

NO. 42857-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

JOSHUA MATTHEW WINGATE,

Defendant/Appellant.

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OPENING BRIEF

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ORIGINAL

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## **ASSIGNMENTS OF ERROR**

1. The Superior Court erred in denying Mr. Wingate's CrR 7.8 motion to vacate two second-degree assault convictions, on Counts 3 and 4, due to ineffective assistance of counsel.

2. The Superior Court erred in rejecting Mr. Wingate's alternative claim of ineffective assistance of appellate counsel.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err in denying the CrR 7.8 motion to vacate Mr. Wingate's second-degree assault convictions, given that: (a) it is undisputed that unlawful display of a firearm meets the "legal test" for being a lesser included offense of second-degree assault; (b) it is undisputed that Wingate's now-disbarred trial lawyer failed to request a jury instruction on the lesser-included offense; (c) the trial court made an undisputed finding that this failure was not strategic or tactical; and (d) trial witnesses testified that Wingate displayed his gun to the "victims" of Counts 3 and 4 with a mental state of fear and an intent to prevent a fight?

2. Alternatively, was appellate counsel ineffective for failing to raise this issue on appeal?

3. The CrR 7.8 motion was not filed within one year of the end of the first direct appeal, but was filed within one year of a later direct appeal following remand for potential resentencing. Following *In re*

*Personal Restraint of Skylstad*, 160 Wn.2d 944, 162 P.3d 413 (2007), which holds that the one-year time limit (RCW 10.73.090) for filing a CrR 7.8 motion does not start to run until all direct appeals, including appeals following remands for resentencing, are over, did the Superior Court correctly rule that the CrR 7.8 motion was timely?

## STATEMENT OF THE CASE

### I. PROCEDURAL HISTORY

On December 6, 2001, Joshua Wingate was found guilty following a jury trial in Pierce County Superior Court of one count of assault in the first degree (Count 1) in violation of RCW 9.41.010, 9.94A.310, 9.94A.370 and 9A.36.011(1)(a), and two counts of assault in the second degree (Counts 3 and 4) in violation of RCW 9.41.010, 9.94A.310, 9.94A.370 and 9A.36.021(1)(c). He was acquitted of Count 2, which had charged second-degree assault against a different person. CP:89. In addition, Special Verdicts were returned on Counts 1, 3, and 4 finding that the crimes involved the use of a firearm. CP:87, 92, and 94. Mr. Wingate's trial lawyer was Rodney DeGeorge, then-WSBA #22931. CP:399-404; CP:431, FOF No. 1.

At Mr. Wingate's first sentencing hearing, the Superior Court imposed an exceptional sentence below the range on Count 1 and concurrent, lower, sentences on the other two counts. That resulted in

sentences of 60 months on Count 1; 20 months on Count 3; and 20 months on Count 4, concurrent. That court also imposed firearm sentencing enhancements: 60 months on Count 1, 36 months on Count 3, and 36 months on Count 4, concurrent to each other. CP:95-111. Mr. Wingate's total confinement for all three counts, including the sentencing enhancements, was thus 120 months. That changed, following a motion to reconsider, an appeal, and resentencing, as described below. But that first Judgment was entered on January 25, 2002. *Id.*

On February 14, 2002, the state filed a motion to reconsider the exceptional sentence downward and on February 22, 2002, it filed a Notice of Appeal. The appeal was to this Court, in Case No. 28476-6-II.

On May 10, 2002, in response to the motion to reconsider, the Superior Court granted the state's motion to reconsider the exceptional sentence downward, in part. It changed the sentence by running the firearm enhancements consecutively rather than concurrently. However, the appeal was then pending. Thus, on May 16, 2002, the state obtained a remand to allow the Superior Court to modify the exceptional sentence in accordance with its already-filed decision to grant the motion to reconsider.

On June 28, 2002, at a second sentencing hearing, the Superior Court imposed the same number of months for each crime and

enhancement but ran all enhancements consecutively. CP:136-151.

The state continued its appeal, challenging the exceptional sentence below the range on Count 1. Mr. Wingate filed a cross-appeal on July 29, 2002, in Case No. 29156-8-II. One of the issues he raised was ineffective assistance of trial counsel for failure to raise certain issues. This Court consolidated the appeals. On September 21, 2004, it held that the facts of this case did not warrant a first-aggressor instruction and reversed. *State v. Wingate*, 123 Wn. App. 4144, 98 P.3d 111 (2004).

The Washington Supreme Court, however, reversed this Court. On November 10, 2005, it ruled that the first-aggressor instruction was lawful and remanded to this Court. *State v. Wingate*, 155 Wn.2d 817, 122 P.3d 908 (2005).

Upon remand, this Court rejected the previously-briefed claim of ineffective assistance for failure to propose an “actual danger” jury instruction. *State v. Wingate*, 2006 Wash. App. LEXIS 1294 (unpublished). It also rejected a prosecutorial misconduct argument. With regard to sentencing, this Court held that two of the reasons supporting the exceptional sentence were legally insufficient: (1) Mr. Wingate’s duress, coercion, threat and compulsion could not justify an exceptional sentence, because there was no evidence that anyone compelled him to shoot the victim; and (2) Mr. Wingate’s concern for the victim’s welfare was

insufficient to support a downward departure absent a finding that another person committed the crime. This Court also held, however, that the Superior Court's ruling that the standard sentence range was excessive "was not clearly erroneous in light of the extraordinary circumstances in this case." *Id.*, at \*15. It therefore remanded for "reconsideration" of the "sentence" and "possible resentencing" following such reconsideration:

... Moreover, in light of the exceptional circumstances of this case, there is ample basis to support the trial court's exceptional sentence downward to further the purposes of the SRA. Thus, we hold that the trial court did not abuse its discretion in imposing an exceptional sentence downward, which was not clearly too lenient.

Nonetheless, we must remand for clarification. As we explain above, the trial court based Wingate's exceptional sentence downward on two factors not supported by the record. Because the trial court did not articulate that it would have imposed the same exceptional sentence based on any one of its four stated reasons, we cannot discern on the record before us whether the sentence is clearly authorized by law.

Accordingly, we affirm Wingate's convictions and *remand for reconsideration of the trial court's reasons for Wingate's exceptional sentence downward and for possible resentencing.*

*Id.*, at \*\*16-17 (emphasis added).

Mr. Wingate's timely-filed Petition for Review was denied on May 1, 2007. *State v. Wingate*, 160 Wn.2d 1003, 158 P.3d 615, 2007 Wash. LEXIS 353 (2007). The mandate issued on May 8, 2007.

Then, before the Superior Court hearing on this Court's remand, Wingate moved to strike his three firearm enhancements, arguing that *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), applied and, hence, that they should be deadly weapon, not firearm enhancements. On August 24, 2007, the Superior Court considered all of those issues on the merits. It rejected the *Recuenco* argument on the merits and accepted the downward departure argument on the merits, entering an order clarifying the exceptional sentence, stating that "one or both of [its] findings would support the sentence [it] imposed on January 25, 2002." CP:202-03. (Order Clarifying Exceptional Sentence Pursuant to Court of Appeals Mandate.)

Mr. Wingate filed a direct appeal. On February 12, 2009, this Court considered that appeal on the merits; did not recharacterize it as a motion or petition for discretionary review; and affirmed. *State v. Wingate*, 2009 Wash. App. LEXIS 352 (2009).

Mr. Wingate filed a Petition for Review on March 13, 2009. The Supreme Court denied it on July 14, 2010. *State v. Wingate*, 2010 Wash. LEXIS 568 (2010). The mandate issued on July 20, 2010.

Mr. Wingate filed his CrR 7.8 motion within one year of the issuance of that mandate, that is, on June 10, 2011. CP:239-397. He challenged his convictions on Counts 3 and 4, second-degree assault, on

the ground that his trial lawyer was ineffective for failing to request an instruction on the lesser included offense of unlawful display of a weapon on each of those counts.

The Superior Court rejected the state's challenge to the timeliness of that motion and considered it on the merits. CP:432, COL No. 1.

The CrR 7.8 motion was supported by the undisputed declarations of both the defendant, Mr. Wingate, and his trial lawyer, Mr. DeGeorge. CP:399-404. Mr. Wingate was represented by DeGeorge during his trial, his first sentencing, and at the beginning of his first appeal, until DeGeorge stopped complying with the rules governing his representation of Wingate on appeal. CP:399-404; CP:431, FOF No. 1. DeGeorge was reprimanded on June 26, 2003, and disbarred on January 30, 2006. *Id.*

The trial court credited DeGeorge's admissions in his affidavit in support of the CrR 7.8 motion. That court specifically ruled that, having presided over the trial and having observed DeGeorge's conduct at that trial, he fully credited the DeGeorge affidavit stating that he did not research the issue of Wingate's entitlement to a lesser included offense instruction. The trial court ruled that DeGeorge's statement to that effect in his current affidavit was consistent with the level of preparation and background research that DeGeorge displayed at trial. The trial court also credited the un rebutted DeGeorge affidavit's statement that this reason

was not tactical or strategic, but was instead based on lack of research; the court found that this was also consistent with the level of preparation and background research DeGeorge displayed at trial. Specifically, the trial court stated on these points:

1. Mr. Wingate was represented by attorney Rodney DeGeorge during his trial. Mr. DeGeorge was reprimanded on June 26, 2003, and disbarred on January 30, 2006.

2. Mr. DeGeorge did not discuss with the defendant the possibility of proposing a jury instruction for the lesser included offense of Unlawful Display of a Weapon pursuant to RCW 9.41.270(1) regarding counts III and IV.

3. The Trial Judge observed the conduct of Mr. DeGeorge at trial. The Court finds that Mr. DeGeorge did not research the issue of the defendant's entitlement to a jury instruction on the lesser included offense of Unlawful Display of a Weapon pursuant to RCW 9.41.270(1). There is no evidence that shows Mr. DeGeorge's failure to seek a lesser included instruction for counts III and IV was a tactical or strategic decision.

CP:431, FOF Nos. 1-3.

The trial court denied the CrR 7.8 motion, however, ruling Wingate was not entitled to an instruction on the lesser included offense of unlawful display of a weapon because the evidence did not support an inference that only the lesser, and not the greater, crime had been committed. It explained that Wingate himself testified that he had pointed the gun at the victims of Counts 3 and 4:

3. Trial Counsel Rodney DeGeorge effectively represented the defendant at trial. Mr. DeGeorge was not ineffective.

4. Based on the holding in State v. Crace, 157 Wash.App. 81, 236 P.2d 914 (2010) and the legal reasoning in State v. Jaynes, 131 Wash.App. 1058 (2006), there was insufficient evidence for this Court to give an instruction on Unlawful Display of a Weapon pursuant to RCW 9.41.270(1) as a “lesser included offense” of the crime of Assault in the Second Degree.

5. The “factual” prong outlined in State v. Workman, 90 Wash.2d 443, 584 P.2d 382 (1978) that would have provided the Trial Court with authority to give the lesser included instruction for the crime of Unlawful Display of a Weapon was not met by the evidence presented at trial.

6. Even if the defendant had requested the trial court give an instruction on the crime of Unlawful Display of a Weapon, the trial court would not have instructed the jury on the crime of Unlawful Display of a Weapon.

CP:432, COL Nos. 3-6.

## **II. THE EVIDENCE PRESENTED AT TRIAL AND SENTENCING**

That summary of the procedural history of this case shows that the Superior Court denied relief because it reasoned that the evidence did not support an inference that only the lesser offense had been committed. Obviously, this makes a review of the evidence presented at trial necessary. Since that review forms the heart of the argument on this appeal, it is contained in the Argument Section I(D), below.

A good snapshot of the trial evidence, though, comes from the trial judge's summary of that evidence in findings supporting its exceptional sentence below the range. CP:155-160.

To recap, Mr. Wingate was charged with one count of first-degree assault and three counts of second-degree assault. He testified at trial, and explained that he acted in defense of himself and others. The jury acquitted him of Count 2, second-degree assault, but convicted him of Count 1, first-degree assault, and Counts 3 and 4, second-degree assault. Thus, the jury did not completely accept Mr. Wingate's self-defense testimony.

The Superior Court, however, did – at least in part. Its Findings of Fact and Conclusions of Law, CP:155-160, show that there were several young men congregating outside the home of Wingate's friend, James Koo; that one of them, Mr. Park, was itching for a fight with Koo over a girl; that Wingate arrived to help protect Koo; that only after Park chased Koo, and knocked over a girl in the process, did Wingate draw his gun and point it; that Wingate ultimately fired that gun only at Park and only when Park advanced towards him, refused to stop advancing, challenged Wingate to shoot, and then Wingate – after first lowering his gun – did shoot. The trial judge's complete summary of that trial evidence is:

1. The defendant, Matthew Wingate, arrived at the residence of his friend James Koo after learning that Steven Park, the victim in Count I, had called and told Koo he was coming over to confront him about a girl he was dating.
2. Wingate, Koo and numerous other acquaintances waited both inside and outside the Koo residence until Steven Park arrived.
3. Park arrived with his friends: Marco Poydras, Christy Dang, Joseph Feist and Chad Scott. Park attempted to confront Koo but was unable to speak with him face to face as Koo ran away from him and around his father's truck.
4. Park continued his pursuit of James Koo by jumping onto and over the truck which was parked in the driveway in front of Koo's house.
5. Park was intent of [sic] confronting Koo and pushed aside his friend, Elizabeth Kim, who attempted to stop him from chasing Koo.
6. Park yelled obscenities directed at Mr. Koo during this confrontation.
7. The defendant, Matt Wingate, who was watching the events from across the street drew his .38 caliber handgun and pointed it at Feist, Scott and Poydras.
8. Park stopped chasing Koo and walked from Koo's driveway to the opposite side of the street towards Wingate where Wingate was pointing the gun at his friends.
9. James Koo went back inside his residence and did not see the events that transpired after Steven Park walked away from him.
10. Wingate pointed his gun at Park and told him that he should leave since no one wanted to fight.
11. Park walked towards Wingate with his hands to his side and asked whether Wingate was going to shoot him.

12. Wingate backed away from Park as Park approached.
13. Wingate lowered his gun and fired one shot into Park's thigh.
14. Wingate never saw Park holding or brandishing any type of weapon during the events that occurred outside Koo's residence.

CP:156-57, FFCL, pp. 2-3.

Critically, the Superior Court also ruled that the "victims" of Counts 3 and 4 brought their own weapons and that Wingate "believed" that they "attempted to retrieve a shotgun from the trunk [of one of the cars] but were disarmed by one of his friends":

1. The victims for Counts III and IV, Joseph Feist and Chad Scott, remained with the vehicles in which they arrived at the Koo residence.
2. Feist and Scott stood near the opened trunk of Feist's car which contained baseball equipment including a baseball bat.
3. Wingate believed that Feist and Scott attempted to retrieve a shotgun from the trunk but were disarmed by one of his friends.

CP:157-58, FFCL, pp. 3-4.

The Superior Court considered these facts so mitigating that it imposed an exceptional sentence, based on Mr. Wingate's less culpable mental state:

1. The victim for Count I, Stephen Park, was the initiator or a willing participant in the altercation

- that resulted in the defendant assaulting him with a firearm;
2. The defendant committed the crime while under duress, coercion; threat or compulsion insufficient to constitute a complete defense but which significantly affected his conduct;
  3. The defendant manifested extreme caution for the well being of the victim;
  4. The presumptive sentence (multiple offense policy) is clearly excessive in light of this chapter, as expressed in RCW 9.94A.010.

CP:158-59, FFCL, pp. 4-5.

## ARGUMENT

### I. **UNLAWFUL DISPLAY OF A FIREARM IS A LESSER-INCLUDED OFFENSE OF SECOND DEGREE ASSAULT; TRIAL COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION ON THAT LESSER INCLUDED OFFENSE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL**

#### A. **Mr. Wingate Was Convicted of Two Counts of Second-Degree Assault**

Mr. Wingate was convicted of several counts of assault. The second-degree assault charges specified assault with a "deadly weapon" and all alleged that they were committed with a deadly weapon that was a handgun. CP:42-44, Counts 2, 3, 4.

#### B. **The "Legal" and "Factual" Tests for Determining Whether a Defendant Charged With Second-Degree Assault is Entitled to an Instruction on Unlawful Display of a Firearm As a Lesser Included Offense**

A defendant is entitled to an instruction on a lesser included offense if each element of the lesser offense is a necessary element of the offense charged (the “legal” test) and if the evidence in the case supports “an inference” that the lesser offense was committed (the “factual” test). *State v. Speece*, 115 Wn.2d 360, 362, 798 P.2d 294 (1990). *Accord State v. Harris*, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993); *State v. Workman*, 90 Wn.2d 443, 447-48. This is known as the “*Workman*” test after the first Washington Supreme Court case to adopt it.<sup>1</sup>

**C. The “Legal” Test Was Satisfied Here**

Under the “legal” test, unlawful display of a weapon is a lesser included offense of second-degree assault. This was confirmed most recently in *In re the Personal Restraint of Crace*, 157 Wn. App. 81, 236 P.3d 914 (2010), *review granted*, 171 Wn.2d 1035, 257 P.3d 664 (2011).

This is also clear from a comparison of the elements of the two crimes. The assault statute, RCW 9A.36.021(c), provides: “(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree ... (c) Assaults another with a deadly weapon.” Its elements include “specific intent to create reasonable fear and apprehension of bodily injury.” *State v. Byrd*, 125 Wn.2d 707,

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<sup>1</sup> *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

713, 887 P.2d 396 (1995). The unlawful display statute, RCW 9.41.270, provides: “1) It shall be unlawful for any person to carry, exhibit, display, or draw any firearm ... or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.” Its elements include that the defendant displayed a weapon in a manner manifesting the intent to intimidate another or warranting alarm for another’s safety. RCW 9.41.270(1).

Thus, evidence will support an inference that a defendant committed unlawful display, rather than assault with a deadly weapon, *if the defendant “draw[s]” his gun without the specific intent to cause “fear and apprehension of bodily injury,” but, instead, does it with an “intent to intimidate” or cause “alarm for another’s safety.”* As the *In re Crace* Court explained:

“To convict a defendant of second degree assault, the jury must find specific intent to create reasonable fear and apprehension of bodily injury.” *State v. Ward*, 125 Wash. App. 243, 248, 104 P.3d 670 (2004) (citing *State v. Byrd*, 125 Wash.2d 707, 713, 887 P.2d 396 (1995)). For instance, a defendant’s “intent may be inferred from pointing a gun, but not from mere display of a gun.” *Ward*, 125 Wash. App. at 248, 104 P.3d 670 (citing *State v. Eastmond*, 129 Wash.2d 497, 500, 919 P.2d 577 (1996)).

To convict based on unlawful display of a weapon, the defendant must

carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

RCW 9.41.270(1). Because all the elements of unlawful display of a weapon are also necessary elements of second degree assault, unlawful display of a weapon is a lesser included offense of second degree assault, satisfying the legal prong of the *Workman* test.

*Crace*, 157 Wn. App. at 107-08 (citations omitted). Thus, the “legal” test was satisfied in this case. The trial court agreed. CP:432, COL No. 4.

**D. The “Factual” Test Was Satisfied Here**

**1. *The “Factual” Test Was Satisfied Here – The Evidence Shows This***

The only question on this appeal is whether the “factual” test was also satisfied. That test is satisfied if the evidence supports an *inference* that only the lesser, rather than the greater, crime, was committed.<sup>2</sup>

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<sup>2</sup>*State v. Berlin*, 133 Wn.2d 541, 551, 947 P.2d 700 (1997) (“To satisfy the factual prong of *Workman*, the evidence must support an inference that manslaughter was committed.”); *State v. Gostol*, 92 Wn. App. 832, 965 P.2d 1121 (1998).

The evidence in this case was surely sufficient to create an “inference” that Wingate’s mental state was the less culpable, “intent to intimidate” or cause “alarm” one, rather than the more culpable “specific intent” to “create reasonable fear and apprehension of bodily injury” one. Not as to Mr. Park, who was shot – but as to Mr. Scott and Mr. Feist, the victims of Counts 3 and 4, who were not.

For example, one witness who had no predisposition to favor either side was a neighbor, Mr. Edvald. This state’s witness testified that when Wingate had the gun, and was backing up, Wingate looked “*very scared.*” VRP:216 (emphasis added). This provides support for the “inference” that Wingate pulled out his gun with a mental state of fear, not with the mental state of intending to cause someone else injury or even threaten to do so.

Other witnesses confirmed that Wingate had good reason to have a mental state of fear, rather than of intending to intimidate or cause fear of injury in someone else. Witness John Kim testified that before the shooting, aggressor Park’s friend Joe Feist had a gun out, that it looked like a .45 caliber, that it was “black steel,” and that Feist was trying to hand that gun to Park. Kim further testified that Park was trying to take the gun, but did not have a chance to do so. VRP:404-06. This also supports an “inference” that Wingate held the mental state of fear, not the mental state of specific intent to intimidate, with regard to “victim” Feist.

Further, Mr. Wingate testified about his own mental state. He acknowledged that he drew his gun. He testified that he did so because Park was picking a fight with his friends, including a woman – Elizabeth Kim – and that he felt that he needed to draw a gun for the sole purpose of getting Park and his friends to give up the gun or guns that they had brought with them. Thus, Wingate testified that he saw Park push his ex-girlfriend Ms. Kim and, after that push, Wingate felt Park was getting out of control. Wingate explained, “that’s why I did what I did.” “I went to where the trunk was, where his friends were, basically. When I was watching him, they were guarding the car, that’s what they were doing. And I did not pull my firearm out until I was right upon them, *so if they were armed, they will not be able to pull theirs out. And then after I was upon them and pulled mine out, told them to back up, I went and took the shotgun out the trunk, and the trunk was still open.*” VRP:516 (emphasis added). This provides direct evidence that Wingate pulled out his gun for the purpose of preventing Park’s back-up muscle-friends from using their weapons, rather than for the purpose of causing them bodily injury or threatening to do so.

Wingate continued that, after securing the shotgun, he began backing up. Park’s friends returned to the trunk of the car that carried the weapons. At that point, Wingate actually lowered his gun - thus

confirming that his purpose was to disarm the others, not to create injury or threaten injury himself. Wingate further testified that he did not see Park approach, but that after he started backing up, Park was there, about 25' away; Wingate told Park that Koo did not want to fight him; Park said it was none of his business. VRP:517-18.

To be sure, Wingate thereafter shot Park as Park advanced on him. But Park is not Feist or Scott. Wingate never shot and never directly threatened Feist and Scott.

With regard to Feist, Wingate testified that he saw Feist, who was near the trunk, make a movement like Feist was pulling out a gun. At that point, and only at that point, did Wingate say, "You better drop that gun *or I'm going to shoot.*" (Emphasis added.) This is the only time Wingate made any sort of threat, conditional, direct, or otherwise. And this was a conditional statement, which means it was not direct and was in fact, equivocal.<sup>3</sup> Feist responded to this conditional statement by taking the large gun from his waistband and putting it in the trunk. VRP:519-20. Thus, the only possible threat Wingate uttered to Feist was a conditional one - that he would not shoot unless Feist refused to "drop the gun." Such

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<sup>3</sup> *State v. Stenson*, 132 Wn.2d 668, 740-41, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998) (conditional request to proceed *pro se* is an indication of equivocation).

a conditional statement to Feist, about shooting the other person continues his aggressive conduct, in the context of this imperfect self-defense case, could certainly fit within the definition of unlawful display, rather than assault.

Further, Wingate never even made a conditional threat to Scott. Thus, if his conditional statement to Feist is the only thing the supporting the trial court's rejection of Wingate's challenge to his conviction on Count 3, nothing supports its rejection of Wingate's challenge to his conviction on Count 4.

Evidence of Wingate's less culpable mental state is even more clear from Wingate's testimony: "I know how to use a gun properly and handle it properly. *I was trying not to be a threat to them.* They were being more of a threat. And after Joe took out his gun, I didn't know how many other people had guns. He came with other people too." VRP:535 (emphasis added). It is almost as if Wingate's lawyer was examining Wingate to elicit the elements of unlawful display of a firearm, and then forgot to ask for the instruction on that lesser offense.

Notably, state's witness Ms. Kim – Park's former girlfriend whom Park pushed while he was trying to get at Koo – testified that Wingate *never* pointed a gun at Feist, Poydras or Scott. She stated that she did not see Wingate point the gun at anyone but Park, and that Park was not near

Feist, Scott and Poydras. She continued that Wingate was telling Park to leave, things like “Just let it go,” “He doesn’t want to fight,” “Just go home, just leave.” VRP:156-69.

It is irrelevant that the state and the trial court might not believe Mr. Wingate’s, Mr. Edvald’s, Mr. Kim’s, or Ms. Kim’s, versions; the only prerequisite to giving a lesser included offense instruction is that evidence raise an “inference” that only the lesser included offense occurred. Mr. Wingate’s testimony, combined with the testimony of Mr. Edvald, Mr. Kim, and Ms. Elizabeth Kim, meets that standard with regard to the assault counts naming Feist, and certainly Scott, as victims.

Further, as discussed in Section I(B) above, the difference between the greater and lesser crimes is one of degree regarding the defendant’s mental state. A defendant’s mental state is a factual matter within the province of the jury to decide.<sup>4</sup>

***2. The “Factual” Test Was Satisfied Here – Feist’s and Scott’s Absence Shows This***

Further, supposed victims Feist and Scott did not even testify. The jury had no first-hand testimony about whether they were frightened, intimidated, or felt apprehension or fear of bodily injury. Instead, jurors

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<sup>4</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

had to rely on the testimony of other witnesses. Those other witnesses confirmed that the greater context was that there was a fight brewing already, that Park was the aggressor who was chasing Koo, that Wingate came to try to protect his friends, and that Wingate did not have the requisite intent to assault.<sup>5</sup> This confirms the existence of at least an “inference” that Wingate committed unlawful display, not assault, against Feist and Scott.

***3. The “Factual” Test Was Satisfied Here – The Jury’s Acquittal on Count 2 Suggests This***

In fact, the jury was not even convinced that one of the three young men supposedly victimized by Wingate’s decision to show his gun was victimized at all – they acquitted him completely of Count 2, assault on Mr. Poydras. CP:89.

***4. The Trial Court’s Comments Support the Notion That the “Factual” Test Was Satisfied Here***

The trial court acknowledged that this was not a typical assault case at the numerous sentencing hearings. Those comments show that while the jury was entitled to reach the verdicts that it reached, the

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<sup>5</sup> *E.g.*, VRP11-20 (Park admits that he and several cars full of people were in front of Koo’s house and that he was still angry and after Koo; also testifies that it wasn’t until after this chasing, and after he had pushed Elizabeth Kim, that he saw Wingate there).

evidence also would have supported a conclusion that the second-degree assault crimes were not done with an intent to injure but instead with the lesser included offense's "intent to intimidate," given that Wingate believed that his friends were in danger, and acted to try to diffuse the situation.

The trial court began with comments of this sort at the first sentencing. It stated that the standard range was equal to that of a murder sentence, and that that was excessive considering the facts of this case:

Well, I do think this was a more tragic case than one commonly finds . . . . The standard range sentence here . . . is 129 to 171 months, which is pretty much the equivalent of second degree murder. And with the addition of the firearm enhancement penalties, it is worse than first degree murder. And this for someone of a young age, with no prior criminal history, who really was in a situation where he could have killed Mr. Park if he wanted to, and as far as I can tell intentionally did not do so.

. . . .  
[G]iving him the equivalent of first degree murder for somebody who was shot in the leg seems to me excessive.

RP (1/25/01) at 12, 14.

Then, at the remand hearing of August 24, 2007, the Superior Court stated:

Well, the Court, as it previously indicated, does find that there are mitigating factors sufficient to justify a sentence below the standard sentencing range. I will simply re-endorse the two basis [sic] that I had previously articulated in which the Court of Appeals found were

justified. I do think that such a sentence is justified for Mr. Wingate.

With respect to this specific issue about the firearm enhancement versus a deadly weapons enhancement, although I am – I have made it clear that I’m sympathetic to Mr. Wingate’s situation. I think it’s one of those cases where, *I think, an innocent man probably got convicted, not in the sense that Mr. Wingate didn’t shoot somebody. We all know that he did. I do think that it was in self-defense. That’s my opinion. The jury had a different opinion.* I do think that the jury did find firearm, clearly, in the special verdict form.

...

Reluctantly, I come to that. As I say, I don’t think the outcome is right for Mr. Wingate, but that’s the outcome.

RP 8/4/07 at 11-13 (emphasis added).

The Superior Court judge thus believed Wingate acted “in self-defense. That’s my opinion.” This provides a final confirmation that a reasonable person could draw the “inference” that Wingate lacked the mental state for the greater crime.

**E. Defense Trial Counsel’s Failure to Request This Instruction Constituted Ineffective Assistance, Because The Evidence Pointed to this Lesser Crime; There Was No Tactical Reason for Ignoring this Lesser, Since Mr. Wingate Did Not Deny His Presence Or Possession of a Gun; and the Sentencing Difference Was Large**

***1. The Test for Ineffective Assistance***

The Supreme Court weighed in recently on the test for ineffective assistance of counsel in a related context. In both *State v. Breitung*, \_\_\_

Wn.2d \_\_\_, 267 P.3d 1012 (2011) and *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011), direct appeal cases, that Court reiterated that *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), controls the decision about whether trial counsel was ineffective.

Under that test, to prove ineffective assistance of counsel, the movant must show both deficient performance and prejudice. *Strickland*, 466 U.S. 668, 687. “A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney’s conduct.”<sup>6</sup> To show prejudice, the movant need not prove that the outcome *would* have been different. He must show only a “reasonable probability” – by less than a more likely than not standard – that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.<sup>7</sup>

The *Grier* decision described the problems with applying this test on direct appeal, without extra-record evidence of the reasons for the lawyer’s failure to request a lesser-included offense instruction. Those problems are

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<sup>6</sup> *State v. Benn*, 120 Wn.2d 631, 662, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993) (citations omitted).

<sup>7</sup> *Strickland*, 466 U.S. at 694; *State v. Hendrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996).

not present here, given the undisputed affidavit of trial counsel showing that he made no strategic decision on this point at all, and the trial court's Finding accepting that concession as consistent with the rest of that now-disbarred trial lawyer's performance.

**2. *The Fact That the "Legal" and "Factual" Tests for a Lesser Included Offense are Satisfied Militates in Favor of a Finding of Ineffective Assistance***

Several Washington courts have considered whether trial counsel's failure to request a lesser included offense instruction fell so far below the required standard of practice that it violated *Strickland*. In *In re Crace*, 157 Wn. App. 81, a PRP case, the appellate court ruled that trial counsel's failure to request the lesser included instruction of unlawful display of a weapon, leaving an all or nothing defense to the second-degree assault charge which carried a life-imprisonment sentence for that defendant, constituted ineffective assistance because there was no tactical justification for it.

First, the *Crace* court held that the evidence supported an inference that only the lesser offense was committed, because the defendant did not deny showing his sword but claimed that he did it *because he was in fear*. As discussed above in Section I(D), the transcript in this case shows the same thing: Mr. Wingate had the same mental state of fear. This supports the "inference" that not the greater, but the lesser, offense was committed.

***3. The Large Difference Between the Sentencing Exposure as Charged and the Sentencing Exposure if Convicted of a Lesser Counsel in Favor of Finding Ineffective Assistance***

The *Crace* court also held that the sentence for the lesser included offense would have been less than a year while the sentence Crace actually received was life imprisonment, and that this disparity supported a finding of ineffective assistance. The disparity in sentences in Wingate's case was also large. If he had been convicted of three gross misdemeanor offenses (RCW 9.41.270) for those three supposed second-degree assaults, the maximum sentence would have been one to three years rather than five years, and they would not have carried standard range sentences of 15 to 20 months. Critically, they would not have been subject to firearm enhancements of 36 months each, consecutive. The difference between three lesser included offense convictions and three convictions of second-degree assault with firearm enhancements as charged would therefore have been at least three times 36 months, or nine years (108 months). Hence, this also weighs in favor of a finding of ineffective assistance.

***4. Trial Counsel's Reference to the Elements of the Lesser Offense in Opening Mitigates in Favor of a Finding of Ineffective Assistance***

Third, Wingate's own lawyer used words such as "display" of the firearm to the supposed victims of the second-degree assaults in opening

statement, as a way to minimize the criminal act. VRP:30. This certainly suggests that trial counsel was considering describing that lesser included offense to the jury in an instruction, but never did – maybe he forgot.

***5. Raising Self-Defense Does Not Preclude Seeking a Lesser Included Offense Instruction – This Also Militates in Favor of a Finding of Ineffective Assistance***

Nor does self-defense preclude the lawyer from seeking instructions on the alternate, but not inconsistent, theory that the display of a weapon did not even amount to an assault. Such alternative theories of defense are permitted.<sup>8</sup>

This also militates in favor of a finding of ineffective assistance.

***6. Mr. Wingate's Extra-Record Declaration Supports a Finding of Ineffective Assistance***

Further, Wingate never sought an all or nothing defense – and he would have made that clear to Mr. DeGeorge, if DeGeorge had asked. Unfortunately, as the extra-record evidence here shows, DeGeorge did not ask.

Mr. Wingate's Declaration, CP:314-16, makes clear that he “did

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<sup>8</sup> *Matthews v. United States*, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988) (even if a defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment; such alternative theories of defense must be permitted).

not discuss the issue of whether [his] trial lawyer, Mr. DeGeorge, should ask for lesser included offense instructions, with him. In fact, at the time, [Mr. Wingate] d[id] not think [he] knew what a lesser included offense was.” CP:315, ¶ 5. The reason was that DeGeorge did not ask. *Id.*, ¶ 6. Wingate would have told him what he can now tell this Court: “I definitely thought that I should be found not guilty. But I also told Mr. DeGeorge very clearly that I wanted whatever was best for my case, even if I could not escape conviction of all charges.” *Id.*, ¶ 7. In fact, “If Mr. DeGeorge had asked me whether I wanted to risk conviction of all counts, with no “lesser included” options for the jury, I definitely would have told him that I was willing to give the jury some option – any option – to show leniency. That would have included asking for a lesser included offense.” CP:315-16, ¶ 8.

DeGeorge’s failure to discuss this point with his client was similar to DeGeorge’s practice on the rest of this case. As Wingate explains, DeGeorge spent very little time learning about the case from him:

9. Mr. DeGeorge did not discuss very much of the case with me at all.
10. I do not remember the exact number of times that Mr. DeGeorge met with me before trial, but it was about six times. He did not meet with me outside of court at all – not even once – to discuss my testimony or my cross-examination. During recess, we spoke for only a few minutes about my

expected testimony. That was the same day I testified.

11. Mr. DeGeorge did not talk to me about any pre-trial motions, any trial requests, or any jury instructions. He did not talk to me about opening statement or about closing argument.
12. In total, Mr. DeGeorge spent about three hours with me before the trial started. Outside of the time that I would see him in court at trial, he spent no time at all with me during the trial.
13. Mr. DeGeorge spent no time with me at all in advance of sentencing. I spoke to him about sentencing in court, on the day I was sentenced, and that was only for a few minutes.

CP:316, ¶¶ 9-13. This also supports a finding of ineffective assistance.

***7. Alternatively, Counsel Was Ineffective For Failing to Raise This Issue on Direct Appeal***

Alternatively, if this Court believes that this claim, with all its extra-record evidence, should somehow have been raised on direct appeal, then Mr. Wingate should instead prevail on his claim of ineffective assistance of appellate counsel for failing to raise it on direct appeal.

When a petitioner raises ineffective assistance of appellate counsel on collateral review, he must show that the legal issue that appellate counsel failed to raise had merit. *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). This Brief shows that Wingate was entitled to an instruction on a lesser included offense; that DeGeorge

did not request such an instruction; that the evidence supported the giving of such an instruction; that DeGeorge can remember no legitimate trial strategy for failing to request such an instruction; and that DeGeorge failed to conduct reasonable pretrial preparation and research due to the substance abuse problems that led to his debarment for conduct during the very period of Wingate's trial. This corroborates the showing – from DeGeorge's Affidavit and Wingate's Declaration – that there was no legitimate trial strategy for this omission.

**II. MR. DEGEORGE CONFIRMS THAT HE DID NOT MAKE A REASONED TACTICAL DECISION – HE NEGLECTED TO DO RESEARCH AND PREPARATION FOR MR. WINGATE'S TRIAL**

**A. Mr. DeGeorge's Affidavit Confirms That His Mistakes at Wingate's Trial Stemmed From the Substance Abuse Problems That Led to His Disbarment**

This is not a case where the reasons for trial counsel's failures are a mystery. DeGeorge acknowledges he has been reprimanded and disbarred. CP:399-404. He acknowledges the reasons for his reprimand from the WSBA in 2003 and his disbarment in 2006. CP:400, ¶ 6. Those reasons, as described in Section C below, include failure to prepare for, and appear at, hearings in civil and criminal cases during the time period as his representation of Mr. Wingate. CP:400, ¶¶ 7, 8.

DeGeorge admits that the problems he was having in representing clients from 1999 to 2005 were caused by alcohol and substance abuse.

CP:401, ¶¶ 10, 11:

13. In general I fell down on the technicalities and homework at even the best of times. The time during Matt's trial was not the best of times for me. So I am sure that I fell down even more than usual on the kind of homework or preparation that his trial required.

*Id.*, ¶ 13.

In fact, DeGeorge acknowledges that he failed to ask for a lesser-included offense instruction, that he does not recall why he failed to do so, but that he knows he did not do any research about the availability of this lesser-included offense instruction:

15. I do not specifically remember why I did not ask for instructions on the lesser included offense of unlawful display of a weapon as to the second-degree assault counts. In fact, when I was contacted by Ms. McCloud, I told her that I did not remember even whether I asked for such instructions or not. *I do not remember doing any research about the elements of that crime to determine whether it was a lesser-included offense of the second-degree assault charges.* I do remember that the two supposed victims of those second-degree assault charges did not even come to court to testify, so they did not say anything about whether they were in reasonable fear. And I do remember thinking that Mr. Wingate had a very strong self defense case, so I know that I believed that the evidence of second-degree assault was at best debatable and that there was

evidence Matt was not the one who was doing the intimidating, he was the one who was trying to do the defending. But I cannot remember now why I did not seek a lesser included offense instruction given those circumstances.

CP:402, ¶ 15 (emphasis added).

DeGeorge even acknowledges that his performance in Wingate's trial as a whole was substandard:

16. I do remember that I fell down on my performance in other respects during that trial. I remember that I felt that there was a good reason to bring a judgment for acquittal notwithstanding the verdict, due to the insufficiency of the evidence, after the jury convicted. In fact, I remember taking some of Judge Chushcoff's comments as an invitation for me to file such a motion. I remember thinking that I should file such a motion. And then I remember neglecting to file it. So I know that I fell down in my preparation in other respects during and after Matt's trial.

*Id.*, ¶ 16.

Finally, he acknowledges that given this context, in all likelihood he fell down on his responsibilities to research and propose a lesser-included offense instruction, also:

17. Although I don't remember what my thinking was about lesser included offense instructions, my best guess is that I fell down on my responsibilities in that area, also. That would have been consistent with the other errors, revolving around lack of adequate preparation, that I was making at that time in my life.

CP:403, ¶ 17.

**Mr. DeGeorge's Trial Performance Betrayed Lack of Preparation and Little Familiarity With the Facts or the Law, Confirming that He Was Not Making Legitimate Tactical Decisions**

The trial record corroborates this. The transcript shows that DeGeorge made many mistakes based on his lack of familiarity with the witnesses, the case, and the discovery.

During the cross examination of Stephen Park on the first day of trial, it became obvious that DeGeorge had not read the discovery. DeGeorge asked questions about why Park called Koo that day. The state objected based on relevance; DeGeorge could not respond because he did not know the answer to the question he had asked. The state explained that the answer was in the discovery, and if DeGeorge had read it, he would already know. DeGeorge agreed! VRP:44-45.

On the second day of trial, it became apparent that DeGeorge had not interviewed critical witnesses. During the same cross examination of Park, DeGeorge withdrew a question after the state revealed what the witness's answer was likely to be:

MR. MCCANN: It is my understanding, Your Honor – and Mr. DeGeorge has had an opportunity to interview this witness – that if Mr. Park were asked, he would indicate that the defendant has a reputation for being hostile and has a reputation for drawing firearms in situations. He knows of specific instances that I didn't

elicit upon direct examination. I think we're going down a path that Mr. DeGeorge probably wouldn't want to go down if he wishes to open this up. It is inappropriate to suggest that this defendant's behavior on that day was –

MR. DEGEORGE: I'm going to withdraw the question, Your Honor.

THE COURT: Well, in general, I think 404(a)(1) does permit this kind of testimony, and apparently it could be proved by specific instances of conduct under 405(b) and by reputation under 405(a). So I'm not sure if the exact form of the question, without sort of thinking hard about it, would be appropriate. But in general this inquiry is not admissible. Now, if you wish to withdraw it, Mr. DeGeorge, it's up to you.

MR. DEGEORGE: the Government had an opportunity to speak with the witness during the interim, and based on his representations, it is probably more problematic than it is worth.

VRP:113-14.

DeGeorge was apparently unaware of what facts might be critical to his case. When he declined to re-cross examine witness Ms. Kim, the court dismissed the jury and asked her himself:

THE COURT: When you went around the back of Mr. Park and started to pull on him, did he in any way swat at you at that time?

THE WITNESS: No. Well, he tried to go like this (demonstrating).

\* \* \*

THE COURT: Was he doing that at the time he got shot?

THE WITNESS: I believe so.

THE COURT: For what it's worth, do you have any more questions?

MR. DEGEORGE: I think that that's important.

THE COURT: It occurred to me. If you don't want to ask questions, I'm not going to ask anybody to do anything.

\* \* \*

MR. DEGEORGE: In fact my recollection was that she did actually say something like that yesterday during the interview.

THE COURT: Let's have the jury.

VRP:170-72.

DeGeorge seemed unfamiliar with rules of trial procedure. He stated "No objection" when the state offered Exhibits 15 and 16 for admission. The court admitted them. VRP:202-204. But then he requested voir dire:

MR. MCCANN: The State would ask permission to publish 15 and 16 to the jury.

THE COURT: Proceed.

MR. DEGEORGE: Brief voir dire?

THE COURT: Voir dire of what? It has been admitted.

MR. DEGEORGE: Yes. No objection.

VRP:204.

He also seemed unfamiliar with basic trial strategies. When the state was unable to find a witness, but wanted to be able to put her on the stand if she was located, DeGeorge objected to the state being able to reopen their case, but also indicated his preference to have her at the end of the defense case. He changed his mind upon the advice of this Court:

THE COURT: ... Mr. DeGeorge, before you reject out of hand the idea of interrupting the Defense case with respect to Ms. Dang, one way or the other, either as a rebuttal witness or as me allowing it as a reopening of the State's case, Ms. Dang is presumably going to be allowed to testify if she should show up in time. And it seems to me that it might be better for you to have it in the middle of the Defense case for one reason and one reason only, which is to the extent that you still have some witnesses around who can respond or reply or contradict anything she's going to say.

Really, the biggest reason for wanting the State's case in chief to go completely forward and then the Defense case is this very reason, because the State may then introduce new materials which the Defense has not responded to in its case in chief. That, to me, is where the real prejudice is. But you don't seem to regard that as prejudice because you said it would be better to have it at the end.

MR. DEGEORGE: I changed my mind.

\* \* \*

MR. DEGEORGE: I will withdraw my objection. Thinking about it, I would prefer, if possible, that my

witnesses be the last ones the jurors hear rather than the State's witnesses. So I will withdraw my objection ....

VRP:305-06.

DeGeorge also failed to object to improper testimony until prompted by the trial court. This happened at least twice. The first time was a failure to object to questions implicating Mr. Wingate's constitutional right to remain silent:

Q: And you didn't go down the block and call the police, did you?

A: No, I didn't.

Q: You didn't call them the next day?

THE COURT: Hold on a second. I'm going to have a side bar, please.

\* \* \*

MR. DEGEORGE: ...the court had a side bar. I just wanted to note the objection for the record, and that was forthcoming. The State was inquiring as to whether – how quickly Mr. Wingate made a response to law enforcement. That obviously gets into his Fifth Amended right to remain silent, and there shouldn't be an inquiry into that.

THE COURT: No one was objecting, but I thought there was a problem there.

MR. DEGEORGE: I think I was a step behind, actually. But I wanted to just that [sic] note for the record, because we didn't discuss that and that was a valid issue.

VRP:539-42.

DeGeorge also failed to object to the state's improper closing. The court interrupted that itself to protect Wingate's rights:

MR. MCCANN: ... Now, I have a friend who teaches firearm safety courses, and she helped me understand this legal concept of "self-defense" by putting it into a sort of rhyme, and the rhyme goes like this: "It was all that I could do. You would do it, too, if you knew what I knew." I encourage you to compare that to the legal instruction, and I submit to you that you'll find that that rhyme is an accurate statement of the law. "It was all that I could do. You would do it, too, if you knew what I knew."

"Now, what is important? Well, all of that is important. But what I place the most importance on is "It was all that I could do." "It was all that I could do."

THE COURT: Can we have a side bar, counsel?

Closing Argument, VRP:36.

After excusing the jury, the trial court put its concerns regarding closing argument on the record, and invited DeGeorge to state his own objection or make a motion. The prosecutor even alluded to the need for action by the defense attorney by stating his belief that it was up to the defense to make objections on its own. Still, DeGeorge declined to take advantage of this opportunity:

THE COURT: ... [D]uring Mr. McCann's closing arguments ... I did ask for a side bar, and I did instruct him that I was concerned about where he was going with that poem, about whether it might shift the burden of proof and/or mislead the jury with respect to duty to retreat. There was no actual objection pending at that

point, but I was worried about a potential constitutional issue brewing there. So I asked DeGeorge and Mr. McCann to go to a sidebar, and at that point I did ask Mr. McCann not to pursue it further and he did not proceed further with it. And I was not requested any additional relief by anybody. So that's all I have to say about the sidebar, but I will allow counsel to supplement the record, starting with you.

MR. MCCANN: I don't think anything needs to be added. I think it was an appropriate argument. I was arguing a particular jury instruction. I think it is up to the Defense to make objections on their own, make objections based on the law. My rendition of the poem, as it has been called, is an accurate reflection of the jury instruction on "self-defense," in my opinion.

THE COURT: Fair enough. But I at least reflected accurately the side bar?

MR. MCCANN: Yes.

MR. DEGEORGE: Nothing, Your Honor.

THE COURT: You don't want to add anything?

MR. DEGEORGE: No.

Closing Argument, VRP:90-92.

The errors were not limited to the transcript. Defense filings in both the trial and appellate courts showed lack of familiarity with facts of the case, issues raised, and basic rules of procedure. For example, DeGeorge filed a Memorandum in Support of Exceptional Sentence on May 10, 2002. It contained a bare listing of three issues, with no analysis

or argument. There were multiple typographical errors, and no citations to the record. The docket also shows two letters to Mr. DeGeorge from the Department of Assigned Counsel, dated 3/28/02 and 11/27/02, returning Wingate documents to him and reminding him of his obligation as retained counsel to perfect the appeal.<sup>9</sup> There was also a letter to DeGeorge from the Court of Appeals dated 1/7/03, which stated:<sup>10</sup>

This matter was remanded to the trial court on September 4, 2002 for entry of an order of indigency and appointment of counsel on appeal. On November 27, 2002, the Department of Assigned Counsel sent to you a letter outlining the procedures necessary for you to get these documents entered with the trial court. To date, this court has received nothing in this regard. Please inform this court within 15 days of this letter what steps you have taken in resolving these issues.

These deficiencies corroborate DeGeorge's admissions that he did not put in the time and effort to make reasoned tactical decisions, including decisions about lesser-included offense instructions.

C. **Trial Counsel's Virtually Contemporaneous Disbarment For Deficiencies Like The Ones That Affected Mr. Wingate Lends Additional Support to These Claims of Ineffective Assistance**

DeGeorge was disbarred in 2006. The WSBA disciplinary notice indicates that he was disbarred for violating RPC's concerning Diligence,

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<sup>9</sup> Letters from Department of Assigned Counsel, filed 3/29/02 and 12/2/02.

<sup>10</sup> Letter from Court of Appeals, filed 1/9/03.

Communication, Fees, Expediting Litigation, Candor Towards the Tribunal, Dishonesty, and Conduct Prejudicial to the Administration of Justice. They were based on his conduct in 11 matters from 2001-2005, precisely the time that he was representing Mr. Wingate.<sup>11</sup>

Mr. DeGeorge first stipulated to a reprimand in 2003 for lack of diligence and failure to communicate with his client. CP:362-368. He violated RPC 1.3 in that case by not appearing at a hearing on November 26, 2001, failing to obtain a speedy trial waiver, and failing to timely file a motion for good cause before the case was closed. CP:364, ¶ 29. DeGeorge violated RPC 1.4 by failing to return his client's phone calls and keep the client informed about the status of her matter. *Id.*, ¶ 30. These RPC violations occurred during the same 4-month period, November 2001 to February 2002, as Wingate's trial and sentencing.<sup>12</sup>

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<sup>11</sup> The State Bar's disciplinary file on Mr. DeGeorge contains more specifics. A full copy of the file is included at CP:357-97.

<sup>12</sup> The Stipulated Facts to the reprimand also show that DeGeorge closed or moved his office sometime between November 26, 2001 and January 31, 2002, and failed to inform his client. CP:364, ¶¶ 18-20. Likewise, it is apparent from the documents filed in Wingate's case that DeGeorge moved his practice, yet the docket sheet does not list any notice of change of address filed with the court. The Amended Defendant's List of Witnesses, filed on November 27, 2001, reflects a Tacoma address for DeGeorge. The Memorandum in Support of Exceptional Sentence, filed on May 10, 2002, shows that he was then receiving mail at a Lakewood Post Office box.

Mr. DeGeorge stipulated to that reprimand on June 18, 2003. He failed to appear before the Association's Board of Governors for the administration of his reprimand. CP:375, ¶ 29. On September 16, 2005, he was disbarred for further violations of the RPCs, based on 25 instances of misconduct. CP:388-91, ¶¶ 118-142. His misconduct displayed a shocking lack of diligence. In multiple criminal cases, he failed to file pleadings and made misrepresentations to clients about the steps he had taken. *Id.*, ¶¶ 118, 121-22, 126, 141. In a felony case, he was sanctioned for failing to review the evidence and failing to advise the defendant regarding his guilty plea, sentence, and appeal options. CP:390, ¶ 135. In a sex offender case, he failed to provide the court with evidentiary documents essential to the defendant's case. CP:389, ¶ 132. DeGeorge failed to take more than minimal action for two and half years in an auto accident case, forcing the plaintiff to engage a new law firm one month before the statute of limitations expired. *Id.*, ¶¶ 133-34.

Suspension and/or disbarment are not per se evidence of ineffective assistance. *United States v. Ross*, 338 F.3d 1054, 1056 (9th Cir. 2003), *cert. denied*, 540 U.S. 1168 (2004). They may, however, "raise doubts about [trial counsel's] competence." *Id.*<sup>13</sup> Such suspension

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<sup>13</sup> *Accord In re Personal Restraint of Brett*, 142 Wn.2d 868, 884, 16 P.3d

and disbarment are especially relevant when they are based on “the type of conduct alleged by appellant to have been incompetent in the instant case.”<sup>14</sup>

That is precisely what we have here. DeGeorge was disbarred for the same sort of lack of preparation that plagued his work in Wingate’s case, right at the same time, because of the same substance abuse issues.

It is true that disbarment information may be less relevant where disbarment *follows* the representation of the defendant who is seeking relief. *State v. Queen*, 73 Wn.2d at 708. In this case, however, the conduct underlying the disbarment occurred contemporaneously with Mr. Wingate’s trial – the 11 matters forming the basis for disbarment covered the time period 2001-2005. Wingate was tried in late 2001 and sentenced in 2002. DeGeorge was then sanctioned for similar conduct in 2003, and that conduct also overlapped Wingate’s trial. Further, DeGeorge admits

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601 (2001) (Talmadge, J. concurring) (“[C]ounsel’s representation of a client falls below an objective standard of reasonableness as a matter of law when that lawyer is disbarred for conduct contemporaneous in time with their representation of a capital defendant and that conduct affects their representation of that client.”).

<sup>14</sup> *E.g.*, *State v. Queen*, 73 Wn.2d 706, 708, 440 P.2d 461 (1968) (counsel effective, notwithstanding subsequent disbarment, in part because “the grounds for [trial counsel’s] disbarment were totally unrelated to appellant’s case or to the type of conduct alleged by appellant to have been incompetent in the instant case.”).

that his problems began before 2001, “probably in late 1999 or 2000.” CP:401, ¶ 11. Given the overlap in time between the Wingate representation, on the one hand, and the disbarment and sanctionable conduct, on the other hand, DeGeorge’s disbarment and the sanctioning are relevant to the issue of the standard of care he exercised in Wingate’s case.

### **III. NO ADDITIONAL PREJUDICE MUST BE PROVEN**

Because this is a claim of ineffective assistance, Wingate must prove deficient performance and meet the *Strickland* standard of prejudice to prevail. He need not show any additional prejudice, even though this is a collateral attack. *State v. Sandoval*, 171 Wn.2d 163, 168-69 (2011).

### **IV. THE TRIAL COURT CORRECTLY RULED THAT THE MOTION TO VACATE WAS TIMELY**

Even though Mr. Wingate’s first appeal ended a long time ago, there was a resentencing and a new appeal. The Washington Supreme Court issued its final decision on that last appeal on July 7, 2010. The mandate issued on July 20, 2010. Mr. Wingate has one year from that date, which represents the conclusion of the last direct appeal following remand for a sentencing hearing, to file either a PRP or a CrR 7.8. *In re Skylstad*, 160 Wn.2d 944, 950-54. This motion is therefore timely.

## CONCLUSION

This Court should reverse the denial of the motion to vacate. Mr. Wingate was sentenced to 60 months on Count 1, 20 months on Count 3, and 20 months on Count 4, concurrent, plus sentence enhancements of 60 months on Count 1, 36 months on Count 3, and 36 months on Count 4, consecutive, for a total of 192 months. CP:136-51. This Court should remand with instructions to vacate the convictions and enhancements on Counts 3 and 4, reducing the sentence by six years.

DATED THIS 1<sup>st</sup> day of March, 2012.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 15<sup>th</sup> day of March, 2012, a copy of the OPENING BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Kathleen Proctor, DPA  
Office of Prosecuting Attorney  
930 Tacoma Ave. S., Room 946  
Tacoma, WA 98402-2171

Joshua M. Wingate, DOC No. 836196  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520



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Sheryl Gordon McCloud