

NO. 42857-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA M. WINGATE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 01-1-03444-0

BRIEF OF RESPONDENT/CROSS-APPELLANT

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A. ASSIGNMENTS OF ERROR PERTAINING TO
RESPONDENT'S CROSS APPEAL

1. The trial court erred in finding that the defendant's collateral attack filed on June 10, 2011 was timely filed under RCW 10.73.090 when the mandate from the direct appeal affirming his convictions and sentence issued on May 10, 2007. (Conclusion of Law No.1, CP 427-433)

2. The trial court erred in retaining the defendant's untimely collateral attack and deciding it on the merits instead of transferring it to the Court of Appeals to be considered as a personal restraint petition.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF
ERROR AND RESPONDENT'S CROSS -APPEAL.

1. Was defendant's judgment and sentence final following the first direct appeal when the appellate court affirmed defendant convictions, upheld two of the four reasons supporting the downward exceptional sentence, and tentatively upheld the exceptional sentence subject only to the trial court's decision about whether it would impose the same sentence based upon the two remaining valid mitigating circumstances when, on remand, the trial court did not resentence defendant but entered an order stating that its earlier judgment remained in effect? (Cross-appeal)

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5. Has defendant failed to show that the trial court abused its discretion in denying his post-judgment motion for relief claiming ineffective assistance of counsel because his trial attorney did not seek instruction on the lesser included offense of unlawful display of a weapon on the two counts of assault in the second degree when the trial court found, based upon its recollection of the trial evidence, that it would not have given such instruction even if it had been requested? (Appeal)

6. Was the defendant's collateral attack on his judgment properly denied because it was merely a reformulation of an issue raised and rejected on direct review? (Appeal)

C. STATEMENT OF THE CASE.

This is the third time that this case is before the appellate courts for some form of review. A procedural summary of its history follows:

Appellant, JOSHUA MATT WINGATE¹ ("defendant") was convicted following a jury trial of one count of assault in the first degree and two counts of assault in the second degree; the jury returned special verdicts finding defendant was armed with a firearm during the commission of these assaults. CP 136-151, 164-177. At trial, defendant argued that he was acting in self-defense. As noted in one of the appellate decisions flowing from this case, there was conflicting evidence regarding who precipitated the confrontation between defendant and the victims. *State v. Wingate*, 155 Wn.2d 817, 819, 122 P.3d 908 (2005). Although the jury found the State's evidence credible and rejected defendant's claim of self-defense, the trial court imposed an exceptional sentence downward by shortening the standard range. CP 164-177. The State appealed the

¹ Defendant was prosecuted under the name of "Joshua Matthew Wingate" and that name carried through the first appeal. At the remand hearing ordered by the appellate court the order of his names was switched to "Matt Joshua Wingate," and this name order has carried through the second appeal. This third appeal brings the name order back to "Joshua Matt Wingate."

imposition of the exceptional sentence and defendant cross-appealed his convictions raising claims of instructional error, ineffective assistance of counsel and prosecutorial misconduct. In a published decision, the Court of Appeals reversed defendant's convictions for instructional error, but did not reach the other issues, anticipating that there would be a retrial. *State v. Wingate*, 123 Wn. App. 415, 98 P.3d 111 (2004), *reversed*, 155 Wn.2d 817, 122 P.3d 908 (2005). The Supreme Court took review and reversed this decision, then remanded to the Court of Appeals for consideration of the other issues raised on appeal. *State v. Wingate*, 155 Wn.2d 817, 122 P.3d 908 (2005). On remand, the Court of Appeals affirmed defendant's convictions, rejecting the claims of ineffective assistance and prosecutorial misconduct. CP 164-177. As for the exceptional sentence, while it found that two of the four mitigating factors relied upon by the trial court were not supported by sufficient evidence, it also held that the trial court did not abuse its discretion in imposing a downward exceptional sentence:

[I]n 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. ... Because the trial court did not articulate that it would have imposed the same exceptional sentence based on anyone of its four stated reasons, we cannot discern on the record before us whether the sentence is clearly authorized by law.

CP 164-177. The Court of Appeals affirmed the convictions and “remand[ed] for reconsideration of the trial court’s reasons for Wingate’s exceptional sentence downward and for *possible* resentencing.” CP 164-177 (emphasis added). The mandate issued on May 8, 2007. CP 164-177.

Prior to the hearing on remand in the superior court, defendant filed a pleading entitled “Memo Regarding Resentencing.” CP 187-191. In this document, defendant asked the court to “reaffirm” the exceptional sentence that it had previously imposed. *Id.* This was accomplished in a single sentence. *Id.* The remainder of the three-page pleading asked the court to modify its earlier sentence by reducing the previously imposed firearm enhancements to the time that would be appropriate for deadly weapon enhancements. CP 187-191. This issue was a new issue that had not been raised on direct review. *See* CP 164-177. At the hearing on remand, the defendant argued this motion, again asking the court to modify the previously imposed sentence by changing the enhancement time imposed from that pertaining to a firearm enhancement to the lesser amount imposed for a deadly weapon enhancement. CP 219-227. The sentencing court opted not to resentence the defendant but entered an order stating that it would impose the same sentence based upon either of the two remaining mitigating factors. CP 202-203. The court denied defendant’s motion to reduce the firearm enhancements to deadly weapon enhancements. CP 202-203; 219-227. The order stated that the

previously entered judgment remained in effect. CP 202-203. This order entered on August 24, 2007. *Id.*

Defendant filed a notice of appeal from entry of this order. CP 204-207. On appeal, defendant challenged the trial court's denial of his motion to modify his three firearm enhancements. CP 219-227. The appellate court affirmed the trial court's refusal to modify defendant's sentence. *Id.* The court issued the mandate from the appeal from the denial of the post-judgment motion on July 20, 2010. CP 219-227.

On June 10, 2011, defendant filed in the superior court a CrR 7.8 motion to vacate alleging that he had received ineffective assistance of counsel because his attorney did not seek instruction on the lesser included offense of unlawful display of a weapon for the charges of assault in the second degree; he asserted that he should be given a new trial. CP 239-397. In this pleading defendant asserted that his collateral attack was timely because "there was a resentencing and a new appeal" and that this motion was filed within one year that the mandate had issued in this second appeal. CP 239-397. The State responded with a pleading asking the court to transfer the collateral attack to the Court of Appeals as it was an untimely collateral attack on the judgment. CP 405-414. The State disputed defendant's characterization that there had been "a resentencing and new appeal" noting that the court had not "resentenced" defendant after the first appellate remand but expressly reaffirmed its previous sentence. CP 405-414; *see also* CP 202-203. As the subject of the second

appeal was the order denying the defendant's motion to modify his firearm enhancement time, the second appeal did not involve the review of defendant's judgment or sentence –but only the court's order. *See* CP 219-227. The trial court ruled that the motion was timely, but found that defendant had failed to meet his burden of showing ineffective assistance of counsel because the court was unlikely to have instructed the jury on the lesser included offense of unlawful display of a weapon had defendant's could sought such an instruction at trial. CP 427-433²; RP 25-26.

Defendant filed a notice of appeal from the denial of his post-judgment motion. CP 416-424. The State filed a cross appeal regarding the trial court's finding that the collateral attack was timely and its refusal to transfer the matter to the Court of Appeals under CrR 7.8(c)(2). CP 439-440.

² Attached as Appendix A.

D. ARGUMENT ON ISSUES PERTAINING TO CROSS APPEAL³
AND APPEAL.

1. THE TRIAL COURT ERRED IN FINDING THAT THE MOTION FOR RELIEF OF JUDGMENT WAS TIMELY FILED AND BY FAILING TO TRANSFER THIS UNTIMELY COLLATERAL ATTACK TO THE COURT OF APPEALS PURSUANT TO CrR 7.8(c)(2).

Recognizing that collateral relief undermines the principles of finality of litigation and degrades the prominence of the trial, the Legislature enacted a one year time limit in which to file a collateral attack on a criminal judgment and sentence. RCW 10.73.090. The statute provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

RCW 10.73.090(1). The time bar is applicable to any collateral attack filed more than one year after July 23, 1989. RCW 10.73.130. A collateral attack “means *any form* of post-conviction relief other than a direct appeal.” RCW 10.73.090(2) (emphasis added).

³ The State recognizes that cross-appeal issues are usually addressed after the issues raised in the appellant’s brief. Because the State’s cross-appeal concerns whether the trial court erred in deciding it had the authority to determine the merits of the collateral attack, it is logical to address that issue first rather than whether the court’s determination on the merits was correct.

Before a superior court judge can consider a post-judgment motion filed pursuant to CrR 7.8, it must determine that it has the authority to retain the motion for a decision on the merits. Under CrR 7.8(c)(2), the trial court “*shall* transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the [trial] court determines that the motion is not barred by RCW 10.73.090 *and either* (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.” (Emphasis added). This is a two part requirement, but the trial court may not keep any motion that is untimely under RCW 10.73.090. *State v. Smith*, 144 Wn. App. 860, 184 P.3d 666 (2008); *see also State v. Lamb*, 163 Wn. App. 614, 628 n.11 (2011). The superior court does not have the authority to deny an untimely motion. *Smith*, 144 Wn. App. at 864. In order to determine whether a petition is untimely, the court must determine when the judgment became final. A judgment and sentence becomes final on the last of the following dates:

- (a) The date it is filed with the clerk of the trial court;
- (b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
- (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

RCW 10.73.090(3). In *In re Skylstad*, 160 Wn.2d 944, 948, 162 P.3d 413 (2007), the Supreme Court held that this statute means a judgment is final “when all litigation on the merits ends” and requires direct appeal review to be terminated on both the conviction and the sentence. Skylstad appealed his conviction and sentence for robbery with a firearm enhancement; the Court of Appeals affirmed the conviction but reversed the sentence. 160 Wn.2d at 946. The mandate on this first appeal issued May 14, 2004. The trial court resentenced Skylstad and he appealed again. The Court of Appeals ultimately affirmed this sentence, but while this second appeal was pending, Skylstad filed a personal restraint petition (PRP). *Id.* The Court of Appeals dismissed this PRP as time-barred, finding that it was filed more than one year after the May 14, 2004 mandate. The Supreme Court took review and reversed holding that a judgment cannot be final until the sentence is also final. As Skylstad still had a direct appeal pending on his sentence at the time he filed his PRP, the one year time frame for filing a timely collateral attack under RCW 10.73.090 had yet to commence. The Supreme Court made it clear that “a judgment is not final until both the conviction and the sentence have been affirmed.” *Skylstad*, 160 Wn.2d at 950-51, citing *Burton v. Stewart*, 549 U.S. 147, 127 S. Ct. 793, 798-99, 166 L. Ed. 2d 628 (2007).

In the case now before the court, defendant’s convictions were affirmed in the first direct appeal. CP 164-177. Additionally, the appellate court found that two of the four reasons the trial court relied

upon for imposing an exceptions sentence downward were proper. CP 164-177. The Court of Appeals did not vacate the sentence because it was legally sustainable based upon the two valid factors. The appellate court could not be certain, however, that the trial court would have imposed the same sentence based on two factors that it imposed based upon four. Consequently, the case was remanded for “*possible* resentencing.” CP 177 (emphasis added). The trial court did not choose to resentence defendant, but entered an order which stated that it stood by its previous sentence. CP 202-203. At that point, the direct review of defendant judgment and sentence was complete as both his judgment and sentence had been affirmed on appellate review.

Defendant’s case became final the date the mandate from the first appeal issued, May 8, 2007, as the appellate court affirmed the convictions and tentatively affirmed the sentence, subject only to the trial court’s option to revise. When the trial court entered the August 24, 2007 order stating that it was not revising its sentence and would return defendant to the department of corrections to serve the previously imposed sentence this confirmed that the prior appeal had resolved all issues pertaining to defendant’s convictions and sentence. Defendant no longer had any direct appeal rights stemming from his convictions or sentence. Defendant’s later pleadings erroneously labeled what occurred at this remand hearing as a “resentencing” -apparently in an effort to make his situation appear

analogous to the one in *Skylstad* - but the trial court's order clearly indicates that no resentencing occurred. CP 202-203.

At the hearing on remand in 2007, defendant sought relief from his judgment on a basis that had not been raised on direct appeal. CP 187-191. His motion – labeled a “Memo Regarding Resentencing” was filed on June 11, 2007, and sought post-conviction relief outside of a direct appeal in that it asked the court to reduce the confinement time on the previously imposed firearm enhancements. *Id.* This motion, therefore, constituted a collateral attack on the judgment under RCW 10.73.090(2)⁴. This motion was a timely filed collateral attack having been filed with one year of May 8, 2007. When the court entered an order denying the motion, that order was subject to direct review under RAP 2.2, but an appeal of this order would not bring the criminal judgment before the appellate court for review. There may have been a second appeal in defendant's case but it was not of the judgment or sentence; this distinguishes defendant's case from the situation in *Skylstad* and his reliance on that case to support his claim of timeliness of his subsequent collateral attack is misplaced.

⁴ Which states: “For the purposes of this section, ‘collateral attack’ means any form of postconviction relief other than a direct appeal. “Collateral attack” includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.”

The motion to vacate that defendant filed on June 6, 2011 was his second collateral attack. CP 239-397. As it was filed more than one year after May 8, 2007, the date the mandate issued on the direct review of his judgment and sentence, it was clearly untimely under RCW 10.73.090. The trial court should have transferred the motion to the Court of Appeals under the provisions of CrR 7.8(c)(2). The trial court erred in finding that the collateral attack was timely filed and erred in deciding its merits. This court should vacate the trial court's ruling and remand with directions to forward the untimely collateral attack to the Court of Appeals to be handled as a personal restraint petition as required by CrR 7.8(c)(2).

2. THIS COURT SHOULD LIMIT ITS CONSIDERATION TO INFORMATION THAT WAS PRESENTED TO THE TRIAL COURT AT THE TIME IT MADE THE DECISION UNDER REVIEW WHICH DID NOT INCLUDE TRIAL TRANSCRIPTS.

An appellate court reviews a CrR 7.8 ruling for an abuse of discretion, and will not reverse a denial absent an abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 642, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991). A trial court abuses its discretion when it bases its decisions on untenable or unreasonable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). Since the standard of review is abuse of discretion the reviewing court should review the trial court's decision based on the

information before the trial court at the time of its ruling. Information that was not before the court was irrelevant to the trial court's analysis.

Defendant brought a motion for relief of judgment alleging that he received ineffective assistance of counsel because his trial counsel did not request instruction on the crime of unlawful display of a weapon as a lesser included offense on the two counts of assault in the second degree. CP 239-397. In his supporting memorandum, defendant made factual representations as to what the trial testimony had been and provided citations to the verbatim report of proceedings, but did not provide the transcripts or even select portions of the transcript to support the claims made in his pleading regarding the content of the trial testimony. CP 239-397. At the hearing, the court on more than one occasion referenced that fact that it did not have the transcripts of the trial to review. RP 17, 20. The court relied upon its memory and some notes taken during the trial. RP 17, 20. Furthermore, the court stated that it was concerned that it didn't have enough record before it to make a decision:

At least one of the things that worried me – as I say, I don't know if I have enough record to do this. ...

I'm thinking of that evidence at least that I know of that I can recall – I guess, you know, I tried this case nine or ten years ago, and I'm looking at some notes. I'm not going to rely on that for absolute what happened here. At least it occurs to me that it may well be that Mr. Wingate, as much as I'm sympathetic to him, maybe wouldn't have gotten that instruction anyhow.

RP 20-21. There record is clear that defendant's counsel had a copy of the transcripts in her possessions and stated that she could provide it "if necessary." RP 21. The court ultimately ruled against defendant because, based upon its recollections of the evidence, it concluded that it would not have given instruction on unlawful display of a weapon even if it had been requested. RP 25-26. Despite this unfavorable ruling, defendant did not seek reconsideration by providing the court with the transcripts and asking the court to reconsider based upon a more thorough review of the evidence presented at trial.

While defendant did not provide the trial court with trial transcripts before asking it to rule on the CrR 7.8 motion, defendant has sought to get this information before the appellate court for review. Defendant asked the appellate court to transfer the verbatim report of proceedings from the direct appeal of the trial for consideration in the instant appeal and the Commissioner granted this motion.

This court should not consider information that was not before the trial court at the time it made its decision particularly when the trial court noted its concern about the lack of information that defendant's counsel had provided to support his motion. Proper appellate review requires this court to assess the correctness of the ruling based upon the record that was presented below, which did not include the trial transcripts.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR RELIEF OF JUDGMENT AFTER IT FOUND THAT DEFENDANT HAD FAILED TO MEET HIS BURDEN IN SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is

a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226.

Recently, the United States Supreme Court reiterated just how strong a presumption of competence exists under *Strickland*: "The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom." *Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011) (citing *Strickland*, 466 U.S. at 690). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to

find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Grier*, 171 Wn.2d 17, 40, 246 P.3d 1260 (2011); *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). The Court recognized that there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, at 689. Only in rare situations would the "wide latitude counsel must have in making tactical decisions" limit an attorney to a single technique or approach. *Id.*

[T]he standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence."

Harrington, 131 S. Ct. at 788 (citations omitted). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988); *Grier*, 171 Wn.2d at 42-43. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an

inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.

Harrington, 131 S. Ct. at 790.

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice. *Strickland*, 466 U.S. at 694. "In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently...[but] whether it is "reasonably likely" the result would have been different." *Harrington*, 131 S. Ct. at 792. "The likelihood of a different result must be substantial, not just conceivable." *Id.* Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation.

Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002). In *Strickland*, the Court indicated that, "[i]n making the determination as to whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." 466 U.S. at 694.

In sum, *Strickland* requires a showing of more than an attorney making a few mistakes at trial; it requires a lapse of constitutional magnitude where it is as if the defendant did not have an attorney at all. Proper examination of such claims requires deference to counsel, avoiding

hindsight, recognizing there is an art to lawyering with different stylistic approaches, and accepting that mere error by counsel is not enough to prove prejudice.

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Defendant alleged his claim of ineffective assistance of counsel in a post-judgment CrR 7.8 motion collaterally attacking his conviction. CP 239-397. The court denied the motion to vacate. CP 427-433. An appellate court reviews a CrR 7.8 ruling for an abuse of discretion, and will not reverse a denial absent an abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 642, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991). A trial court abuses its discretion when it bases its decisions on untenable or unreasonable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

In this case, defendant seeks to show ineffective assistance of his trial counsel for his failure to seek instructions on unlawful display of a weapon as lesser included offenses of the two counts of second degree

assault.⁵ The trial court found that even if the instruction had been requested, it would not have been given. CP 427-433, COL 4-6. The court recalled that defendant testified that he pointed his firearm at the victims of the assaults in the second degree. One of the findings of facts entered by the court to support the exceptional sentence included the following:

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.

Park stopped chasing Koo and walked from Koo's driveway to the opposite side of the street toward Wingate where Wingate was pointing the gun at his friends

CP 155-160, FOF I subparagraphs 7 and 8. Defendant called the court's attention to these findings in his motion to vacate. CP 239-397. At the hearing, the court recalled the defendant's testimony stating that he pointed the gun at the victims of the assault second to back them away from the trunk of a car which he said contained a shotgun so that he could retrieve the shotgun. RP 20, 22. Defendant's counsel agreed with this

⁵ Defendant provided several excerpts from the trial transcript claiming that they show his attorney was generally unprepared or that he failed to object when he should have been. Defendant makes no effort to show how these instances had any prejudicial effect on his trial. Similarly, defendant goes to great effort to malign his attorney's abilities by setting forth the circumstances leading to the disbarment of his trial attorney. Defendant's case was not one of the cases addressed in the disbarment proceedings. CP 239-397, Appendix H. That his counsel may have been deficient in other cases does not establish that any deficient performance or resulting prejudice occurred in defendant's case. The only instance where defendant presented evidence and argument addressing both prongs of deficient performance and resulting prejudice is the claim relating to the failure to request instruction on unlawful display of a weapon.

summation of the evidence. *Id.* Thus the evidence at trial was not that defendant was just carrying or displaying a weapon, but that he pointed it directly at the victims of the assault in the second degree.

In making its decision below, the court indicated that it had looked at two cases *State v. Jaynes*, 131 Wn. App. 1058 (2006) and *In re Crace* 154 Wn. App. 1016 (2010), *vacated upon reconsideration*, 157 Wn. App. 81, 236 P.2d 914 (2010), *pet. for review granted*, 171 Wn.2d 1035 (2011). The court cited to these cases using a WESTLAW identifier and apparently did not realize that both decisions were unpublished. But the *Jaynes* decision also cited to the published decision in *State v. Karp*, 69 Wn. App. 369, 848 P.2d 1304 (1993), which addresses when instruction on unlawful display of a weapon is warranted as a lesser included of assault in the second degree. In *Karp* the court noted that the “evidence must support an inference that the lesser offense was committed *instead of* the greater offense.” 69 Wn. App. at 376 (emphasis in original). The court went on to state:

Here, the record does not support an inference that only the unlawful display statute was violated. Karp admitted at trial that he pointed a shotgun at his wife’s companion. That evidence supports an inference that an assault was committed because it is intentional conduct that would place a reasonable person in apprehension of harm. See *Johnson*, *supra*. While Karp’s conduct also supports an inference that he violated the unlawful display statute, the evidence does not support an inference that only that statute was violated. Karp was not entitled to the lesser included offense instruction.

Id. at 376. From these cases, the court below concluded that if the evidence was that the defendant pointed his gun at the victim of the assault then instruction on the lesser included offense of unlawful display of a weapon should be refused. RP 17-21. The court looked to appellate decisions to guide his ruling and applied the law set forth in these decisions to the facts of defendant's case. RP 17-21. By doing so, it reached the conclusion that it would not have given the instruction on unlawful display of a weapon even if trial counsel had requested it. RP 25, CP 427-433.

As stated above defendant has the burden of showing that the legal grounds for his requested instruction were meritorious, but also that the verdict would have been different if the instructions had been given. *See Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). Defendant has failed to show that the trial court would have given the requested instruction and failed to present any argument that the jury's verdict would have been different had the instruction been given. Considering that the jury rejected defendant's claim of self-defense and his version of events, and found beyond a reasonable doubt that he was acting with the intent to cause great bodily harm and with the intent to create apprehension and fear, it is extremely unlikely that it would have found him guilty of the lesser offense of unlawful display of a weapon had it been given that option. Under

Harrington, defendant has to show a substantial likelihood of a different outcome not a mere possibility.

As defendant has failed to show that the trial court's decision to deny his motion to vacate was based on untenable or unreasonable grounds, he has failed to demonstrate any abuse of discretion in the ruling below.

Additionally, the trial judge found that defendant's trial counsel had effectively represented defendant at trial and was not ineffective. CP 427-433. Having this view of trial counsel's performance, it is not surprising that it denied the motion to vacate.

If this court rejects the State's argument that the trial court lacked the authority to decide the untimely collateral attack, it should affirm the decision of the trial court denying the motion on its merits.

4. THE COLLATERAL ATTACK WAS PROPERLY DENIED AS IT WAS MERELY A REFORMULATION OF AN ISSUED THAT WAS RAISED AND REJECTED ON DIRECT REVIEW.

A criminal defendant may not raise in a collateral attack an issue which "was raised and rejected on direct appeal unless the interests of justice require re-litigation of that issue." *In re Personal Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). "Simply 'revising' a previously rejected legal argument . . . neither creates a 'new' claim nor

constitutes good cause to reconsider the original claim.” *In re Jeffries*, 114 Wn.2d 485, 488, 789 P.2d 731 (1990).

[I]dential grounds may often be proved by different factual allegations. So also, identical grounds may be supported by different legal arguments, . . . or be couched in different language, . . . or vary in immaterial respects. Thus, for example, “a claim of involuntary confession predicated on alleged psychological coercion does not raise a different ‘ground’ than does one predicated on physical coercion.”

Jeffries, 114 Wn.2d at 488 (citations omitted). A petitioner may not create a different ground for relief merely by alleging different facts, asserting different legal theories, or couching his argument in different language. *Lord*, 123 Wn.2d at 329.

In his direct appeal, defendant asserted that he had received ineffective assistance of counsel because his attorney had not requested an instruction on “actual danger.” CP 164-177. The Court of Appeals held that defendant had failed to show any actual prejudice and rejected his claim on the merits. *Id.* Now on collateral attack, defendant is again asserting ineffective assistance of counsel but arguing a different factual basis to support his claim of deficient performance. Under *Lord* and *Jeffries*, this does not present a new claim for relief, but a reformulation of an old one that has previously been rejected by the court. As counsel did not address why the interests of justice required relitigation of this claim, it could be properly rejected on procedural grounds. The court below

properly denied relief on a reformulated claim that had been rejected on direct review.

D. CONCLUSION.

This court should find that the trial court erred in finding that defendant's motion to vacate was a timely filed collateral attack under RCW 10.73.090. It should vacate the trial court's order and remand with directions to forward the motion to the Court of Appeals to be handled as a personal restraint petition. If this Court disagrees with the issues raised in the State's cross-appeal, it should affirm the trial court's denial of defendant's motion to vacate as defendant has presented a reformulation of an issue raised and rejected on direct appeal without showing the interests of justice require its relitigation. Moreover, defendant cannot show that the trial court abused its discretion in holding that defendant failed to show that that he was prejudiced by his trial attorney's failure to seek instruction on the lesser offense of unlawful display of a weapon.

DATED: June 8, 2012

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ ^{efile} or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/12/2010
Date Signature

APPENDIX “A”

Findings of Fact and Conclusions of Law



01-1-03444-0 37594454 FNFL 12-01-11



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 01-1-03444-0

vs.

JOSHUA MATTHEW WINGATE,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
THE DEFENDANT'S CrR 7.8 MOTION
AND STATE OF WASHINGTON'S
REQUEST TO TRANSFER THIS
MATTER TO THE COURT OF
APPEALS.

Defendant

THIS MATTER came before the Court on October 14, 2011, on Mr. Wingate's CrR 7 8 Motion to Vacate. At the same time this Court heard the State of Washington's request that this matter be transferred to the Court of Appeals. At the hearing the defendant not being present but was represented by Attorney Sheryl Gordon McCloud and the State of Washington was representative by Deputy Prosecuting Attorney Hugh K. Birgenheier. The Court considered Mr Wingate's CrR 7 8 Motion to Vacate; the supporting memorandum; the Declaration of Matthew Wingate and the Affidavit of his former lawyer, Rodney DeGeorge. The Court also considered the State of Washington's Request that this matter be transferred to the Court of Appeals. Additionally the Court heard the arguments of counsel.

THIS COURT, having reviewed the motion, memorandum, request, declaration, and affidavit, and having heard the argument of counsel; decides as follows

FINDINGS OF FACT AND
CONCLUSIONS OF LAW -1

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

PROCEDURAL HISTORY

1
2 1. On December 6, 2001 the defendant was found guilty in Pierce County Superior
3 Court, Judge Bryan Chushcoff, presiding, of one count of assault in the first degree (Count I) and
4 two counts of assault in the second degree (Counts III and IV) In addition, special verdicts
5 were returned on all three counts (Counts I, III and IV) finding that the crimes involved the use
6 of a firearm during the commission of these crimes At trial the defendant was represented by
7 John Rodney DeGeorge, then-WSBA #22931.

8 2 The defendant was sentenced on January 25, 2002. At the time of sentencing the
9 Trial Court imposed exceptional sentences below the standard range on Count I. The Trial Court
10 imposed a standard sentence range on counts III and IV The Trial Court sentenced the
11 defendant to 60 months on Count I, 20 months on Count III; and 20 months on Count IV. The
12 Trial Court ordered that the sentences in counts I, III and IV be served concurrently. The Trial
13 Court also imposed additional terms for the firearm sentencing enhancements: 60 months on
14 Count I, 36 months on Count III, and 36 months on Count IV, concurrent to each other. The
15 defendant was sentenced to a total of 120 months in the Department of Corrections.
16

17 3 On February 12, 2002 the State of Washington filed a motion to reconsider the
18 exceptional sentence downward. On February 22, 2002 the State of Washington filed a Notice
19 of Appeal due to the thirty-day time limit to appeal The state appealed to Division II,
20 Washington Court of Appeals, in Case No. 28476-6-II.

21 4. The Trial Court granted the State of Washington's motion to reconsider the
22 imposition of the exceptional sentence downward in part, to run the firearm enhancements
23 consecutively rather than concurrently On May 16, 2002, the State sought, and was granted, a
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1 remand from the Court of Appeals to allow the Trial Court to modify the exceptional sentence in
2 accordance with the Trial Court's decision to grant the motion to reconsider

3 5 On June 28, 2002, a second sentencing hearing was held. At that hearing, the
4 Court imposed the same number of months for each crime and enhancement, but ordered that the
5 enhancements run consecutively rather than concurrently

6 6. The State of Washington continued its appeal of the imposition of the exceptional
7 sentence below the standard range. The defendant filed a cross-appeal on July 29, 2002, in Case
8 No 29156-8-II. One of the issues raised on the cross-appeal was ineffective assistance of trial
9 counsel regarding the failure to request certain jury instructions regarding self-defense. The
10 State of Washington's appeal and the defendant's cross-appeal were consolidated on June 6,
11 2003.

12 7. On September 21, 2004, the Court of Appeals held that the facts in the
13 defendant's case did not warrant a first-aggressor instruction and reversed the conviction without
14 addressing the remaining issues. State v. Wingate, 123 Wash.App 415, 98 P.3d 111 (2004).

15 8. The State of Washington sought review of the reversal of the defendant's
16 conviction. On November 10, 2005 the Washington Supreme Court reversed the Court of
17 Appeals and reinstated the defendant's conviction. The Superior Court held the trial court
18 properly gave a first-aggressor instruction. The case was remanded to the Court of Appeals
19 State v. Wingate, 155 Wash 2d 817, 122 P 3d 908 (2005).

20 9. On June 20, 2006, the Court of Appeals affirmed the defendant's conviction and
21 remanded the defendant's case to the Superior Court for reconsideration of its reasons for the
22 exceptional sentence downward and for possible re-sentencing. State v. Wingate, 2006 Wash.
23 App. LEXIS 1294 (unpublished). In its opinion the Court of Appeals directed, "Accordingly, we
24
25

1 affirm Wingate's convictions and remand for reconsideration of the trial court's reasons for
2 Wingate's exceptional sentence downward and for possible resentencing."

3 10. On July 16, 2006 the defendant filed a Petition for Review in the Washington
4 Supreme Court in Case No. 79005-1. On May 1, 2007 the Washington State Supreme Court
5 denied review. State v. Wingate, 160 Wn.2d 1003 (2007).

6 11. The mandate issued on May 8, 2007 returning the case to the Trial Court

7 12. Prior to this Court's hearing to clarify the exceptional sentence, the defendant
8 filed a motion to modify his three firearm enhancements, arguing that the sentencing
9 enhancements should be deadly weapon enhancements, not firearm enhancements

10 13. On August 24, 2007, the Superior Court rejected that argument and issued an
11 order stating that "one or both of [its] findings would support the sentence [it] imposed on
12 January 25, 2002" The Court did not resentence the defendant The Judgment and Sentence
13 imposed on January 25, 2002 remains in full force and effect

14 14. Mr. Wingate filed a Notice of Appeal of that Order on October 12, 2007, to the
15 Court of Appeals, Division II, in Case No. 36755-6-II. On February 12, 2009, the Court of
16 Appeals affirmed the trial court State v. Wingate, 2009 Wash. App LEXIS 352 (2009).

17 15 Mr. Wingate filed a Petition for Review on March 13, 2009, to the Washington
18 Supreme Court in Case No 79005-1. That petition for review was denied on July 7, 2010. State
19 v. Wingate, 169 Wash.2d 1007 (2010). The mandate issued on July 20, 2010.

20 21 16. On June 10, 2011 Attorney Sheryl Gordon McCloud filed a Notice of
22 Appearance, a Motion to Vacate the defendant's convictions under CrR 7.8 and a supporting
23 declaration. On October 3, 2011 the defendant filed a signed declaration of the defendant's trial
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1 attorney, Mr DeGeorge. The defendant had filed an unsigned copy of the declaration two
2 months earlier.

3 FINDINGS OF FACTS

4 1 Mr Wingate was represented by attorney Rodney DeGeorge during his trial Mr.
5 DeGeorge was reprimanded on June 26, 2003, and disbarred on January 30, 2006.

6 2. Mr DeGeorge did not discuss with the defendant the possibility of proposing a
7 jury instruction for the lesser included offense of Unlawful Display of a Weapon pursuant to
8 RCW 9A1 270(1) regarding counts III and IV

9 3. The Trial Judge observed the conduct of Mr. DeGeorge at trial. The Court finds
10 that Mr DeGeorge did not research the issue of the defendant's entitlement to a jury instruction
11 on the lesser included offense of Unlawful Display of a Weapon pursuant to RCW 9A1 270(1)
12 There is no evidence that shows Mr. DeGeorge's failure to seek a lesser included instruction for
13 counts III and IV was a tactical or strategic decision.

14 4 The defendant testified at trial that he pointed the firearm at the victims that were
15 named in count III and IV.

16 5 In the Court of Appeals opinion issued on June 20, 2006, the Court of Appeals
17 only authorized the Trial Court to a) determine if based on its ruling if the Trial Court would still
18 impose an exceptional sentence and b) conduct a sentencing hearing if necessary. The Court of
19 Appeals did not authorize the Trial Court to conduct any additional hearings or hear any
20 additional arguments from the parties.

21 22 5 The Court of Appeals opinion stated as follows "Accordingly, we affirm
23 Wingate's conviction and remand for reconsideration of the trial court's reasons for Wingate's
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1 exceptional sentence downward and for possible resentencing" State v. Wingate, 133
 2 Wash App 1027 (2006)

3 **CONCLUSIONS OF LAW**

4 1 Pursuant to In re the Personal Restraint of Skylstad, 160 Wash 2d 944, 950-54,
 5 162 P 3d 413 (2007) the defendant's CrR 7.8 motion is timely because the motion was filed
 6 within one year of the mandate issued on July 20, 2010.

7 2. The mandate issued by the court on May 8, 2007 is not the date that would start
 8 the one year time limit under CrR 7 8.

9 3 Trial Counsel Rodney DeGeorge effectively represented the defendant at trial
 10 Mr. DeGeorge was not ineffective.

11 4. Based on the holding in State v Crace, 157 Wash App 81, 236 P 2d 914 (2010)
 12 and the legal reasoning in State v Jaynes, 131 Wash.App 1058 (2006), there was insufficient
 13 evidence for this Court to give an instruction on Unlawful Display of a Weapon pursuant to
 14 RCW 9A1.270(1) as a "lesser included offense" of the crime of Assault in the Second Degree.
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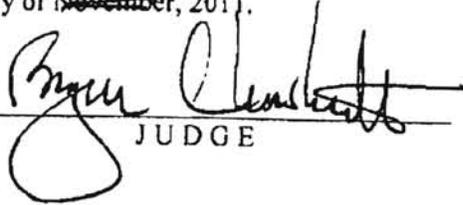
16 5. The "factual" prong outlined in State v. Workman, 90 Wash 2d 443, 584 P.2d 382
 17 (1978) that would have provided the Trial Court with authority to give the lesser included
 18 instruction for the crime of Unlawful Display of a Weapon was not met by the evidence
 19 presented at trial.

20 6. Even if the defendant had requested the trial court give an instruction on the crime
 21 of Unlawful Display of a Weapon, the trial court would not have instructed the jury on the crime
 22 of Unlawful Display of a Weapon
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7. The motion to vacate counts III and IV is DENIED

DONE IN OPEN COURT this 1st ~~day of November~~ December, 2011.

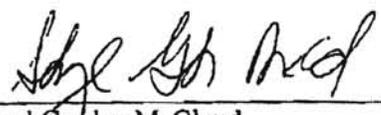

JUDGE

Presented by:



Hugh K. Bingenheier
Deputy Prosecuting Attorney
WSB# 14720

Approved as to Form.



Sheryl Gordon McCloud
Attorney for Defendant
WSB# 16709

FILED
DEPT. 4
IN OPEN COURT

DEC 1 - 2011

Pierce County Clerk
By 
DEPUTY

FINDINGS OF FACT AND
CONCLUSIONS OF LAW-7

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PIERCE COUNTY PROSECUTOR

June 08, 2012 - 11:56 AM

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