode." State v. Muir, 67 Wn.App. 149, 154, 835 P.2d 1049 (1992); State v.

Smith, 137 Wn.App. 262, 203, 153 P.3d 199 (2007); State v. Loewen, 97 Wn.2d 562, 568, 647 P.2d 489 (1982). Moreover, in order to uphold a search under this exception, the court "must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search and instead was 'actually motivated by a perceived need to render aid or assistance'." State v. Lynd, 54 Wn.App. 18, 21, 771 P.2d 770 (1989) (*citing Loewen* 97 Wn.2d at 568 (1982)).

Had the police believed in this case that there was any concern for Mrs. Hidalgo's welfare or that she was in danger of death or harm, they would not have waited over half an hour to search for her. They would not have skipped checking in her house for her and instead gone to the backyard and the car which they wished to search for evidence of a crime. They would not have checked twice to make sure that the car was behind the house without either looking for or noticing that she was not behind the house. The claim of concern for Mrs. Hidalgo was a pretext. The aim of going behind Mrs. Hidalgo's house to look inside Mr. Pierce's car, which was parked there, was to seek evidence in a criminal investigation.

Further, while Kimsey implied that neither he nor Smith knew that Mrs. Hidalgo did not call 911 from her home, that information

would have been available to the 911 operator and her testimony that she told the 911 operator that she was going to work and where she could be reached was un rebutted. Under the fellow officer rule, Kimsey and Smith could not rely on the 911 operator's report of Mrs. Hidalgo's call to justify a search under the community caretaking exception where the knowledge of the 911 operator would have shown that exception to be inapplicable. State v. Mance, 82 Wn.App. 539, 542, 918 P.2d 527 (1996); Whitely v. Warden, 40 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971) (while officers can rely on a police bulletin, the bulletin cannot insulate the sufficiency or reliability of the information; if the agency lacks probable cause, the officers lack probable cause).

The court erred in denying Mr. Pierce's suppression motion and this denied him his rights under the Fourth Amendment and Art. 1 § 7 of the Washington Constitution. This issue was raised by trial counsel and preserved for review. It should be available to Mr. Pierce in his Personal Restraint Petition because it is a constitutional issue for which Mr. Pierce can meet his burden of establishing actual prejudice. In re Pers. Restraint of Rice, 118 Wn.2d 876, 884, 828 P.2d 1086 (1992). Had the trial court properly granted Mr. Pierce's suppression motion,

everything found in the car would have been suppressed. RP (11/5/04) 136-137. There would have been an absence of physical evidence to proceed on any of the charges involving the boot and boot prints, and the gun that was the basis for all of the gun enhancements in the Coble robbery. This would have affected the entire trial, including all but one of the gun enhancements. The result would have been dismissal of the charges that flowed from the Cartwright incident, and dismissal of the charges related to the Coble incident. And clearly, Mr. Pierce's charges for possession with intent to deliver and the firearm enhancement for that charge would have had to be dismissed. The court should, accordingly, order the evidence suppressed and remand the matter for a new trial that does not include the suppressed evidence.

2. **MR. PIERCE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL BY THE FAILURE OF HIS APPOINTED COUNSEL ON APPEAL TO RAISE THE MERITORIOUS CHALLENGE TO THE TRIAL COURT'S DENIAL OF HIS MOTION TO SUPPRESS PHYSICAL EVIDENCE.**

Mr. Pierce's appointed counsel on appeal did not raise the meritorious issue challenging the trial court's erroneous denial of his pretrial suppression motion, and there was no tactical reason not to

have raised an issue, which would have resulted in the reversal of some of his convictions.

To show ineffective assistance of counsel, a defendant must demonstrate (1) that his attorney's performance was deficient and, (2) that this deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To meet these standards, a petitioner must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that but for counsel's unprofessional errors, appellant would have prevailed on appeal. See In re Brown, 143 Wn.2d 431, 452, 21 P.3d 687 (2001) ("[T]o prevail on the appellate ineffectiveness claim, [Petitioner] must show the merit of the underlying legal issues his appellate counsel failed to raise"). Appellate counsel's failure to raise a meritorious issue, one that would have resulted in the reversal of a conviction, clearly constitutes deficient performance. In re Personal Restraint of Maxfield, 133 Wn.2d 332, 945 P.2d 196 (1997). In Maxfield, the Washington Supreme Court held that the petitioner was denied the effective assistance of appellate counsel where counsel had failed to adequately brief the meritorious

issue that the state constitution protected his privacy interest in his electrical consumption records.

For another example, in In re Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004), the court held that "the failure of ... appellate counsel to raise the issue [of the closure of the courtroom during voir dire] on appeal was both deficient and prejudicial and therefore constituted ineffective assistance of counsel."

In the case against Mr. Pierce, appellate counsel failed to raise the issue thoroughly addressed above. As indicated, the trial court erred when it failed to suppress the evidence obtained under the circumstances outlined. When appellate counsel failed to address this issue, counsel's performance was deficient because it is an obvious issue that appellate counsel should be expected to address on appeal, and the deficient performance prejudiced Mr. Pierce as he was unable to present this position to the Court of Appeals for review.

Because the issue had merit and appellate counsel failed to raise it, Mr. Pierce should prevail on his claim of ineffective assistance of counsel in his personal restraint petition.

3. MR. PIERCE'S SEPARATE CONVICTIONS FOR SECOND DEGREE ASSAULT AND ROBBERY DENIED HIM HIS STATE AND FEDERAL CONSTITUTIONAL PROTECTION AGAINST

DOUBLE JEOPARDY UNDER THE FIFTH  
AMENDMENT TO THE U.S. CONSTITUTION AND  
ARTICLE 1, § 9 OF THE WASHINGTON  
CONSTITUTION

Mr. Pierce was convicted of committing two counts of second-degree assault and first-degree robbery on December 31, 2003, presumably at the Coble's home. These separate convictions violated Mr. Pierce's state and federal constitutional rights to be free of double jeopardy because any assault committed at the Coble's was entirely incidental to and had no purpose independent of the robbery. All of these convictions should merge. Although the state argued and defense counsel agreed at sentencing that the two assaults had separate victims, the jury was not required to identify a victim for any of these crimes and not required to find different victims for each assault. RP 291; Court's Instructions No. 18, 21 and 22. Although the jurors were told that each crime should be decided separately and that their verdicts on one count should not control the verdicts on other counts (Court's Instruction 4), the jurors were instructed only that they had to find, for each assault, that "the defendant assaulted another." Instructions 21 and 22. Similarly, the jurors were not required to agree that a particular person was the victim of the robbery charge. Instruction 18.

According to the Fifth Amendment, no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The problem is one that has been resolved through the reasoning of Albernaz v. United States, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). In State v. Freeman, 153 Wn.2d 765, 773, 776, 108 P.3d 753 (2005) the court stated, "Courts may not, however, enter multiple convictions for the same offense without offending double jeopardy." Additionally, *citing* State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 853 (1983), and the federal authority of Albernaz, *supra*, the court has held that the court must determine whether the charged crimes constitute the same offense.

Under Freeman, a second-degree assault conviction merges with a first-degree robbery conviction "when the assault facilitates the robbery" and there is no independent purpose or effect to either crime. Here, it is clear that any assault that occurred on December 31, 2003 was undertaken solely to facilitate the robbery and had no independent purpose or effect separate from the robbery. Because any assault was incidental to the robbery and any assault could have constituted the force or fear used to obtain or retain the property taken in the robbery, the remaining assault conviction should merge with the robbery

conviction. Ultimately, at a recent re-sentencing the trial court, in Mr. Pierce's case, agreed with this authority and reasoning. However, its ruling only had the effect of dismissing one of the assaults.

In State v. Aho, 137 Wn.2d 736, 743-744, 975 P.2d 512 (1999), the court held that because a defendant has a right to be tried only for the offense charged against him, a conviction could not stand where the charging period for the crime partially predated the effective date of the crime, and the jury was not required to determine which act it relied on for conviction, the defendant's conviction could not stand. By the same logic, because Mr. Pierce had a right to be tried only for the offense, as it was charged against him, and because the jury did not specify any act it was relying on for conviction in the assaults and robbery, he cannot be held to have committed the assaults or robbery against any particular victim<sup>4</sup>. Because any assaults on December 31, 2003 were clearly incidental to any robbery on that date, all of the crimes must merge.<sup>5</sup>

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<sup>4</sup> In closing, the prosecutor did say, "assault two's were committed on each of the Cobles," RP 240, he never elected who was the alleged victim of either count or who was the alleged victim of the robbery.

<sup>5</sup> At re-sentencing following remand, the court merged one assault with the robbery. Mr. Pierce now asks this court to merge the  
(continued...)

Moreover, it is not enough that one of the assaults was deemed to be the same course of conduct with the robbery. State v. Womac, 160 Wn.2d 643, 656-660, 160 P.3d 40 (2007) (if a conviction merges with another conviction, the conviction and sentence must be actually vacated even if it was not counted as criminal history).

Mr. Pierce's December 31, 2003, robbery and assault convictions should all merge into one conviction.

4. MR. PIERCE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL BY THE FAILURE OF HIS APPOINTED COUNSEL ON APPEAL TO RAISE THE MERITORIOUS ISSUE THAT MR. PIERCE'S DECEMBER 31, 2003 ASSAULT CONVICTIONS SHOULD MERGE WITH HIS ROBBERY CONVICTION ON THAT DATE.

Mr. Pierce's December 31, 2003, assault and robbery convictions should merge under a straightforward application of State v.

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<sup>5</sup>(...continued)

other assault as well. At resentencing, one of the assaults was dismissed (Count XI) and the remaining assault (Count X) was separated from the robbery and counted as a separate crime. At the original sentencing several years ago, however, Counts VIII and X were found to be the same criminal conduct, and counted as one in the offender score. The court should re-merge the remaining assault with the robbery conviction as it was in the original Judgment and Sentence, (i.e., the law of the case). Also, the court should merge the theft and burglary (Counts IX and XII) with the assault and robbery counts (Counts VIII and X) as they all constitute the same criminal conduct as stated in RCW 9.94A.589.

Freeman<sup>6</sup>. While Freeman was not decided before sentencing in Mr. Pierce's case, it was decided before appellate counsel filed Mr. Pierce's opening brief on August 2, 2005. Mr. Pierce was denied effective assistance of appellate counsel because of counsel's failure to raise the issue on direct appeal. The obvious prejudice to Mr. Pierce is not only in having the additional convictions, but also the additional weapon enhancements.

As noted, however, on remand from his original conviction, the trial court was partially persuaded by the above double jeopardy argument. However, the argument at re-sentencing was not based upon appellate counsel's work. And, as noted above, the trial court only partially implemented the reasoning of this argument. Therefore, because Mr. Pierce was denied full appellate review of this issue, the matter was not remanded to the trial court with instructions to re-sentence Mr. Pierce with instructions consistent with the complete merger argument articulated above.

Appellate counsel should be aware of important decisions of the Washington Supreme Court and of utilizing this awareness to seek the benefit of the decisions for his or her clients. The purpose of decision

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<sup>6</sup> Freeman was decided on March 17, 2005. Mr. Pierce was sentenced on January 7, 2005.

of the Supreme Court is in fact to provide such guidance to counsel such as the counsel who represented Mr. Pierce on his appeal.

On appeal, there was no mention of why the burglary and theft weren't asked to be merged with the robbery and the assault charges. This argument should have applied to the merging of all the crimes linked to the Coble robbery.

5. MR. PIERCE WAS DENIED HIS RIGHT UNDER THE SIXTH AMENDMENT AND ARTICLE 1 § 22 TO HAVE A JURY UNANIMOUSLY DETERMINE THAT HE COMMITTED THE THEFT WITH WHICH HE WAS CHARGED IN COUNT XII.

The Lewis County prosecutor charged Mr. Pierce, in Count XII, with first degree theft, in that on December 31, 2003, he "did wrongfully obtain property belonging to another of a value exceeding \$1500 with intent to deprive the true owner of such property." See Exhibit "H". No property was identified as the property taken and the jury instruction did not require the jury to find any particular property was taken. Instruction 25. The prosecutor did not elect any particular property in closing argument for the theft count or for the robbery count; the prosecutor stated only that the Cobles had described some of what they lost and identified "some of the property that we have here,

satellite receiver, VCR, the luggage, jewelry. Okay. So they are victims of a home invasion robbery." RP 240-242 (emphasis added).

The only property for which the prosecutor even attempted to elicit evidence of value was Mrs. Coble's wedding ring, which she admitted she did not really know that value of. She did not recall how much it cost when purchased 52 years earlier and had never had it appraised. RP 40-41.

Given the number of items which were allegedly taken, the absence of credible evidence of the value of any of the property, and the failure of the state to elicit any particular item or items it was relying on for conviction, Mr. Pierce's theft in the first degree conviction should be reversed.

Mr. Pierce has a constitutional right, for each count charged, to have the jury determine unanimously that he committed the criminal act with which he was charged in that county. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), *modified by* State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); Const. Art. I § 22; Sixth Amendment to the U.S. Constitution. To assure this right, where evidence of multiple acts is presented to the jury, the state must elect the particular criminal act on

which it will reply for conviction, or the trial court must instruct the jury that all of the jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. Kitchen 110 Wn.2d at 411; Petrich 101 Wn.2d at 572. In general, when trial error abridges a right guaranteed to the defendant by the United States Constitution, the jury verdict will be affirmed only if that error was "harmless beyond a reasonable doubt". Chapman v. California, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065 (1967). Where the state does not elect and no unanimity instruction is given, the error is harmless only if no reasonable juror could have had a reasonable doubt as to any of the alleged conduct. Kitchen 110 Wn.2d at 411-412; State v. Coleman, 159 Wn.2d 509, 150 P.3d 1126 (2007). Here, a rational juror could certainly have had a reasonable doubt that Mr. Pierce took any piece of property with a value of over \$1,500, including the wedding ring, or that all of the property taken together had a value of over \$1,500. The state's error in failing to elect what property it was relying on for conviction in the theft count or to request a unanimity instruction was not harmless and should require the reversal of Mr. Pierce's theft conviction.

Further, because no specific property was identified for the theft charge, the instruction was insufficient to require the state to bear the burden of proof for every element as required by In re Winship, 397 U.S. 359, 364, 25 L.Ed.2d 560, 99 S.Ct. 628 (1980). For this reason as well, Mr. Pierce's theft conviction should be reversed.

Likewise, Mr. Pierce's Robbery conviction should be reversed as well. The state failed to identify the personal property it relied upon for its conviction. RP 240-242. The court failed to give a unanimity instruction on the robbery count. CP 111-173 (Court's Instructions to the Jury). Because this error cannot be considered harmless, the robbery conviction must be reversed.

6. MR. PIERCE WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BY HIS TRIAL ATTORNEY'S FAILURE TO OBJECT TO INADEQUATE JURY INSTRUCTIONS OR TO THE FAILURE TO GIVE A UNANIMITY INSTRUCTION.

Defense counsel never sought to require the state to specify, through a bill of particulars or otherwise, what property it was relying on for conviction in the first degree theft and the robbery charges and did not object to any of the Court's Instructions, including the failure to give a unanimity instruction. RP 238. As a result, it was never clear what property the state was alleging as the property taken in the theft.

Given the complete absence of any attempt to value the property taken, the inadequate valuation of the wedding ring, and the possibility that the jury thought that there might have been additional property taken that was not shown to them, the error was not harmless.

7. MR. PIERCE'S FIREARM ENHANCEMENTS SHOULD BE REVERSED BECAUSE THE JURY WAS NOT PROPERLY INSTRUCTED ON THE FIREARM ENHANCEMENT.

Mr. Pierce was charged, for each burglary, the two assaults and the robbery (Counts I, VIII, IX, X, XI), with being "armed with a deadly weapon," and the deadly weapon was identified as a "firearm." Only for the theft and possession with intent to deliver (Counts XII and XIII) was he charged with "being armed with a firearm." Exhibit H. Thus, on Counts I, VIII, IX, X, and XI, Mr. Pierce was not properly charged with being armed with a firearm.

The jury was instructed on all counts that for purposes of the special verdict, the state had to prove only that Mr. Pierce was armed with a deadly weapon, and that a firearm is a deadly weapon. Instruction No. 36. The jury was never instructed that it had to find that the "firearm" was operable, as required by State v. Pam, 98 Wn.2d 748, 745-755, 659 P.2d 454 (1983), *overruled in part on other*

*grounds State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). RCW 9.94.010.<sup>7</sup>

For all counts, the jury verdict finding that Mr. Pierce was armed with a firearm cannot reflect a jury finding that it was operable. Absent a jury finding that the weapons were operable, it was improper to impose firearm enhancements rather than deadly weapon enhancements. Under the decision of the Washington Supreme Court in State v. Recuenco, 163 Wn.2d 428, 434-35, 180 P.3d 1276 (2008) (No.74964-7; filed 4/17/08) (Recuenco II), and contrary to the decision

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<sup>7</sup> With regard to the firearms stolen from Mr. Cartwright, charged in the theft of a firearm counts, Cartwright testified that they were in good working order. RP 52. Det. Kimsey testified that the gun found in Mr. Pierce's car, presumably the weapon charged in the possession of a stolen firearm count, was in working order when tested by the Washington State Patrol Crime Lab. RP 193-195. None of these weapons, however, were identified as the weapons in the Coble incident, which predated the Cartwright incident and April 2004 possession of a stolen firearm. Thus the jurors had no information about whether any weapon used in the Coble incident was operable. Mr. Coble testified that it could have been cardboard. RP 30. With respect to the Cartwright burglary, the state made no argument about the weapon in that incident. The notion of weapons should read in the singular, weapon. There was only one gun that was testified to being used in the Coble incident. The possession of a stolen firearm count was with regard to a shotgun. The gun Det. Kimsey testified to finding in the car was a .22 pistol. Not only did the jurors have no information given them to find the gun operable, but they also had no information that any of the guns presented at trial were ever even at the Coble incident.

of the Court of Appeals in Mr. Pierce's direct appeal, the trial court erred in imposing a sentence for a firearm enhancement rather than a deadly weapon enhancement.

First, although the Court of Appeals found that Mr. Pierce was charged with being armed with a firearm, the actual charging language for five of the counts does not support that finding. The charge on those five counts was, at best, ambiguous. Mr. Pierce was charged with being "armed with a deadly weapon" which was set forth as being a "firearm." Since a "firearm" is a deadly weapon, however, identifying the deadly weapon as a "firearm" does not give notice that the state will seek a firearm enhancement rather than a deadly weapon enhancement. This is particularly true where the weapon enhancement is expressly charged as "being armed with a firearm," in other counts in the same information. As the Supreme Court stated in Recuenco (II), "When the term 'sentence enhancement' describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an 'element' of a greater offense than the one covered by the jury's guilty verdict." State v. Recuenco, 163 Wn.2d 428, 434-35, 180 P.3d 1276 (2008) (citing Apprendi, 530 U.S. at 494 n.19.). In Recuenco (II) the court further noted, "... Washington law requires the State to allege

in the information the crime, which it seeks to establish. This includes sentencing enhancements." State v. Recuenco, 163 Wn.2d 428, 435, 180 P.3d 1276 (2008), *citing* State v. Crawford, 159 Wn.2d 86, 94, 147 P.3d 1288 (2006) "(stating that prosecutors must set forth their intent to seek enhanced penalties for the underlying crime in the information)." Id. Recuenco (II) recognized a deadly weapon enhancement is essentially a lesser-included enhancement of the firearm enhancement and the state may opt to seek only the lesser. Id. For the five counts with which he was charged only with being armed with a deadly weapon, Mr. Pierce could not receive a firearm enhancement because he was not charged with being armed with a firearm. Id. at 433-435.

Further, since the jury was properly instructed only with a deadly weapon instruction for all counts, which informed it that a firearm was a deadly weapon, the jury's special verdict cannot represent a jury finding that Mr. Pierce was armed with a firearm rather than with a deadly weapon for purposes of supporting a firearm enhancement. Accordingly, Mr. Pierce's weapons enhancements should be reduced to deadly weapons enhancements rather than firearms enhancement for all counts, because he was denied his right to a jury

finding on the facts essential to a finding that he was armed with a firearm. Since the jury instruction was proper, the only error was in the trial court's imposing firearm enhancements rather than weapon enhancements. Recuenco (II).

A petitioner may raise an issue which was previously raised and resolved on direct appeal where he can show that the ends of justice would be served by reexamining the issue. In re Restraint of Vandervlugt, 120 Wn.2d 427, 432, 842 P.2d 950 (1992); In re Restraint of Taylor, 150 Wn.2d 683, 688, 717 P.2d 755 (1986). This showing is made by an intervening change in the in the law of confrontation which took place during the pendency of a direct appeal, but where the direct appeal decision did not rely on the new case, justified re-raising the confrontation issue in a PRP. In re Restraint of Hegney, 138 Wn.App. 511, 544, 158 P.3d 1193 (2007) ("Because Hegney's direct appeal was pending when the Supreme Court announced Crawford and we did not rely on Crawford in our opinion, 'the ends of justice would be served' by reexamining this case.").

In Mr. Pierce's case, the Court of Appeals relied on the decision of the United States Supreme Court in Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2545, 2553, 165 L.Ed.2d 466

(2006), to hold that the error in failing to instruct on firearm enhancements was harmless error. Since the decision of the United States Supreme Court, however, the Washington Supreme Court held on remand from the United States Supreme Court that the error in failing to properly charge and instruct on the firearm enhancement is not subject to a harmless error analysis because it is not error to instruct only on the weapons enhancement. Recuenco 163 Wn.2d at 444, (holding the harmless error doctrine did not apply). For this reason, Mr. Pierce should be entitled to re-raise the challenge to his firearm enhancements on collateral review and should be granted relief of the issue.

It is significant to note that Mr. Pierce was in custody on the day the gun was found in his car. Under State v. Mills, 80 Wash.App. 231, 237 (Div. II 1995), this is significant as he could not have had readily access to the gun while locked up in jail.

8. MR. PIERCE WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL BY THE FAILURE OF HIS APPOINTED COUNSEL ON APPEAL TO FILE A PETITION FOR REVIEW TO PRESERVE HIS FIREARM ENHANCEMENT ISSUE OR ADVISE HIM OF THE NECESSITY OF PRESERVING THE ISSUE IN HIS PRO SE PETITION.

In Washington v. Recuenco, the United States Supreme Court held that "Respondent's argument that, as a matter of state law, the Blakely v. Washington, 542 U.S. 296 (2004), error was not harmless remains open to him on remand." Recuenco 126 S.Ct. at 2551 n.1. On remand in Recuenco, the Washington Supreme Court called for briefing on the remaining state constitutional issues. Other cases were held pending a decision on the Recuenco remand, and will be entitled to the benefit of the holding in Recuenco II. See e.g., State v. Korum, 80876-7 (stayed pending the decision in Recuenco on February 5, 2008).

Despite this, Mr. Pierce's appellate counsel failed to file a Petition for Review challenging his sixty-month firearm enhancements when the Washington Supreme Court was still considering whether a harmless error analysis could apply to such an enhancement under Washington law, or to advise Mr. Pierce of the reasons for doing so.

This was deficient performance and the prejudice to Mr. Pierce is that he is now serving a firearm enhancement with which he was never charged. Because his appellate attorney failed to preserve his issue, in light of the outstanding question left open in Washington v. Recuenco, or to advise him of his need to preserve the issue, Mr. Pierce was denied the effective assistance of counsel on appeal.

9. MR. PIERCE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL BY THE FAILURE OF HIS APPOINTED COUNSEL TO CALL WITNESSES ON MR. PIERCE'S BEHALF, HIS FAILURE TO DILIGENTLY SEEK ESSENTIAL DISCOVERY, HIS FAILURE TO COMPETENTLY CROSS-EXAMINE WITNESSES, HIS FAILURE TO PRESENT MITIGATING EVIDENCE, AND HIS FAILURE TO PROPERLY MOVE TO DISMISS REGARDING THE FIREARM ENHANCEMENT FOR COUNT XIII.

To show ineffective assistance of counsel, a defendant must demonstrate (1) that his attorney's performance was deficient and (2) that this deficient performance prejudiced him. See Ground 2 above. Trial counsel's performance was deficient when he failed to perform in accordance with the minimal standards warranted for effectively defending Mr. Pierce. In short, there was no strategic reason for not calling witnesses on Mr. Pierce's behalf, for failing to effectively cross examine key state witnesses when all the tools were available for doing so (with regard to the shoe and tire prints), and for failing to conduct discovery regarding the dispatch records. Mr. Pierce was prejudiced as he was left virtually defenseless. Because of trial counsel's deficient performance, Mr. Pierce was unable to show the jury the specific problems with the State's evidence.

- a. Defense counsel failed to call witnesses on behalf of Mr. Pierce.

At trial, defense counsel failed to put on a defense of any kind. RP 237. Therefore, counsel failed to call any witnesses on behalf of Mr. Pierce. Specifically, counsel should have, at a minimum, called Officer Patrick Smith and he should have called a witness from the 911-dispatch center. On the issue of the suppression hearing noted in above (See Ground 1), Smith was the first officer to respond to the dispatch following Mrs. Hidalgo's call on the day Mr. Pierce was arrested and his vehicle seized. Had defense counsel called Smith, counsel could have called into question those events inconsistently reported by Kimsey - the primary officer who ultimately arrested Mr. Pierce and testified at trial.

Smith could have testified as to the duration for which he was present talking to Mr. Pierce prior to Kimsey's arrival. Smith could have further testified about the scope of his investigation throughout the property and the fact that he never located Mrs. Hidalgo. He would have testified that the message he received from dispatch indicated Mrs. Hidalgo was not at home, but was at work. There would have been evidence impeaching the testimony of Kimsey by one of his own, Smith. This error was not harmless, and cannot be characterized as strategic, as there was no good reason for it.

b. Failure to Diligently Seek Discovery

As indicated, the record was clear that the officers showed-up at the property only because dispatch brought Mrs. Hidalgo call to their attention. Trial counsel, however, failed to acquire any dispatch records by the time of trial. Such records routinely include computer entries made by the 911 operator who takes such calls, accompanying time logs of officer activity addressing the case, an audio tape of the caller, and audio tapes of the dispatcher and officer communication on radio traffic. In the present case, Mrs. Hidalgo obtained the dispatch log some time after trial had concluded. See Exhibit "C", Affidavit of Wanita Hidalgo and attached Dispatch Records.

c. Counsel's Failure to Competently Cross-examine State's Witnesses.

At trial, the state introduced boot prints, shoe prints, and tire tracks. Over defense objection, the officer who obtained the evidence was allowed to offer comparison testimony between shoe/boot prints and shoe/boot soles despite lacking any foundation to testify as any sort of expert in this field of forensic science. RP 203. The officer offered that the work boots taken from Mr. Pierce matched the lug tread pattern in the photographs of the boot prints left behind. RP 203.

The officer also took photographs of tires that were laying next to Mr. Pierce's residence and proceeded to find that they were a "match to the Cobles' tire tracks in their driveway." RP 204. Counsel repeated his objection to evidence failing to qualify the witness to testify to such comparisons. RP 205.

Defense counsel cross-examined Kimsey. RP 215-229. During the course of this brief witness questioning, counsel neglected to address critical issues related to shoe, boot, and tire print evidence. Counsel engaged in brief questioning regarding the detective's comparisons of the boot sole and the photographs of its alleged prints. RP 222-223. However, counsel never engaged in critical questioning about the length of the soles he was comparing with the length of soles measured in the photographs. RP 215-229. Officer Susan Shannon had previously testified that the shoe prints she examined were "nine and a half to ten inches." RP 125. She said the "other print was approximately eight and a half inches." RP 125. At the scene of the Cartwright burglary, the officer's testimony was that the prints were 9½ to 10 inches and 8½ inches. RP 102-103. When counsel failed to in any way present to the jury the length of the soles of the shoes seized from Mr. Pierce, counsel failed to present clear evidence that

the shoe prints from the property were substantially shorter than those seized from Mr. Pierce. That was counsel's only opportunity to present evidence that could have resulted in his argument that the footprints were left by a smaller foot, or perhaps even a child. A jury could only have then concluded it was someone other than Mr. Pierce whose prints were left behind at the crime scene, as the shoes seized from him were substantially longer than the prints measured in the photographs.

Counsel failed to address an important issue regarding tire print evidence as well. The officer who investigated, noted her own tire track and Mr. Cartwright's, and took photographs of a different, third, set of tire tracks. RP 124. Defense counsel was aware that another person had previously been to Mr. Cartwright's home who was capable of leaving prints. That person being Mr. Cartwright's girlfriend, Ms. Woodard. RP 50, 54, 61, 62, 65. After learning this, counsel should have addressed with Officer Shannon her failure to compare the only unaccounted for tire print with Ms. Woodard's tires. When he failed to address this issue, he failed in his diligence to effectively represent Mr. Pierce at trial.

- d. Counsel's Failure to Present Mitigating Information and Counsel's Failure to Diligently Pursue Further Discovery.

As indicated, Mr. Pierce's counsel failed to present the shoe evidence noted above. Not only was this a deficient performance in cross-examination, but it was also a deficient performance as counsel failed to present to the jury extremely important mitigating evidence. Size comparisons were easily available and counsel simply chose not to address them. As was also indicated previously, counsel failed to acquire dispatch record data that would have verified (had he called Smith to the stand) that the call was not an emergency because it was not noted as a high-level priority call. See Exhibit C. The information included on the log indicates no crime was in progress, and there was not threat to life or property, as the log states, at the top of the page, that the 911 call was a type 1, priority 3 dispatch.

e. Counsel's Failure to Properly move to Dismiss the Firearm Enhancement on Count XIII.

Counsel failed to properly articulate reasons for moving to dismiss the deadly weapon enhancement to Count XIII. At the close of the State's case, counsel did move to dismiss the deadly weapon enhancement accompanying Count XIII. RP 232-234. His argument focused on Mr. Pierce being located somewhere significantly away from the vehicle and the firearm being located inside the vehicle. RP 232-234. However, what counsel failed to address was the firearm,

which was wrapped in newspaper, zipped inside a zip-lock bag, and stuffed inside the working mechanisms of the passenger seat being located under the seat and the drugs being located in an out-of-reach area that was accessible through the hatchback. RP 192-193, 195-198.

A person is armed while committing a crime if he can easily access and readily use a weapon and if a nexus connects him, the weapon, and the crime. State v. Schelin, 147 Wn.2d 562 (2002). Here, the state had no evidence that made all of these required connections. Therefore, the deadly weapon enhancement would have been dismissed had counsel properly argued his motion to dismiss at the close of the state's case. When he failed to do so his error was fatal to Mr. Pierce's defense. Therefore, this substandard performance was prejudicial and the court should now reverse Mr. Pierce's conviction as he was denied effective counsel at trial.

10. MR. PIERCE WAS DENIED A FAIR TRIAL  
BECAUSE THE EVIDENCE USED TO CONVICT  
HIM WAS INSUFFICIENT TO SUPPORT A  
CONVICTION.

The larger of two footprints in the snow outside the Cobles' house, from cross trainer type shoes, were 12 inches long; the smaller hiking boots were 10 inches long. RP 102-103. One set of prints found in the mud at Mr. Cartwright's house was an estimated 9½ inches to

10 inches tennis shoe and a smaller 8½ inches. RP 125. Mr. Pierce's shoes were size 8 ½ (as opposed to inches). RP 217. The boot ultimately found in Mr. Pierce's car was a size 7½. RP 267. The tire tracks found in the Coble's driveway were completely different from those found in the Cartwright's driveway. Also significant is the fact that no two prints were found to have come from the same suspect. Furthermore, according to the Coble's, there were both a man and a woman suspect at the scene. The smaller shoe print most likely belonged to the woman suspect, not the man. The actual tires on Mr. Pierce's car were not a match. RP 225. Given the obvious size discrepancy between Mr. Pierce's shoe size (as indicated at trial), and the prints located at the Coble's and Cartwright's, the evidence was insufficient to support that Mr. Pierce was present on the pertinent properties on the particular days of the offenses.

A challenge to the sufficiency of the evidence is of constitutional magnitude because "due process requires the State to prove its case beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 316, 61 L.Ed.2d 560, 999 S.Ct. 2781 (1979). If the evidence is insufficient, the conviction must be reversed and the case dismissed with prejudice. State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998). Evidence is

only sufficient if, after reviewing the evidence in a light most favorable to the prosecution, any rational jury could find the essential elements beyond a reasonable doubt. A reviewing court draws all reasonable inferences in favor of the State. State v. G.S., 104 Wn.App. 648, 651, 17 P.3d 1221 (2001). In light of the above factual scenario regarding foot prints, and the impossibility of having been present on the properties without footprints under the circumstances, no rational trier of fact could have found Mr. Pierce to have been present when the crimes were committed. This court must now remand with instructions to dismiss with prejudice all charges surrounding the Cartwright burglary and the Coble robbery.

### III. OTHER REMEDIES INADEQUATE

Between the Court's mandate in 2007 and the present filing, Mr. Pierce has brought motions under CrR 7.5 and 7.8 before the trial court. The motion(s) were denied. Through no fault of Mr. Pierce, his trial counsel and appellate counsel failed him in the several areas noted above. Therefore, the remedies that may have been available to him at earlier proceedings were inadequate as his constitutional right to effective counsel was violated at both levels. As for the issues not brought before the trial court on motion, the Court of Appeals and this

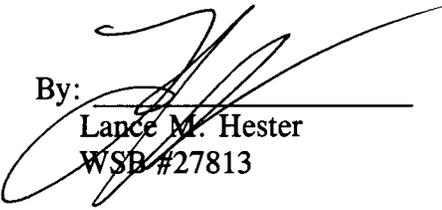
Personal Restraint Petition remain his only avenue of redress that is available. Mr. Pierce has previously petitioned the Supreme Court of the State of Washington to accept review. That effort was denied. There is no other venue available for Mr. Pierce to seek review at this time. As indicated throughout this briefing, many of Mr. Pierce's rights were violated under the U.S. Constitution, the Washington State Constitution, and existing case law. Given that he is serving a sentence of well over 30 years, this Court should accept this personal restraint petition and grant the relief requested.

IV. CONCLUSION

Mr. Pierce asks this Court to grant his amended petition, reverse his convictions, dismiss where appropriate to do so as noted above, and to remand with instructions to re-sentence consistent with the positions he has submitted herein.

RESPECTFULLY SUBMITTED this 4th day of December,  
2008.

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

By:   
Lance M. Hester  
WSB #27813

CERTIFICATE OF SERVICE

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

Lewis County Prosecuting Attorney's Office  
345 West Main Street, 2nd Floor  
Chehalis, WA 98532

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

Signed at Tacoma, Washington this 4th day

of December, 2008.

FILED  
COURT OF APPEALS  
CLATSOP COUNTY  
09 DEC - 4 PM 2:01  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

  
Lee Ann Mathews