

NO. 42857-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Plaintiff/Respondent,
v.
JOSHUA MATTHEW WINGATE,
Defendant/Appellant.

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DIVISION II
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STATE OF WASHINGTON
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REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

Mr. Wingate's Opening Brief explained that he was convicted of second-degree assault. It continued that under the "legal" test, unlawful display of a weapon is a lesser-included offense of second-degree assault.¹ It explained that in a collateral attack case, like this one, the appellate court can consider matters outside the record concerning whether defense trial counsel made a tactical decision about foregoing such a lesser-included offense instruction or not.² It continued that the large difference in sentencing exposure between assault and unlawful display; combined with trial counsel's reference to the elements of the lesser offense in opening without following up on requesting an instruction on the lesser thereafter; along with trial counsel's contemporaneous personal problems, discipline, and disbarment due to neglect of his responsibilities; plus the undisputed declarations of both Mr. Wingate and his trial lawyer that the trial lawyer never researched, considered, or discussed whether to request such an instruction with the client; all showed that the failure to request the lesser-included offense instruction was based on neglect, not tactics.

¹ *In re the Personal Restraint of Crace*, 157 Wn. App. 81, 236 P.3d 914 (2010), *review granted*, 171 Wn.2d 1035, 257 P.3d 664 (2011).

² *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011).

Opening Brief, pp. 24-31.

Notably, the state's Response does not dispute these arguments.

Its only argument about the merits of this ineffective assistance of counsel claim is that there was no factual basis for obtaining a lesser-included offense instruction. Specifically, the Response argues that the trial court ruled "that even if the instruction had been requested, it would not have been given." Response, p. 22. The trial court's legal conclusion on that point, however, does not bind this Court. Whether or not there was a factual basis for giving this instruction is reviewed by this Court *de novo*. We review the factual basis for giving this instruction – including the contradictory evidence, some of which supported the instruction and some of which did not. Since there was evidence that would support the giving of this instruction, the instruction should have been given if requested – the existence of contradictory evidence on the record is irrelevant. Section II.

The rest of the state's arguments are purely procedural. The state claims that the CrR 7.8 motion raising this claim was untimely; we review the dates showing its timeliness in Section III.

The state asserts that the CrR 7.8 motion raising this claim should have been transferred to this Court rather than decided by the Superior Court. This is really just a different way of saying that the claim was

untimely; if it was timely and potentially meritorious, then the Superior Court certainly had jurisdiction to hear it. Section IV.

The state continues that Mr. Wingate was barred from raising this claim in a collateral attack, because he had raised a different ineffective assistance of counsel claim on direct appeal. But the Washington Supreme Court has held to the contrary. The rule is that a defendant cannot raise the same claim on both appeal and in a collateral attack, but an ineffective assistance of counsel claim based on one set of facts and one legal theory is not barred by a prior instructional issue claim based on a different set of facts, a different legal theory, and a different jury instruction. That is especially true where, as here, the Washington Supreme Court has ruled that this specific claim – concerning the failure to request a lesser-included offense instruction – cannot be raised on appeal, but must be raised in a collateral attack where extra-record evidence is available. Section V.

Finally, the state claims that despite the fact that this is a collateral attack, this Court “should limit its consideration to information that was presented to the trial court at the time it made the decision under review which did not include trial transcripts.” Response, p. 13. But in *State v. Grier*, 171 Wn.2d at 29-30, the Washington Supreme Court specifically ruled that when a claim of ineffective assistance of counsel for failure to

request a lesser-included offense instruction is raised in a collateral attack (there, a PRP), the Court must consider even extra-record evidence. It necessarily follows that the Court must also consider the transcript, *which is not extra-record at all but is the record itself*. See RAP 9.1. Section VI.

II. THE STATE ERRS IN CLAIMING THAT THERE WAS NO FACTUAL BASIS FOR AN INSTRUCTION ON UNLAWFUL DISPLAY OF A WEAPON. THE TESTIMONY OF FOUR WITNESSES SUPPORTED THE INSTRUCTION, AND THE EXISTENCE OF CONTRADICTORY TESTIMONY IS IRRELEVANT.

The state's only argument about the merits of this ineffective assistance of counsel claim is that there was no factual basis for giving a lesser-included offense instruction. The Response correctly states on this point that the trial court ruled "that even if the instruction had been requested, it would not have been given." Response, p. 22.

The trial court's legal conclusion, however, does not bind this Court. Whether or not there was a factual basis for giving this instruction is reviewed by this Court *de novo*. This is clear from the fact that the test for determining whether trial counsel was ineffective in failing to request an instruction on a lesser-included offense is the test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d

674 (1984).³ Claims of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 687, are considered mixed questions of fact and law and hence they are reviewed *de novo*. *In re Personal Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). *See also State v. Tamalini*, 134 Wn.2d 725, 729, 953 P.2d 450 (1998) (review of trial court's refusal to give lesser-included instruction is *de novo*).

That means that the trial court's decision about whether the record was sufficient to support the giving of a lesser-included offense instruction is reviewed *de novo*. There is no deference to the trial judge's statement that he thinks that the record did not support the giving of such an instruction.

On *de novo* review, it is clear that the testimony of no less than four witnesses supported the giving of a lesser-included offense instruction. As discussed in the Opening Brief, all that the evidence had to do to support the giving of such an instruction was to create an "inference" that Wingate's mental state was the less culpable, "intent to intimidate" or cause "alarm" one, rather than the more culpable "specific intent" to "create reasonable fear and apprehension of bodily injury" one. Opening Brief, pp. 14-16.

³ *See State v. Breitung*, 173 Wn.2d 393, 267 P.3d 1012 (2011) (*Strickland* test applies to this claim); *State v. Grier*, 171 Wn.2d 17 (same).

The evidence showed that this was true – not as to the assault on Mr. Park, who was shot – but as to the alleged assaults on Mr. Scott and Mr. Feist, the victims of Counts 3 and 4, who were not shot. As the Opening Brief explained, a neighbor, Mr. Edvald, testified that when Wingate had the gun, and was backing up, Wingate looked “*very scared.*” VRP:216 (emphasis added). Other witnesses confirmed that Wingate had good reason to have a mental state of fear, rather than of intending to intimidate or cause fear of injury. John Kim testified that before the shooting, aggressor Park’s friend Joe Feist had what looked like a .45 caliber gun and that Feist was trying to hand that gun to Park. Kim further testified that Park was trying to take the gun, but did not have a chance to do so. VRP:404-06. *See* Opening Brief, pp. 16-21.

Mr. Wingate himself testified that he drew his gun out of a desire to protect Elizabeth Kim from Park. He continued that he drew his gun for the purpose of preventing Park’s friends from using their weapons, rather than for the purpose of causing them bodily injury or threatening to do so. He explained that even after he got his gun he lowered it, so as not to shoot, until Park approached him, and that he did ultimately shoot at Park. VRP:516-18. But, again, we are not challenging Mr. Wingate’s conviction of shooting Mr. Park. The CrR 7.8 motion challenged his conviction of second-degree assaults on Feist and Scott. And the evidence

is undisputed that Wingate never shot and never directly threatened Feist and Scott. This is summarized in the Opening Brief, at pp. 19-20.

In fact, as the Opening Brief explained, Wingate testified that he saw Feist, who was near the trunk, make a movement like Feist was pulling out a gun. At that point, and only at that point, did Wingate say, “You better drop that gun *or I’m going to shoot.*” (Emphasis added.) The Opening Brief explained that this was a conditional statement, which means it was not a direct threat but instead an equivocal assertion.⁴ Feist responded by putting the gun in the trunk. VRP:519-20. Wingate’s conditional statement to Feist, in the context of this imperfect self-defense case, could certainly fit within the definition of unlawful display, rather than assault. And Wingate never even made a conditional threat to Scott.

Taken together, this evidence supports the inference that only unlawful display occurred. This is confirmed by Mr. Wingate’s additional testimony, “I know how to use a gun properly and handle it properly. *I was trying not to be a threat to them.* They were being more of a threat.” VRP:535 (emphasis added).

Finally, state’s witness Ms. Kim – Park’s former girlfriend whom

⁴ *State v. Stenson*, 132 Wn.2d 668, 740-41, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998) (conditional request to proceed *pro se* is an indication of equivocation).

Park pushed while he was trying to get at Koo – testified that Wingate *never* pointed a gun at Feist, Poydras or Scott, and that Wingate kept saying things like “Just let it go,” “He doesn’t want to fight,” “Just go home, just leave,” VRP:156-69, there is certainly such an “inference” in the record.

The fact that there was contradictory evidence – including evidence relied upon by the trial judge in denying the CrR 7.8 motion – is irrelevant. The only prerequisite to obtaining a lesser-included offense instruction is that some evidence raise an “inference” that only the lesser-included offense occurred.⁵ Mr. Wingate’s testimony, combined with the testimony of Mr. Edvald, Mr. Kim, and Ms. Elizabeth Kim, meets that “inference” standard with regard to the alleged assaults on Feist and Scott.

III. THE STATE ERRS IN CLAIMING THAT THE CrR 7.8 MOTION WAS UNTIMELY; IT WAS FILED WITHIN ONE YEAR OF THE FINALITY OF THE CONVICTION FOLLOWING RESENTENCING AND APPEAL.

As discussed above, the rest of the state’s arguments are procedural, not substantive.

First, the state claims that the CrR 7.8 motion raising this claim was untimely. Response, p. 8.

⁵ *State v. Speece*, 115 Wn.2d 360, 362, 798 P.2d 294 (1990); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 392 (1978).

The trial court rejected this claim. It denied relief because the Washington Supreme Court issued its final decision on the last direct appeal in Mr. Wingate's case on July 7, 2010. The mandate issued on July 20, 2010. CP:219-227. Mr. Wingate had one year from that date, which represents the conclusion of the last direct appeal following remand for a sentencing hearing, to file either a PRP or a CrR 7.8. *In re Skylstad*, 160 Wn.2d 944, 950-54, 162 P.3d 413 (2007). He filed his CrR 7.8 motion on June 10, 2011, within that one year. His CrR 7.8 motion was therefore timely.

The state instead argues that the last direct appeal was not really a direct appeal, so the Wingate conviction became final far earlier.

This is incorrect under *In re Skylstad*, 160 Wn.2d 944, 950-54. In that case, the state Supreme Court held that the one-year time limit for filing a CrR 7.8 motion (per RCW 10.73.090) does not start to run until all *appeals*, including appeals following remands for resentencing, are over.

The timeline for Mr. Wingate's case shows that his direct appeals following all remands for resentencing were not over until May 8, 2010. This is based on the following dates:

1. The Judgment was entered on January 25, 2002. CP:95-111.
2. At Mr. Wingate's first sentencing hearing, the court imposed exceptional sentences below the standard range on Count 1 and the

standard sentence range in the other two counts: 60 months on Count 1; 20 months on Count 3; and 20 months on Count 4. It also imposed additional terms for the firearm sentencing enhancements: 60 months on Count 1, 36 months on Count 3, and 36 months on Count 4, concurrent to each other.

3. Mr. Wingate's total confinement for all three counts, including the sentencing enhancements, was thus 120 months. CP:95-111.

4. But then the state filed a motion to reconsider the exceptional sentence downward on February 14, 2002, along with a notice of appeal on February 22, 2002, in Case No. 28476-6-II. The state's Response appears to acknowledge that this was a direct *appeal*. Response, p. 4.

5. On May 10, 2002, the trial court granted the state's motion to reconsider the exceptional sentence downward in part, to run the firearm enhancements consecutively rather than concurrently.

6. On May 16, 2002, the state sought, and was granted, a remand from this Court to permit the Superior Court to modify the exceptional sentence in accordance with the Superior Court's decision to grant the motion to reconsider.

7. On June 28, 2002, a second sentencing hearing was held. At that hearing, the Superior Court imposed the same number of months for each crime and enhancement, but ordered that the enhancements run

consecutively rather than concurrently. CP:136-151.

8. The state continued its appeal of the exceptional sentence and Wingate filed a cross-appeal on July 29, 2002, in Case No. 29156-8-II. The state appears to acknowledge, in its Response, that this was still a direct *appeal*. Response, p. 4. On September 21, 2004, this Court held that the facts in Wingate's case did not warrant a first-aggressor instruction and reversed the conviction without addressing the remaining issues. *State v. Wingate*, 123 Wn. App. 4144, 98 P.3d 111 (2004). The Response seems to acknowledge that this was still part of the direct *appeal*. Response, p. 4.

9. The Washington Supreme Court reversed on November 10, 2005, holding that the Superior Court properly gave a first-aggressor instruction, and remanded to the Court of Appeals. *State v. Wingate*, 155 Wn.2d 817, 122 P.3d 908 (2005). The Response seems to acknowledge that this was still part of the direct *appeal*. Response, p. 4.

10. Upon remand, this Court affirmed and remanded to the trial court for reconsideration of its reasons for the exceptional sentence and for possible re-sentencing. This was on June 20, 2006. *State v. Wingate*, 2006 Wash. App. LEXIS 1294 (unpublished). The Response seems to acknowledge that this was still part of the direct *appeal*. Response, p. 4.

11. Mr. Wingate filed a timely Petition for Review on July 16,

2006, in the Washington Supreme Court in Case No. 79005-1. It was denied on May 1, 2007. *State v. Wingate*, 160 Wn.2d 1003, 158 P.3d 615, 2007 Wash. LEXIS 353 (2007). Since this was a petition for review from what both parties acknowledge was still the direct appeal, it was also part of the direct *appeal*.

12. The mandate issued on May 8, 2007. CP:164-177. That meant that the next step in Wingate's case was a hearing in the Superior Court at which resentencing might occur. As this Court is aware, such resentencing following appeal is considered a sentencing hearing from which a *direct appeal* lies – and the case does not become final for collateral attack purposes until the appeals following such a resentencing are over. This is because *In re Skylstad*, 160 Wn.2d 944, ruled that a judgment does not become final until the resentencing, following a direct appeal which remanded for resentencing, is also final. *Id.*, 160 Wn.2d 944, 950. *See also Burton v. Stewart*, 549 U.S. 147, 127 S.Ct. 793, 798-99, 166 L.Ed.2d 628 (2007) (statute of limitations for filing *habeas corpus* petition in federal court does not begin to run until both conviction and sentence become final, even if there is a resentencing).

13. Prior to the Superior Court's hearing to clarify the exceptional sentence, Mr. Wingate filed a motion to modify his three firearm enhancements, arguing that *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d

188 (2005), applied and that the sentencing enhancements should be deadly weapon enhancements, not firearm enhancements.

14. On August 24, 2007, the Superior Court rejected that argument and issued an order stating that “one or both of [its] findings would support the sentence [it] imposed on January 25, 2002.”

15. Mr. Wingate filed a timely Notice of *Appeal* of that Order on October 12, 2007, to the Court of Appeals, Division II, in Case No. 36755-6-II. On February 12, 2009, this Court affirmed. *State v. Wingate*, 2009 Wash. App. LEXIS 352 (2009). That *appeal* was characterized as a *direct appeal*. Neither the parties nor this Court characterized it as a collateral attack. For all purposes – the form of briefing, the designation of the record, the assignments of error – the case was treated as a *direct appeal*, meaning a continuation of the criminal case, rather than a separate civil post-conviction motion. It is only now, for the first time, that the state is claiming that it was something other than a direct appeal. Response, p. 11 (“Defendant no longer had any direct appeal rights stemming from his convictions or sentence.”).

16. Mr. Wingate filed a timely Petition for Review on March 13, 2009, to the Washington Supreme Court in Case No. 79005-1. It was not re-characterized as a motion for discretionary review, which is what it would have had to have been recharacterized as if it were really a request

for a review of a post-conviction, collateral, filing. The parties and the state Supreme Court treated it as a regular petition for review, that is, as a continuation of the direct appeal in the criminal case. It is only now, for the first time, that the state is claiming in hindsight that it was something other than a petition for review of a direct appeal. Response, p. 12 (“This motion, therefore, constituted a collateral attack on the judgment under RCW 10.73.090(2).”). That petition for review was denied on July 7, 2010. *State v. Wingate*, 2010 Wash. LEXIS 568 (2010):

Petition for review of a decision of the Court of Appeals, No. 36755-6-II, February 12, 2009, 148 Wn. App. 1038. *Denied* July 7, 2010.

17. The *mandate* issued on July 20, 2010. CP:219-227. Mandates issue only after direct appeals. They do *not* issue after collateral attacks. Instead, a Certificate of Finality issues after a collateral attack. RAP 12.5(a); RAP 16.15(e); *In re Lord*, 123 Wn.2d 737, 870 P.2d 964 (1994).

The state’s Response basically asks this Court to recharacterize that final appeal – which the parties and the courts had previously treated as a direct appeal – as something else, in order to gain a tactical advantage in this current case. The state never called that direct appeal a collateral attack or a motion for discretionary review before. That tends to undermine its hindsight assertion that it was a collateral attack now.

And if it was not a collateral attack, then it was a direct appeal that

was timely under *Skylstad*.

If it was a collateral attack, but the parties didn't know that and the court didn't know that at the time, that poses a different problem. It shows that the parties were misled by their perception, and the court's perception, that it was a direct appeal. That presents a proper basis for equitable tolling.⁶

IV. THE STATE ERRS IN CLAIMING THAT THE CrR 7.8 MOTION SHOULD HAVE BEEN TRANSFERRED TO THIS COURT; THAT IS JUST ANOTHER WAY OF CLAIMING THAT THE MOTION WAS UNTIMELY.

The state next asserts that Mr. Wingate's CrR 7.8 motion should have been transferred to this Court rather than decided by the Superior Court. It argues that, under CrR 7.8(c)(2), the trial court "shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the [trial] court determines that the motion is not barred by RCW 10.73.090 [the one-year time limit] and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual

⁶ *State v. Littlefair*, 112 Wn. App. 749, 759, 51 P.3d 116 (2002), *review denied*, 149 Wn.2d 1020 (2003) (RCW 10.73.090 is statute of limitation, hence subject to equitable tolling); *In re Personal Restraint of Hoisington*, 99 Wn. App. 423, 993 P.2d 296 (2000) ("RCW 10.73.090 'functions as a statute of limitation, not as a jurisdictional bar'" hence is subject to equitable tolling).

hearing.” Response, p. 8.

This is really just a different way of saying that the claim is untimely; if it is timely and potentially meritorious, then the Superior Court certainly has jurisdiction to hear it. The discussion in Section III, immediately above, shows that the CrR 7.8 motion was timely. The discussion in the Opening Brief and in Section II, above, shows that it was at least potentially meritorious. The Superior Court thus made the correct decision in retaining and deciding it.

If the Superior Court erred, then the remedy would have been to transfer it to this Court. Since the case is in this Court now, this Court can adjudicate the underlying issue on the merits, now.

V. THE STATE ERRS IN CLAIMING THAT AN INEFFECTIVENESS CLAIM BASED ON ONE SET OF FACTS AND ONE LEGAL THEORY ON DIRECT APPEAL BARS AN INEFFECTIVENESS CLAIM BASED ON A DIFFERENT SET OF FACTS AND DIFFERENT THEORY ON COLLATERAL ATTACK. FURTHER, *GRIER* REQUIRES A CLAIM LIKE THIS TO BE RAISED ON COLLATERAL ATTACK.

The state further argues that Mr. Wingate is barred from raising this ineffective assistance claim in a collateral attack, because he raised a different ineffective assistance of counsel claim on direct appeal.

The Washington Supreme Court, however, has established a different rule. The rule is that a defendant cannot raise the same *ground*

for relief on both appeal and in a collateral attack. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 671 n.14, 101 P.3d 1 (2004) (citing *In re Taylor*, 105 Wn.2d 683, 687, 717 P.2d 755 (1986) for definition of ground for relief).

A ground for relief is a distinct legal claim. *Taylor*, 105 Wn.2d at 688. “Should doubts arise in a particular case as to whether two grounds are different or the same, they should be resolved in favor of the applicant.” *Id.*

Mr. Wingate’s current ground for relief is a claim of ineffective assistance of counsel, focusing on trial counsel’s lack of legitimate strategic reasons or background research to justify his *failure to request* a lesser-included offense instruction. Mr. Wingate’s ground for relief was a claim concerning improper *giving* of a “first aggressor” instruction. Thus, the facts of the current claim are different – they involve defense trial counsel’s discipline, disbarment, lack of research, lack of discussion with the client, and lack of preparation, rather than entitlement to a first-aggressor instruction. The legal theory is different – ineffective assistance due to failure to conduct research and adequately prepare. Under the controlling authority of *Taylor*, they are different grounds for relief. That means that Mr. Wingate did *not* raise this current claim previously, on appeal.

In fact, he could not have raised it on direct appeal. At the time of the direct appeal, he could not add the Declaration of Matt Wingate to the record; he could not add the Affidavit of Rodney DeGeorge to the record; and he did not have the final disbarment file from the WSBA to corroborate these claims. Thus, this is not a claim that was, or could have been, raised on the direct appeal and joined with the “first aggressor” instruction claim that was limited to the record.

That conclusion is especially compelling here. In *State v. Grier*, the Washington Supreme Court ruled that a claim of this sort – that defense trial counsel’s failure to request a lesser-included offense instruction constituted ineffective assistance of counsel – *must* be raised in a collateral attack rather than on direct appeal. *Grier*, 171 Wn.2d at 29-30. In light of this controlling precedent, the state’s assertion that this claim cannot be raised in the very forum in which this Court said it must be raised – *i.e.*, the post-conviction forum – must certainly be rejected.

Even if for some reason this Court thinks that that claim could have been raised in the direct appeal forum, it is also true that the interests of justice require relitigation of such a previously raised claim if there has been an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 303; *see also In re*

Gentry, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999), amended 6/30/99.

The intervening changes here are: the availability of the final WSBA disbarment file; the availability of Mr. DeGeorge's Affidavit; and the availability of Mr. Wingate's Declaration. They were not, and could not have been, available to the court on direct appeal.

VI. THE STATE ERRS IN CLAIMING THAT THE TRANSCRIPT OF THE TRIAL IS IRRELEVANT.

The state's only other argument is that despite the fact that this is a collateral attack, this Court "should limit its consideration to information that was presented to the trial court at the time it made the decision under review which did not include trial transcripts." Response, p. 13.

This is silly. In *State v. Grier*, 171 Wn.2d at 29-30, the Washington Supreme Court specifically ruled that when a claim of ineffective assistance of counsel for failure to request a lesser-included offense instruction is raised in a collateral attack (there, a PRP), the Court must consider even extra-record evidence.⁷

⁷ As that Court stated, *Grier*, 171 Wn.2d at 29-30:

When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). While off-the-record conversations between Grier and her attorney may be germane to her ineffective assistance claim, Grier must file a personal restraint petition if she intends to rely on evidence outside

A fortiori, it must consider the trial transcript, which is not extra-record, *but is the record itself*. RAP 9.1 (“The “record on review” may consist of (1) a “report of proceedings”, (2) “clerk’s papers”, (3) exhibits, and (4) a certified record of administrative adjudicative proceedings.”).

The Response brief makes it sound as if the trial court was at a disadvantage because it could not remember enough of the trial. But the transcripts are actually a part of the Superior Court record. RAP 9.1(a). In fact, they were filed with the Superior Court on May 6, 2002 (4 volumes); August 12, 2003 (1 volume), and January 30, 2008 (1 volume). They were not just available to the Superior Court, they were as much a part of its record as was the CrR 7.8 motion itself.

VII. CONCLUSION

This Court should reverse the denial of the motion to vacate. Mr. Wingate was sentenced to 60 months on Count 1, 20 months on Count 3, and 20 months on Count 4, concurrent, plus sentence enhancements of 60

of the trial record. *Id.*; *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (“In short, inquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions, just as it may be critical to a proper assessment of counsel’s other litigation decisions.”). Grier’s claim that defense counsel had not consulted with her as to lesser-included offenses finds no support in the record before us, and indeed, the record supports the contrary conclusion.

months on Count 1, 36 months on Count 3, and 36 months on Count 4, consecutive, for a total of 192 months. CP:136-51. This Court should remand with instructions to vacate the convictions and enhancements on Counts 3 and 4, reducing the sentence by six years.

DATED THIS 5th day of July, 2012.

Respectfully submitted,



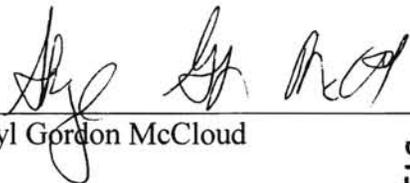
Sheryl Gordon McCloud, WSBA #16709
Attorney for Joshua Matthew Wingate

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of July, 2012,
a copy of the REPLY BRIEF was served upon the following individuals by
depositing same in the U.S. Mail, first-class, postage prepaid:

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