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SUPREME COURT  
STATE OF WASHINGTON

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BY RONALD R. CARPENTER

CLERK

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

FILED  
JUN 11 2008  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

NO. 81626-3

v.

RESPONSE TO MOTION FOR  
DISCRETIONARY REVIEW

GUY DANIEL TURNER,

Petitioner.

I. IDENTITY OF MOVING PARTY:

Respondent, State of Washington, requests the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT:

The State respectfully requests that this Court deny the petition for review.

III. GROUND'S FOR RELIEF:

Discretionary review is not appropriate in this case because the Court of Appeals's decision does not conflict with a Supreme Court or Court of Appeals's decision and it does

1 not involve a significant question of law or issue of public interest as required by RAP  
2 13.4(b).

3 IV. ARGUMENT:

4 RAP13.4(b) governs the Supreme Court's acceptance of a petition for discretionary  
5 review. The rule provides:

6 A petition for review will be accepted by the Supreme Court only:  
7 (1) If the decision of the Court of Appeals is in conflict with a  
8 decision of the Supreme Court; or (2) If the decision of the Court  
9 of Appeals is in conflict with a decision of another division of the  
10 Court of Appeals; or (3) If a significant question of law under the  
11 constitution of the State of Washington or of the United States is  
12 involved; or (4) If the petition involves an issue of substantial  
13 public interest that should be determined by the Supreme Court.

14 RAP 13.4(b). In this case petitioner seeks review of the opinion filed by Division  
15 II of the Court of Appeals on April 29, 2008. Petition for Review (PR) at 1. In its opinion,  
16 Division II declined to vacate petitioner's second degree assault conviction, which the trial  
17 court had conditionally vacated but did not reduce to judgment, because it did not violate  
18 double jeopardy. Appendix A.

19 A. THIS COURT SHOULD DENY REVIEW BECAUSE THE  
20 COURT OF APPEALS' DECISION IS NOT IN CONFLICT  
21 WITH A DECISION OF THE SUPREME COURT.

22 Petitioner asserts that Division II's decision in this case is in conflict with this  
23 court's decision in *State v. Womac*, 160 Wn.2d 643, 130 Wn. App. 450 (2005). In  
24 *Womac*, this court ruled that Womac's convictions for homicide by abuse, second degree  
25 felony murder, and first degree assault for the death of his son constituted the "same  
offense" for purposes of double jeopardy and only one of those convictions could be  
reduced to judgment. *Id.* at 647. This court directed the trial court to vacate Womac's

1 convictions for second degree felony murder and first degree assault. *Id.* at 664. This  
2 court focused its decision on the fact that all three of Womac's convictions were reduced to  
3 judgment. *Id.* at 660. In this case, Division II's decision is consistent with *Womac*  
4 because the trial court merged petitioner's first degree robbery and second degree assault  
5 convictions, vacated petitioner's second degree assault conviction for purposes of  
6 sentencing, and did not reduce the second degree assault conviction to judgment.

7 Appendix A.

8  
9 For the first time on appeal, petitioner argues that the trial court's order vacating  
10 petitioner's second degree assault conviction is really an addendum to petitioner's  
11 judgment. PR at 5-6. This issue was never raised in the courts below. The Court of  
12 Appeals has made no decision on whether a court's order vacating a conviction is an  
13 addendum to a judgment. Petitioner cannot show a conflict with a decision of the Supreme  
14 Court, when petitioner has not first raised the issue in the Court of Appeals.

15 B. THIS COURT SHOULD DENY REVIEW BECAUSE  
16 PETITIONER CANNOT SHOW THE COURT OF APPEALS'S  
17 DECISION RAISES A SIGNIFICANT QUESTION OF LAW  
18 UNDER THE WASHINGTON STATE OR UNITED STATES  
19 CONSTITUTION.

20 Petitioner cannot show that Division II's decision in this case raises a significant  
21 question of law under the Washington State or United States Constitution. Petitioner  
22 argues that because this court accepted review in *Womac*, then it must also accept review  
23 in this case. PR at 7. However, this case is substantially different from *Womac* because in  
24 this case the trial court did vacate petitioner's second degree assault conviction, and only  
25 reduced the first degree robbery conviction to judgment, whereas all three of Womac's  
convictions were reduced to judgment.

1 The present case is similar to *State v. Ward*, 125 Wn. App, 138, 104 P.3d 61  
2 (2005), and *State v. Trujillo*, 112 Wn. App. 390, 49 P.3d 935 (2002), which were cited  
3 with approval in *Womac*. *Womac* at 658-59. In *Ward*, the jury convicted the defendant of  
4 both second degree felony murder and alternatively first degree manslaughter. Because the  
5 trial court reduced only the second degree felony murder conviction to judgment, there was  
6 no double jeopardy violation. *Ward*, 125 Wn. App. 138, 144. Similarly, in *Trujillo* a jury  
7 convicted the defendants of first degree assault and in the alternative first degree attempted  
8 murder. *Trujillo*, 112 Wn. App. 390. Only the first degree murder conviction was reduced  
9 to judgment. *Id.* at 411. Because only one conviction was reduced to judgment, the  
10 *Trujillo* court found no double jeopardy violation. *Id.*

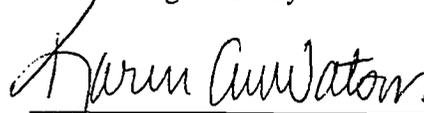
11  
12 In the present case, like *State v. Ward* and *State v. Trujillo*, petitioner's case is  
13 distinguishable from *Womac* because petitioner was not subject to double jeopardy when  
14 only his first degree robbery conviction was reduced to judgment.

1 V. CONCLUSION:

2 Petitioner fails to establish that review is appropriate under RAP 13.4(b). For the  
3 foregoing reasons, the State respectfully requests this Court to deny petitioner's petition for  
4 review.

5 DATED: June 11, 2008.

6 GERALD A. HORNE  
7 Pierce County  
8 Prosecuting Attorney

9 

10 Karen A. Watson  
11 Deputy Prosecuting Attorney  
WSB # 24259

12 Certificate of Service:

13 The undersigned certifies that on this day  
14 she delivered by U.S. mail or ABC-LMI delivery  
15 to the attorney of record for the appellant/respondent  
16 a true and correct copy/copies of the document to which this  
17 certificate is attached. This statement is certified  
18 to be true and correct under penalty of perjury of the  
19 laws of the State of Washington. Signed at Tacoma,  
20 Washington, on the date below.

21 6-10-08 Therese Ka  
22 Date Signature

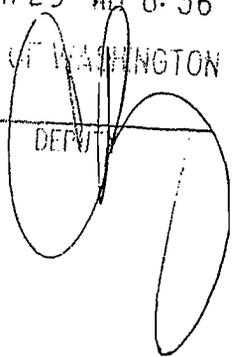
# **APPENDIX "A"**

*Opinion*

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DIVISION II

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STATE OF WASHINGTON

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
GUY DANIEL TURNER,  
  
Appellant.

No. 33678-2-II

PUBLISHED OPINION

BRIDGEWATER, P.J. — Guy Daniel Turner requests that this court vacate his second degree assault conviction, which the trial court did not reduce to judgment, based on double jeopardy considerations. Our Supreme Court asked us to reconsider this issue in light of its recent decision in *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007). After reviewing *Womac*, we decide not to vacate Turner’s second degree assault conviction because it does not violate double jeopardy.

The State charged Turner in the alternative with first degree assault and first degree robbery. A jury convicted Turner of second degree assault and first degree robbery. Turner

moved to have the assault conviction merge with the robbery conviction and the State agreed, citing *State v. Freeman*, 153 Wn.2d 765, 778, 108 P.3d 753 (2005). The *Freeman* court held, “Under the merger rule, assault committed in furtherance of a robbery merges with robbery and without contrary legislative intent or application of an exception, these crimes would merge.” *Freeman*, 153 Wn.2d at 778. Neither party contests that in order to prove first degree robbery, the State had to prove that Turner committed an assault in furtherance of the robbery.

The State asked the trial court to sign an order indicating that (1) a jury found Turner guilty of both the first degree robbery count and the second degree assault count, (2) the second degree assault charge merged into the robbery charge, and (3) the trial court would vacate the assault charge for purposes of sentencing. But it also asked the trial court to indicate that the conviction for assault was valid and could be taken to sentencing if the Court of Appeals found any problems with the robbery conviction. Over Turner’s double jeopardy-based objection, the trial court signed the order.

On appeal, Turner argued, *inter alia*, for us to vacate the assault conviction. Our commissioner entered a ruling affirming judgment, noting that because we upheld the robbery conviction, there was no need to address Turner’s merger argument. After we denied his motion to modify the commissioner’s ruling, Turner petitioned for review, pro se, to our Supreme Court, which remanded to us for reconsideration in light of *Womac*.

As a preliminary matter, we note that this issue is moot because the Supreme Court did not overturn Turner’s first degree robbery conviction. Nevertheless, we are bound by the Supreme Court to consider the issue.

*Womac* makes it clear that in order to avoid double jeopardy, a trial court must vacate a charge that it has reduced to judgment but chooses not to sentence. *Womac*, 160 Wn.2d at 660. That is not the case here because the trial court never reduced Turner's second degree assault conviction to judgment.

The *Womac* court considered *State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005), and *State v. Trujillo*, 112 Wn. App. 390, 410, 49 P.3d 935 (2002), *review denied*, 149 Wn.2d 1002 (2003), two cases that we rely on today as dispositive in Turner's case. *Womac*, 160 Wn.2d at 659-60. In *Ward*, the jury found the defendant guilty of second degree felony murder and, alternatively, first degree manslaughter, which was a lesser-included offense of second degree intentional murder. *Ward*, 125 Wn. App. at 144. The trial court entered a judgment and sentence solely on the second degree felony murder conviction. *Ward*, 125 Wn. App. at 144. The trial court denied the defendant's motion to vacate the first degree manslaughter conviction but it chose not to mention the valid manslaughter conviction in the judgment and sentence. *Ward*, 125 Wn. App. at 142, 144. When the court subsequently vacated his judgment and sentence for second degree felony murder, he argued that the trial court could not charge, try, or sentence him on the first degree manslaughter conviction because the trial court should have vacated that verdict, or that it was vacated by "operation of law." *Ward*, 125 Wn. App. at 144.

Division One of this court determined that convicting and sentencing a defendant for both second degree felony murder and first degree manslaughter would violate double jeopardy and noted that where there is a violation of double jeopardy, the remedy is to vacate one of the convictions and sentences. *Ward*, 125 Wn. App. at 144. But Division One found no double jeopardy violation because the trial court had entered judgment and sentenced the defendant on

only the second degree felony murder conviction. *Ward*, 125 Wn. App. at 144. Because there was no violation of double jeopardy, the trial court was not required to vacate the defendant's manslaughter conviction. *Ward*, 125 Wn. App. at 145.

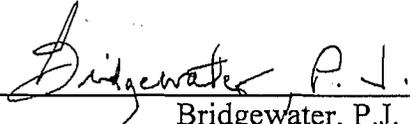
Similarly, in *Trujillo*, a jury convicted four defendants of first degree assault, and in the alternative, first degree attempted murder. *Trujillo*, 112 Wn. App. at 408-09. We held, "[W]here the jury returns a verdict of guilty on each alternative charge, the court should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense." *Trujillo*, 112 Wn. App. at 411. We then reasoned that because the trial court did not reduce the verdict for first degree assault to judgment, it "does not subject the appellants to any future jeopardy." *Trujillo*, 112 Wn. App. at 411. We also noted that if the trial court had reduced the jury's verdict on assault to judgment, "the trial court should enter an order vacating the assault judgment." *Trujillo*, 112 Wn. App. at 412 n.15.

The *Womac* court noted that the defendant in that case was not charged in the alternative and then based its decision to vacate the conviction on the fact that the trial court reduced the defendant's convictions to judgment. *Womac*, 160 Wn.2d at 660. As such, the *Womac* court determined that the remaining counts violated double jeopardy and, accordingly, ordered the trial court to vacate both. *Womac*, 160 Wn.2d at 660.

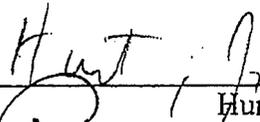
Here, the trial court did not reduce Turner's second degree assault conviction to judgment and did not sentence him for the conviction. Nor did the trial court include any information about the second degree assault conviction in Turner's judgment and sentence. Thus, this case is distinguishable from *Womac*, and under *Ward* and *Trujillo*, Turner's second degree assault

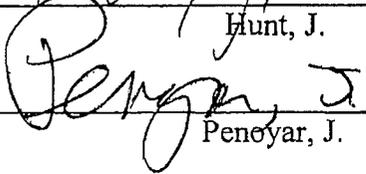
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conviction did not subject him to double jeopardy. Accordingly, we do not vacate Turner's conviction for second degree assault.

  
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Bridgewater, P.J.

We concur:

  
\_\_\_\_\_  
Hunt, J.

  
\_\_\_\_\_  
Penoyar, J.