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STATE OF WASHINGTON  
BY: *[Signature]*

**NO. 41387-6-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**JACK SEBADE,**

Appellant.

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

The Honorable William Faubion, Judge

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**APPELLANT'S BRIEF**

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**A. ASSIGNMENTS OF ERROR**

1. The self-defense instructions in Sebade's case misstated the law.

2. The self-defense instructions in Sebade's case are inaccurate.

3. The self-defense instructional error denied Sebade a fair trial.

4. To the extent Sebade's attorney contributed to the instructional error, Sebade was denied his constitutional right to effective representation.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Sebade acted with lawful force in his own defense. But the self-defense instructions used at trial misstated the law and significantly lessened the state's burden to disprove self-defense. Was Sebade denied a fair trial?

2. To the extent defense counsel contributed to the instructional errors, was Sebade denied his right to effective representation?

**C. STATEMENT OF THE CASE**

Jack Sebade is a regular at the Duck Inn. Report of Proceedings ("RP") 10/06/10 at 17-18. He was there having a few drinks on the evening of October 23 and 24, 2009. RP 10/06/10 at 9, 12; RP 10/07/10 at 182-83. Around midnight, he left the Duck Inn and headed to his van which was parked just outside of the front door. RP 10/07/10 at 185. On

the way to his van, he noticed a young woman standing nearby. RP 10/07/10 at 186. Being a born-again Bible believer, Sebade thought he would take a few moments to talk to the young woman – Amanda Lindsey – about the Lord and salvation. RP 10/06/10 at 87-88; RP 10/07/10 at 186, 190. Sebade got into his van and grabbed some religious tracts. RP 10/07/10 at 187. He went over to Amanda, introduced himself, and began talking to her. RP10/07/10 at 186-87.

Amanda was not receptive to the conversation but she did not walk away. RP 10/06/10 at 91-92. She made eye contact with her friend Sandy Brooks who did nothing to help her out of the situation. RP 10/06/10 at 92-93; RP 10/07/10 at 119-22. Amanda texted “help me” to Sarah, a friend who was in the bar. RP 10/06/10 at 93. After a short time, Sarah, who was intoxicated, came out of the bar and was instantly confrontational with Sebade. RP 10/06/10 at 87, 94; RP 10/07/10 at 187. Sarah got so close to Sebade that she had contact with his wide brim hat pushing the brim down and obstructing Sebade’s vision. RP 10/07/10 at 187, 191. Sarah was very hostile toward Sebade. RP 10/07/10 at 190.

Darren Hall was at the Duck Inn that evening with Amanda, Sandy, and Sarah. 10/06/10 at 87-89. He went outside to see what was going on. RP 10/07/10 140. From Hall’s perspective, Sebade had his hand

on Sarah's shoulder and was pushing the religious tracts toward her face. RP 10/07/10 at 140-41. Sebade denied ever touching Sarah. RP 10/07/10 at 191. Hall was unsure what was going on but he feared that Sarah might be physically or sexually assaulted by Sebade. RP 10/07/10 at 140, 160.

Hall confronted Sebade. RP 10/07/10 at 141-42. Sebade could not see Hall very well because Sebade's hat was still pushed down. RP 10/07/10 at 192. Hall swore at Sebade and told him to get in his van and leave. RP 10/07/10 192-93. Sebade felt that Hall had no right to tell him what to do and that he did not have to leave. RP 10/07/10 193. In an effort to diffuse the situation, Sebade showed Hall that he had a handgun. RP at 10/07/10 at 197. Sebade told Hall that he was a sovereign citizen and did not have to leave when Hall suddenly struck Sebade. RP 10/07/10 at 193-94. Sebade felt himself losing consciousness and his legs going out from underneath him. RP at 10/07/10 at 194-95. He fell to the ground and blacked out. RP 10/07/10 at 195. When Sebade regained consciousness, he saw Hall standing nearby so he fired his gun at Hall. RP 10/07/10 at 198-99. Sebade felt that he would be killed if he did not pull the trigger. RP 10/07/10 at 202-03. Sebade was fearful of Hall because of Hall's attitude, intonation in voice, and the obvious fact that Hall had knocked him out. RP 10/07/10 at 203. Sebade felt that he would be killed if he did not pull the trigger. RP 10/07/10 at 202-03.

Although it was Sebade's intent to shoot Hall, Sebade did not immediately know that his bullet had struck Hall. RP 10/07/10 at 232.

Hall's friends drove him to the hospital in Longview. RP at 10/06/10 at 100; RP 10/07/10 at 162-63. An emergency room doctor easily removed the bullet from Hall's abdomen. RP 10/07/10 at 165. The bullet had just settled under Hall's skin. RP 10/07/10 at 164-65.

Sebade was charged with second degree assault with a firearm enhancement. Clerk's Papers ("CP") at 4-5. At trial, Sebade explained how he was acting in self-defense when he shot Hall. RP 10/07/10 at 192-204. The court instructed the jury on self-defense. CP 6-28. Defense counsel did not object to the instructions which were a mix of non-homicide and homicide self-defense instructions.<sup>1</sup> RP 10/07/10 at 245; CP 6-28.

The jury found Sebade guilty as charged. CP 29, 30. Sebade was sentenced to 3 months for the assault and 36 months on the firearm enhancement. CP 31-40. Sebade made a timely appeal of all portions of his judgment and sentence. CP 41.

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<sup>1</sup> Defense counsel apparently proposed jury instructions, RP 10/6/10 at 110-11, but none have been filed for the record.

**D. ARGUMENT**

**SELF DEFENSE INSTRUCTIONS THAT MISSTATED THE LAW DENIED JACK SEBADE A FAIR TRIAL.**

Jack Sebade feared for his safety when he shot and wounded Darren Hall. In short, Sebade acted in self-defense. Yet at trial, the self-defense instructions misstated the law, and lessened that state's burden to disprove that Sebade acted legally and within his right to defend himself. Defense counsel compounded the trial court's error by failing to object to the inaccurate self-defense instructions. These errors denied Sebade a fair trial and effective representation. Accordingly, Sebade's assault conviction should be reversed.

"Jury instructions must more than adequately convey the law of self-defense. The instructions, read as a whole, must make the relevant legal standard 'manifestly apparent to the average juror.'" *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (quoting *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)).

The applicable self-defense standards are found in RCW 9A.16.020 (non-homicide cases) and RCW 9A.16.050 (homicide cases) In pertinent part, RCW 9A.16.020 provides:

The use, attempt or offer to use force upon or toward the person of another is not unlawful ... (3) Whenever used by a party about to be injured . . . in case the force is not more than is necessary.

RCW 9A.16.020(3)(emphasis added) .

In contrast, RCW 9A.16.050 deems homicide justifiable:

- (1) In the defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished.

RCW 9A.16.050(1)(emphasis added). This latter standard, for justifiable homicide, is the proper standard where the defendant killed the alleged victim. *See e.g., State v. Read*, 147 Wn.2d 238, 242-43, 53 P.3d 26 (2002) (second degree murder); *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)(second degree murder); *State v. Churchill*, 52 Wash. 210, 218-19, 100 P. 309 (1909)(manslaughter); *State v. Freeburg*, 105 Wn. App. 492, 502-03 n.7, 20 P.3d 1249 (1997)(murder).

Under both the homicide and non-homicide standards, the evidence is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). Therefore, self-defense incorporates both objective and subjective elements. *Id.*

Just as the statutory legal standards differ depending on whether a criminal case involves a homicide, the Washington Pattern Jury

Instructions provide different standards for homicide and non-homicide cases. WPIC 17.02<sup>2</sup> sets forth the general requirements of lawful defensive force in non-homicide cases. Sebade's Instruction 14 mirrors its language:

#### INSTRUCTION NO. 14

It is a defense to a charge of Assault in the Second Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration

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<sup>2</sup> WPIC 17.02 Lawful Force—Defense of Self, Others, Property

It is a defense to a charge of \_\_\_\_\_ that the force *[used][attempted][offered to be used]* was lawful as defined in this instruction.

[The *[use of][attempt to use][offer to use]* force upon or toward the person of another is lawful when *[used][attempted][offered]* [by a person who reasonably believes that *[he][she]* is about to be injured] [by someone lawfully aiding a person who *[he][she]* reasonably believes is about to be injured] in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.]

[The *[use of][attempt to use][offer to use]* force upon or toward the person of another is lawful when *[used][attempted][offered]* in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.]

The person *[using][or][offering to use]* the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of *[and prior to]* the incident.

The *[State][City][County]* has the burden of proving beyond a reasonable doubt that the force *[used][attempted][offered to be used]* by the defendant was not lawful. If you find that the *[State][City][County]* has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty *[as to this charge]*.

all of the facts and circumstances known to the person at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 22. This is a correct statement of the law for a non-homicide case because it told the jury that a person is entitled to use defensive force when he “reasonably believes that he is about to be injured.” See RCW 9A.16.020(3).

Inaccurately, and to the detriment of Sebade’s case, the preceding instruction, Instruction 13, used a very different standard – the homicide standard. Instruction 13 paralleled the language from WPIC 16.07<sup>3</sup>, and provided:

#### INSTRUCTION NO. 13

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great personal injury, although it

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<sup>3</sup> WPIC 16.07 Justifiable Homicide—Actual Danger Not Necessary

A person is entitled to act on appearances in defending *[himself][herself][another]*, if that person believes in good faith and on reasonable grounds that *[he][she][another]* is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for a homicide to be justifiable.

afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for the use of force to be lawful.

CP 21 (emphasis added).

Thus, under Instruction 14, Sebade could lawfully use force if he faced apparent injury. Under Instruction 13 however, he could lawfully use force only if he faced apparent danger of great personal injury, the homicide standard.

To further confuse matters, the jury was not instructed on the definition of “great personal injury” even though a WPIC definition of the term was available. See WPIC 2.04.01.<sup>4</sup> Instead, the court gave only a general definition of injury which included only terms that did not otherwise appear elsewhere in the instructions.

#### INSTRUCTION NO. 3

Bodily injury, physical injury or bodily harm means physical pain or injury, illness or an impairment of physical condition.

CP 11.

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<sup>4</sup> WPIC 2.04.01 Great Personal Injury—Justifiable Homicide—Justifiable Deadly Force in Self-Defense—Definition

“Great personal injury” means an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the slayer or another person.

As noted above, the “great personal injury” standard comes from RCW 9A.16.050(1), the justifiable homicide statute, and is reserved for homicide cases. Because the jury instruction discussion did not occur on the record, the likely source of the inaccurate “great personal injury” standard in Sebade’s non-homicide assault case is *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997). Initially, the *Walden* opinion does indeed appear to support the use of the homicide standard in a non-homicide case. Ultimately, however, it does not.

Walden was convicted of two counts of second degree assault for using a knife against three unarmed teens. *Walden*, 131 Wn. 2d at 471. At trial, Walden claimed self-defense and the court instructed jurors using the homicide standard – perceived death or great personal injury.<sup>5</sup> *Id.* at 472. Notably, although Walden was merely charged with assault, he did not object to the use of this more rigorous homicide standard. Rather, the sole issue at trial and on appeal was whether the self-defense instructions impermissibly created an objective standard, preventing jurors from considering Walden’s subjective belief about the harm he faced. *Id.* at 471.

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<sup>5</sup> The instruction at Walden’s trial actually used the terms “great bodily harm” and “great bodily injury” as opposed to the term used in the justifiable homicide statute – “great personal injury.” *Walden*, 131 Wn.2d at 472. The Supreme Court noted that difference and warned that courts should not use the terms “great bodily harm” or “great bodily injury” in self-defense cases. *Walden*, 131 Wn.2d at 475 n.3.

Before examining the portion of the self-defense instruction challenged on appeal, the *Walden* court noted that the first paragraph of the instruction (which was not at issue) “adequately conveys the relevant law on the amount of force allowed in self-defense.” *Walden*, 131 Wn2d at 475. That paragraph reads:

One has the right to use force only to the extent of what appears to be the apparent imminent danger at the time. However, when there is no reasonable ground for the person attacked or apparently under attack to believe that his person is in imminent danger of death or great [personal injury], and it appears to him that only an ordinary battery is all that is intended, he had no right to repel a threatened assault by the use of a deadly weapon in a deadly manner.

*Walden*, 131 Wn.2d at 475.

Because *Walden* did not challenge this portion of the instruction, it was the law of the case in his appeal. *State v. Hickman*, 135 Wn.2d 97, 101 n.2, 954 P.2d 900 (1998) (instructional language not objected to becomes the law of the case at trial on appeal). The *Walden* court was never asked to decide whether the “great personal injury” standard was excessive in an assault case. Given the law of the case doctrine, the homicide standard was the applicable standard in *Walden*. The *Walden* court’s observation that the unchallenged paragraph “adequately conveys the relevant law” is unassailable only because of the procedural posture of that particular case.

But *Walden* does not and could not stand for a general proposition that the homicide standard is properly used in non-homicide cases. The opinion cites to RCW 9A.16.050(1), the justifiable homicide statute, for authority. *Walden*, 131 Wn.2d at 474. And the instructional language above - discussing the requisite perceived fear – comes from *State v. Churchill*, Wash. 210, 218, 100 P. 309 (1909), a homicide case. Moreover, Supreme Court cases since *Walden* discussing the “death or great personal injury” standard have also been homicide cases. See *Read*, 147 Wn.2d at 243 (“A person is justified in using deadly force in self-defense only if the person reasonably believes he or she is in imminent danger of death or great personal injury”) (*citing* RCW 9A.16.050(1) and *Walden*); *Walker*, 136 Wn.2d at 772-779 (*also citing* RCW 9A.16.050(1) and *Walden*).

Use of the homicide standard in Sebade’s non-homicide case may also be predicated on a faulty assumption: if a defendant raised self-defense and employs what amounts to deadly force, his claims must be evaluated under the self-defense statute for homicides (RCW 9A.16.050).

This assumption is incorrect. The term “deadly force” is defined as “the intentional application of force through the use of firearms or any other means reasonably likely to cause death or serious physical injury.” RCW 9A.16.010(2). The term is not found anywhere in RCW 9A.16.020

(non-homicide lawful force statute) or 9A.16.050 (homicide lawful force statute). Rather, it is found in RCW 9A.16.040, which addresses lawful force by police officers. See RCW 9A.16.040(1) (for public officers, peace officers, or people aiding them “deadly force is justifiable in the following cases ...”).

Notably, RCW 9A.16.040 also provides, “The section shall not be construed as . . . [a]ffecting the permissible use of force by a person acting under the authority of RCW 9A.16.020 or 9A.16.050.” RCW 9A.16.040(4)(a). And the statutory notes to this provision explain:

The legislature recognizes that RCW 9A.16.040 established a dual standard with respect to the use of deadly force by peace officers and private citizens, and further recognizes that private citizens’ permissible use of deadly force under the authority of RCW 9.01.200, 9A.16.020, or 9A.16.050 is not restricted and remains broader than the limitation imposed on peace officers.

[1986 c 209 § 3.]

This discussion is significant because it demonstrates the Legislature’s understanding that citizens may use deadly force under RCW 9A.16.020 (the non-homicide lawful force statute) and RCW 9A.16.050 (the justifiable homicide statute). Only when such force results in an actual homicide do the standards found in RCW 9A.16.050 apply. In all other cases, including Sebade’s case, the non-homicide standard obviously applies.

Therefore, in Sebade's case, instead of using the homicide standard (fear of great personal injury), under RCW 9A.16.020(3) and Instruction 13, jurors should have simply been asked to decide whether Sebade reasonably feared bodily injury and whether the amount of force he used was "necessary," a term defined in Instruction 15. CP 23 (no reasonably effective alternative to force and amount of force was reasonable.) Instruction 13's use of "great personal injury" was improper at Sebade's non-homicide trial.

Where jury instructions are inconsistent, any error is presumed prejudicial and a new trial is mandatory unless the state can show the error was harmless beyond a reasonable doubt. *Walden*, 131 Wn.2d at 478. "An instructional error is harmless only if it 'is an error which is trivial, or formal, or merely academic; and was not prejudicial to the substantial rights of the party assigning it, and it in no way affected the final outcome of the case.'" *Id.* (quoting *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

Whereas Instruction 14 properly told Sebade's jury that he could lawfully use defensive force if he feared injury to himself, Instruction 13 raised the bar significantly by requiring fear of great personal injury. This is no small distinction. "Bodily injury" merely means "physical pain or

injury, illness, or an impairment of physical condition.” Instruction 3, CP 11. In contract, “great personal injury,” although not defined for the jury, means an injury that “would produce severe pain and suffering.” WPIC 2.04.01.

The prejudice resulting from use of the homicide standard is significant. The court has recognized that the distinction between “great personal injury” and lesser standard is most critical in cases where the alleged victim is unarmed. *See Freeburg*, 105 Wn. App. at 505-07 (*citing State v. Corn*, 95 Wn. App. 41, 975 P.2d 520 (1999)). Here there was no evidence that Hall was armed with a weapon. Instruction 13 and 14 misstated the subjective component of the self-defense analysis, making it far easier to disprove the defense.

Under the proper legal standard of fear of injury, jurors could well have found that the state failed to disprove self-defense beyond a reasonable doubt. The evidence showed that Darren Hall was angry and aggressive. He was seeking to hurt Sebade and most certainly posed a threat of bodily injury to Sebade. But whether Hall posed a threat of great personal injury to Sebade was less apparent. Also, because the term “great personal injury” was never defined for the jury, they had no guide by which to test that standard.

An instruction that misstates the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial. *LeFaber*, 128 Wn.2d at 900. Therefore, challenges to self-defense instructions can be raised for the first time on appeal. *State v. Cowen*, 87 Wn. App.45, 50, 939 P.2d 1249 (1997). Here, however, defense counsel agreed that jury instruction 13 should employ the erroneous “great personal injury” standard. RP 10/7/10 at 24. This raises the specter of invited error. To the extent invited error applies, however, it is trumped by ineffective assistance of counsel. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (“Review is not precluded where invited error is the result of ineffectiveness of counsel.”)

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend VI; Wash. Const. Art 1, § 22. A defendant is denied this right when his attorney’s conduct “(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney’s conduct.” *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Both requirements are met here.

Reasonable attorney conduct includes a duty to investigate the facts and the relevant law. *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d

1302, *review denied*, 900 Wn.2d 1006 (1978); *Strickland*, 466 U.S. at 690-91. Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel. *Aho*, 137 Wn.2d at 745-46 (counsel ineffective for offering instruction that allowed client to be convicted under a statute that did not apply to his conduct). WPIC 16.07 (Instruction 13) is clearly erroneous because it uses the “great bodily harm” standard. Here, counsel’s failure to investigate the law and recognize this problem falls well below what can be considered reasonable and competent.

As a result, Sebade was prejudiced because there is a reasonable probability that but for counsel’s errors, the result of the trial would have been different. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987), *quoting Strickland*, 466 U.S. at 693-94. For the reasons already discussed, use of the homicide standard in a non-homicide case virtually ensured Sebade’s conviction for second degree assault.

#### **E. CONCLUSION**

The justifiable homicide standard for the lawful use of force is reserved for homicide cases. Use of that standard in a non-homicide case significantly eased the state’s burden to disprove lawful force and denied

Sebade a fair trial. Sebade should receive a new trial – one in which his jury is properly instructed on lawful use of force.

Respectfully submitted this 29<sup>th</sup> day of April, 2011.

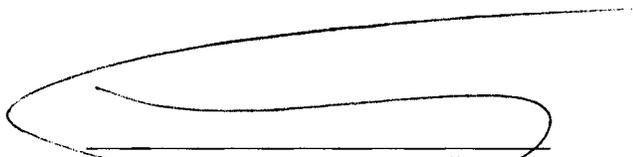


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**CERTIFICATE OF MAILING**

I certify that on April 29, 2010, I deposited in the mails of the United State in Winthrop, Washington, first class postage pre-paid, a copy of this document address to (1) Daniel Herbert Bigelow, Wahkiakum County Prosecuting Attorney, P.O. Box 608, Cathlamet, WA 98612-0608; (2) Jack Sebade/DOC # 344875, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520; and (3) the original plus one copy to the Court of Appeals , Division Two.



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LISA E. TABBUT, WSBA #21344

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