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COURT OF APPEALS
DIVISION II

No. 37806-0-II

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STATE OF WASHINGTON
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DEPUTY
IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:

HOYT WILLIAM CRACE,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

Hoyt Crace was convicted by a jury of attempted assault in the second degree, criminal trespass, and malicious mischief and subsequently sentenced by a judge to life without parole (on the Class C, attempted second-degree assault conviction) after the court concluded he was a persistent offender.

In his opening brief, Crace raised three claims: a Sixth Amendment ineffective assistance of counsel claim based on trial counsel's failure to request a lesser included instruction of unlawful display of a weapon, and two related constitutional claims arising from a juror's post-verdict disclosure that she saw Crace shackled on his way to court in jail-issued sandals (which he was required to wear throughout trial and which she recognized as jail issued), but where the juror chose not to disclose this fact during *voir dire* (or at any time later in the trial).

In response, the State essentially concedes that current caselaw requires reversal of Crace's conviction based on the failure to give the lesser included instruction, but then argues that state caselaw rests on an unsound foundation and should be overruled. This Court should follow current Washington, rather than replace it with a rule that frankly is not found in the cases cited by the State.

Next, the State argues that Crace was not forced to wear jail sandals and cannot claim improper state action. The State’s declaration admittedly creates a conflict in the facts—facts that can only be resolved through an evidentiary hearing. If this Court does not reverse and remand for a new trial on the first claim, it should remand for an evidentiary hearing.

That evidentiary hearing should also explore the reasons for the juror’s decision to keep secret her observations of Crace being escorted to court in shackles and wearing what she recognized as jail issued sandals throughout trial. Contrary to the State’s argument—that this Court should read *voir dire* in the narrowest manner possible—this Court must resolve any doubts about potential juror bias *against* the juror. It is undeniable that the juror failed to disclose relevant facts during *voir dire*. Crace is entitled to a hearing so that the question of why she did so can be further explored.

B. ARGUMENT

1. THE FAILURE TO REQUEST A LESSER INCLUDED INSTRUCTION OF UNLAWFUL DISPLAY OF A WEAPON MAY HAVE BEEN A TACTICAL DECISION. HOWEVER, IT WAS AN UNREASONABLE TACTICAL DECISION AS CASELAW CLEARLY ESTABLISHES.

Crace defended against the intent element of his assault in the second degree charge by claiming that he was unable to form the requisite intent to injure or intimidate. Recognizing the uncertain proof regarding this element, the State offered and the trial court gave a lesser included instruction of “attempted” assault. However, despite the fact that Crace’s

defense was that he committed unlawful display of a weapon defense counsel did not seek such an instruction. This failure is even more remarkable given that a conviction for unlawful display of a weapon reduced Crace's sentence from "life" to one year (unlike the "attempted" lesser which resulted in *no* reduction in Crace's sentence). Further, the jury's rejection of the second-degree assault charge demonstrates the necessary prejudice: a reasonable likelihood of a different verdict, if counsel had performed competently.

State v. Ward, 125 Wn.App. 243, 104 P.3d 670 (2004), is completely on point. Frankly, it would be difficult to find a case more on point. Implicitly acknowledging this fact, the State argues that this Court, which has followed *Ward* in the past, should "not follow Division I and its decision in *Ward*." *Response*, p. 11. Given that the State urges this Court to reject state precedent and replace it with a rule that it draws from decisions from other jurisdictions, it is important to carefully examine those cases.

The State cites to several 7th Circuit cases, which it argues hold that the failure to request a lesser included instruction can virtually never constitute ineffective assistance. *Response*, p. 9. The cases say no such thing, and can easily be distinguished from *Ward*. For example, the State argues that *United States v. Windsor*, 981 F.2d 943, 947 (7th Cir. 1992), stands for the proposition that the "decision to request an instruction on a

lesser-included offense is a matter of trial strategy.” *Response*, p. 9. In *Windsor*, the defendant was charged with robbing a bank *with a dangerous weapon*, and argued ineffectiveness on appeal based on counsel’s alleged failure to request to instruct the jury on the lesser included offense of *simple* bank robbery. At the time the proposed instructions were first submitted, the defendant was proceeding with an insanity defense. Thus, the instruction was not available since the insanity defense admits the elements of the charged crime. When the insanity defense was not dropped, Windsor had exercised his right to represent himself. Thus, he could not claim ineffective assistance: “this court knows of no constitutional right to effective assistance of standby counsel.” Finally, the testimony that Windsor pointed his gun at the tellers and then threatened to use it was “uncontroverted.” The facts of *Windsor*, not discussed by the State, reveal that it is simply inapplicable.

The State’s reliance on *United States v. Hirschberg*, 988 F.2d 1509 (7th Cir. 1993), is also dubious. *Hirschberg* is not a “failure to offer a lesser included” case. Instead, it involves the cross examination of a witness by defense counsel which apparently opened the door to damaging rebuttal testimony. The 7th Circuit held: “We see no reason to second-guess counsel in these circumstances. The defendants chose to proceed with the cross examination and test the district court's discretion.” It is unclear how

this cross-examination case assists this Court in deciding this lesser included issue-which is perhaps why the State attempts to disguise the case.

In *Kubat v. Thieret*, 867 F.2d 351, 360 (7th Cir. 1989), the next case relied on by the State, the defendant was charged with aggravated kidnapping and claimed in habeas that his attorneys should have tendered an instruction on the lesser included offense of unlawful restraint. However, the State court had earlier found that the lesser would have been inconsistent with Kubat's alibi defense. Thus, it was reasonable not to pursue an inconsistent theory of liability: "arguing a lesser included offense concerning theft might have diluted the alibi defense and resulted in a loss of credibility." *Id.* at 364. In contrast, in *Ward* an instruction on the lesser included offense was not inconsistent with his defense at trial and therefore, was "at little or no cost to Ward." *Ward*, 125 Wn. App. at 249. Thus, *Kubat* is only marginally relevant and is not at odds with *Ward*.

The State's reliance on *Moyer v. State*, 620 S.E.2d 837 (Ga. Ap. 2005), is misplaced for a similar reason. In that case, trial counsel orally requested the lesser charge be given to the jury. However, the trial court denied the request because Moyer was proceeding with an affirmative coercion defense, which admits the acts charged, but seeks to justify, mitigate, or excuse the acts.

Finally, *Autrey v. State*, 700 N.E.2d 1140 (Ind. 1998), held that trial counsel was not ineffective for failing to request lesser-included offense

instructions on a charge of murder because it represented a *reasonable* “all or nothing” tactical choice by defense counsel to obtain a full acquittal by placing the blame for the victim’s death on another person and highlighting the “discordant” testimony of the witnesses.

All of the cases cited by the State are compatible with *Ward*. The failure to request a lesser included instruction is not always ineffective. Instead, according to *Ward*, the failure to request a lesser constitutes deficient performance only where the evidence shows that the defendant is guilty of some crime; where offering the lesser does not conflict with the chosen defense; and where the defendant faces starkly different penalties. 125 Wn. App. at 250 (“Given the developments at trial, and the starkly different potential penalties, it was objectively unreasonable to rely on such a[n all-or-nothing] strategy.”).

Subsequent cases from Washington appellate courts further demonstrate the nuance that the State either fails to appreciate or attempts to obscure: that in some cases the failure to propose a lesser instruction is legitimate trial strategy and, in others, it is an unreasonable strategy.

For example, in *State v. O’Connell*, 137 Wash.App. 81, 152 P.3d 349 (2007), O’Connell argued that defense counsel was ineffective for failing to propose an instruction on first degree theft as a lesser included offense of first degree robbery. However, the facts simply did not support the instruction. His victim testified that O’Connell threatened to rape and kill

her, fought with her, pushed her out of her car, and then hit her arm when he backed up the car. Even if the defense had been successful in discrediting her testimony, an officer testified that she had obvious injuries. Because the record showed both the use and threatened use of violence, first degree theft was not a justified lesser included offense. Thus, trial counsel's failure to propose such an instruction was a "legitimate" trial strategy.

In contrast, in *State v. Pittman*, 134 Wash.App. 376, 166 P.3d 720 (2006), counsel's failure to request a lesser included offense instruction (in a burglary case where Pittman conceded trespassing) left Pittman in what the court called a "tenuous" position. One of the elements of the attempted burglary charge was in doubt—his intent to commit a crime inside Cline's home—but he was plainly guilty of some offense. It was undisputed that Pittman attempted to unlawfully enter the alleged victim's home. He told the victim and the police that he intended to go inside to apologize. His entire defense was that he never intended to commit a crime once he was inside the home. This was a "risky" defense because Pittman clearly committed a crime similar to the one charged but the jury had no option other than to convict or acquit.

The risk was increased in *Pittman* because the penalties for the lesser and greater offenses "varied significantly," *i.e.*, a standard range of 9 to 10 ½ months versus a maximum penalty of 90 days in jail. Thus, the Court of

Appeals reasoned that because Pittman committed an offense similar to the one charged, his counsel's "all or nothing" strategy exposed him to a substantial risk the jury would convict on the only available option, attempted residential burglary. Further, because the State's evidence of intent to commit a crime inside Cline's home was weak, especially considering there was no proof Pittman stole anything, there was a reasonable likelihood that given the chance, the jury would have convicted Pittman of attempted first degree criminal trespassing instead of attempted residential burglary. "His counsel's failure to seek lesser included offense instructions constituted ineffective assistance of counsel."

Frankly, this case is a much more compelling case of ineffectiveness than either *Ward* or *Pittman*. Here, there was uncontroverted evidence that Crace displayed a weapon. The evidence regarding his mental state was, in contrast, muddled. Most importantly, the risk associated with an assault or attempted assault conviction was severe (life without parole)—the reward associated with an unlawful display conviction great (Crace would have been a free man long ago).

Thus, even assuming counsel made a knowing decision not to seek a lesser instruction for unlawful display of a weapon that decision was obviously unreasonable. Crace is entitled to a new trial.

2. THIS COURT SHOULD ORDER AN EVIDENTIARY HEARING TO DETERMINE WHETHER CRACE WAS COMPELLED TO DRESS IN ORANGE JAIL SANDALS; HOW MANY JURORS KNEW THE SANDALS WERE FROM THE JAIL; WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT; AND TO DETERMINE WHETHER CRACE WAS PREJUDICED.

The declarations attached to the PRP and the State's response raise a conflict of facts. Crace concedes that this contest can only be resolved at an evidentiary hearing.¹ That hearing should include a determination of whether Crace was required by a state actor to wear jail issued sandals.

Crace admits there is no constitutional violation unless the record shows "that the accused's clothing would be identifiable to the jury as prison garments." *United States v. Rogers*, 769 F.2d 1418, 1423 (9th Cir.1985); accord *Williams*, 425 U.S. at 505. The record developed so far demonstrates that at least one juror fully understood that the sandals worn by Crace constituted jail garb.

Thus, an evidentiary hearing is warranted where Crace will attempt to show that his wearing of jail clothing "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (internal quotation marks and citation omitted); see *Villafuerte v. Stewart*,

¹ The State appears to argue that because the State's declaration inserts facts not conclusively rebutted in Crace's declaration that no real contest exists. Of course, Crace wrote his declaration first. It would be an impossible standard to meet to require Crace to anticipate and "rebut" every possible response in his declaration.

The State also questioned the validity of the juror's electronically approved signature. Thus, counsel has attached a declaration personally signed by her to this reply.

111 F.3d 616, 628 (9th Cir.1997) (applying *Brecht* to prison garb clothing issue in habeas case).

Because an evidentiary hearing will also determine what information is relevant to the issue of prejudice, Crace will wait until after such a hearing to detail the unfair prejudice in this case that merits a new trial. However, it is important to point out that the juror's declaration expressly states that, after observing Crace in shackles and jail sandals, she thought about not only the possibility that Crace had prior convictions, but that he may well be a third striker. This is classic proof of unfair prejudice.

The State also argues that Crace cannot raise this issue because trial counsel did not object to the jail sandals. In *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999), the Court reached the shackling issue, despite no objection from trial counsel—although the Court also noted counsel's responsibility to object or request a curative instruction. However, given that the State has raised a question about State action in its response, Crace respectfully seeks to amend his PRP to include a claim of ineffective assistance of counsel for failing to object to Crace's jail sandals.²

² Along with this reply, Crace submits an amended PRP which includes a short section on ineffective assistance of trial counsel. Obviously, the ineffective assistance claim arises from the same facts that comprise Crace's original claim. IN those cases where a trial court does not order the jail clothes, the failure of counsel to object to shackling of Petitioner "is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *In re Davis*, 152 Wn.2d 647, 700, 101 P.3d 1 (2004). Crace does not object to the State submitting a response on the ineffective assistance claim.

In any event, if this Court does not grant Crace's PRP on his first claim, Crace concedes that this Court should remand this claim to the trial court for an evidentiary hearing.

3. CRACE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY WHERE A JUROR KEPT SECRET THE FACT THAT SHE SAW CRACE SHACKLED ON HIS WAY TO COURT.

Ordinarily, *voir dire* examination serves to protect the right of a litigant to a fair and impartial jury by exposing potential bias on the part of prospective jurors. In exercising peremptory challenges and challenges for cause, the litigants must rely on the truthfulness of the responses from the prospective jurors. However, when a juror conceals material information from the court and the parties, the *voir dire* process cannot adequately serve its purpose.

The State's response sets the bar much higher than the law requires. The State argues that this Court should read *voir dire* in the narrowest manner possible and conclude based on a paper record that the juror did not deliberately lie. In contrast, Crace need show only an inadvertent nondisclosure where a correct response would have furnished a valid "for cause" challenge *or* a deliberate nondisclosure that, standing alone, demonstrates bias. Because the record is undisputed that the juror at issue failed to disclose relevant information during *voir dire*, if this Court does

not grant relief on Crace's first claim, then this Court should order an evidentiary hearing on this claim.

The State urges this Court to read *voir dire*—the questions asked and the answers given—in the narrowest manner possible. The State argues that because the juror *observed* Crace in shackles, she did not fail to accurately answer whether she had previously *heard* anything about the case. *Response*, p. 21.

Caselaw requires a reviewing court to read the *voir dire* in the *opposite* manner suggested by the State. Doubts regarding juror bias must be resolved against the juror. *United States v. Nell*, 526 F.2d 1223, 1230 (5th Cir. 1976). For example, in *United States v. St. Clair*, 855 F.2d 518 522-3 (8th Cir. 1988), a juror was *not* asked directly whether he had experience with explosives (in an explosives case), but instead failed to volunteer an affirmative answer after another juror was questioned on this subject. The Court held:

The juror who later professed during deliberations to seven years of experience with explosives did not speak up during *voir dire*. Defense counsel was never given an opportunity to question whether this juror could, indeed, base a verdict strictly on the evidence and testimony presented at trial. If, on questioning, a potential juror had answered in the negative, there might have existed the requisite showing for a challenge for cause, because the juror clearly would have entered into the deliberations process with a prejudicial view of the evidence. The district court could have remedied this problem during post-trial proceedings by identifying this juror and questioning him under oath as to his reasons for holding back this pertinent information, and his ability in having

reached a guilty verdict without relying on his specialized knowledge. This is especially true where the Court is considering whether to grant an evidentiary hearing, rather than addressing the merits of a claim.

Id.

Of course, the question presented at this stage is merely whether, viewing the evidence in the light most favorable to Crace, he has made a sufficient showing to justify a hearing—a less onerous burden than the one described above. *McDonough*, 464 U.S. at 555-56, 104 S.Ct. 845.

Further, whether the juror deliberately withheld information is not the only question posed. A juror can also be *substantively* biased, and unsuitable for jury service, regardless of whether his or her lies undermined the petitioner's procedural *voir dire* right. See *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 555-6 (1984) (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring) (“[R]egardless of whether a juror’s answer is honest or dishonest, it remains within a trial court’s option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate ... in exceptional circumstances, that the facts are such that bias is to be inferred.”); *id.* at 558, 104 S.Ct. 845 (Brennan, J., joined by Marshall, J., concurring in judgment) (“[F]or a court to determine properly whether bias exists, it must consider at least two questions: are there any facts in the case suggesting that bias should be conclusively presumed; and, if not, is it

more probable than not that the juror was actually biased against the litigant. Whether the juror answered a particular question on *voir dire* honestly or dishonestly, or whether an inaccurate answer was inadvertent or intention, are simply factors to be considered *in this latter determination of actual bias.*” (emphasis added)).

One such circumstance is when a prospective juror deliberately withholds information during voir dire in order to increase the likelihood of being seated on the jury. *McCoy v. Goldston*, 652 F.2d 654, 659 (6th Cir.1981) (“We also hold that a district judge shall presume bias, and grant a new trial, when a juror deliberately concealed information or gave a purposefully incorrect answer.”). Another example of implied bias arising from a juror's deliberate concealment of material information is found in *United States v. Colombo*, 869 F.2d 149 (2d Cir.1989). In *Colombo*, evidence that came to light after the guilty verdict indicated that one of the jurors had a brother-in-law who was a government attorney. She allegedly told another juror that she did not mention it “because she wanted to sit on the case.” *Colombo*, 869 F.2d at 150. Such misconduct, the court observed, is “inconsistent with an expectation that a prospective juror will give truthful answers concerning her or his ability to weigh the evidence fairly and obey the instructions of the court.” *Colombo*, 869 F.2d at 151-52. In another case, the appellate court found the record strongly suggested that a juror wanted to serve on the jury, and that he feared he would not be

allowed to do so if he disclosed his brother's employment as a deputy sheriff in the office that performed some of the investigation in the defendant's case. *United States v. Scott*, 854 F.2d 697, 699 (5th Cir.1988). The court held there was sufficient implication of the juror's bias to require a new trial.

Here, the questioned juror, who wrote an article about her jury service which highlighted her observations of Crace shackled on his way to court, wearing jail sandals throughout trial, and correctly speculates that he was a three-striker, does not indicate in her declaration that she failed to disclose that she saw Crace prior to trial because the question was not asked. Instead, she simply says it was “personal.”

Crace and the State should be permitted to explore in a hearing exactly what the juror meant by “personal.”

To illustrate with caselaw, in *State v. Cho*, a juror failed to disclose under appropriate questioning that he had been a police officer. *State v. Cho*, 108 Wash.App. 315, 318-19, 30 P.3d 496 (2001). The appellate court remanded for an evidentiary hearing, “in which the parties may, if they choose, present additional testimony to illuminate juror number eight's answers on voir dire as well as statements he allegedly made to defense counsel after the verdict.” *Id.* at 329. Review of the question of implied bias “is best done on the basis of findings made after the parties have an opportunity to develop a record with that issue in mind.” *Id.*

Crace respectfully requests the same opportunity.

Finally, the State argues, even if the juror was dishonest or biased, eleven presumably unbiased jurors remained and therefore, Crace is not entitled to any remedy. Once again, the law directly contradicts the State's argument. A defendant is denied the right to an impartial jury even if only *one* juror is biased or prejudiced. *Tinsley v. Borg*, 895 F.2d 520, 523-24 (9th Cir.1990).

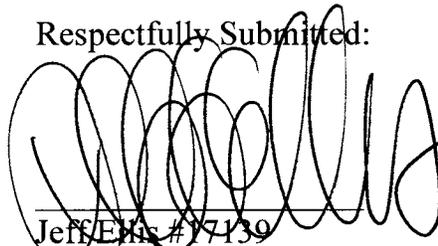
This Court should remand this issue to the Superior Court for an evidentiary hearing.

D. CONCLUSION

Based on the above, this Court should either grant Crace's petition and remand for a new trial or should remand this case for an evidentiary hearing.

DATED this 2nd day of October, 2008.

Respectfully Submitted:



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DECLARATION OF LINDA HOERLING-GLENN

I, Linda Hoerling-Glenn, declare as follows:

1. I served as a juror in *State of Washington v. Hoyt Crace*.
2. After the trial, I wrote an account of my jury service that was published in the *Puyallup Herald*.
3. I have attached a copy of that story, which is true and correct.
4. I was recently contacted by Mr. Crace's current counsel who asked me two questions regarding my article.
5. Mr. Ellis asked why I did not report to the court that I had observed Mr. Crace outside of the courtroom prior to trial. I told him that it was a personal decision since I did not know until he was the defendant for my particular juror assignment.
6. Mr. Ellis asked how I came to consider the possibility that Mr. Crace was facing a third strike. I told him that, prior to my jury duty I had read about the three strike rule and understood the process. I thought about this possibility during trial, but did not discuss it with anyone else.

I declare under the penalty of perjury of the laws of the State of Washington that the above is true and correct.

9.26.08
Date and Place


Linda Hoerling-Glenn

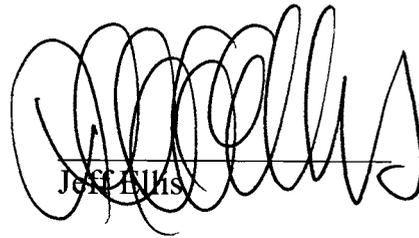
CERTIFICATE OF SERVICE

ADR 10/3/08

I, Jeff Ellis, certify that on October 2, 2008, I served the party listed below with a copy of the attached corrected *Motion to Permit Amended Opening Brief, Amended Opening Brief*, and *Reply in Support of PRP* by placing a copy in the mail, postage pre-paid, addressed to:

Kathleen Proctor
Deputy Prosecuting Attorney
Pierce County Prosecuting Attorney
930 Tacoma Ave. S, Rm. 946
Tacoma, WA 98402-2171

10/2/08 Seattle, WA
Date and Place



Jeff Ellis