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(Pierce County Superior Court No. 14-1-00779-7)

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

IN RE RESTRAINT OF VENIAMIN RUSEV,

STATE OF WASHINGTON,

Respondent,

v.

VENIAMIN RUSEV,

Petitioner.

PERSONAL RESTRAINT PETITION
AND PETITIONER'S OPENING BRIEF

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I. STATUS OF PETITIONER

Petitioner, VENIAMIN RUSEV, seeks relief from unlawful confinement.

1. Petitioner Rusev is now in the custody of the Washington Department of Corrections following his conviction in Pierce County Superior Court No. 14-1-00779-7. Appendix A, B.

2. Petitioner Rusev was convicted after a jury trial in the aforementioned cause of two counts of robbery in the first degree and one count of assault in the first degree, each with associated firearm enhancements. Appendix E.

2. Petitioner Rusev was sentenced by Judge John R. Hickman on June 26, 2015, to serve 335 months confinement in the custody of Washington Department of Corrections. Appendix A.

3. Petitioner Rusev was represented at trial by Bryan Hershman, 1105 Tacoma Avenue South, Tacoma, WA 98402.

4. Petitioner Rusev appealed from the decision of the trial court. That matter was heard in this Court in State v. Rusev, CoA 47762-9-II. Petitioner Rusev's lawyer in the Court of Appeals was Lise Ellner, P.O. Box 2711, Vashon, WA 98070. The Court of Appeals affirmed Mr.

Rusev's conviction, but remanded for resentencing in order for the trial court to strike any reference to mandatory minimum sentence.

5. Petitioner Rusev sought discretionary review in the Washington Supreme Court No. 94462-8 of the portion of the Court of Appeals opinion. Petitioner Rusev was represented in his request for discretionary review by the undersigned, David L. Donnan, 600 First Avenue, Suite 512, Seattle, WA 98104. The Washington Supreme Court denied discretionary review on September 6, 2017.

6. The Court of Appeals issued the mandate on September 13, 2017. Appendix G.

7. On remand following direct appeal, Mr. Rusev was resentenced at which time Judge Hickman removed reference to any mandatory minimum sentence. Appendix B, F.

8. Since his conviction Petitioner Rusev has not asked a court for any other relief from his judgment and sentence other than that already outlined above.

II. GROUNDS FOR RELIEF

A. Issues.

1. Defendants are entitled to have the jury fully instructed on the relevant law in a criminal case. The lack of instructions regarding self-

defense, defense of others and the justifiable use of force precluded the necessary analysis and jury findings on essential elements of assault. Because there was no reasonable tactical basis not to fully instruct the jury and the absence of those instructions prejudiced Mr. Rusev's ability to receive a full and fair determination of the issues surrounding, his conviction should be reversed.

2. The robbery and assault of Ihor Onishchuk occurred in the same place, at the same time, involved the same victim and shared the same criminal objective. As a result, these offenses should have been treated as the same criminal conduct. Where there was no tactical or strategic reason not to request the sentencing, court find the same criminal conduct, defense counsel failed to provide constitutionally sufficient representation and Mr. Rusev was substantially prejudiced by this failure.

3. Prosecutors have special duties which limit their advocacy. Where improper argument which is inflammatory, unduly emotional and relies upon matters outside the evidence, there is a significant chance it compromised the jury's ability to thoughtfully consider the evidence and render its verdict. Under such circumstances, a new trial is required.

4. Where multiple firearm enhancements result in a sentence which is excessive, the defendant may seek an exceptional sentence. Where there is no reason not to seek an exceptional sentence and there is a reasonable probability that the sentencing judge would have considered such a request favorably, Mr. Rusev was substantially prejudiced by his attorney's failure to advocate for the mitigated sentence and a new sentencing hearing is warranted.

5. The constitutional guarantee against double jeopardy protects a defendant against multiple punishments for the same offense. Mr. Rusev contends the robbery and assault convictions as to Ihor Onishuck constitute the same offense in this case because the same evidence proved both counts. Remand for resentencing is, therefore, required.

B. Facts.

Veniamin "Ben" Rusev (DOB 1/27/83) emigrated from Russia when he was 18 years old. He worked for a while in the hotel industry but eventually developed his own business repairing cars. He lived in a Tacoma apartment, with his brother Dimitiry Rusev, which was attached to the garage where he did his work. RP 510-11.¹

¹ For clarity, petitioner Veniamin Rusev, and co-defendant Vossler Blesch, are referred to by their last names. Because the alleged victims share the last name Onishchuk, they are referred to by their first names, Ihor and Dmytro.

Rusev would occasionally work on cars for Vitali Alesik, who bought them, fixed them up, and then resold them. RP 510-11. Rusev specifically worked on a Volvo for Alesik, who allowed him to drive it for a few months while he tried to fix it, but ultimately concluded it was beyond repair. RP 512, 604-05.

The victims, Ihor Onishchuk and his younger brother Dymtro Onishchuk, also worked for Alesik on occasion. RP 507.

In a separate transaction, Ihor had sold a Mercedes-Benz to his cousin, Oleg Mikhalchuk. Oleg, who was also a friend of Alesik's asked Rusev to look at a Mercedes he bought from Ihor. RP 516. Rusev concluded the Mercedes was unsafe and irreparable, and Ihor had cheated his own cousin by selling such a dangerous car. RP 522, 567, 607-08, 667, 669, 671, 674, 688-89. Oleg returned the Mercedes and the keys, but Ihor denied there were any problems with the Mercedes and refused to return Oleg's money. RP 670-74.

On the day of the incident, February 23, 2014, Rusev had asked had arranged for Alesik to retrieve his Volvo from Rusev's shop. RP 1639-40. Rusev thought Alesik was coming to get the Volvo with someone else. RP 1384. Alesik testified he told Rusev he was coming to

The brothers' cousins, Oleg and Yaheni Mikhalchuk, are also referred to by their first names. Vitali Alesik, is referred to by his last name. No disrespect intended.

get the car, but also later said was sending others. RP 421, 523-32, 619-20, 637-39, 643-51.

That day Rusev and his friends had planned a barbeque and were going to go to a shooting range later to test fire Vossler Blesch's new .45 handgun. RP 951, 1044-45, 1051, 1322-24. After Rusev, Blesch, Dimitiry, and another friend were done barbequing; they were playing video games when they saw a BMW drive up in front of Rusev's apartment and then leave. RP 1286. Dymtro and Ihor had driven to Rusev's in the BMW, but did not know they needed to drive to the rear of the building to access the garage until after they spoke to Alesik by phone. RP 358-59.

When Ihor and Dymtro demanded the Volvo, Rusev told them he needed to check with Alesik before handing over the keys and the car. RP 1384. The situation in the garage soon became tense. RP 968-69, 977. Rusev was upset and according to Blesch walked in a circle around Ihor and Dymtro. RP 977.

Blesch knew that Rusev wanted him to accompany the group into the garage because Rusev did not trust Ihor. RP 962, 1040-41, 1065. Once in the garage, Blesch moved his jacket aside so that Ihor and Dymtro could see the handgun in his waist band. RP 962-66, 1069, 1071-73.

Blesch does not speak Russian. RP 936-39. As a result, he did not understand the conversation in Russian between Rusev and Ihor. Blesch

did observe Dymtro and Ihor begin handing over their wallets, jackets and shoes. RP 368, 975, 981-82, 1043-44. The shoes were kicked aside and the jackets and other items were placed on the Volvo. RP 388, 982, 1671-72. Rusev looked at Ihor's wallet for identification and Ihor's driver's license to find about his name and then put it on top of the Volvo as well. RP 396, 463, 803.

Rusev made a phone call, presumably to Alesik, to confirm who was picking up the Volvo. RP 978-79. Rusev also asked Blesch to rack the gun to maintain control of the situation. RP 985-86, 1036. In his continuing effort to maintain control of the situation, Rusev then told Ihor and Dymtro to take off their pants. RP 1121-22. Ihor refused. RP 813-22, 989-93.

At this point, Ihor told Dymtro they needed to attack Rusev together and use Rusev as a shield to get out of the garage. RP 397-98. Ihor grabbed Mr. Rusev first. RP 847, 851, 896, 1021. Blesch saw Dymtro grab for his waistband at the same time that Ihor and then Dymtro started fighting Rusev, ultimately grabbing him in a bear hug. RP 454-63, 484, 994, 1023-24, 1121-22, 1170. Ihor testified he was 3-4 inches taller than Rusev and Dymtro is strong because he goes to the gym every day, so they could have overpowered Rusev. RP 1023-24.

Blesch believed that Mr. Rusev was fighting for his life and when Rusev yelled “Vossler, Vossler,” or “help me,” Blesch panicked and hit both Rusev and Ihor with a single shot. RP 995, 1039-40, 1055-60, 1625. Blesch explained that before the shooting, Ihor and Dymtro were the aggressors and his intent was to defend Rusev. RP 1072. Blesch was particularly concerned because it appeared Dymtro was reaching to pull something, perhaps a gun, from his midsection. RP 1053-54. Rusev, however, never said “shoot” or did anything to indicate he wanted Blesch to shoot. RP 1060, 1118, 1158-60. Blesch’s shot paralyzed Ihor, however, and tore off part of Rusev’s ear. RP 769, 993, 1385, 1650.

Rusev was in shock after Blesch fired the gun, but he walked over to Blesch who was still pointing the gun at Ihor and Rusev moved his arm down and then called 9-1-1 to get help for Ihor. RP 995, 1057-58, 1246, 1308. Both Rusev and Blesch were cooperative with police and explained what had transpired. RP 1046, 1379-81, 1571, 1625-26.

C. Argument.

MR RUSEV PRESENTS SEVERAL CLAIMS WHICH WARRANT RELIEF IN THE FORM OF REVERAL OF HIS CONVICTION AND SENTENCE OR A REFERENCE HEARING.

1. Mr. Rusev is restrained and presents claims for which he may obtain relief.

RAP 16.4 requires the appellate court grant relief to a petitioner under a “restraint” that is “unlawful.”² Mr. Rusev remains under restraint as he is confined, in the custody of the State of Washington’s Department of Corrections, following his conviction and sentencing in Pierce County Superior Court No. 14-1-00779-7, serving a sentence of 335 months confinement.³

As a personal restraint petitioner, Mr. Rusev may obtain relief by demonstrating either a constitutional violation or a violation of the laws of

² RAP 16.4(a):

Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioner’s restraint is unlawful for one or more of the reasons defined in section (c).

³ RAP 16.4(b):

A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

the State of Washington. RAP 16.4(c) (2), (6);⁴ In re Riefschnieder, 130 Wn.App. 498, 501, 123 P.3d 496 (2005) (citing In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148, 866 P.2d 8 (1994)).

2. Mr. Rusev's conviction and sentence were obtained in violation of our state and federal constitution, making his restraint unlawful.

Mr. Rusev's restraint is unlawful because his conviction was obtained, and his sentence imposed, in violation of his state and federal

⁴ RAP 16.4(c) provides that the restraint must be unlawful for one or more of the following reasons:

- (1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or
- (2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or
- (3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or
- (4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or
- (5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or
- (6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or
- (7) Other grounds exist to challenge the legality of the restraint of petitioner.

constitutional rights to due process of law and jury trial, as well as the effective assistance of counsel and the right to be free from double jeopardy and cruel and unusual punishments. See In re Khan, 184 Wn.2d 679, 688-91, 363 P.3d 577 (2015); State v. Henderson, 182 Wn.2d 734, 344 P.3d 1207 (2015). For the reasons outlined herein, the proceedings were inconsistent with the fundamental prerequisites of justice.

a. The jury instructions failed to properly advise the jury regarding the State's burden to disprove self-defense beyond a reasonable doubt and the failure to seek proper instructions was not reasonable.

i. Instructions must properly inform the jury of the law.

Jury instructions must properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case. State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996), abrogated on other grounds in State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. LaFaber, 128 Wn.2d at 900; State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984). The instructions must specifically convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 306-07, 165 P.3d 1241 (2007), citing Victor v. Nebraska, 511 U.S. 1, 5-6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). It is reversible error to instruct the jury in a

manner relieving the State of its burden to prove every element of a crime beyond a reasonable doubt. Bennett, 161 Wn.2d at 307; Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

Where the accused is charged with first degree assault those essential elements are defined by statute and caselaw.⁵ RCW 9A.36.011 (1) (a). To convict someone of first degree assault, the jury must find that he intended to inflict great bodily harm, assaulted the victim, and inflicted great bodily harm. State v. Rodriguez, 121 Wn.App. 180, 187, 87 P.3d 1201(2004).⁶ A criminal assault requires unlawful force. State v. Acosta, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984).⁷ Where the accused acted in self-defense, the force was not unlawful and the predicate assault was not committed. Id.⁸

⁵ Mr. Rusev was charged in Count III of the Information with assault in the first degree by “acting as an accomplice ... unlawfully and feloniously, with intent to inflict great bodily harm, intentionally assault I. Onishchuk with a firearm or deadly weapon or by any other means likely to produce great bodily harm or death, contrary to RCW 9A.36.010(1)(a).”

⁶ Assault in the first degree includes a specific intent element. State v. Thomas, 123 Wn.App. 771, 98 P.3d 1258, *review denied*, 154 Wn.2d 1026 (2004). The mens rea of first-degree assault is intent to inflict great bodily harm. State v. Rivera, 85 Wn.App. 296, 932 P.2d 701, *review denied*, 133 Wn.2d 1002 (1997). Apprehension of one assaulted is not necessary element of assault in first degree. State v. Stationak, 1 Wn.App. 558, 463 P.2d 260 (1969).

⁷ Three common-law definitions of the term “assault,” which is not statutorily defined, are: (1) attempt, with unlawful force, to inflict bodily injury upon another; (2) unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not actor intends to inflict or is incapable of inflicting that harm. State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995).

⁸ Where the defendant was charged as an accomplice to first or second degree assault committed by another, the State must prove the defendant had general knowledge of the crime of “assault.” See Court’s Instruction 6.

To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *See State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (defendant bears initial burden of producing evidence killing occurred in circumstances amounting to self-defense); *State v. Acosta*, 101 Wn.2d at 619 (State bears burden of disproving self-defense in second degree assault prosecution).

Where self-defense is an issue, the jury instructions must “**more than adequately**” inform the jury of the law on self-defense in order to pass appellate scrutiny. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (emphasis added). When the “defense-of-others” defense to assault charge is properly raised, trier of fact must determine whether actor’s apprehension of danger and use of force were reasonable. *State v. Kirvin*, 37 Wn.App. 452, 682 P.2d 919 (1984). Where the jury was misinformed regarding the application of the law of self-defense, this amounts to an error of constitutional magnitude because it touches on the essential elements of the crime and the burden of proof. This is a question which must be answered on a case-by-case basis; however, the circumstances here demonstrate the failure of the jury to touch on all the essential elements of the crime. *Walden*, 131 Wn.2d at 473. This is because when the facts present a question of self-defense, the State must prove the absence of self-defense beyond a reasonable doubt, just as any

other element. Acosta, 101 Wn.2d at 615-16. The constitution requires the jury be instructed as to each element of the offense charged and this require also applies to a self-defense jury instruction. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); State v. Fowler, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990).

The failure to provide the jury with a complete definition of assault which reflected the right to self-defense and its interplay with Mr. Rusev's complicity in the acts of Vossler Blesch. This was fatal to the defendant and prejudicial because the jury was left with that all shootings are assaults as a matter of law. See Court's Instruction 22. The first of the two definitions of assault indicate simply that "An assault is an intentional shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A shooting is offensive if the shooting would offend an ordinary person who is not unduly sensitive." Id. The second definition advised the jury "[a]n assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury..." Court's Instruction 22. The first makes no allowance for self-defense and the second fails to define what would be "unlawful force." Id. Self-defense instructions were necessary to guide the jury through its analysis of the facts.

While a defendant whose aggression provokes assaultive contact may lose his right of self-defense, this is a question for the jury guided by an appropriate first-aggressor instruction. Proper self-defense instructions

are necessary to allow the jury to put themselves in the defendant's shoes and from that perspective determine the reasonableness from all the surrounding facts and circumstances as they appeared to the defendants. State v. Rodriguez 121 Wn.App. 180, 184-86, 87 P.3d 1201 (2004). The degree of force permitted in self-defense may be limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant, but that is a decision which belongs to the trier of fact. *See* State v. Bailey, 22 Wn.App. 646, 650, 591 P.2d 1212 (1979).

ii. There was substantial evidence of self-defense which directly impacted the determination of Mr. Rusev's knowledge and complicity in the "assault."

To be entitled to a jury instruction on self-defense, a defendant must produce some evidence demonstrating self-defense. Walden, 131 Wn.2d at 473. Furthermore, the defendant may rely on evidence solicited from the State's witnesses to make the case for self-defense because the parties are entitled to the benefit of all the evidence admitted at trial.

In Mr. Rusev's case, Dymtro Onishchuk testified that it was Ihor who grabbed Mr. Rusev. RP 398. Dymtro then grabbed Mr. Rusev from behind and they held him in a "bear hug" as they pushed toward the door using Rusev as a shield. RP 398, 407, 464, 474, 484-85. Dymtro acknowledged it was he and his brother who put their hands-on Mr. Rusev. RP 466.

Ihor confirmed that he remembers grabbing Mr. Rusev's shoulder and pushing him to the side toward the door. RP 1021. Ihor acknowledge he was 3-4 inches taller than Mr. Rusev and that Dymtro is very strong and goes to the gym every day. RP 1023. Ihor was confident he and Dymtro would have overpowered Mr. Rusev. RP 1024.

Vossler Blesch testified that although Mr. Rusev did indicate he wanted him present, with his gun, they never planned on shooting anyone. RP 963. Mr. Blesch further confirmed that Ihor pushed Mr. Blesch and then grabbed him. RP 994, 1039. Ihor was on top, in a kind of a bear hug. RP 994. After scuffling for a few seconds, Mr. Blesch testified that Mr. Rusev called out for help.⁹ RP 995, 1039. "Voss help me." RP 995. Blesch testified it was then that he raised the gun and fired one shot he aimed at Ihor's arm. RP 995, 1040.

Mr. Blesch testified that Mr. Rusev was bent over, trapped in this aggressive bear hug, when he pulled the trigger. RP 1050. Blesch did so with the intent to defend Mr. Rusev. RP 1052. Mr. Blesch went on to explain that he was scared because the brothers had spoken to each other in Russian, which he did not understand, at the same time it looked like one was going to make a move to pull something from his waist which may have been a gun. RP 1054. Mr. Blesch testified it was in the grips of that fear that he took the safety off and fired in a panic. RP 1055. Blesch was aiming for Ihor's arm. RP 1058. Blesch testified did not intend to hurt

⁹ Dymtro did not recall if Mr. Rusev said anything immediately before the shot was fired. RP 399.

anyone. RP 1059. Instead he affirmed his earlier statement to the police, “Aggressor Onishchuk was communicating to the other brother in Russian. The other brother looked at me like he was going to pull something out on me since he still had his hand on his belt.” RP 1160.

Nothing Mr. Rusev did indicated he wanted Mr. Blesch to pull the trigger. RP 1060. Before the shooting, Mr. Blesch saw the Onishchuks as the aggressors. RP 1072. Mr. Blesch’s statement to police specifically described the Onishchuk brothers as the aggressors. RP 1158-60.

Mr. Blesch later told his mother that he had shot someone after two individuals attacked his friend. RP 1075. He reiterated from the witness stand that he believed Mr. Rusev was fighting for his life after the Onishchuks had grabbed him. RP 1149. It was then that Mr. Rusev cried out for help. RP 1151. He called for help and Mr. Blesch reacted with the tragic results of firing a shot that injured by Ihor as well as Mr. Rusev. RP 1118.

Mr. Rusev presented substantial evidence that Vossler Blesch was acting in defense of Mr. Rusev and he was entitled to have the jury determine the lawful scope of his ability to defend themselves, Mr. Blesch’s ability to come to his defense, and its interplay with his culpability for the assault. No instructions on self-defense were given,

however, and none were sought by defense counsel. See Court's Instructions to the Jury; Defendant's Proposed Instruction.¹⁰

For defense counsel's failure to request to amount to deficient performance, Mr. Rusev must show that had counsel requested the instruction, the trial court would have given it. In this case there was substantial evidence from which the defense could argue, and the jury could find, that the Onishchuks were the aggressors in the scuffle which preceded the shooting, having grabbed Mr. Rusev and placed him in a "bear hug." Mr. Blesch testified he perceived an imminent threat to Mr. Rusev's life and he acted in response to that threat. The reasonableness and reliability of this evidence was a question for the jury. Only following proper instructions could the jury determine Mr. Rusev's culpability, but that was not possible without being instructed on the law of self-defense and the impact it had on the State's burden of proof.¹¹

¹⁰ Defense counsel specifically disavowed he was arguing self-defense in closing argument following an objection by the State. RP 1903. The prosecutor reiterated that point in her rebuttal. RP 1921.

¹¹ Without proper instruction on the right to self-defense then the jury runs the risk the instructions can impinge on citizen's right to bear arms or that the jury might draw adverse inference from the exercise of those constitutional rights. See State v. Rupe, 108 Wn.2d 734, 743 P.2d 210 (1987).

iii. The failure to seek self-defense instructions served no reasonable tactical or strategic purpose.

Every person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI;¹² Const. art. I, § 22;¹³ United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); In re Khan, 184 Wn.2d 679, 688, 363 P.3d 577 (2015); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942); Cronin, 466 U.S. at 653-54.

In Mr. Rusev’s case, the failure to request instructions on self-defense in order to outline its interplay with the burden of proof and the legal limits of the first aggressor doctrine was not a reasonable or

¹² The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.”

¹³ Article I, § 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...”

legitimate tactical decision. Compare e.g. State v. Rodriguez, 121 Wn.App. 180, 184-85, 87 P.3d 1201 (2004) (defense counsel was deficient for not requesting an adequate self-defense instruction); State v. Powell, 150 Wn.App. 139, 155, 206 P.3d 703 (2009) (failure to request reasonable belief instruction was deficient performance); In re Personal Restraint of Hubert, 138 Wn.App. 924, 926-30, 158 P.3d 1282 (2007) (failure to advance defense that defendant reasonably believed victim was not mentally incapacitated constituted deficient performance); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (ineffective assistance in failing to investigate effective date of statute and then proposing instruction that allowed conviction under that statute). Defense counsel was left arguing self-defense without an instructional support for the jury when he notes that “Vossler was shocked that he had fired that gun. Remember what he said? I pulled it out and, in a panic, fired because he saw the client fight for his life.” RP 1888.

As with the foregoing cases, Mr. Rusev’s trial counsel failed to provide proper instructions necessary to advance the crucial aspects of his defense presented by the evidence. Rodriguez, 121 Wn.App. at 184-85; Powell, 150 Wn.App. at 155; Hubert, 138 Wn.App. at 926-27. Such

conduct could not be characterized as legitimate tactic and this failure amounted to deficient performance. Strickland, 466 U.S. at 694.

Where defense counsel argues that the defendant didn't ask Blesch to shoot. "He just asked him to come to his aid. Counsel would suggest to you in or a dime, in for a dollar. All he had to do was ask for the assault. At that point I'd submit to you my client was in a defensive mode, not an aggressive mode. He was asking for help for his own defense." RP 1904. This is a request for defense of another, undertaken without the benefit of any instructions for the jury to support this argument or to explain the application of burden of proof. There is no reasonable tactical or strategic reason not to provide the jury with the legal basis to support this argument.

Based on the argument and testimony elicited, there was a significant question regarding the right to defense of persons and property. Under these circumstances, there was no objectively reasonable tactical basis for failing to request instructions. See e.g. Powell, 150 Wn.App. at 155. An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998).¹⁴ A decision is not a

¹⁴ See also State v. Fernandez-Medina, 141 Wn.2d 448, 459-62, 6 P.3d 1150 (2000) (an inconsistent defense goes to the weight of, but does not entirely

permissible tactical or strategic choice if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”). While an attorney’s decisions are treated with deference, the actions must be reasonable under the circumstances and that was not true here.

iv. Mr. Rusev’s right to a fair trial was prejudiced by the failure to provide the jury with instructions essential to assessing critical issues.

The prejudice that resulted from the failure to request a necessary instruction flows from the jury’s having no way to understand the legal significance of the evidence. See e.g. Hubert, 138 Wn.App. at 932. This problem is particularly acute in the case of self-defense because it is the State’s burden, once the issue is raised, to disprove the act was in self-defense, beyond a reasonable doubt. Walden, 131 Wn.2d at 473-74. Where defense counsel fails to identify and present a viable defense available to the charged crime and there is

negate the evidence supporting alternative instructions); State v. McClam, 69 Wn.App. 885, 850 P.2d 1377, review denied, 122 Wn.2d 1021 (1993).

evidence to support that defense, the defendant has been denied a fair trial. Powell, 150 Wn.App. at 156.

The prosecutor posits the only “question is did the defendant act as an accomplice with Vossler Blesch in the ... robbery of both Ihor Onishchuk and Dymtro Onishchuk and the assault of Ihor? And the answer to that is yes.” RP 1840. Without an instruction fully defining self-defense, defense of others, justifiable use of force, its relevance to the determination of “lawful force” and whether or not Mr. Rusev was knowingly complicit in the “assault.” The prosecutor argued the need to find general knowledge of the crime of assault. RP 1852. Given the lack of instructions, however, this essentially nullified this critical aspect of the defense because it failed to provide the jury with an opportunity to make a finding on all the essential elements of the offense charged. See Powell, 150 Wn.App. at 156; Hubert, 138 Wn.App. at 930-32. This certainly includes a proper description of the first aggressor and how that plays into the continuum of legal responsibility. The prosecutor argues however that “since the State’s proven that they’re an accomplice, you view everything they do together as a whole.” “so if Vossler Blesch met three of the four elements and the defendant met one, that’s sufficient. That’s all we

have to prove.” RP 1854. The question is not answered by the mere fact that a gun was present, even if Mr. Rusev facilitated its presence.

The jury’s ability to properly apply the burden of proof, particularly here where the burden is on the State to disprove self-defense, requires the full legal construct in order to produce a just and reliable result. Rodriguez, 121 Wn.App. 184-85. This is an error of constitutional magnitude and substantially prejudices Mr. Rusev’s ability to receive a fair determination by the jury on all the essential elements of his alleged offense.

b. Improper argument by the prosecutor compromised the jury’s ability to fully and fairly adjudicate of the charges.

i. Prosecutor has special duties which circumscribe their advocacy.

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasi-judicial capacity in a search for justice. State v. Case, 49 Wn.2d 66, 70–71, 298 P.2d 500 (1956) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899)). Over a 100 years ago, Fielding’s words bear repeating again:

[A] public prosecutor ... is a quasi-judicial officer, representing the people of the state, and presumed to act impartially in the interest only of justice. If [s]he lays aside the impartiality that should characterize his official action, to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, [s]he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

Fielding, 158 N.Y. at 547, 53 N.E. 497, *quoted with approval in Case*, 49 Wn.2d at 70–71.

Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Case, 49 Wn.2d at 71. Thus, a prosecutor must function within boundaries while zealously seeking justice. Id.

ii. The prosecutor’s closing and rebuttal included improper argument.

It is improper under Washington law for a prosecutor, a representative of the State, to comment on the credibility of the witnesses or the guilt and veracity of the accused. State v. Warren, 165 Wn.2d 17, 26-30, 195 P.3d 940 (2008). The rules provide that an attorney shall not assert his or her personal opinion as to the justness of a cause, as to the credibility of a witness, or as to the guilt or innocence of an accused. See State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); State v. Case, 49 Wn.2d 66, 298

P.2d 500 (1956). Moreover, a prosecutor violates a defendant's Fourteenth Amendment and Washington Constitution article I, section 22 right to an impartial jury when the prosecutor resorts to incendiary and inflammatory rhetoric to achieve convictions. State v. Clafin, 38 Wn.App. 847, 850, 690 P.2d 1186 (1984) (use of a poem with vivid and highly inflammatory imagery an appeal to the jury's passion and prejudice).

In this case, the prosecutor began her closing argument with a passionate appeal to the sympathies of the jury by invoking the emotional state of Dymtro, "as he held his brother in his arms and applying pressure to the gunshot wound, pleading with the defendant to call 911 for help, he was terrified that his brother wasn't going to make it." RP 1828.

The prosecutor then chose to throw her own personal prestige and conclusions into the jury's effort to weigh of the evidence.

I submit to you that the defendant's account of what occurred when he spoke to the detectives completely minimized his involvement, completely minimized his actions, what he did in the robbery and assault of these two.

RP 1846.

Similarly, as to the credibility of Vossler Blesch, the prosecutor again interjected her personal opinion,

I submit to you that Vossler Blesch's testimony, although difficult at times and back and forth at times, you look at what he told the detective and what he testified to and what he told you about the actions, yeah, frantic situation, but

actively participated in it, actively participate in at the request of the defendant.

RP 1847.

As to the reliability of Ihor and Dymtro, again the prosecutor places her own personal endorsement on their credibility,

Back to Ihor's and Dmytro's testimony, I submit to you that it was credible. There's an issue with Ihor. There's spots that he doesn't have a memory of. He doesn't have a memory of ever doing anything that was physically aggressive towards the defendant other than pushing him off to the side. I submit to you that it's not a matter of his lying to you or being deceptive to you or to the law enforcement when they came out total to him or to defense counsel and myself when we went to talk to him.

RP 1848.

As to the robbery charge, the prosecutor summarizes the evidence and again places her personal prestige behind the conclusion, "I submit to you his intent is to commit the theft and it's to commit it with force." RP

1862. On this point, the prosecutor continues,

I submit to you the State has proven beyond a reasonable doubt that the defendant acted with knowledge, that his actions of demanding, of grabbing, of handing, all of those actions support that we've proven beyond a reasonable doubt that he acted with knowledge to commit the crime of robbery.

RP 1863-64. Lastly, the prosecutor asserts:

I submit to you that the State has proven the defendant acted as an accomplice with Vossler Blesch, and he acted with the general knowledge that his aiding and facilitating

for the crime of robbery, which was then elevated to robbery in the first degree because of the firearm involved, and he acted with the general knowledge of aiding and facilitating the simple crime of assault.

RP 1868-69.

In her rebuttal the prosecutor argued again,

I submit to you that they did plan an assault, and I went through several pieces of evidence and testimony that came out on why that assault was planned, but the robbery was not.

RP 1915. Finally,

And I submit to you that based on the defendant's actions, his intentional deliberate actions, it was clear that he wanted to cause fear and intimidate Dmytro and Ihor. And it's clear that he acted with the intent to take their property and to do so with force with Vossler behind him.

RP 1923.

The prosecutor's closing and rebuttal arguments were significantly tainted by her opening appeal to passions and prejudices of the jury and were followed by numerous assertions of her own personal beliefs regarding the credibility of the witnesses and the verdict.

iii. Improper argument, taken as a whole, compromised the reliability of the jury's verdict.

In Mr. Rusev's case, the improper argument included inflammatory rhetoric designed to stoke sympathy for the victims and then was reinforced by the prosecutor's first person endorsements of the

credibility of her witnesses. When viewed in its totality these improper arguments warrant reversal because they were “both improper and prejudicial.” State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing State v. Gregory, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006)). A review of this record in its entirety, creates a clear picture of the prejudicial effect of a prosecutor’s improper argument because “there is a *substantial likelihood* the misconduct affected the jury’s verdict.” State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); see also State v. Music, 79 Wn.2d 699, 714–15, 489 P.2d 159 (1971), *judgment vacated in part by*, 408 U.S. 940, 92 S.Ct. 2877, 33 L.Ed.2d 764 (1972).

Furthermore, the prosecutor’s comments likely caused such an enduring prejudice that they could not be neutralized by a curative instruction. In re Pers Restraint of Phelps, 190 Wn.2d 155, 165, 410 P.3d 1142 (2018). This is true because the jury will inevitably draw “improper influences from the evidence ... or where the prosecutor otherwise comments on the evidence in an inflammatory manner.” Id. at 170. As our Supreme Court has noted, “[f]air trial’ certainly implies a trial in which the attorney representing the state does not throw the prestige of [her] public office ... and the expression of [her] own belief of guilt into the scales against the accused.” Case, 49 Wn.2d at 71 (citing State v. Susan, 152 Wash. 365, 278 P. 149 (1929)). A new trial is, therefore, warranted.

c. Where the robbery and assault offenses furthered the same ultimate criminal objective, the two offenses were the same criminal conduct and the offender score should have reflected the lower range.

Mr. Rusev was convicted of robbery and assault against Ihor Onishchuk, as well as robbery of Dymtro Onishchuk, based on his conduct in the garage on February 23, 2014. Appendix E: Verdict Forms. This episode and the convictions in counts two and three involving Ihor which arose from it, arose from the same criminal objective and furthered each other, not any separate criminal objective. As a result, they constitute the same criminal conduct under the SRA. Despite being the same criminal conduct, these two offenses were erroneously used to increase the sentencing ranges of the each other offense. See Appendix A, B.

To the extent the burden has fallen to the accused to alert the court to this question, the failure of defense counsel to advocate for the lesser sentencing range was not a reasonable tactical or strategic choice and it substantially prejudiced Mr. Rusev because it directly affects the sentencing range and the application of the firearm enhancements.

i. Rusev's offender score was calculated without benefit of the same criminal conduct finding.

Mr. Rusev had no prior criminal history before this unfortunate incident. He came before the court at sentencing with only these three

convictions bearing on the calculation of his offender score. See Appendix A, B. The offender score for assault in the first degree, a serious violent offense, was determined by adding two points for each “prior” violent conviction.

If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

RCW 9.94A.525(9).

“Prior” conviction is defined as:

A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

RCW 9.94A.525(1).¹⁵

As to other current offenses, RCW 9.94A.589 provides that:

... whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and

¹⁵ While the Sentencing Reform Act (SRA) does not formally define a “current offense” which must be used as if it was a prior conviction for the purpose of the offender score, the term is defined functionally as convictions entered or sentenced on the same day. In re Finstad, 177 Wn.2d 501, 301 P.3d 450 (2013). Absent an exceptional sentence, sentences for these current offenses are to be served concurrently. State v. Rasmussen, 109 Wn.App. 279, 34 P.3d 1235 (2001).

prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, that if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently.

RCW 9.94A.589 (1)(a). If sentencing court finds that some of defendant's current offenses encompass the same criminal conduct, then those offenses are counted as one crime for sentencing purposes. State v. Calvert, 79 Wn.App. 569, 903 P.2d 1003, *review denied* 129 Wn.2d 1005 (1995).¹⁶

Multiple offenses encompass the same criminal conduct and are counted as one crime when they have (1) the same objective criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. In re Connick, 144 Wn.2d 442, 459, 28 P.3d 729 (2001). For purpose of determining whether two offenses involve "same criminal conduct," and so should be counted as one crime in calculating offender score for sentencing purposes, "intent" is not the specific *mens rea* element of particular crime, but objective criminal purpose in committing

¹⁶ Johnson notes the same statute is used for consecutive/concurrent and offender score calculation. Johnson's prior convictions for possession of stolen property and forgery were not the "same criminal conduct," within the meaning of the statute on consecutive or concurrent sentences and for purposes of offender score calculation during sentencing on subsequent attempted robbery conviction. State v. Johnson, 180 Wn.App. 92, 320 P.3d 197, *review denied* 181 Wn.2d 1003 (2014). Two crimes cannot be the "same criminal conduct," within the meaning of the statute on consecutive or concurrent sentences, if one crime involves only one victim and the other involves multiple victims. Id.

crime; part of inquiry is determining whether one crime furthered other. State v. Adame, 56 Wn.App. 803, 785 P.2d 1144, *review denied* 114 Wn.2d 1030 (1990).

The determination of whether offenses involve the same criminal intent for purposes of the sentencing statute considers whether one crime furthered the other, or the two were part of a recognizable scheme or plan. State v. Williams, 176 Wn.App. 138, 307 P.3d 819, *review granted* 180 Wn.2d 1001 (2013) *affirmed* 181 Wn.2d 795.

ii. The robbery and assault convictions concerning Ihor were offenses which constituted the “same criminal conduct.”

As to counts two and three, there is no doubt the two offenses involved the same victim and occurred at the same time and place. See the Information – Appendix C. Both counts named Ihor Onishchuk as the victim and the offense occurred in the same relatively short encounter on February 23, 2104, in an automotive garage in South King County.

The law is clear that multiple current offenses are considered the same criminal conduct, and thus as a matter of law are collectively counted as one crime in the offender score, when they are committed at the same time and place, involve the same victim, and have the same objective criminal intent. State v. Chenoweth, 185 Wn.2d 218, 222, 370 P.3d 6 (2016); State v. Wilkins, 200 Wn.App. 794, 809, 403 P.3d 8909

(2017); State v. Davis, 174 Wn.App. 623, 300 P.3d 465, *review denied* 178 Wn.2d 1012 (2013) (sentencing court's determination that assault and attempted murder convictions were the same criminal conduct was not an abuse of discretion).

In determining whether current offenses should be treated as same offense for sentencing purposes, analysis of whether offenses exhibited same criminal intent may include, but is not limited to, extent to which one crime furthered other, whether they were part of same scheme or plan and whether criminal objectives changed. State v. Calvert, 79 Wn.App. 569, 903 P.2d 1003, *review denied* 129 Wn.2d 1005 (1995); State v. Vike, 125 Wn.2d 407, 885 P.2d 824 (1994).

As to the objective criminal intent test, the court must focus on the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next. In re Connick, 144 Wn.2d 442, 459, 28 P.3d 729 (2001). The sentencing judge, Judge Hickman, expressed his view that this was a singular effort from the outset:

I don't think this was a benign incident from the very beginning. I never considered it a benign incident. A deliberate action was created by Mr. Rusev to shake down these two individuals.

RP 1966. The State's theory of accomplice liability was that Mr. Rusev shared a common goal of intimidation and the taking of the property that was the subject of the robbery was part of that same criminal endeavor.

This is a flat-out robbery that went further than planned on and an assault that went much further than planned on.

RP 1921. The State argued and the sentencing judge agreed that these offenses occurred in the context of singular criminal enterprise whose objective was intimidation. RP 1867. Where this was all part of a single enterprise in which the force degree of force was an issue in dispute, but the underlying objective was always the same.

iii. Mr. Rusev had the constitutionally defined right to the effective assistance of counsel through sentencing and failure to assert the same criminal conduct issue as to the robbery and assault of Ihor was both highly prejudicial and not reasonable under the circumstances.

The right to the effective assistance of counsel extends to all the critical aspects of the criminal proceeding, including sentencing as well. See Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) and State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011). This requires zealous advocacy and a clear understanding of the application of the rules and statutes of sentencing. This is particularly important because the sentencing court was not required to determine, without invitation,

whether defendant's current offenses constituted the same criminal conduct for purposes of determining sentence range. State v. Nitsch, 100 Wn.App. 512, 997 P.2d 1000, *review denied* 141 Wn.2d 1030 (2000).¹⁷ In this case, by agreeing to the scoring and failing to assert the same criminal conduct claim, waived the right to challenge the reliance of the sentencing court upon his own representations. In re Connick, 144 Wn.2d 442, 463-64, 28 P.3d 729 (2001).

There was no reasonable basis, however, to fail to seek a reduction in the sentencing range and therefore a new sentencing proceeding is required because (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. State v Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland, 466 U.S. at 687.

In Mr. Rusev's case, the evidence amply supported the assertion that both crimes involved same objective criminal intent, measured by how one crime furthered the other. The defendant's criminal intent, viewed objectively, never changed from one crime to the other. See State v. Walden, 69 Wn.App. 183, 847 P.2d 956 (1993). These circumstances are similar to the attempted theft of firearm and third-degree assault

¹⁷ Defendant waived issue of whether his previous felonies were to be counted separately in determining his offender score, where defendant failed to challenge calculation of his offender score at sentencing and did not request trial court to make a "same course of criminal conduct" determination. State v. Wilson, 117 Wn.App. 1, 75 P.3d 573, *review denied* 150 Wash.2d 1016 (2003) .

convictions which encompassed the same criminal conduct where both charges arose from a struggle between the defendant and police officer after officer where depriving the officer of gun was not possible without assaulting him. State v. Miller 92 Wn.App. 693, 964 P.2d 1196, *review denied* 137 Wn.2d 1023(1998).

Similarly, convictions for second degree assault and second degree kidnapping should have been treated as the same criminal conduct for sentencing purposes, where the offenses happened at the same time and place and involved the same victim, and there was no evidence of any assaultive behavior during the kidnapping that did anything beyond facilitating and furthering the abduction. State v. Taylor, 90 Wn.App. 312, 950 P.2d 526(1998); State v. Clark 46 Wn.App. 856, 732 P.2d 1029 (1987) (first-degree assault and two counts of first-degree robbery should have been considered part of same conduct, since there was no substantial change in nature of defendant's criminal objective); State v. Worl 129 Wn.2d 416, 918 P.2d 905(1996) (attempted second-degree murder and malicious harassment arising from knife attack comprised same criminal conduct as matter of law).

The application of the rule to Mr. Rusev is best seen in the way in which his case is distinguishable from Freeman. Freeman's convictions for first degree assault and first degree robbery did not constitute same

offense for sentencing purposes because the defendant did something far beyond what was necessary to merely further the robbery, as victim offered no resistance and gave no indication that he was not going to give over his money. State v. Freeman, 118 Wn.App. 365, 76 P.3d 732 (2003) *affirmed* 153 Wn.2d 765, 108 P.3d 753 (2005).¹⁸ Mr. Rusev's was not a case of gratuitous violence.

Instead, the circumstances here more closely parallel Green where robbery and attempted murder committed by defendant during commission of robbery would not merge, but the two crimes encompassed same criminal conduct for sentencing purposes. The defendant's conviction on each crime should not have been counted as a separate crime in criminal history in arriving at standard sentencing range for each conviction. State v. Green, 46 Wn.App. 92, 730 P.2d 1350, *reversed on other grounds and remanded* 109 Wn.2d 207, 743 P.2d 1237 (1986).

¹⁸ Mr. Rusev's case was also not like Tomgren where convictions for second-degree robbery and second-degree assault did not share the same criminal intent where defendant and his male gang members assaulted the victim in a convenience store parking lot for disrespecting one of their members, defendant fled after the gang beat the victim unconscious, the purpose of the assault was not to rob the victim, and the purpose of a female gang member, who remained at the scene, in robbing the victim was to deprive the victim of his money. State v. Tomgren, 147 Wn.App. 556, 196 P.3d 742 (2008).

iv. Petitioner was prejudiced by the failure to advocate for the same criminal conduct determination.

Trial counsel's failure to advance at sentencing the argument that Mr. Rusev's convictions for robbery and assault against Ihor should be considered the same criminal conduct for purposes of calculating his offender score prejudiced him greatly. This constitutes constitutionally ineffective assistance of counsel because there was a reasonable probability that, had counsel so argued, the trial court would have found that the two offenses encompassed the same criminal conduct. See State v. Phuong, 174 Wn.App. 494, 299 P.3d 37, *review denied* 182 Wn.2d 1022 (2013). Furthermore, such a miscalculation of an offender score results in a fundamental defect which inherently results in a complete miscarriage of justice. In re Goodwin, 146 Wn.2d 861, 867, 50 P.3d 618 (2002).

Clearly there was a reasonable probability of the trial court finding the two offenses constituted the same criminal conduct because there was no dispute that they occurred at the same time and place, involved the same victim. Furthermore, these offenses involved the same objective criminal intent animated both crimes. As a result, the failure to advance such a factually supported claim in order to significantly reduce the sentencing exposure Mr. Rusev faced, served to reasonable tactical or strategic purpose. Phuong, 174 Wn.App. at 494. Instead it exposed Mr.

Rusev to a substantially greater sentencing range and undercut his ability to argue for a lesser sentence. These shortcomings constitute a manifest injustice which substantially compromised the integrity of the proceedings and require a new sentencing hearing at which Mr. Rusev's claims for lesser sentence can be heard.

d. Petitioner received constitutionally deficient representation where defense counsel failed to advocate for an exceptional sentence below the standard range to ameliorate the effect of the firearm enhancements.

i. Petitioner's sentence was "clearly excessive" in light of the multiple offense policy and the firearm enhancements.

The prosecutor asked the sentencing court to impose sentences at the high end of the sentencing range in addition to the imposition of consecutive firearm enhancements, i.e. 68 months each for the robbery counts, 171 months for the assault, and three consecutive firearm enhancements of 60 months each. RP 1954. The prosecutor noted that Mr. Rusev had no criminal history but argued for the long sentence based on the severity of the injury to Ihor. RP 1955.

Defense counsel called the underlying circumstances here as "stupid as it is tragic." RP 1962. Although Mr. Rusev had admittedly asked that Vossler Blesch to be present with him in the garage to scare or intimidate Ihor Onishchuk, Rusev certainly did not anticipate a shooting

would take place. Id. It was in fact Mr. Rusev who called 911 to summon aid for Ihor. Defense counsel therefore asked for a sentence at the low end of the standard range in addition to the firearm enhancements. RP 1963. Mr. Rusev himself conveyed his “deep regrets and pain inside” over what had transpired. RP 1965.

The sentencing court imposed concurrent sentences at the low end of the standard range for the underlying offenses in addition to the three consecutive firearm enhancements for a total sentence of 335 months of confinement. RP 1968.

ii. Courts have discretion under the SRA to impose exceptional sentences to ameliorate the onerous effects of the consecutive firearm enhancements. .

The SRA was designed to create a structure in sentencing felony offenders which would make the system more accountable and “[e]nsure that the punishment for a criminal offense is proportionate to the the seriousness of the offense and the offender’s criminal history” and “commensurate with the punishment imposed on others committing similar offenses.” RCW 9.94A.010(1), (3). A court “may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [the SRA}, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535.

In Mr. Rusev's case, the sentencing range is driven by the firearm enhancements provisions of RCW 9.94A.533(3). Appendix C. That statute provide in pertinent part that:

The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. ... :

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

...

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

The legislative purpose in creating the deadly weapon and firearm enhancements was to recognize that armed crime, including having weapons available for protection, imposes particular risks of danger on society. State v. Eckenrode, 159 Wn.2d 488, 150 P.3d 1116 (2007). Nevertheless, the Washington Supreme Court has recognized that "in a

case in which standard range consecutive sentencing for multiple firearm-related convictions ‘results in a presumptive sentence that is clearly excessive in light of the purpose of the [the SRA],’ a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences.” State v. McFarland, 189 Wn.2d 47, 55, 399 P.3d 1106 (2017), quoting RCW 9.94A.535 (1) (g).

In McFarland, multiple sentencing statutes applied including provisions with the same “[n]otwithstanding any other law,” language found in the firearm statute applied to Mr. Rusev. 189 Wn.2d at 52, citing RCW 9.41.040(6). This decision followed the Court’s earlier ruling in Mulholland where the Court recognized that despite the “notwithstanding” language of RCW 9.94A.589, a court could order multiple sentences for serious violence offenses run concurrently as an exceptional sentence if it found there were mitigating factors justifying such a sentence. In re Per. Restraint of Mulholland, 161 Wn.2d 322, 327-28, 166 P.3d 677 (2007).

Building on the logic of McFarland and Mulholland, it appears that in a case in which the standard sentencing range for multiple convictions and “results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA],” a sentencing court has discretion to impose an exceptional, mitigated sentence. See McFarland, 189 Wn.2d at 55, quoting RCW 9.94A.535(1)(g).

iii. The failure to advocate for an exceptional sentence fell below the standards of reasonable practice and relief is appropriate in order to ensure proportionality and consistency in sentencing.

Where the defense has argued that this is a stupid and tragic accident by a young man who has been otherwise hard working and committed to being a good citizen, the imposition of consecutive firearm enhancements in addition to the standard range sentences on the underlying offenses produces an onerous level of punishment beyond that which the circumstances support. RP 1962-64 (“Simply because my client did not trust Vitali and simply because he wanted Vossler, a six-foot-four-inch, 250-pound young man behind him doesn’t mean that he would anticipate that a shooting would take place.”)

The failure to offer a reasonable alternative in the form of an exceptional sentence, however, which would alleviate the most cruel and oppressive portions of the rigid application of such mandatory, discretionless sentencing provisions which were identified served no tactical purpose and failed to identify for the sentencing court the basis upon which it could exercise its discretion to impose a more appropriate sentence. Moreover, proportionality and consistency in sentencing are central values of the SRA, and reviewing courts should afford relief when

it serves those values. McFarland, 189 Wn.2d at 57; Mullholland, 161 Wn.2d at 332-33.

iv. Mr. Rusev is entitled to relief because he was actually and substantially prejudiced by this fundamental defect in the proceedings and the resulting miscarriage of justice.

If there is a reasonable probability that but for counsel's failure to advocate for an exceptional sentence, the result would have been different, prejudice is established and reversal is required. Strickland, 466 U.S. at 694; Hendrickson, 129 Wn.2d at 78; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (this is a lower standard than the "more likely than not" standard); In re Personal Restraint of Hubert, 138 Wn.App. 924, 928, 158 P.3d 1282 (2007); In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

Mr. Rusev is entitled to relief because the error in failing to advocate for an exceptional sentence actually and substantially prejudiced his constitutional rights. In re Wilson, 169 Wn.App. 379, 387, 279 P.3d 990 (2012) (reversing for instructional error and ineffective assistance); In re Pers. Restraint of Davis, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004);

RAP 16.4(c) (2). The sentencing court's failure to consider its ability to craft a sentence more in keeping with Mr. Rusev's culpability and not solely driven by the imposition of consecutive firearm enhancements has a substantial prejudicial effect on the petitioner.

Furthermore, even if defense counsel was not necessarily deficient in failing to advocate for an exceptional sentence, the Washington Supreme Court has recognized that a sentence imposed without due consideration of an authorized mitigated sentence constitutes a "fundamental defect" resulting in a complete miscarriage of justice. Mullholland, 161 Wn.2d at 332. Even where the sentencing court has not expressed a particular level of sympathy or discomfort with the sentencing range, the judge noted that Mr. Rusev had no prior record and was remorseful. RP 1968. The failure to consider the alternative forms of an exceptional sentence under these circumstances was nonconstitutional error that constitutes a fundamental defect which inherently resulted in a complete miscarriage of justice. McFarland, 189 Wn.2d at 58-59; In re Matter of Swagerty, 186 Wn.2d 801, 383 P.3d 454 (2016).

As in Mullholland, the record suggests at least the possibility that the sentencing court would have considered imposing [an exceptional sentence] had it properly understood its discretion to do so. Remand for resentencing is therefore warranted.

McFarland, 189 Wn.2d at 58-59. Remand for resentencing is similarly warranted in Mr. Rusev's case.

e. The trial court erred in imposing multiple punishments for the same offense in violation of the petitioner's right to be free from double jeopardy.

The constitutional guarantee against double jeopardy protects a defendant against multiple punishments for the same offense. U.S. Const. amend. V; Wash. Const. art. I, sec. 9; In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). A claim of a violation of double jeopardy rights is reviewed de novo. State v. Land, 172 Wn.App. 593, 598, 295 P.3d 782, *review denied*, 177 Wn.2d 1016 (2013).

Mr. Rusev contends the robbery and assault convictions as to Ihor Onishuck constitute the same offense in this case because the same evidence proved both counts. State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). Generally, if there is an element in each which is not included in the other the offenses are not the same and the double jeopardy clause does not prevent convictions for both. Vladovic, 99 Wn.2d at 423. However, even where there is an element in each offense that is not included in the other, there may be a double jeopardy violation where the two offenses are the same in fact. State v. Nysta, 168 Wn.App. 30, 47-48, 275 P.3d 1162 (2012), *review denied*, 177 Wn.2d 1008 (2013). Double

jeopardy occurs if the offenses are the same in fact, that is, if “evidence of the same single act was required to support each conviction.” Nysta, 168 Wn.App. At 48.

The robbery and assault were the same in fact here because the crimes are part and parcel of the same criminal effort and one is essential inexorable from the other. The allegations of robbery were based on the show of force that was the underlying assault itself. RP 1921 (“This is a flat-out robbery that went further than planned on and an assault that went much further than planned on.”) Where the robbery could not be completed without the assault and the assault simply went “much further than planned on,” this is still the same evidence of same single act being used to support each conviction. See also State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005); State v. Johnson, 92 Wn.2d 671, 681, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980).

III. REQUEST FOR RELIEF

Mr. Rusev requests this Court find that he is entitled to relief in the form of a reversal of his conviction and sentence, or in the alternative to remand for a reference hearing in order to establish relief is appropriate, for the reasons detailed herein.

DATED this 12th day of September, 2018.

Respectfully submitted,



DAVID L. DONNAN (WSBA 19271)
MERYHEW LAW GROUP
Attorneys for Petitioner Rusev

DECLARATION OF COUNSEL

I declare under penalty of perjury under the laws of the State of Washington that I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

Signed this 12th of September, 2018 @ Seattle WA.


DAVID L. DONNAN (WSBA 19271)

V. STATEMENT OF FINANCES

1. I ask the court to file this without making me pay the filing fee because I am so poor I cannot pay the fee.

2. I have a spendable balance of \$ 10.00 in my prison or institution account.

3. I ask the court to appoint a lawyer for me because I am so poor I cannot afford to pay a lawyer.

4. I am not employed.

5. During the past 12 months I did not get any money from a business, profession or other form of self-employment.

6. During the past 12 months, I did not get any rent payments, interest, dividends, or any other money. I do not have any cash except as said in answer 2, nor any savings or checking accounts, stocks, bonds, or notes, real estate and other property or things of value.

7. I am not married.

VI. OATH OF PETITIONER

I, VENIAMIN RUSEV, am over 18 years of age and I am the petitioner in this action.

I have read the petition, know its contents, and I believe the facts I have detailed therein to be true and correct.

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

Signed at Stafford Creek Corrections Center, Aberdeen,
Washington on this 10 day of August, 2018



VENIAMIN RUSEV

TABLES OF APPENDICES

Appendix A – Judgment and Sentence filed June 26, 2015.

Appendix B – Judgment and Sentence filed October 20, 2017.

Appendix C - Information filed February 25, 2014.

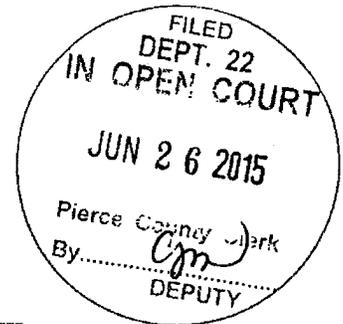
Appendix D – Court’s Instruction filed June 15, 2015.

Appendix E – Verdict Forms filed June 15, 2015.

Appendix F – Verbatim Report of Proceedings – October 20, 2017.

Appendix G – Court of Appeals Mandate dated September 13, 2017.

APPENDIX A



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-00779-7

vs.

JUDGMENT AND SENTENCE (FJS)

VENIAMIN GEORGEV RUSEV

Defendant.

- Prison
- RCW 9.94A.712/9.94A.507 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Alternative to Confinement (ATC)
- Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8
- Juvenile Decline Mandatory Discretionary

SID: WA27513601
DOB: 01-27-1983

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 06-15-2015 by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	ROBBERY IN THE FIRST DEGREE (AAA2)	9A.56.190	FASE	2-23-14	TPD 140541021
II	ROBBERY IN THE FIRST DEGREE (AAA2)	9A.56.190	FASE	2-23-14	TPD 140541021
III	ASSAULT IN THE FIRST DEGREE (E23)	9A.36.011(1)(a)	FASE	2-23-14	TPD 140541021

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

JUDGMENT AND SENTENCE (JS)

(Felony) (7/2007) Page 1 of 11

15-9-05838-1

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

as charged in the Original Information

- A special verdict/finding for use of firearm was returned on Count(s) I, II, and III RCW 9.94A.602, 9.94A.533.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

NONE KNOWN OR CLAIMED

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	4	IX	51-68 MOS	60 MOS	111-128 MOS	LIFE 50 K
II	4	IX	51-68 MOS	60 MOS	111-128 MOS	LIFE 50 K
III	4	XII	129-171 MOS	60 MOS	189-231 MOS	LIFE 50 K

2.4 **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence:

within below the standard range for Count(s) _____.

above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

JUDGMENT AND SENTENCE (JS)

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2.6 **FELONY FIREARM OFFENDER REGISTRATION.** The defendant committed a felony firearm offense as defined in RCW 9A.010.

The court considered the following factors:

the defendant's criminal history.

whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

evidence of the defendant's propensity for violence that would likely endanger persons.

other: Firearm used during incident

The court decided the defendant should should not register as a felony firearm offender.

III. JUDGMENT

3.1 The defendant is **GUILTY** of the Counts and Charges listed in Paragraph 2.1.

3.2 The court **DISMISSES** Counts _____ The defendant is found **NOT GUILTY** of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTNRJN \$ LOC Restitution to: _____

\$ _____ Restitution to: _____
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV \$ 500.00 Crime Victim assessment

DNA \$ 100.00 DNA Database Fee

PUB \$ 0 Court-Appointed Attorney Fees and Defense Costs

FRC \$ 200.00 Criminal Filing Fee

FCM \$ _____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____

\$ _____ Other Costs for: _____

\$ 800 TOTAL

The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for 7/31/15 @ 1:30 in Dept 22

RESTITUTION. Order Attached

JUDGMENT AND SENTENCE (JS)

(Felony) (7/2007) Page 3 of 11

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

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[] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ per CCO per month commencing per CCO. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT

The defendant shall not have contact with _____ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

X Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

73-981000

6/29/2015

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4.4a All property is hereby forfeited

Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4b BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

60 months on Count II _____ months on Count _____

60 months on Count II _____ months on Count _____

155 months on Count III _____ months on Count _____

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 months on Count No II _____ months on Count No _____

60 months on Count No II _____ months on Count No _____

60 months on Count No III _____ months on Count No _____

_____ months on Count No _____ months on Count No _____

_____ months on Count No _____ months on Count No _____

_____ months on Count No _____ months on Count No _____

Sentence enhancements in Counts I, II, III shall run
 concurrent consecutive to each other.

Sentence enhancements in Counts I, II, III shall be served
 flat time subject to earned good time credit

Actual number of months of total confinement ordered is: 155 + 180 months (flat 335 months total)
(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

The confinement time on Count(s) III contain(s) a mandatory minimum term of 60 months

JUDGMENT AND SENTENCE (JS)

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2 **CONSECUTIVE/CONCURRENT SENTENCES.** RCW 9.94A.589. All counts shall be served
3 concurrently, except for the portion of those counts for which there is a special finding of a firearm, other
4 deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with
5 juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served
6 consecutively: _____

7
8 The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to
9 the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony
10 sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for
11 the following cause numbers. RCW 9.94A.589: _____

12 Confinement shall commence immediately unless otherwise set forth here: _____

13 (c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely
14 under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the
15 credit for time served prior to sentencing is specifically set forth by the court: *Subject to DOC Calculation*

16 4.6 [] **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:

17 Count _____ for _____ months;

18 Count _____ for _____ months;

19 Count _____ for _____ months;

20 [] **COMMUNITY CUSTODY** (To determine which offenses are eligible for or required for community
21 custody see RCW 9.94A.701)

22 The defendant shall be on community custody for:

23 Count(s) _____ 36 months for Serious Violent Offenses

24 Count(s) I, II, III 18 months for Violent Offenses

25 Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses
26 involving the unlawful possession of a firearm by a
27 street gang member or associate)

28 Note: combined term of confinement and community custody for any particular offense cannot exceed the
statutory maximum. RCW 9.94A.701.

(B) While on community placement or community custody, the defendant shall: (1) report to and be
available for contact with the assigned community corrections officer as directed; (2) work at DOC-
approved education, employment and/or community restitution (service); (3) notify DOC of any change in
defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully
issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) not
own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform
affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) abide by any
additional conditions imposed by DOC under RCW 9.94A.704 and .706 and (10) for sex offenses, submit
to electronic monitoring if imposed by DOC. The defendant's residence location and living arrangements
are subject to the prior approval of DOC while in community placement or community custody.

Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the
statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may
result in additional confinement.

JUDGMENT AND SENTENCE (JS)

The court orders that during the period of supervision the defendant shall:

consume no alcohol.

have no contact with: SEE NCO

remain within outside of a specified geographical boundary, to wit: _____

not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age

participate in the following crime-related treatment or counseling services: _____

undergo an evaluation for treatment for domestic violence substance abuse

mental health anger management and fully comply with all recommended treatment.

comply with the following crime-related prohibitions: _____

Other conditions: _____

For sentences imposed under RCW 9.94A.702, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

4.7 **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

JUDGMENT AND SENTENCE (JS)

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 RESTITUTION HEARING.

Defendant waives any right to be present at any restitution hearing (sign initials).

V.R.

5.5 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION. Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200.

N/A

5.8 [] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 14-1-00779-7

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

EMILY DIRTON

Court Reporter

73-081015

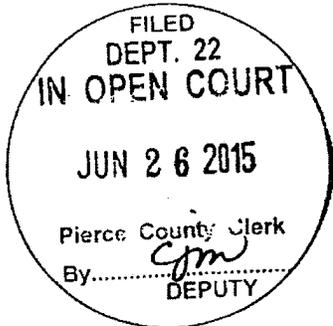
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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 14-1-00779-7

vs

VENLAMIN GEORGEV RUSEV,

Defendant.

WARRANT OF COMMITMENT

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[x] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

JOHN R. HICKMAN

By direction of the Honorable

John R. Hickman

JUDGE

Dated: 6/26/15

KEVIN STOCK

CLERK

By: *Ty W*

DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

JUN 29 2015 By *Ty W* Deputy

STATE OF WASHINGTON

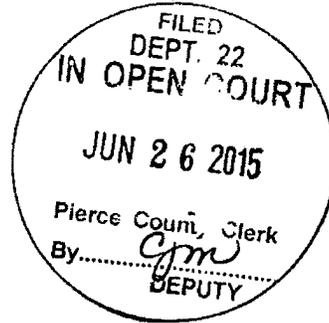
ss:

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____,

KEVIN STOCK, Clerk
By: _____ Deputy

dk



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VOTING RIGHTS STATEMENT

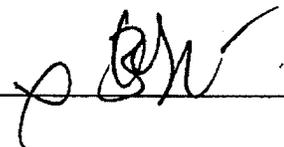
RCW 10.64.140: After conviction of a felony, or entry of a plea of guilty to a felony, your right to vote is immediately revoked and any existing voter registration is cancelled. Pursuant to RCW 29A.08.520 after you have completed all periods of incarceration imposed as a sentence, and after all community custody is completed and you are discharged by the Department of Corrections, your voting rights are automatically restored on a provisional basis. You must then reregister to be permitted to vote.

Failure to pay legal financial obligations, or comply with an agreed upon payment plan for those obligations, can result in your provisional voting right being revoked by the court.

Your right to vote may be fully restored by a) A certificate of discharge issued by the sentencing court, RCW 9.9A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is either provisionally or fully restored is a class C felony, RCW 92A.84.660.

I acknowledge receipt and understanding of this information:

Defendant's signature: _____



14-1-05779-7

APPENDIX B

as charged in the Original Information

- A special verdict/finding for use of firearm was returned on Count(s) I, II, and III RCW 9.94A.602, 9.94A.533.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

NONE KNOWN OR CLAIMED

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	4	IX	51-68 MOS	60 MOS	111-128 MOS	LIFE 50 K
II	4	IX	51-68 MOS	60 MOS	111-128 MOS	LIFE 50 K
III	4	XII	129-171 MOS	60 MOS	189-231 MOS	LIFE 50 K

- 2.4 [] EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence:
- within below the standard range for Count(s) _____.
 - above the standard range for Count(s) _____.
 - The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
 - Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory.
- Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 **FELONY FIREARM OFFENDER REGISTRATION.** The defendant committed a felony firearm offense as defined in RCW 9A.01.010.

The court considered the following factors:

the defendant's criminal history.

whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

evidence of the defendant's propensity for violence that would likely endanger persons.

other: Firearm used during incident

The court decided the defendant should should not register as a felony firearm offender.

III. JUDGMENT

3.1 The defendant is **GUILTY** of the Counts and Charges listed in Paragraph 2.1.

3.2 The court **DISMISSES** Counts _____ The defendant is found **NOT GUILTY** of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTNRJN \$ per order Restitution to: _____
\$ _____ Restitution to: _____
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV \$ 500.00 Crime Victim assessment

DNA \$ 100.00 DNA Database Fee

PUB \$ _____ Court-Appointed Attorney Fees and Defense Costs

FRC \$ 200.00 Criminal Filing Fee

FCM \$ _____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____

\$ _____ Other Costs for: _____

\$ _____ TOTAL

The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for _____

RESTITUTION. Order Attached

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

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[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ per CCO per month commencing per CCO. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT
The defendant shall not have contact with _____ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4a All property is hereby forfeited
 Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4b BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

60 months on Count I _____ months on Count _____

60 months on Count II _____ months on Count _____

155 months on Count III _____ months on Count _____

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 months on Count No I _____ months on Count No _____

60 months on Count No II _____ months on Count No _____

60 months on Count No III _____ months on Count No _____

_____ months on Count No _____ months on Count No _____

_____ months on Count No _____ months on Count No _____

_____ months on Count No _____ months on Count No _____

Sentence enhancements in Counts I, II, III shall run
 concurrent consecutive to each other.

Sentence enhancements in Counts I, II, III shall be served
 flat time subject to earned good time credit

(155 + 180 mo + 127)

Actual number of months of total confinement ordered is: 335 months total

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____

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CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: Subject to DOC calculation

4.6 [] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

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The court orders that during the period of supervision the defendant shall:

[] consume no alcohol.

have no contact with: _____

IHOR ONISHCHUK 3-26-94 See NCO orders
DMYTRO ONISHCHUK 8-31-95

JUDGMENT AND SENTENCE (JS)

(Felony) (7/2007) Page 6 of 11

[] remain [] within [] outside of a specified geographical boundary, to wit: _____

[] not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age

[] participate in the following crime-related treatment or counseling services: _____

[] undergo an evaluation for treatment for [] domestic violence [] substance abuse

[] mental health [] anger management and fully comply with all recommended treatment.

[] comply with the following crime-related prohibitions: _____

[] Other conditions: _____

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PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

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JUDGMENT AND SENTENCE (JS)

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10/20/2017

V. NOTICES AND SIGNATURES

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5.4 RESTITUTION HEARING.

[] Defendant waives any right to be present at any restitution hearing (sign initials): _____

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N/A

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CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 14-1-00779-7

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

Kaedra Wakenshaw
Court Reporter

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APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed.

The offender shall work at Department of Corrections approved education, employment, and/or community service.

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions.

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC.

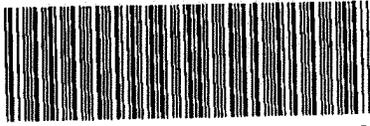
The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

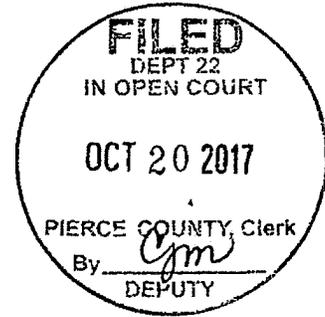
The Court may also order any of the following special conditions:

- (I) The offender shall remain within, or outside of, a specified geographical boundary: _____
_____ *per CCO*
- (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: _____
_____ *See NCOs*
- (III) The offender shall participate in crime-related treatment or counseling services, *per CCO*
- (IV) The offender shall not consume alcohol; _____
- (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or
- (VI) The offender shall comply with any crime-related prohibitions.
- (VII) Other: _____

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-00779-7

vs.

VENIAMIN GEORGEV RUSEV

Defendant.

ADVICE OF RIGHT TO APPEAL

RIGHT TO APPEAL

Judgment and Sentence having been entered, you are now advised that:

- 1.1 You have the right to appeal your conviction(s). If you have entered a guilty plea, you have waived your right to raise certain issues, as discussed in your guilty plea statement, in an appeal. You have a right to appeal any sentence that is outside the standard sentence range. You also have a right to appeal rulings on other post convictions motions as listed in Rules of Appellate Procedure 2.2.
- 1.2 Unless a notice of appeal is filed with the clerk of the court within thirty (30) days from the entry of judgment or the order appealed from, you have irrevocably waived your right of appeal.
- 1.3 The clerk of the Superior Court will, if requested by you, file a notice of appeal on your behalf.
- 1.4 If you cannot afford the cost of an appeal, you have the right to have a lawyer appointed to represent you on appeal and to have such parts of the trial record as are necessary for review of errors assigned transcribed for you, both at public expense.

ACKNOWLEDGMENT

Regarding the foregoing advice of my "Right to Appeal":

- 1. I understand these rights; and
- 2. I waive formal reading of these rights; and
- 3. I acknowledge receipt of a true copy of these rights.

DATE: 10/20/17

DEFENDANT: [Signature]

DEFENDANT'S ATTORNEY: [Signature]

DATE: 10/20/17

JUDGE: [Signature] JOHN R. HICKMAN

FILED
 DEPT 22
 IN OPEN COURT
 OCT 20 2017
 PIERCE COUNTY, Clerk
 By [Signature]
 DEPUTY

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APPENDIX C

February 25 2014 12:52 PM

KEVIN STOCK
COUNTY CLERK

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-00779-7

vs.

VENIAMIN GEORGEV RUSEV,

INFORMATION

Defendant.

DOB: 1/27/1983
PCN#: 541159339

SEX : MALE
SID#: UNKNOWN

RACE: WHITE
DOL#: WA RUSEVVG170B7

CO-DEF: VOSSLER AURON BLESCH 14-1-00780-1

COUNT I

I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse VENIAMIN GEORGEV RUSEV of the crime of ROBBERY IN THE FIRST DEGREE, committed as follows:

That VENIAMIN GEORGEV RUSEV, acting as an accomplice, in the State of Washington, on or about the 23rd day of February, 2014, did unlawfully and feloniously take personal property belonging to another with intent to steal from the person or in the presence of I. Onishchuk, the owner thereof or a person having dominion and control over said property, against such person's will by use or threatened use of immediate force, violence, or fear of injury to I. Onishchuk, said force or fear being used to obtain or retain possession of the property or to overcome resistance to the taking, and in the commission thereof, or in immediate flight therefrom, the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon, to-wit: a firearm, contrary to RCW 9A.56.190 and 9A.56.200(1)(a)(ii), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a firearm, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533, and against the peace and dignity of the State of Washington.

INFORMATION- 1

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

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COUNT II

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse VENIAMIN GEORGEV RUSEV of the crime of ROBBERY IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That VENIAMIN GEORGEV RUSEV, acting as an accomplice, in the State of Washington, on or about the 23rd day of February, 2014, did unlawfully and feloniously take personal property belonging to another with intent to steal from the person or in the presence of D. Onishchuk, the owner thereof or a person having dominion and control over said property, against such person's will by use or threatened use of immediate force, violence, or fear of injury to D. Onishchuk, said force or fear being used to obtain or retain possession of the property or to overcome resistance to the taking, and in the commission thereof, or in immediate flight therefrom, the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon, to-wit: a firearm, contrary to RCW 9A.56.190 and 9A.56.200(l)(a)(ii), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a firearm, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533, and against the peace and dignity of the State of Washington.

COUNT III

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse VENIAMIN GEORGEV RUSEV of the crime of ASSAULT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That VENIAMIN GEORGEV RUSEV, acting as an accomplice, in the State of Washington, on or about the 23rd day of February, 2014, did unlawfully and feloniously, with intent to inflict great bodily harm, intentionally assault I. Onishchuk with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death, contrary to RCW 9A.36.011(1)(a), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a firearm, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding additional time to

1 the presumptive sentence as provided in RCW 9.94A.533, and against the peace and dignity of the State
2 of Washington.

3 DATED this 25th day of February, 2014.

4 TACOMA POLICE DEPARTMENT
WA02703

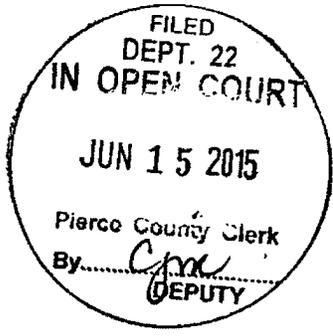
MARK LINDQUIST
Pierce County Prosecuting Attorney

6 prc

By: /s/ PATRICK COOPER
PATRICK COOPER
Deputy Prosecuting Attorney
WSB#: 15190

APPENDIX D

0199



7242

6/17/2015

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
 Plaintiff,
 vs.
 VENIAMIN GEORGEV RUSEV
 Defendant.

CAUSE NO. 14-1-00779-7

COURT'S INSTRUCTIONS TO THE JURY

DATED this 17 day of June, 2015.

[Signature]
 JUDGE

ORIGINAL

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

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5/17/2015

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyer to object to questions asked by another lawyer, and may should not influence you. Do not make any assumptions lawyer's objections.

Our state constitution prohibits a trial judge from would be improper for me to express, by words or condu

of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

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6.17.2015

INSTRUCTION NO. 2A

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

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6/11/7/2015

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

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INSTRUCTION NO. 4

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

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INSTRUCTION NO. 5

A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:

- (1) Solicits, commands, encourages, or requests another person to commit the crime; or
- (2) Aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

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6/17/2015

INSTRUCTION NO. 6

The State must prove an accomplice had general knowledge of the charged crime. The State is not required to prove the accomplice had knowledge of every element of the charged crime.

Thus, the State must prove an accomplice in a charged crime of robbery in the first degree and robbery in the second degree had general knowledge of the crime of "robbery". The State is not required to prove an accomplice had knowledge the robbery would be committed with a deadly weapon.

The State must prove an accomplice in a charged crime of assault in the first degree and assault in the second degree had general knowledge of the crime of "assault". The State is not required to prove an accomplice had knowledge the assault would be committed with a deadly weapon.

CP-08

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6/17/2015

INSTRUCTION NO. 7

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact.

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INSTRUCTION NO. 8

A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or a person to whom the defendant was acting as an accomplice, is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon or inflicts bodily injury.

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INSTRUCTION NO. 9

A person commits the crime of robbery when he or a person to whom the defendant was acting as an accomplice, unlawfully and with intent to commit theft thereof takes personal property from the person against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of anyone. A threat to use immediate force or violence may be either expressed or implied. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which case the degree of force is immaterial.

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6-17-2015

INSTRUCTION NO. 10

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.

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INSTRUCTION NO. 11

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

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6-17-2015

INSTRUCTION NO. 12

Deadly weapon means any weapon, device, instrument, substance, or article which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

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INSTRUCTION NO. 13

To convict the defendant of the crime of robbery in the first degree as charged in Count I-A, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of February, 2014, the defendant or a person to whom the defendant was acting as an accomplice, unlawfully took personal property from Ihor Onishchuk;

(2) That the defendant or a person to whom the defendant was acting as an accomplice, intended to commit theft of the property;

(3) That the taking was against Ihor Onishchuk's will by the defendant's or a person to whom the defendant was acting as an accomplice, use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of another;

(4) That force or fear was used by the defendant or a person to whom the defendant was acting as an accomplice, to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5)(a) That in the commission of these acts or in immediate flight therefrom the defendant or a person to whom the defendant was acting as an accomplice, was armed with a deadly weapon or

(b) That in the commission of these acts or in the immediate flight therefrom the defendant or a person to whom the defendant was acting as an accomplice, displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), and (6), and any of the alternative elements (5)(a) or (5)(b), have been proved beyond a reasonable doubt, then it will be

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your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a) or (5)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

To convict the defendant of the crime of robbery in the first degree as charged in Count II-A, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of February, 2014, the defendant or a person to whom the defendant was acting as an accomplice, unlawfully took personal property from Dmytro Onishchuk;

(2) That the defendant or a person to whom the defendant was acting as an accomplice, intended to commit theft of the property;

(3) That the taking was against Dmytro Onishchuk's will by the defendant's or a person to whom the defendant was acting as an accomplice, use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of another;

(4) That force or fear was used by the defendant or a person to whom the defendant was acting as an accomplice, to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5)(a) That in the commission of these acts or in immediate flight therefrom the defendant or a person to whom the defendant was acting as an accomplice, was armed with a deadly weapon or

(b) That in the commission of these acts or in the immediate flight therefrom the defendant or a person to whom the defendant was acting as an accomplice, displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), and (6), and any of the alternative elements (5)(a) or (5)(b), have been proved beyond a reasonable doubt, then it will be

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your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a) or (5)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

The defendant is charged in count I-A with Robbery in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Robbery in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

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INSTRUCTION NO. 16

The defendant is charged in count II-A with Robbery in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Robbery in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

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INSTRUCTION NO.

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A person commits the crime of robbery in the second degree when he or a person to whom the defendant was acting as an accomplice commits robbery.

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INSTRUCTION NO. 18

To convict the defendant of the crime of robbery in the second degree as charged in Count I-B, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of February, 2014, the defendant or a person to whom the defendant was acting as an accomplice, unlawfully took personal property from Ihor Onishchuk;

(2) That the defendant or a person to whom the defendant was acting as an accomplice, intended to commit theft of the property;

(3) That the taking was against Ihor Onishchuk's will by the defendant's or a person to whom the defendant was acting as an accomplice, use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of another;

(4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and

(5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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INSTRUCTION NO. 19

To convict the defendant of the crime of robbery in the second degree as charged in Count II-B, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of February, 2014, the defendant or a person to whom the defendant was acting as an accomplice, unlawfully took personal property from Dmytro Onishchuk;

(2) That the defendant or a person to whom the defendant was acting as an accomplice, intended to commit theft of the property;

(3) That the taking was against Dmytro Onishchuk's will by the defendant's or a person to whom the defendant was acting as an accomplice, use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of another;

(4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and

(5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or a person to whom the defendant was acting as an accomplice, assaults another with a firearm.

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INSTRUCTION NO. 21

Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

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INSTRUCTION NO. 22

An assault is an intentional shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A shooting is offensive if the shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

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INSTRUCTION NO. 23

A firearm, whether loaded or unloaded, is a deadly weapon.

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INSTRUCTION NO. 24

To convict the defendant of the crime of assault in the first degree as to Count III-A, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of February, 2014, the defendant or a person to whom the defendant was acting as an accomplice, assaulted Ihor Onishchuk;

(2) That the assault was committed with a firearm;

(3) That the defendant or a person to whom the defendant was acting as an accomplice, acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 25

The defendant is charged in count III-A with Assault in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Assault in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

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INSTRUCTION NO. 24

A person commits the crime of assault in the second degree when he or a person to whom the defendant was acting as an accomplice, assaults another with a deadly weapon.

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INSTRUCTION NO. 27

Deadly weapon also means any weapon, device, instrument, substance, or article which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

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6/17/2015

INSTRUCTION NO. 28

To convict the defendant of the crime of assault in the second degree as to Count III-B, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of February, 2014, the defendant or a person to whom the defendant was acting as an accomplice, assaulted Ihor Onishchuk with a deadly weapon; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 29

You will also be given special verdict form for each crime. If you find the defendant not guilty of the crime, do not use the respective special verdict form for that count. If you find the defendant guilty of the crime, you will then use the special verdict form for the respective count and fill in the blank with the answer "yes" or "no" according to the decision(s) you reach. In order to answer the special verdict form(s) "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no."

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INSTRUCTION NO. 30

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime as charged in each count respectively.

If one participant in a crime is armed with a firearm, all accomplices to the participant are deemed to be so armed, even if only one firearm is involved.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 31

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

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You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty," according to the decision you reach. If you are not able to reach a verdict, leave the verdict form blank.

When completing the verdict forms with respect to Count I, you will first consider the crime of Robbery in the First Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form I-A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in the verdict form.

If you find the defendant guilty on Verdict Form I-A, do not use Verdict Form I-B. If you find the defendant not guilty of the crime of Robbery in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Robbery in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form I-B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in the verdict form.

When completing the verdict forms with respect to Count II, you will first consider the crime of Robbery in the First Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form II-A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in the verdict form.

If you find the defendant guilty on Verdict Form II-A, do not use Verdict Form II-B. If you find the defendant not guilty of the crime of Robbery in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser

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crime of Robbery in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form I-B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in the verdict form.

When completing the verdict forms with respect to Count III, you will first consider the crime of Assault in the First Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form III-A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in the verdict form.

If you find the defendant guilty on Verdict Form III-A, do not use Verdict Form III-B. If you find the defendant not guilty of the crime of Assault in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Assault in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form III-B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in the verdict form.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

INSTRUCTION NO. 32

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

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6-11-7-12-01-5

APPENDIX E

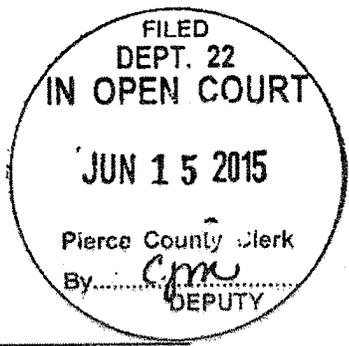
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6/17/2015



COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.

CAUSE NO. 14-1-00779-7



VENIAMIN GEORGEV RUSEV,
Defendant.

COUNT I-A
VERDICT FORM
RE IHOR ONISHCHUK

We, the jury, find defendant, Guilty (write in "Not Guilty" or "Guilty") of the
crime of Robbery in the First Degree as charged in Count I-A.

Ante Hall
PRESIDING JUROR

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

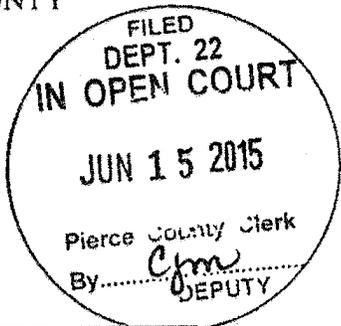
vs.

VENIAMIN GEORGEV RUSEV

Defendant.

CAUSE NO. 14-1-00779-7

VERDICT FORM I-B
RE IHOR ONISHCHUK



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We, the jury, having found the defendant not guilty of the crime of Robbery in the First Degree, or being unable to unanimously agree as to that charge, find the defendant _____ (write in Not Guilty or Guilty, or leave blank if unable to agree) of the lesser included crime of Robbery in the Second Degree as charged in Count I-B.

PRESIDING JUROR

ORIGINAL

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6.17.2015



14-1-00779-7 44836150 VRD 06-16-15

OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

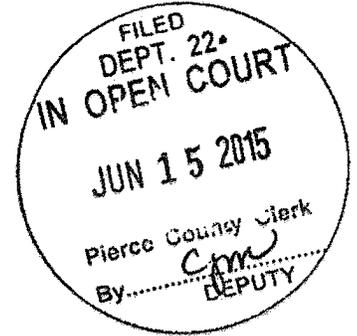
vs.

VENIAMIN GEORGEV RUSEV,

Defendant.

CAUSE NO. 14-1-00779-7

COUNT II-A
VERDICT FORM
DMYTRO ONISHCHUK



We, the jury, find defendant, Guilty (write in "Not Guilty" or "Guilty") of the crime of Robbery in the First Degree as charged in Count II-A.

[Signature]
PRESIDING JUROR

ORIGINAL



14-1-00779-7 44838153 VRD 06-16-15

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

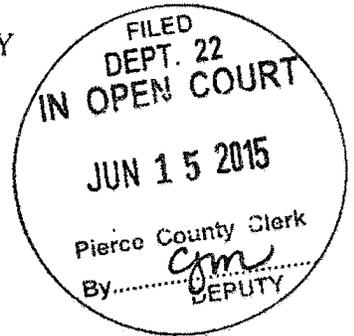
vs.

VENIAMIN GEORGEV RUSEV

Defendant.

CAUSE NO. 14-1-00779-7

VERDICT FORM II-B
DMYTRO ONISHCHUK



We, the jury, having found the defendant not guilty of the crime of Robbery in the First Degree, or being unable to unanimously agree as to that charge, find the defendant _____ (write in Not Guilty or Guilty, or leave blank if unable to agree) of the lesser included crime of Robbery in the Second Degree as charged in Count II-B.

PRESIDING JUROR

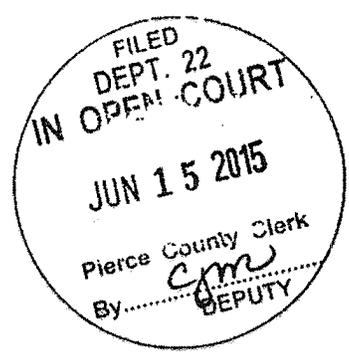
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14-1-00779-7 44836165 VRD 06-16-15



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6.17.2015

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-00779-7

vs.

VENIAMIN GEORGEV RUSEV

VERDICT FORM III-A

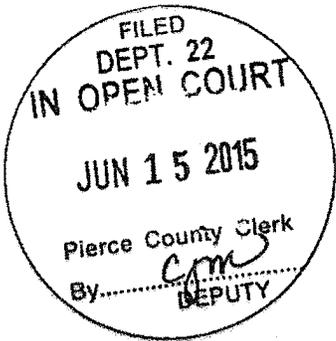
Defendant.

IHOR ONISHCHUK

We, the jury, find the defendant Guilty (write in Not Guilty or Guilty, or leave blank if unable to agree) of the crime of Assault in the First Degree as charged in Count III-A.

A. [Signature]
PRESIDING JUROR

ORIGINAL



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-00779-7

vs.

VENIAMIN GEORGEV RUSEV

VERDICT FORM III-B

Defendant.

IHOR ONISHCHUK

We, the jury, having found the defendant not guilty of the crime of Assault in the First Degree; or being unable to unanimously agree as to that charge, find the defendant

_____ (write in Not Guilty or Guilty, or leave blank if unable to agree) of the lesser included crime of Assault in the Second Degree as charged in Count III-B.

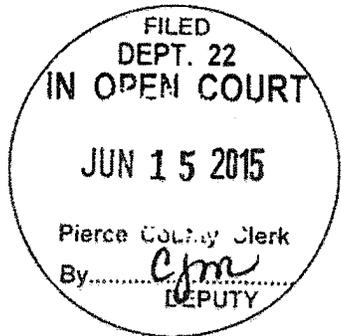
PRESIDING JUROR

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6/17/2015



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
VENIAMIN GEORGEV RUSEV,
Defendant.

CAUSE NO. 14-1-00779-7

COUNT I-A
SPECIAL VERDICT FORM
FIREARM

We, the jury, having found the defendant guilty of the crime of Robbery in the First Degree, as charged in Count I-A, return a special verdict by answering as follows:

QUESTION: Was the defendant, or a person to whom the defendant was acting as an accomplice, armed with a firearm at the time of the commission of the crime in Count I-A?

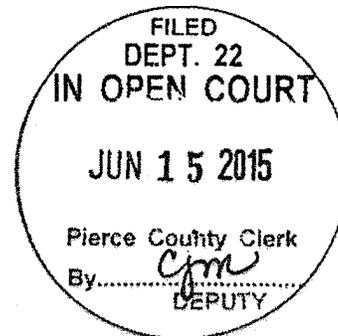
ANSWER: Yes (Write "yes" or "no")

[Signature]
PRESIDING JUROR

ORIGINAL



14-1-00779-7 44836204 VRD 06-16-15



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

VENIAMIN GEORGEV RUSEV,

Defendant.

CAUSE NO. 14-1-00779-7

COUNT I-B
SPECIAL VERDICT FORM
FIREARM

We, the jury, having found the defendant guilty of the crime of Robbery in the Second Degree, as charged in Count I-B, return a special verdict by answering as follows:

QUESTION: Was the defendant, or a person to whom the defendant was acting as an accomplice, armed with a firearm at the time of the commission of the crime in Count I-B?

ANSWER: _____ (Write "yes" or "no")

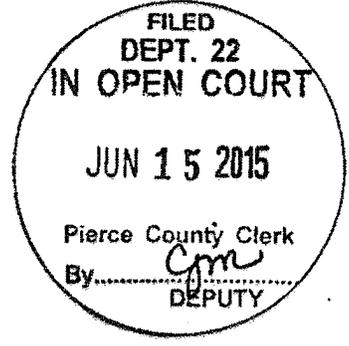
PRESIDING JUROR

ORIGINAL

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14-1-00779-7 44836209 VRD 06-16-15



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6.1.7.2015

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-00779-7

vs.

COUNT II-A
SPECIAL VERDICT FORM
FIREARM

VENIAMIN GEORGEV RUSEV,

Defendant.

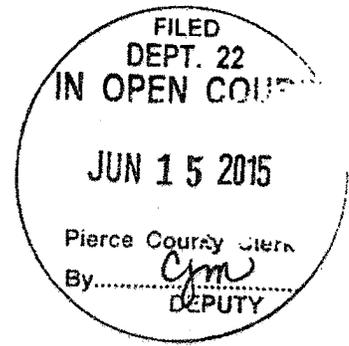
We, the jury, having found the defendant guilty of the crime of Robbery in the First Degree, as charged in Count II-A, return a special verdict by answering as follows:

QUESTION: Was the defendant, or a person to whom the defendant was acting as an accomplice, armed with a firearm at the time of the commission of the crime in Count II-A?

ANSWER: Yes (Write "yes" or "no")

[Signature]
PRESIDING JUROR

ORIGINAL



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
VENIAMIN GEORGEV RUSEV,
Defendant.

CAUSE NO. 14-1-00779-7

COUNT II-B
SPECIAL VERDICT FORM
FIREARM

We, the jury, having found the defendant guilty of the crime of Robbery in the Second Degree, as charged in Count II-B, return a special verdict by answering as follows:

QUESTION: Was the defendant, or a person to whom the defendant was acting as an accomplice, armed with a firearm at the time of the commission of the crime in Count II-B?

ANSWER: _____ (Write "yes" or "no")

PRESIDING JUROR

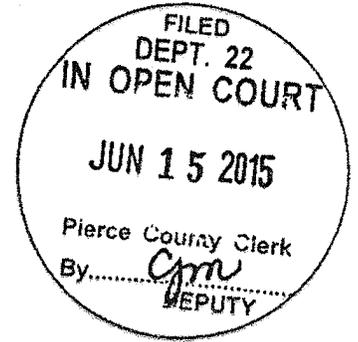
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14-1-00779-7 44836219 VRD 06-16-15



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

VENIAMIN GEORGEV RUSEV

Defendant.

CAUSE NO. 14-1-00779-7

COUNT III-A
SPECIAL VERDICT FORM
FIREARM

We, the jury, having found the defendant guilty of the crime of assault in the first degree, as charged in Count III-A, return a special verdict by answering as follows:

QUESTION: Was the defendant, or a person to whom the defendant was acting as an accomplice, armed with a firearm at the time of the commission of the crime in Count III-A?

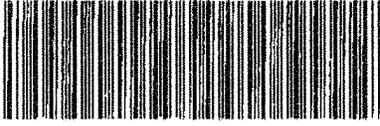
ANSWER: Yes (Write "yes" or "no")

Antonia Hill
PRESIDING JUROR

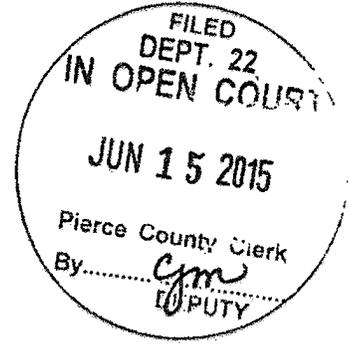
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6/17/2015



14-1-00779-7 44836222 VRD 06-16-15



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

VENIAMIN GEORGEV RUSEV,
Defendant.

CAUSE NO. 14-1-00779-7

COUNT III-B
SPECIAL VERDICT FORM
FIREARM

We, the jury, having found the defendant guilty of the crime of Assault in the Second Degree, as charged in Count III-B, return a special verdict by answering as follows:

QUESTION: Was the defendant, or a person to whom the defendant was acting as an accomplice, armed with a firearm at the time of the commission of the crime in Count III-B?

ANSWER: _____ (Write "yes" or "no")

PRESIDING JUROR

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APPENDIX F

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)	
)	
Plaintiff,)	
)	
vs.)	Superior Court
)	No. 14-1-00779-7
VENIAMIN GEORGEV RUSEV,)	
)	
Defendant.)	

VERBATIM REPORT OF PROCEEDINGS

October 20, 2017
Before the **HONORABLE JOHN R. HICKMAN**

REPORTED BY:
Kaedra Wakenshaw, CCR, RPR, CRR
Official Court Reporter, Dept. 17
930 Tacoma Ave. S.
Tacoma, WA 98402
(253) 798-6642

A P P E A R A N C E S

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For the Plaintiff:

PATRICK R. COOPER
Deputy Prosecuting Attorney
930 Tacoma Avenue South
Tacoma, Washington 98402

For the Defendant:

BRYAN C. HERSHMAN
Attorney at Law
1105 Tacoma Avenue South
Tacoma, Washington 98402

1 I don't know if the Court wants me to continue filling
2 out, or I can hand it up to the Court if you would like.
3 And I have followed what was in that, taking that out. And
4 I do have the paperwork, the revised paperwork, for
5 Mr. Rusev based on the Court of Appeals decision.

6 THE COURT: Counsel?

7 MR. HERSHMAN: Your Honor, good morning. Bryan
8 Hershman on behalf of Mr. Rusev, who's in court next to me
9 listening to the proceeding.

10 It probably is appropriate to tell you that though he
11 is Russian by origin, he speaks fluent English, and he
12 understands what's going on today.

13 We've already signed the Judgment & Sentence. We
14 understand that there's an issue regarding the mand. min,
15 and we'll await direction from the bench as to how the J&S
16 is to be filled out.

17 THE COURT: I'm reading the decision just to
18 refresh my memory.

19 Well, I just think that we -- I think the sentence is
20 the same except we eliminate the language that it would be
21 a mandatory minimum of five years.

22 MR. HERSHMAN: I agree. And that's Box --
23 well, it's Page --

24 MR. COOPER: Well, it's Page 5.

25 MR. HERSHMAN: -- 5, Line 25. Mr. Cooper has

1 left that box unchecked, and I believe that's a correct way
2 to fill this out. The last one, apparently, was checked.
3 I don't remember. Must have been checked.

4 MR. COOPER: It was checked, Your Honor. It
5 was.

6 THE COURT: Yeah. Mandatory minimum, five-year
7 mandatory minimum, does not automatically attach to a First
8 Degree Assault conviction, and it requires a separate
9 factual finding that he used some form of force with means
10 likely to result in death or that he intended to kill the
11 victim, and that finding wasn't made, so they sent it back
12 for resentencing.

13 How are you?

14 THE DEFENDANT: I'm pretty good.

15 THE COURT: Good. Where are you at?

16 THE DEFENDANT: I'm at Stafford Creek right
17 now.

18 THE COURT: Well, that's --

19 THE DEFENDANT: It's a minimum.

20 THE COURT: Yeah. I was going to say.

21 THE DEFENDANT: It's a pretty good facility.

22 THE COURT: You get out and work outside at
23 all?

24 THE DEFENDANT: Yeah. I'm working on my GED,
25 participating in worship team in church now, you know,

1 keeping myself busy.

2 THE COURT: Well --

3 MR. HERSHMAN: This is a tragedy, Your Honor.
4 He's a nice young man. And this didn't have to happen.
5 This whole thing didn't have to happen.

6 THE COURT: I wouldn't disagree.

7 MR. COOPER: And I don't know if the Court --
8 restitution has been ordered, Your Honor, and I am -- I
9 think that's still in effect. I'll hand up to the Court if
10 you'd like to see. Here's a copy of the original
11 Judgment & Sentence.

12 I have shown to Mr. Hershman the page where you had
13 the time with the sentencing time and the sentence -- the
14 firearm sentence enhancement and then where we did not
15 check the box for the minimum/maximum term.

16 THE COURT: All right. Let me get to that,
17 because I see it was checked, obviously.

18 Okay. I think that's the only correction that needs
19 to be done. And I'll go ahead and sign the paperwork and
20 hand it back for signature.

21 Gosh, I can't believe it was that long ago.

22 MR. HERSHMAN: Yeah. How long ago was this?

23 THE DEFENDANT: 2015.

24 THE COURT: Signed in June of '15.

25 MR. HERSHMAN: Wow. Wow. It doesn't seem like

1 that long ago at all.

2 THE DEFENDANT: So three, almost three years.
3 Two and a half.

4 MR. HERSHMAN: Two and a half.

5 MR. COOPER: Two and a half? Two and a half.
6 '17?

7 MR. HERSHMAN: Still, it doesn't seem like it
8 was that long ago. Was the trial in March?

9 THE DEFENDANT: No. In May.

10 MR. HERSHMAN: The trial was in May?

11 THE DEFENDANT: It started the beginning of May
12 or June something.

13 THE COURT: Okay. I just want to make sure
14 everybody else has signed where necessary. Have you all
15 signed this?

16 MR. COOPER: I think we have, but I'll look
17 again, Your Honor --

18 THE COURT: Okay.

19 MR. COOPER: -- to double-check.

20 THE COURT: And I wrote some things in there,
21 that the sentencing was per a mandate from Division II and
22 that the original J&S was signed on 6/26/15.

23 MR. COOPER: All right. Thank you, Your Honor.

24 THE COURT: You bet.

25 So they give you an estimated time of release now that

1 you don't have to do mandatory time?

2 THE DEFENDANT: No. Well, I had my -- 2041,
3 the year, was the release -- release date.

4 THE COURT: In a year?

5 THE DEFENDANT: In a year, yeah.

6 THE COURT: Oh, that's --

7 MR. HERSHMAN: 2041?

8 THE COURT: -- coming up.

9 THE DEFENDANT: Well, we're still working on my
10 other part of my appeal, so...

11 THE COURT: Well, then I won't talk about that.

12 THE DEFENDANT: Okay.

13 (Matter adjourned)

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

VENIAMIN GEORGEV RUSEV,

Defendant.

)
)
)
) Superior Court
) No. 14-1-00779-7
)
)

REPORTER'S CERTIFICATE

STATE OF WASHINGTON

COUNTY OF PIERCE

)
) ss
)

I, Kaedra A. Wakenshaw, Official Court Reporter in the State of Washington, County of Pierce, do hereby certify that the forgoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken on October 20, 2017, in the matter of the above-entitled cause.

Dated this date of August 17, 2018.

KAEDRA A. WAKENSHAW, CCR, RPR, CRR
Official Court Reporter

APPENDIX G

September 14 2017 9:44 AM

KEVIN STOCK
COUNTY CLERK
NO: 14-1-00779-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

VENJAMIN GEORGE RUSEV,

Appellant.

No. 47762-9-II

MANDATE

Pierce County Cause No.
14-1-00779-7

Court Action Required

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on April 18, 2017 became the decision terminating review of this court of the above entitled case on September 6, 2017. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Court Action Required: The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 13th day of September, 2017.


Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Div. II

Page 2
Mandate 47762-9-II

Michelle Hyer
Pierce County Prosecutor
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102
PCpatcecf@co.pierce.wa.us

Hon. John R Hickman
Pierce County Superior Court Judge
930 Tacoma Ave South
Tacoma, WA 98402

WSP Identification & Criminal History Section
ATTN: Quality Control Unit
PO Box 42633
Olympia, WA 98504-2633

Lise Ellner
Attorney at Law
PO Box 2711
Vashon, WA 98070-2711
Liseellnerlaw@comcast.net

Veniamin Rusev
DOC#383818
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

MERYHEW LAW GROUP

September 12, 2018 - 11:53 AM

Filing Personal Restraint Petition

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: Case Initiation
Trial Court Case Title: State of Washington Vs Rusev, Veniamin G *cod*
Trial Court Case Number: 14-1-00779-7
Trial Court County: Pierce County Superior Court
Signing Judge: John R. Hickman
Judgment Date: 10/20/2017

The following documents have been uploaded:

- PRP_Personal_Restraint_Petition_20180912115107D2473398_6209.pdf
This File Contains:
Personal Restraint Petition
The Original File Name was PRP.pdf

Comments:

Sender Name: David Donnan - Email: david@meryhewlaw.com
Address:
600 1ST AVE STE 512
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