SUPREME COURT NO. 92217-9

NO. 71304-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DENNIS WATTERS, JR.,

Petitioner.

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

The Honorable Michael T. Downes, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

A. IDENTITY OF PETITIONER

Petitioner Dennis Watters, Jr., asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Watters, filed June 8, 2015, attached to this petition as Appendix A. Watters filed a timely motion for reconsideration, App. B, which was ultimately denied on July 22, 2015. App. C.

C. ISSUES PRESENTED FOR REVIEW

1. Does the apparent *intentionality* of an actor's conduct differentiate first degree murder by extreme indifference from first degree manslaughter?

2. Did the facts of this case warrant a lesser offense instruction on first degree manslaughter following this Court's decision in State v. Henderson,[1] which highlights the two crimes' nearly identical concepts of culpability?

3. Did the Court of Appeals fail to consider the evidence in the light most favorable to the petitioner *as to the issue being raised*—whether a lesser instruction was warranted?

[1] 182 Wn.2d 734, 344 P.3d 1207 (2015).

4. Even considering this Court's decision in State v. Grier,[2] given the facts of this case, can the petitioner show that despite conviction on the greater offense, that there was a reasonable probability that, but for counsel's performance, the result would have been different?

D. STATEMENT OF THE CASE[3]

The State charged Watters with first degree murder by extreme indifference (count 1) and, in the alternative, second degree intentional murder (count 2) for shooting Ryan Mumm at a park in Snohomish County. CP 192. The State also charged Watters with two counts of first degree assault (counts 3 and 4) based on allegations he later followed and shot at the car in which Mumm and his friend Ethan Mathers were riding. CP 192-93.

Watters sought and received a "justifiable homicide" instruction as to counts 1 and 2. CP 74. Significantly to the issues now presented, the court also instructed the jury on lesser included offenses of first and second degree manslaughter as to count 2, the alternative charge. CP 71-

[2] 171 Wn.2d 17, 246 P.3d 1260 (2011); but see Crace v. Herzog, ___ F.3d ____, 2015 WL 4773456, at *6 (9th Cir. Aug. 14, 2015) (criticizing Grier and granting habeas relief to petitioner whose claim was denied by this Court based on Grier).

[3] The petition refers to the verbatim reports as follows: 1RP – 10/4/13; 2RP – 10/7/13; 3RP – 10/8/13; 4RP – 10/9/13 (morning); 5RP – 10/9/13 (afternoon); 6RP – 10/10/13; 7RP – 10/14/13; 8RP – 10/16/13; 9RP – 10/17/13; 10RP – 10/18/13; 11RP – 10/21/13; 12RP – 10/22/13; 13RP – 10/23/13; 14RP – 10/24/13; 15RP – 10/25/13; 16RP – 10/28, 10/29, 10/30/2013; and 17RP – 12/16/13.

73. However, the court preemptively stated that, as a matter of law, a lesser manslaughter instruction was not available as to count 1. 2RP 16-17. Although two cases, State v. Pastrana, 94 Wn. App. 463, 468, 972 P.2d 557 (1999) and State v. Pettus, 89 Wn. App. 688, 951 P.2d 284 (1998), had previously stated a lesser instruction was unavailable, defense counsel did not alert the court to a change in the law affecting the availability of the lesser charge of first degree manslaughter.

The facts of the underlying crime are complex. The facts relevant to the issues now raised are set forth in the motion for reconsideration. App. B at 2-9.

The State argued in closing, consistent with its theory throughout trial, that Watters was guilty of murder by extreme indifference by firing indiscriminately in a park full of people, even hitting his own car in the process. 16RP 82, 90.

A jury found Watters guilty of the lesser offense of first degree manslaughter as to count 2 (again, charged as an alternative to count 1) but otherwise convicted him as charged, including on count 1. CP 41-53.

Watters appealed the count 1 conviction based on failure to instruct on a lesser offense of first degree manslaughter. CP 5-16. He argued in part that counsel was ineffective for failing to alert the court to a change

in the law affecting the availability of the lesser offense. Brief of Appellant at 15-27 (ineffective assistance claim and related analysis).

The Court of Appeals rejected Watters's ineffective assistance claim. Opinion (App. A) at 6-10. This Court did not address deficient performance. But, moving directly to the first facet of a prejudice analysis, the Court noted that Watters' conduct amounted to "more than mere reckless" conduct because Watters fired directly into Mumm's car and therefore the lesser was not warranted. App. A at 9-10.

Watters asked the Court of Appeals to reconsider its decision on the grounds that the opinion ignored well-established law regarding the parameters of the crime of murder by extreme indifference, misconstrued this Court's recent decision in Henderson, 182 Wn.2d a 734, and misapplied the law regarding the circumstances under which a lesser instruction is warranted. App. B. The Court of Appeals summarily denied the motion for reconsideration. App. C.

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1), (2), AND (3) BECAUSE THE COURT OF APPEALS' OPINION IGNORES COURT OF APPEALS PRECEDENT, FAILS TO CORRECTLY APPLY HENDERSON, FAILS TO CONSIDER THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PETITIONER AS TO THE ISSUE BEING RAISED, AND INVOLVES A SIGNIFICANT CONSTITUTIONAL QUESTION REGARDING THE PREJUDICE PRONG OF AN INEFFECTIVE ASSISTANCE CLAIM.

1. Summary of reasons review should be granted

This Court should accept review of the Court of Appeals' decision under RAP 13.4(b)(2) based on a conflict with well-established law from the Court of Appeals. In rejecting Watters' claim counsel was ineffective for failing to request a lesser instruction of first degree manslaughter, the Court ignored precedent establishing that the apparent *intentionality* of conduct is not that which differentiates first degree murder by extreme indifference from first degree manslaughter. E.g., State v. Berge, 25 Wn. App. 433, 437, 607 P.2d 1247 (1980). This Court should also accept review of Watters' case under RAP 13.4(b)(1). The Court of Appeals also failed to correctly apply this Court's recent decision in Henderson, 182 Wn.2d 734, which highlights the two crimes' nearly identical definitions of culpability, and clearly establishes that the facts of this case warranted a lesser instruction. This Court should also accept review

because the Court of Appeals ignored well-established precedent by failing to consider the evidence in the light most favorable to the Watters as to the issue being raised—whether a lesser instruction was warranted—rather than whether, for example, a justifiable homicide instruction was warranted. Finally, under the facts of this case, despite conviction on the greater offense, Watters can show a reasonable probability of a different outcome but for counsel's failure to request the lesser instruction. See RAP 13.4(b)(3) (review appropriate where case involves significant constitutional question).

2. Background as to the relevant law

The right to a lesser included instruction derives from statute. RCW 10.61.006 states, "[T]he defendant may be found guilty of an offense the commission of which is necessarily included within that with which . . . is charged in the indictment or information." An accused is entitled to an instruction of a lesser offense if the two prongs of the State v. Workman test are satisfied. 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Under the legal prong, each element of the lesser offense must be a necessary element of the charged offense. State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). Under the factual prong, the evidence must support an inference only the lesser offense was committed to the exclusion of the charged offense. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

When analyzing the factual prong, an appellate court reviews the evidence in the light most favorable to the party seeking the instruction. Id. at 455-56. "If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater," the instruction should be given. Berlin, 133 Wn.2d at 551.

Here, the two crimes are first degree murder by extreme indifference and first degree manslaughter. First degree murder by extreme indifference requires proof that the accused "(1) acted with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person." State v. Yarbrough, 151 Wn. App. 66, 82, 210 P.3d 1029 (2009); RCW 9A.32.030(1)(b); CP 69 (to-convict instruction). First degree murder by extreme indifference requires a very high degree of risk, which "elevates the level of recklessness to an extreme level, thus 'manifesting an extreme indifference to human life.'" State v. Dunbar, 117 Wn. 2d 587, 594, 817 P.2d 1360 (1991) (quoting RCW 9A.32.030(1)(b)). The aggravated form of recklessness has been defined as that which "evinc[es] a depraved mind." Dunbar, 117 Wn.2d at 592-93.

First degree manslaughter requires proof that the defendant recklessly caused the death of another. RCW 9A.32.060(1)(a). A person "acts recklessly when he . . . knows of and disregards a substantial risk that a wrongful act may occur and his . . . disregard of such substantial risk is a

gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c). The wrongful act is homicide. Henderson, 182 Wn.2d at 743. As this Court observed in Henderson, decided while Watters' appeal was pending, "[t]he definitions of the lesser crime (disregarding a substantial risk that a homicide may occur) and the greater crime (creating a grave risk of death) are very close to each other—much closer than is typical." Id. at 737.

Henderson held that where evidence showed a defendant shot from the street toward a house hosting a large party, a rational jury could have nonetheless convicted Henderson of first degree manslaughter rather than first degree murder by extreme indifference. Id. A brief discussion of the facts is instructive. In 2008, teenager Philip Johnson called his friend and fellow Hilltop Crips gang member Henderson to say he was going to a party at the Boys and Girls Club. Henderson advised Johnson the club was too close to a rival gang's territory. Johnson went and was shot. After leaving the hospital where Johnson was treated, Henderson and a companion decided to go to a house party. The entrance to the party was through a gate on the side of the house. Security denied Henderson entry. He remained in front of the house near the sidewalk with a few other people. While outside, the group learned Johnson had died. Id. at 737-38.

The party hosts had hired five people to act as security guards and, nervous about Henderson's group, sent three of them to the front of the house. Witnesses testified that either Henderson or one of his companions fired six gunshots toward the house and that the shooter yelled something related to the Hilltop Crips. Id. at 738. One of the shots fatally wounded a security guard. Id at 739. When the police examined the crime scene, they also found two bullet holes in the side of the house and others in cars in the street. Id. The party hosts testified all partygoers were in the basement, the garage, or the backyard, and the only people in front of the house—in the line of fire—were the three security guards. But other witnesses said there were more people in front of the house. Id. at 738-39.

Reviewing the evidence in the light most favorable to the defense, this Court considered what a rational jury might have concluded if, in fact, only the three security guards were in front of the house when Henderson shot at it. Noting the definitions of the two crimes were nearly identical, this Court found a jury could have rationally concluded Henderson's gun shots represented disregard for a substantial risk of homicide rather than extreme indifference that caused a grave risk of death. Id. at 745-46. Significantly, this Court held shots directed toward an area where there were at a minimum three people present still warranted the lesser instruction.

Defense counsel is ineffective when (1) the attorney's performance is deficient and (2) the deficiency prejudices the accused. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Having established deficient performance,[4] a defendant may demonstrate prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been different. Id. at 226. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Watters "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693. To establish ineffective assistance for failure to request a

[4] Watters can show deficient performance. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Counsel must be informed of the relevant law. State v. Kyllo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009). Under State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005) and its progeny, State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011), decided well before trial, to convict a defendant of first degree manslaughter the State must "prove beyond a reasonable doubt that the defendant knew of and disregarded a substantial risk that death may occur." Id. at 848. Gamble and Peters should have alerted counsel that Pettus and Pastrana were no longer good law. Moreover, as Watters has previously argued, the failure to alert the trial court to the demise of Pettus and Pastrana cannot be characterized as a legitimate all or nothing approach. Watters raised a justifiable homicide claim as to counts 1 and 2. But counsel sought manslaughter instructions, at least as to count 2. CP 71-73 (defense proposed instructions including first and second degree manslaughter); 16RP 3-61 (conference regarding jury instructions); 16RP 61-68 (formal exceptions). Pursuing an all-or-nothing approach on count 1 but not count 2, based on the same homicide, would never be reasonable.

jury instruction, Watters must demonstrate he was entitled to it. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001).

3. This Court should accept review under RAP 13.4(b)(1), (2) and (3).

The Court of Appeals' reasons for rejecting Watters' ineffective assistance claim conflict with Court of Appeals precedent on the parameters of first degree murder by extreme indifference as well as this Court's recent Henderson decision. RAP 13.4(b)(1) and (2).

First, the Court's opinion ignores previous decisions regarding the legal characteristics of the greater offense. The Court of Appeals' opinion focuses on Watters's acts as something more severe than mere reckless conduct. But the acts the Court focuses on *do not exceed recklessness in the manner necessary under the statute.* The Court's opinion suggests Watters must have targeted specific individuals, a fact, the Court posits, distinguishes the case from Henderson. But legally, this cannot be that which renders the charged crime more severe than manslaughter. Within the first degree murder statute, "extreme indifference to human life" means a disregard of human life in general, not simply a disregard of the *victim's* life. Berge, 25 Wn. App. 433; State v. Anderson, 94 Wn.2d 176, 616 P.2d 612 (1980). In Berge, the defendant shot and killed his roommate while the roommate slept. Berge testified he had voluntarily

ingested cocaine and that, under the drug's influence, he thought his roommate was a KGB agent. Berge, 25 Wn. App. at 434. Berge was charged with first degree murder by extreme indifference. In finding insufficient evidence, Berge analyzed statutory scheme as a whole for the crime of homicide:

> As we read the homicide statutes, the legislature intended that one who kills with the intent to cause the death of a particular individual be charged with murder in the first degree, pursuant to RCW 9A.32.030(1)(a), or murder in the second degree, as defined in the instruction given by the trial court. *As other statutory provisions cover acts directed at a particular individual or individuals*, we shall assume that the legislature intended RCW 9A.32.030(1)(b) to provide for those situations indicating a recklessness and extreme indifference to human life *generally.*

Berge, 25 Wn. App. at 437 (additional emphasis supplied).

Similarly, in Anderson, the defendant was charged with first degree murder by extreme indifference. Rejecting the State's argument that a recent amendment to the statute allowed conviction for first degree murder where a defendant showed extreme indifference only to the life of the victim, the Court held:

> The State's position would result in a disharmonious construction of RCW 9A.32. . . . Second degree murder would be effectively eliminated. Every "intent to cause the death" (RCW 9A.32.030(1)(a), (b)) would be an "extreme indifference to human life" and conduct which "creates a grave risk of death", i.e., first degree murder.

Anderson, 94 Wn.2d at 190-91; see also State v. Edwards, 92 Wn. App. 156, 162, 961 P.2d 969 (1998) (citing with approval Berge and Anderson).

Based on the foregoing, the Court of Appeals clearly failed to recognize that the apparent intentionality or targetedness of conduct is not that which differentiates murder by extreme indifference from first degree manslaughter. See, e.g., App. A at 9 ("[t]he testimony, even in the light most favorable to Watters, showed that Watters fired three shots . . . directly into the passenger window of the BMW, striking and killing Mumm."); App. A at 10 ("Henderson is distinguishable. Here, there is no evidence that Watters was firing indiscriminately. On the contrary, it is uncontroverted that Watters was aiming at the BMW. . . . Watters shot from extremely close range, not a substantial distance like the defendant in Henderson."). The Court of Appeals' analysis suggests that it is finding a lack of Strickland prejudice because some evidence suggests Watters's conduct was not reckless but instead intentional, placing it beyond manslaughter and into the realm of first degree murder by extreme indifference. But this is patently incorrect under Berge and Anderson.[5]

As this Court observed in Henderson, "[t]he definitions of the lesser crime (disregarding a substantial risk that a homicide may occur) and the

[5] The jury rejected a theory of intentional murder on the alternative homicide charge.

greater crime (creating a grave risk of death) are very close to each other—much closer than is typical." Id. at 737. With this background in mind, here, the evidence viewed in the light most favorable to Watters raises an inference that he committed first degree manslaughter rather than the charged crime. In other words, there was evidence to support that in firing shots, he disregarded a substantial risk that a homicide could occur.

The Court of Appeals' opinion appears to analyze the evidence in the light most favorable to Watters but, effectively, only does so in the context of his justifiable homicide claim. Considering the evidence in the light most favorable to the defense *in the context of whether the instruction was warranted,* Fernandez-Medina, 141 Wn.2d at 455-56, Watters was entitled to a first degree manslaughter instruction.

As the lengthy facts section of the Motion for Reconsideration attests, there were a number of conflicting accounts of the shooting from a host of witnesses present at the park. The State's theory at trial was that Watters shot indiscriminately at a moving car, even hitting his own car in the process. 16RP 82. In closing the State highlighted the fact that the all the cars left the park at a high rate of speed. 16RP 90. It was necessary for the State to make such an argument to support the charge of first degree murder by extreme indifference under Berge and Anderson. In contrast, Watters's theory of justifiable homicide depended upon a more "static"

version of events. See 16RP 90 (State's closing argument discussing Watters's police interview). The Court of Appeals' analysis highlights portions of the latter version, one that Watters used to support his justifiable homicide claim. App. A at 9-10. But Watters is entitled to the benefit of all the facts at trial, including those the State used to argue its theory that he was guilty of the greater charge of murder by extreme indifference to human life.[6]

If this Court accepts review of the underlying legal issues, Watters will prevail because he can show a reasonable likelihood the jury's ultimate verdict was affected. Had the jury been instructed on the lesser offense, there is at least a reasonable likelihood it would have convicted Watters on the lesser. The jury convicted Watters of first degree manslaughter when given the opportunity, rejecting the intentional murder charge on count 2. CP 49. The jury also submitted questions about the meaning of "extreme indifference" as well as "grave risk of death" but was told to refer to the instructions. CP 53-54; 16RP 174.

This Court's decision in State v. Grier is therefore distinguishable based on the facts. 171 Wn.2d 17, 246 P.3d 1260 (2011). In any event,

[6] In rejecting Watters's argument, the Court of Appeals opinion also asserts that when the shooting occurred, the cars were so close that Mathers's BMW had to "squeeze" by. App. A at 9; see 10RP 36 (Mathers' testimony); cf. 13RP 21, 25 (Hogan testimony as to original position of cars). Based on the facts set forth above, whether Mathers had to squeeze by on his way *out* the park is not dispositive as to the cars' position at the time of the shooting.

that decision has recently been called into question by the Ninth Circuit. See Crace v. Herzog, ___ F.3d ____, 2015 WL 4773456, at *6-7 (9th Cir. Aug. 14, 2015) (logic of Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973), which held that jury presented with only two options—convicting on a single charged offense or acquitting the defendant altogether—"is likely to resolve its doubts in favor of conviction" even if it has reservations about one of the elements of the charged offense, is applicable in context of Strickland analysis).

In summary, this Court should grant review under RAP 13.4(b)(2) based on a conflict with well-established Court of Appeals decisions establishing that the apparent *intentionality* of conduct is not that which differentiates first degree murder by extreme indifference from first degree manslaughter. This Court should also accept review under RAP 13.4(b)(1) because the Court of Appeals' decision clearly misapplies this Court's recent decision in Henderson. The decision fails to consider the evidence at trial in the light most favorable to the Watters as to the issue being raised—whether a lesser instruction was warranted. Finally, even considering this Court's opinion in Grier (recently called into question by the federal Ninth Circuit in Crace v. Herzog) Watters can demonstrate a reasonable likelihood of a different outcome under Strickland. RAP 13.4(b)(3).

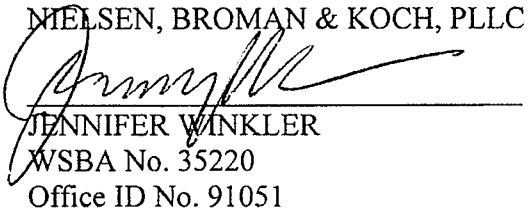
F. CONCLUSION

For the foregoing reasons, this Court should accept review of Mr. Watters's case under RAPs 13.4(b)(1), (2), and (3).

DATED this 19TH day of August, 2015

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DENNIS RICHARD WATTERS, JR., Appellant.	)	No. 71304-3-I DIVISION ONE UNPUBLISHED OPINION FILED: June 8, 2015

APPELWICK, J. — Watters appeals his conviction for first degree murder by extreme indifference. He argues that the trial court erred in failing to instruct the jury on the lesser included offense of first degree manslaughter. In the alternative, he argues he received ineffective assistance of counsel at trial because his attorney failed to request the instruction. Watters does not establish that he was entitled to a lesser included instruction. His statement of additional grounds lacks merit. We affirm Watters' conviction. However, we remand to the trial court to vacate a separate sentencing order conditionally vacating Watters's conviction for first degree manslaughter.

FACTS

On July 14, 2012, Ethan Mathers and Ryan Mumm consumed heroin and Xanax and drove to a local Safeway parking lot, a popular hangout, in Mathers's red BMW sedan. At the Safeway, Zachary Smoots offered to sell Mathers and Mumm some marijuana. Mathers took the marijuana without paying for it, and he and Mumm drove away.

Mathers and Mumm drove to Blue Stilly Park in Arlington where they smoked the marijuana. Smoots and several friends, including Brittany Glass and Bo Schemenauer, drove around looking for Mathers and Mumm. Smoots caught up with Mathers and

Mumm after they left the park, and the two groups got out of their cars and fought for a short period. The window of Mathers' car broke during the fight and Mathers cut his hand while throwing the pieces at Smoots' car. According to Mathers, Brittany[1] kicked a dent in his car and threatened him with a metal pipe, so Mathers kicked her. Mathers and Mumm got back into Mathers's car and drove away.

Mathers was upset about his hand and his car, and he and Mumm discussed meeting up with Smoots again to "get somewhat of a fair fight." Mathers called Smoots and the two groups agreed to meet back at the park later that day.

Mathers and Mumm drove to the home where Mumm was temporarily staying with friends, where they used more heroin and gathered weapons, including a croquet mallet and a black metal bar. Mumm also took a Springfield Armory XD9 9mm handgun from the home. Mathers and Mumm recruited three other friends who accompanied them to the park in a separate car.

Brittany called her father, James Glass, and told him she had been assaulted by Mathers. James planned to go to the park and beat up Mathers and Mumm for assaulting Brittany. However, James admitted he was armed with a .357 Taurus revolver that he planned to shoot at a bonfire later that evening. James also called a friend, Dennis Watters, whom he knew had a concealed weapons permit and always carried a gun.

Watters, James, Brittany, Smoots, Schemenauer, and several other friends and family members of the group met up at a Tesoro gas station near the park and waited.

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[1] Several witnesses in this case share a last name with other witnesses. For the purposes of clarity we refer to those witnesses by their first name.

When the group saw Mathers' BMW enter the park, they followed it. The record reflects that approximately 18 people in at least eight separate cars were at the park for the purpose of the fight.

Mathers testified that he grew impatient waiting for Smoots and had turned around to prepare to leave when the group entered the park. Mumm got out of the passenger seat, fired a warning shot into the air, and got back into the car. As Mumm got into the car, a gold Honda Accord driven by Schemenauer's father Ron "gunned it" into the park and slammed into the front of his BMW. At the same time, Watters pulled up in his Ford Ranger truck so that its passenger side was level with the passenger side of the BMW. Mathers testified that the area that the three vehicles occupied was approximately 30 or 40 feet wide and would have accommodated only two or possibly three vehicles passing at a time. Mathers backed up and "squeezed" between the Honda and the Ranger in order to exit the park. As Mumm leaned forward to put the gun down underneath the seat, Watters pointed a gun directly at the BMW's open passenger side window and fired "two or three times." Mumm was hit in the temple. Mathers drove out of the park and towards an AM/PM gas station. Watters followed Mathers and shot at the BMW as Mathers turned into the AM/PM parking lot.

Watters did not testify. However, Watters gave a recorded statement to law enforcement which was admitted at trial. Watters stated that he owned a 9mm Llama handgun and that he brought it to the park at James's request. When Watters entered the park, the BMW headed towards him until the two cars were "bumper to bumper." Mumm, still inside the car, pulled out a gun and pointed it directly at Watters. Watters

stated that Mumm fired the gun out of the window and a round hit his side mirror. Mathers backed the BMW up and the BMW passed Watters' truck "rolling by really slow." At that point, Watters stated:

> I grabbed my weapon out, I loaded it, and as they drove by I shot three rounds I believe into his vehicle. I thought I was still hearing shots so I backed up and I turned around and I got on them and stuff and everything. And Jim was in front of me and I was upset that they shot my truck and that they were trying to shoot at me and stuff and everything. And I was trying to get around them so I could stop them. And I don't know what I was going to do but I tried to stop them. Anyways, they wouldn't stop, so I got on them and stuff and I think I rammed the car. And I rammed it into the AM/PM. And I drove off.

Watters reiterated that he fired three shots into the passenger side of the BMW "as quick as I could pull the trigger." When a detective asked, "Where did you think the bullets were going?" Watters responded, "To the passenger." Watters claimed, "I thought I got [Mumm] in the shoulder" and that he had "seen fragments of a body part flying" but did not realize that Mumm had been fatally shot until later. Watters also admitted that he might have shot his own side mirror. He denied shooting at the BMW as it turned into the AM/PM parking lot.

Mumm died as a result of a gunshot wound to the head. A firearms expert from the Washington State Patrol Crime Lab testified that the bullet in Mumm's skull and a bullet recovered from the tire of the BMW came from Watters's gun.

The State charged Watters with first degree murder by extreme indifference (Count I) or, in the alternative, second degree intentional murder (Count II) for the shooting of Mumm in the park. The State also charged Watters with first degree assault of Mathers

(Count III) and first degree assault of Mumm (Count IV) for shooting at the BMW as it entered the AM/PM. The State sought a firearm enhancement on each count.

At trial, Watters sought and received an instruction on justifiable homicide as to Counts I and II. The State and Watters also agreed that the trial court would give lesser included instructions on first degree manslaughter and second degree manslaughter for Count II. Watters did not request, and the trial court did not give, any lesser included instructions for Count I.

The jury convicted Watters as charged on counts I, III and IV and of the lesser included offense of first degree manslaughter on count II. The jury also returned special verdicts that Watters was armed with a firearm on all four counts. The trial court entered a separate order dismissing count II "without prejudice and subject to reinstatement . . . should the Murder in the First Degree conviction be overturned." The trial court sentenced Watters to consecutive standard range sentences totaling 520 months as well as 180 months for the firearm enhancements.

DECISION

Watters argues that the trial court erred when it failed to instruct the jury on the lesser included offense of first degree manslaughter on Count I. However, the record is clear that Watters did not request a lesser included instruction on Count I.[2] A trial court

[2] Watters relies on a discussion between the trial court and the prosecutor following the State's motion to amend the information to charge the alternative offenses of first and second degree murder as separate counts, count I and count II:

> THE COURT: In terms of the jury being confused, it appears to me the jury is highly likely to be more confused if it's charged in the alternative than if they're charged separately.

is not obligated to give a lesser included instruction *sua sponte*. State v. Hoffman, 116 Wn.2d 51, 111-12, 804 P.2d 577 (1991). To do so would constitute "an unjustified intrusion into the defense prerogative to determine strategy." State v. Grier, 171 Wn.2d 17, 45, 246 P.3d 1260 (2011).

In the alternative, Watters contends, trial counsel was ineffective for failing to request a lesser included instruction. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and the performance prejudiced the defendant's case.[3] Strickland v. Washington, 466 U.S. 668, 694, 104 S.

> The jury instructions will be far more complex, frankly, in the alternative than they will be if it's charged separately.
>
> Is manslaughter even a possibility as it relates to Count I as a lesser included?
>
> [PROSECUTOR]: I don't believe so.
>
> THE COURT: But it is as it relates to Count II, isn't it?
>
> [PROSECUTOR]: Yes, I think it is.
>
> THE COURT: At least legally it is. Whether factually it is or not, I don't know. But I don't believe, correct me if you think I'm wrong, but I don't believe that as a legal matter, a lesser included offense of manslaughter is even available for count one, reckless indifference to human life – or not reckless indifference, but extreme indifference to human life. Whereas it is in count two.

Watters argues that in concluding that a lesser included instruction would not have been available on Count I, the trial court was relying on State v. Pettus, 89 Wn. App. 688, 951 P.2d 284 (1998) and State v. Pastrana, 94 Wn. App. 463, 972 P.2d 557 (1999). As our Supreme Court has recently clarified, the analyses in Pettus and Pastrana are no longer valid. State v. Henderson, 182 Wn.2d 734, 743-44, 344 P.3d 1207 (2015). But, Watters did not request a lesser included instruction, and we decline to speculate as to whether the trial court would have refused to give such an instruction if requested.

[3] In support of his claim that he was prejudiced by defense counsel's failure to request a lesser included instruction, Watters relies on Keeble v. United States, 412 U.S.

Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). To satisfy the prejudice prong, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice." State v. Thompson, 169 Wn. App. 436, 495, 290 P.3d 996 (2012). There is a strong presumption that counsel provided effective assistance. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

Whether a defendant is entitled to a lesser included instruction is analyzed under the two-pronged test outlined in State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). First, each of the elements of the lesser offense must be a necessary element of the charged offense (the "legal prong"). State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). Second, the evidence must raise an inference that *only* the lesser offense was committed to the exclusion of the charged offense (the "factual prong"). State v.

205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973), in which the Supreme Court held that "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." However, Keeble "is inapposite in the context of ineffective assistance of counsel." Grier, 171 Wn.2d at 41. This is because "'[i]n making the determination as to whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.'" Id. (alteration in original) (quoting Strickland, 466 U.S. at 694).

Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). When analyzing the factual prong, we view the evidence in the light most favorable to the party who requested the instruction at trial. Id. at 455-56. However, "the evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." Id. at 456.

A person is guilty of first degree murder by extreme indifference if he or she, "[u]nder circumstances manifesting an extreme indifference to human life . . . engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person." RCW 9A.32.030(1)(b). A person is guilty of first degree manslaughter when he or she "recklessly causes the death of another person." RCW 9A.32.060(1)(a). A person "acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c). In the context of manslaughter, the "wrongful act" is homicide. State v. Gamble, 154 Wn.2d 457, 467, 114 P.3d 646 (2005). "Although the boundary is not exact . . . RCW 9A.32.030(1)(b) [requires] an aggravated or extreme form of recklessness which sets the crime apart from first degree manslaughter." State v. Dunbar, 117 Wn.2d 587, 594, 817 P.2d 1360 (1991).

Here, parties concede that the legal prong is met, because the elements of first degree manslaughter are necessary elements of first degree murder by extreme indifference. Thus, the only issue is whether the factual prong was met. In other words, Watters must demonstrate that a rational juror could find that his conduct constituted a

knowing disregard of a substantial risk that a homicide could occur, but did not constitute an "extreme indifference" that created a "grave risk" of death. RCW 9A.32.030(1)(b).

Watters does not make this showing. The testimony, even in the light most favorable to Watters, showed that Watters fired three shots from a 9mm handgun directly into the passenger window of the BMW, striking and killing Mumm. The passenger window of Watters' truck was lined up with the passenger window of the BMW, and the two vehicles were so close that Mathers had to drive slowly and "squeeze" by. The likelihood that one of the shots would kill one of the occupants of the BMW was extremely high. This was more than mere reckless conduct. Because Watters does not demonstrate that he would have been entitled to a lesser included instruction, he fails to demonstrate that defense counsel's failure to request one was deficient performance.

Watters's reliance on State v. Henderson, 182 Wn.2d 734, 344 P.3d 1207 (2015) is misplaced. In Henderson, the defendant fired shots from the sidewalk towards a house where a party was being held, killing an individual hired to act as security for the party who was standing near the front of the house. Id. at 739. Police found two bullet holes in the side of the house and others in the sides of cars in the street, but none inside the house, where the majority of the partygoers were. Id. Our Supreme Court concluded that, viewing the evidence in the light most favorable to the defendant, a jury could have rationally concluded that he acted with disregard for a substantial risk of homicide rather than an extreme indifference that caused a grave risk of death because he shot from a substantial distance into a relatively unpopulated area and appeared to be erratically firing his gun rather than aiming to kill. Id. at 746.

Henderson is distinguishable. Here, there is no evidence that Watters was firing indiscriminately. On the contrary, it is uncontroverted that Watters was aiming at the BMW in order to "stop them." Moreover, Watters shot from extremely close range, not a substantial distance like the defendant in Henderson.

Watters further claims the trial court violated double jeopardy when it entered the separate order conditionally vacating Count II. "Double jeopardy prohibits courts from explicitly holding vacated lesser convictions alive for reinstatement should the more serious conviction for the same criminal conduct fail on appeal." State v. Turner, 169 Wn.2d 448, 465, 238 P.3d 461 (2010). The State concedes this was error. We remand to the trial court with instructions to vacate the order.

Watters raises numerous issues in his statement of additional grounds, none of which establish a basis for review.

Watters claims the trial court erred in permitting Mumm's mother to testify and to observe voir dire before testifying. Mumm's mother testified only to the dates of Mumm's birth and death and identified him from a photograph. Given the limited nature of the testimony, Watters does not demonstrate any prejudice.

Watters contends that he was prejudiced when Mathers used the term "murdered" and "executed" and when other witnesses referred to Mathers and Mumm as "kids." Because Watters did not object below and has not established a manifest error affecting a constitutional right, he has waived these claims. RAP 2.5(a).

Watters challenges the credibility of several witnesses. However, credibility determinations are the sole province of the jury and not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Watters claims that members of the jury were passing through the courtroom at the time he was being handcuffed and this compromised his presumption of innocence. However, there is no evidence in the record that any jurors saw Watters in handcuffs. Moreover, "[a] jury's brief or inadvertent glimpse of a defendant in restraints inside or outside the courtroom does not necessarily constitute reversible error. Such circumstances are not inherently or presumptively prejudicial and do not rise to the level of a due process violation absent a showing of actual prejudice." In re Pers. Restraint of Davis, 152 Wn.2d 647, 697-98, 101 P.3d 1 (2004). Watters does not demonstrate prejudice.

Watters argues that defense counsel was ineffective for failing to object to various statements as hearsay or speculation and failing to adequately highlight another statement during closing argument. Because statements identified by Watters were of extremely limited relevance, Watters fails to demonstrate deficient performance or resulting prejudice.

Watters claims that a letter written by his father for the purposes of sentencing was disregarded by the trial court. But, the judge stated on the record he had read the letter and Watters' father spoke on Watters' behalf at the sentencing hearing.

Finally, Watters claims that he was denied his constitutional right to counsel at the time of his arrest and that the State improperly edited the statement he made to law

enforcement. These claims appear to rely on facts outside the record and cannot be considered on direct appeal. McFarland, 127 Wn.2d at 337-38.

We affirm Watters' conviction. We remand for the vacation of the order conditionally vacating Count II.

Cox, J.

WE CONCUR:

Leach, J.

Becker, J.

APPENDIX B

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

STATE OF WASHINGTON, Respondent, vs. DENNIS WATTERS, JR., Appellant.	)	No. 71304-3-I MOTION FOR RECONSIDERATION

I. IDENTITY OF MOVING PARTY AND RELIEF SOUGHT

Appellant Dennis Watters, Jr., through his attorneys, Nielsen, Broman & Koch, asks that under RAPs 12.3 and 12.4 this Court reconsider its unpublished opinion, filed on June 8, 2015. The opinion is attached as an Appendix.

II. FACTS RELEVANT TO MOTION

The State charged Watters with first degree murder by extreme indifference (count 1) and, in the alternative, second degree intentional murder (count 2) for shooting Ryan Mumm at Blue Stilly Park in Snohomish County. CP 192. The State also charged Watters with two counts of first degree assault (counts 3 and 4) based on allegations he followed and shot at the car in which Mumm and Ethan Mathers were riding. CP 192-93.

Watters sought and received a "justifiable homicide" instruction as to counts 1 and 2. CP 74. The court also instructed the jury on lesser included offenses of first and second degree manslaughter as to count 2, the

alternative charge. CP 71-73. However, the court preemptively stated that, as a matter of law, a lesser manslaughter instruction was not available as to count 1. 2RP 16-17. Although two cases, State v. Pastrana, 94 Wn. App. 463, 468, 972 P.2d 557 (1999) and State v. Pettus, 89 Wn. App. 688, 951 P.2d 284 (1998), had previously stated a lesser instruction was unavailable, defense counsel did not alert the court to a change in the law affecting the availability of the lesser charge of first degree manslaughter.

The facts at trial, from the perspective of various witnesses, were adduced as follows: Ethan Mathers, 21 years old on July 14, 2012, spent the day with 20-year-old Mumm, a longtime friend. 8RP 23; 10RP 11, 14, 75. Mumm was staying with the Christensen family in Lakewood for a few weeks. 10RP 14; 11RP 179. Most of the family was camping over the weekend, but 19-year-old Randy Christensen, a friend of Mumm and Mathers, remained in town. 11RP 181; 15RP 107. The family owned a number of guns stored in a locked safe. 11RP 179.

That afternoon, Mathers, driving a red BMW sedan, picked up Mumm at the Christensens' and drove to the Safeway in Arlington. 10RP 15; 10RP 144-45. Both Mathers and Mumm were heavy drug users and had already used Xanax and heroin that day. 10RP 16, 75-76, 81, 110. At Safeway, three people in a Volkswagen Jetta offered to sell Mathers marijuana. 10RP 16-17. Mathers recognized one of the three as Zachary Smoots. 10RP 16.

Mathers took the marijuana but drove off without paying. 10RP 17. Smoots gave chase but Mathers lost Smoots's Jetta in the parking lot. 10RP 17.

Mathers testified that after leaving Safeway he, Mumm, and another friend drove to Blue Stilly Park in unincorporated Snohomish County near Arlington and smoked the marijuana. 10RP 17. Later, after Mathers and Mumm had dropped off the friend in Arlington, Smoots's Jetta pulled into traffic behind the BMW and blocked them on a dead end road. 10RP 18. According to Mathers, three men, including Smoots, and a woman, armed with weapons including brass knuckles and a pipe, approached Mathers and Mumm. 10RP 19. A fight ensued that ended with Mathers kicking the woman, Brittany Glass. 10RP 20-21; 11RP 71.

According to Smoots, Mathers punched him and he was briefly unconscious. 11RP 32, 38, 73. When Smoots regained consciousness, Mathers was fighting with Bo Schemenauer, part of Smoots's group. 11RP 38. Smoots testified the fight ended when Mathers and Mumm threw broken glass at Smoots's car and drove away. 10RP 38-39.

After the fight, Mathers became upset that the fight had been unfair. He was also angry his BMW had been damaged in the fight. 10RP 22, 96. After obtaining Smoots's phone number, 10RP 103, 145, he called and threatened to render Smoots paraplegic and damage his car. Mathers urged Smoots to meet him at Blue Stilly Park to settle the score. 11RP 39, 75.

Smoots told Mathers he and Bo did not want to fight and, at Bo's father's suggestion, offered to pay for the damage to Mathers's car. 11RP 48, 76; 15RP 59, 78, 94. But Mathers insisted on fighting. 11RP 40, 48. Brittany contacted her father, James Glass, about Mathers's threats. 11RP 40. Bo contacted his father, Ron Schemenauer. 11RP 41, 76. Both Glass and Schemenauer later participated in the altercation at the park.

Meanwhile, Mathers and Mumm returned to the Christensens' to collect weapons, including a gun. 10RP 25-26, 10RP 85-86; 11RP 183; 15RP 110. Randy Christensen testified he urged the men not to take his father's 9-mm pistol and suggested a BB gun. But Mathers obtained the gun safe key and got into the safe. 15RP 120, 123, 134.

Mathers and Mumm rendezvoused with friends Josh Hogan, Ryland Ford, and Matt Stein at a smoke shop near the intersection of Highway 530 and 27th Avenue Northeast, which was the single access road to the park. 10RP 27. Mumm rode with Mathers, while Hogan and the others drove in Hogan's black Pontiac Bonneville. 10RP 31-32. At the park, Mathers parked his car facing the exit and waited for Smoots's group to arrive. 10RP 32. Mathers was about to leave when a man standing nearby said, "hold on a second." 10RP 33; 12RP 87.

According to Smoots, his supporters included a group of about 10 people in various cars who met at the Arlington Safeway and then went to

the park to look for Mumm and Mathers. 11RP 43; 12RP 16-17. Some of the group then remained at the park, while others went to a nearby Tesoro gas station on Highway 530. 11RP 46-47; 12RP 17, 59, 63, 85. The latter group (Smoots, Bo, Bo's father Ron, James Glass, and Watters, who had meanwhile joined the group) returned after receiving a message the BMW had arrived. 11RP 46-47; 12RP 25, 59, 139. Smoots rode with Bo and Ron in their Honda sedan. 11RP 50, 80-81.

Mathers testified the Honda drove into the park and struck the front bumper of his BMW. 10RP 33; 13RP 18. Watters's blue Ford Ranger pulled in at an angle and stopped with his passenger side window facing Mathers's front passenger window. 10RP 33, 37; see also 13RP 18 (Hogan), 13RP 144 (Kristofer Struhs).

According to Mathers, as the Honda was approaching the BMW, Mumm got out and fired a shot into the air. 10RP 34-35. Mumm reentered the BMW and was placing the gun on the floorboard when a gunshot from the Ranger struck him in the temple. 10RP 34, 36, 58. Mumm never regained consciousness. 10RP 38, 42. The driver of the Ranger fired a total of two or three times. 10RP 36-37. Mathers did not get a good look at the driver because he was trying to steer, shift, and keep the unconscious Mumm

from falling across the gearshift as he left the park. 10RP 38.[1] Hogan, the Bonneville driver and part of Mathers's group, testified he backed up, widening the gap between his car and the "truck" facing his car. 13RP 21, 25. Mathers's BMW then drove through the gap to exit the park. 13RP 21. Mathers testified he put the BMW in reverse and then "squeezed" past the Ranger and Honda on his way out. 10RP 36.

Other witnesses described a confusing scenario surrounding the gunshots. Hogan, the Bonneville driver, testified a blue "Jeep" pulled into the park with its nose to the Bonneville, and he saw the driver, who had a pistol, appear to scan back and forth at his car and the BMW. 13RP 18-20. However, Hogan believed someone in the Honda was shooting as he left the park. 13RP 38-39. Kristofer Struhs, unaffiliated with either group, testified that besides Mumm, the only person with a gun was a Ford Expedition driver.[2] 13RP 161. Cameron Haskett, part of Smoots's group, saw shots coming from both the BMW and the Ranger. 13RP 19-20. Honda driver Ron Schemenauer believed Mumm was firing out of the BMW. 5RP 71.

Smoots gave yet a different account of the events at the park. He and the Schemenauers drove toward the BMW and rammed it, pushing the BMW back five or ten feet. 11RP 49-50; 13RP 144. Mumm, armed with a

[1] Mathers told police he did not see the shooter or the gun but changed his story by the time of trial and claimed the man "looked him in the face." 10RP 36, 125-27.

[2] Glass was driving a green Ford Expedition. 12RP 7-8.

gun, got out of the BMW, approached the driver's side of the Honda, cocked the gun, and pointed it at the occupants. 11RP 50; 13RP 149-50 (Struhs's testimony). Meanwhile, the other vehicles from the Tesoro arrived at the park. 11RP 51, 54; 13RP 149-50 (Struhs testimony). Mumm stepped back from the Honda, fired a few shots into the air, then pointed the gun downward. 11RP 51, 83. Smoots heard but did not see additional shots. 11RP 51, 52, 55. The Honda backed up, and then the red BMW sped out of the park. 11RP 52, 56. As it did so, James Glass fired a shot at it. 11RP 52. Smoots recalled seeing a blue Ford Ranger in the park, but did not recall its location. 11RP 52, 78-79.

Watters's friend James Glass gave yet another version. Glass had received a tearful call from his daughter Brittany about the events of the day and believed Mathers and Mumm had guns. 12RP 7, 14, 55. Glass, driving the Expedition, had his revolver with him because he planned to target-shoot. 12RP 13, 48. Glass called his friend Watters for support because he knew Watters had a concealed weapons permit and usually carried a gun. 12RP 15, 59. Watters said he did not want to get involved but showed up at the Tesoro anyway. 12RP 15-16, 56, 60, 115.

Glass's Expedition arrived at the park behind the Honda and Watters's Ranger. 12RP 26-27. Mumm pointed a gun inside the Honda, then turned and pointed the gun at Watters's truck. 12RP 28, 53-54, 70.

Glass ducked behind his partly opened door and heard, but did not see, more shots. 12RP 28, 31-32.

Afterward, Glass looked up and saw the BMW leaving the park at a high rate of speed, appearing to "clip" the Ranger on the way out. 12RP 32. Glass shot toward the car, planning to disable it. But he changed his mind at the last second and fired at the ground. 12RP 32-35. He noted all the vehicles attempted to leave the park at once. 12RP 35, 90.

Mathers approached the stop sign at the corner of 27th and Highway 530. He noticed the blue Ranger was gaining on him. The Ranger followed as Mathers turned right onto Highway 530. 10RP 40. As Mathers turned into the lot of an Arco gas station, he felt gunshots strike the BMW and he saw a gun pointed out the window of the Ranger as it drove by. 10RP 41.

After the incident, Mathers's BMW had bullet holes in the front passenger side pillar, the metal under the driver's door, the rear passenger side window, and the rear driver's side door. 10RP 51; 11RP 92-93; 13RP 66-79. State ballistics expert Kathy Geil also discovered a bullet lodged between the rim and tire of the rear wheel on driver's side. 13RP 85. Geil opined that Watters's 9-mm pistol fired the bullet in the wheel. 14RP 116. She also opined that a bullet collected from Mumm's skull came from Watters's gun. 11RP 123; 14RP 69-77. The bullet was flattened consistent with having struck the BMW pillar. 14RP 124-25. Police found a single

shell casing at the park near some pieces of broken mirror. 11RP 99-100. Geil opined it was ejected from Mumm's gun. 14RP 115.

Police arrested Watters four days after the incident and impounded the Ranger. 12RP 171, 187. Policed discovered two bullet holes in the window frame of the passenger door. 12RP 188-89. Carly Denui, a state crime lab employee, testified the metal appeared to be pushed outward as if the bullet had passed from the interior to the exterior. 13RP 93-94. The passenger side mirror was also damaged. 13RP 93-94. Geil examined the mirror after police removed it from the Ranger and submitted to the crime lab. Geil believed a bullet passed from the glass side to plastic side, or from the back to the front of the truck, provided that mirror was in its normal position at the time. 14RP 104.

Watters consented to a recorded interview with detectives. 12RP 172. A redacted version was played for the jury. Ex. 199; 13RP 118. Watters told police that as he reached the park, the BMW drove toward him. The passenger pointed a gun at him through the windshield of the BMW, then reached out of the car and fired two rounds into the air. The BMW backed up, then drove past Watters's Ranger with the passenger side facing Watters's passenger side. He saw the BMW passenger fire at him as the BMW passed the Ranger. At that point, Watters pulled out his gun and shot three rounds at the BMW passenger. Ex. 199.

The State argued in closing, consistent with its theory throughout trial, that Watters was guilty of murder by extreme indifference by firing indiscriminately in a park full of people, even hitting his own car in the process. 16RP 82, 90.

A jury found Watters guilty of the lesser offense of first degree manslaughter as to count 2 (again, charged as an alternative to count 1) but otherwise convicted him as charged, including on count 1. CP 41-53.

Watters appealed the count 1 conviction based on failure to instruct on a lesser offense of first degree manslaughter. CP 5-16. He argued in part that counsel was ineffective for failing to alert the court to a change in the law affecting the availability of the lesser offense instruction. Brief of Appellant at 15-27 (ineffective assistance claim and related analysis).

This Court rejected Watters's ineffective assistance claim. Opinion (App.) at 6-10. This Court did not address deficient performance. But, rejecting a showing of prejudice, this Court noted that Watters' conduct amounted to "more than mere reckless" conduct because Watters fired directly into Mumm's car and therefore the lesser instruction was not warranted. App. at 9-10.

Watters now asks this Court to reconsider its decision. The opinion gravely misapprehends the law regarding the crime of murder by extreme

indifference, the law regarding the circumstances under which a lesser instruction is warranted, and misapprehends certain significant facts.

III. GROUNDS FOR RELIEF AND ARGUMNT

THIS COURT SHOULD RECONSIDER ITS DECISION AND HOLD THAT WATTERS WAS PROVIDED INEFFECTIVE ASSISTANCE.

Under RAP 12.4(c), a motion for reconsideration should

> state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised.

Here, this Court misapplied the law by failing to recognize that the apparent *intentionality* of conduct is not that which differentiates first degree murder by extreme indifference from first degree manslaughter. E.g., State v. Berge, 25 Wn. App. 433, 437, 607 P.2d 1247 (1980). This Court also fails to fully address the significance of the Supreme Court's decision in State v. Henderson, which highlights the two crimes' nearly identical definitions of culpability, and establishes that the facts of this case warranted a lesser instruction. 182 Wn.2d 734, 737, 344 P.3d 1207 (2015). Moreover, this Court misapprehended the law by failing to consider the evidence in the light most favorable to the Watters *as to the issue being raised*, rather than whether, for example, a justifiable homicide instruction was warranted.

The right to a lesser included instruction derives from statute. RCW 10.61.006 states, "[T]he defendant may be found guilty of an offense the commission of which is necessarily included within that with which . . . is

charged in the indictment or information." A defendant is entitled to an instruction of a lesser offense if the two prongs of the State v. Workman test are satisfied. 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Under the legal prong, each element of the lesser offense must be a necessary element of the charged offense. State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). Under the factual prong, the evidence presented must support an inference only the lesser offense was committed to the exclusion of the charged offense. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

When analyzing the factual prong, this Court reviews the evidence in the light most favorable to the party seeking the instruction. Id. at 455-56. "If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater," the instruction should be given. Berlin, 133 Wn.2d at 551.

Here, the two crimes are first degree murder by extreme indifference and first degree manslaughter. First degree murder by extreme indifference requires proof that the accused "(1) acted with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person." State v. Yarbrough, 151 Wn. App. 66, 82, 210 P.3d 1029 (2009); RCW 9A.32.030(1)(b); CP 69 (to-convict instruction). First degree murder by extreme indifference requires a very high degree of risk, which "elevates the level of recklessness to an extreme level, thus 'manifesting an

extreme indifference to human life.'" State v. Dunbar, 117 Wn. 2d 587, 594, 817 P.2d 1360 (1991) (quoting RCW 9A.32.030(1)(b)). The aggravated form of recklessness has been defined as that which "evinc[es] a depraved mind." Dunbar, 117 Wn.2d at 592-93.

First degree manslaughter requires proof that the defendant recklessly caused the death of another. RCW 9A.32.060(1)(a). A person "acts recklessly when he . . . knows of and disregards a substantial risk that a wrongful act may occur and his . . . disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c). The wrongful act is homicide. Henderson, 182 Wn.2d at 743. As the Henderson Court observed while this appeal was pending, "[t]he definitions of the lesser crime (disregarding a substantial risk that a homicide may occur) and the greater crime (creating a grave risk of death) are very close to each other—much closer than is typical." Id. at 737.

Henderson held that where evidence showed a defendant shot from the street toward a house hosting a large party, a rational jury could have nonetheless convicted Henderson of first degree manslaughter rather than first degree murder by extreme indifference. Id. Although this Court addresses Henderson briefly, a discussion of the facts is instructive.

In 2008, teenager Philip Johnson called his friend and fellow Hilltop Crips gang member Henderson to say he was going to a party at the Boys and

Girls Club. Henderson advised Johnson the club was too close to a rival gang's territory. Johnson went and was shot. After leaving the hospital where Johnson was treated, Henderson and a companion decided to go to a house party. The entrance to the party was through a gate on the side of the house. Security denied Henderson entry. He remained in front of the house near the sidewalk with a few other people. While outside, the group learned Johnson had died. Id. at 737-38.

The party hosts had hired five people to act as security guards and, nervous about Henderson's group, sent three of them to the front of the house. Witnesses testified that either Henderson or one of his companions fired six gunshots toward the house and that the shooter yelled something related to the Hilltop Crips. Id. at 738. One of the shots fatally wounded a security guard in the torso. Id at 739. When the police examined the crime scene, they also found two bullet holes in the side of the house and others in cars in the street. Id. The party hosts testified all the partygoers were in the basement, the garage, or the backyard, and the only people in front of the house—in the line of fire—were the three security guards. But other witnesses said there were more people in front of the house. Id. at 738-39.

Reviewing the evidence in the light most favorable to the defense, the Court considered what a rational jury might have concluded if, in fact, only the three security guards were in front of the house when Henderson shot at

it. Noting the definitions of the two crimes were nearly identical, the Court found a jury could have rationally concluded Henderson's gun shots represented disregard for a substantial risk of homicide rather than extreme indifference that caused a grave risk of death. Id at 745-46. Significantly, the Court held that shots directed toward an area where there were, *at a minimum*, three people present, warranted the lesser instruction.

Defense counsel is ineffective when (1) the attorney's performance is deficient and (2) the deficiency prejudices the accused. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Having established deficient performance,[3] a defendant may demonstrate prejudice by showing a reasonable probability that, but for counsel's performance, the

[3] Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. This Court did not address this issue. Nonetheless, Watters can show deficient performance. Counsel must be informed of the relevant law. State v. Kyllo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009). Under State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005) and its progeny, State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011), decided well before trial, to convict a defendant of first degree manslaughter the State must "prove beyond a reasonable doubt that the defendant knew of and disregarded a substantial risk that death may occur." Id. at 848. Gamble and Peters should have alerted counsel that Pettus and Pastrana were no longer good law. Moreover, as Watters has previously argued, the failure to alert the trial court to the demise of Pettus and Pastrana cannot be characterized as a legitimate all or nothing approach. Watters raised a justifiable homicide claim as to counts 1 and 2. But counsel sought manslaughter instructions, at least as to count 2. CP 71-73 (defense proposed instructions including first and second degree manslaughter); 16RP 3-61 (conference regarding jury instructions); 16RP 61-68 (formal exceptions). Pursuing an all-or-nothing approach on count 1 but not count 2, based on the same homicide, would never be reasonable.

result would have been different. Id. at 226. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Watters "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693. To establish ineffective assistance for failure to request a jury instruction, Watters must demonstrate he was entitled to the instruction. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). This Court's reasons for rejecting his prejudice argument seriously misapprehend the law and the facts.

First, this Court's opinion misapprehends the legal characteristics of the greater offense. The Court's opinion focuses on Watters's acts as something more severe than mere reckless conduct. But the acts the Court focuses on do not exceed recklessness in the manner necessary under the statute. The opinion suggests Watters must have targeted specific individuals, a fact distinguishing the case from Henderson. But this cannot be that which makes the charged crime worse than manslaughter. Within the first degree murder statute, "extreme indifference to human life" means a disregard of human life in general, not simply a disregard of the *victim's* life. Berge, 25 Wn. App. 433; State v. Anderson, 94 Wn.2d 176, 616 P.2d 612 (1980). In Berge, the defendant shot and killed his roommate while the roommate slept. Berge testified he had voluntarily ingested cocaine and that, under the drug's influence, he thought his roommate was a KGB agent.

Berge, 25 Wn. App. at 434. Berge was charged with first degree murder by extreme indifference. In finding insufficient evidence, Berge analyzed statutory scheme as a whole for the crime of homicide:

> As we read the homicide statutes, the legislature intended that one who kills with the intent to cause the death of a particular individual be charged with murder in the first degree, pursuant to RCW 9A.32.030(1)(a), or murder in the second degree, as defined in the instruction given by the trial court. *As other statutory provisions cover acts directed at a particular individual or individuals*, we shall assume that the legislature intended RCW 9A.32.030(1)(b) to provide for those situations indicating a recklessness and extreme indifference to human life *generally.*

Id. at 437 (additional emphasis supplied).

Similarly, in Anderson, the defendant was charged with first degree murder by extreme indifference. Rejecting the State's argument that a recent amendment to the statute allowed conviction for first degree murder where a defendant showed extreme indifference only to the life of the victim, the Court held:

> The State's position would result in a disharmonious construction of RCW 9A.32. . . . Second degree murder would be effectively eliminated. Every "intent to cause the death" (RCW 9A.32.030(1)(a), (b)) would be an "extreme indifference to human life" and conduct which "creates a grave risk of death", i.e., first degree murder.

Anderson, 94 Wn.2d at 190-91; see also State v. Edwards, 92 Wn. App. 156, 162, 961 P.2d 969 (1998) (citing with approval Berge and Anderson).

Based on the foregoing, this Court's opinion clearly misapplies the law by failing to recognize that the apparent intentionality or targetedness of conduct is not that which differentiates murder by extreme indifference from first degree manslaughter. See, e.g., App. at 9 ("[t]he testimony, even in the light most favorable to Watters, showed that Watters fired three shots . . . directly into the passenger window of the BMW, striking and killing Mumm."); App. at 10 ("Henderson is distinguishable. Here, there is no evidence that Watters was firing indiscriminately. On the contrary, it is uncontroverted that Watters was aiming at the BMW. . . . Watters shot from extremely close range, not a substantial distance like the defendant in Henderson."). This Court's analysis suggests that it is finding a lack of Strickland prejudice because some evidence suggests Watters conduct was not reckless but instead intentional, placing it beyond manslaughter and into the realm of first degree murder by extreme indifference. But this is incorrect under Berge and Anderson.[4]

This Court's opinion also appears to analyze the evidence in the light most favorable to Watters but, effectively, only does so in the context of his justifiable homicide claim. Considering the evidence in the light most favorable to the defense *in the context of whether the instruction was warranted,* Watters was entitled to a first degree manslaughter instruction. As the lengthy facts section of this motion attests, there were a number of

[4] The jury rejected a theory of intentional murder on the alternative homicide charge.

conflicting accounts of the shooting. The State's theory at trial was that Watters shot indiscriminately at a moving car, even hitting his own car in the process. 16RP 82. The State highlighted the fact that the all the cars left the park at a high rate of speed. 16RP 90. As is clear from the preceding argument, it was necessary for the State to make such an argument to support the charge of first degree murder by extreme indifference under Berge and Anderson. Watters's theory of justifiable homicide depended upon a more "static" version of events. See 16RP 90 (State's closing argument discussing Watters's police interview). This Court's analysis highlights portions of the latter version, one that Watters used to support his justifiable homicide claim. App. at 9-10. But Watters is entitled to the benefit of all the facts at trial, including those the State used to argue its theory he was guilty of the greater charge of murder by extreme indifference to human life.

Next, in rejecting Watters's argument, this Court also suggests that when the shooting occurred, the cars were so close that Mathers's BMW had to "squeeze" by. App. at 9; see 10RP 36 (Mathers' testimony); cf. 13RP 21, 25 (Hogan testimony as to original position of cars). Based on the facts set forth above, whether Mathers had to squeeze by on his way *out* the park is not dispositive as to the cars' position at the time of the shooting.

Finally, had the jury been instructed on the lesser offense, there is at least a reasonable likelihood it would have convicted Watters on the lesser.

The jury convicted Watters of first degree manslaughter when given the opportunity, rejecting the intentional murder charge on count 2. CP 49. The jury also submitted questions about the meaning of "extreme indifference" as well as "grave risk of death" but was told to refer to the instructions. CP 53-54; 16RP 174. And while unnecessary to show prejudice here, Washington courts continue to follow the rule in State v. Parker that based on the "unqualified right" of the accused to have the jury consider a legally warranted lesser offense instruction, prejudice is presumed where such an instruction is not given. 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984)

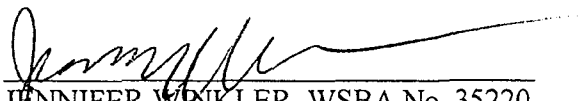
IV. CONCLUSION

For the foregoing reasons, Watters respectfully requests that this Court reconsider its decision as required by RAP 12.4(c).

DATED this 26TH day of June, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Office ID No. 91051

Attorneys for Appellant

APPENDIX C

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

STATE OF WASHINGTON Respondent, v. DENNIS RICHARD WATTERS, JR., Appellant,	)	No. 71304-3-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Dennis Watters, having filed his motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied;

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 22ND day of July, 2015.

Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 71304-3-I
	)	
DENNIS WATTERS, JR.,	)	
	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DENNIS WATTERS
DOC NO. 371201
WASHINGTON STATE PENITENTIAY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF JULY 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

August 19, 2015 - 4:24 PM

Transmittal Letter

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Court of Appeals Case Number: 71304-3

Party Respresented:

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Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

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