NO. 92110-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSHUA THOMAS,

Respondent.

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

The Honorable Charles R. Snyder, Judge

ANSWER TO PETITION FOR REVIEW WITH ADDITIONAL ISSUES IF REVIEW IS GRANTED

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A. IDENTITY OF RESPONDENT/CROSS-PETITIONER

Joshua Jeep Thomas, defendant and appellant below, answers the State's Petition for Review, urging the Court to deny review. But, if the Court grants review, he petitions it to review the additional issues identified below.

B. COURT OF APPEALS OPINION

Mr. Thomas asks this Court to deny review of the unpublished opinion in *State v. Thomas*, Court of Appeals No. 70438-9-I (June 22, 2015), reversing his conviction for second degree assault with a firearm. The Court of Appeals denied the State's Motion for Reconsideration by Order July 22, 2015.

C. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

Joshua Thomas is a long-haired 66-year-old musician, released on appeal bond from a mandatory sentence of 39 months. From age 17 he made his living playing in bars, saloons and nightclubs. Now he moves more slowly, with good and bad days healthwise. At the time of this incident, he lived off a gravel road in the woods of Whatcom County. A widower, he lived alone with a feral cat he took

in. He acknowledged some of his neighbors might think he's a bit of a "kook." RP 319-22, 347-48.

Mr. Thomas lived on a portion of hardpack road with loose gravel not maintained by the county. He and two neighbors maintained the road at considerable labor and expense. A recurring problem was motorcyclists riding too fast, causing ruts. RP 292-301, 304, 324-26.

a. Defense Evidence

On July 19, 2011, Jache Cocchi rode his motorcycle up and down the road for a couple of hours. His full gear and visored helmet concealed his age of 15. RP 335-36, 345-47. As he walked to his mailbox, Mr. Thomas decided to ask him to slow down. Mr. Thomas was having a slower-moving day. He called to the biker to wait. As Mr. Thomas got closer, the rider gave him "the finger," gunned his engine and spun out, spraying Mr. Thomas with gravel as he rode away. RP 333-36.

The biker returned a few minutes later, still going fast. Mr. Thomas motioned with his left hand to slow down. The motorcycle stopped very quickly 30-40 feet away, then hunkered down, revved his engine, and looked like he was about to charge

directly at Mr. Thomas. Mr. Thomas was afraid for his life. He pulled his gun from his pocket and held it in the air. RP 338-42.

Mr. Thomas quickly approached the motorcycle, closing the gap so there was no room to charge at him and knock him down. He put his left hand on the rider's shoulder. He had the gun in his right hand, pointed straight up, but kept it as far from the motorcycle as possible. RP 342-44.

Mr. Thomas gave the rider a "skunk eye," meant to convey not to mess with him. He spoke to the rider, explaining how the doughnuts damage the road the neighbors have to maintain. He thought the rider gave an affirmative response. RP 345-49.

Mr. Thomas never pointed the gun at the rider. He never cocked the gun. He never intended to shoot the gun. He never intended to make the rider think he was going to shoot him. RP 360, 373-76.

The motorcycle took off at high speed again. Mr. Thomas felt threatened, but decided he had done what he could. RP 351-53.

b. <u>State's Evidence</u>

Jache Cocchi said Mr. Thomas pointed the cocked gun directly into his face through the

helmet and said, "Don't move or I'll shoot you, you little bastard." He claimed Mr. Thomas pulled him off the motorcycle and dragged him 10-15 feet away.[1] Then Mr. Thomas uncocked the gun and let him go. RP 41-45.

Kaitlyn, a neighbor girl, testified Jache remained on the bike the entire time. RP 107-09. She told the first officer she talked to that she didn't see the gun pointed at Jache. RP 156-60. She testified at trial Mr. Thomas pointed the gun at Jache, although she'd told defense counsel Jache would not have been able to see the gun because it was at the side of his helmet. RP 120-21.

2. PROCEDURAL FACTS

The State charged Mr. Thomas with assault "with a deadly weapon" in the second degree, RCW 9A.36.021(1)(c), with the mandatory three-year sentencing enhancement for being armed with a firearm, RCW 9.94A.533. CP 4-7.

The defense proposed instructions on lawful use of force and two lesser offenses: unlawful display of a weapon and assault in the fourth

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[1] Mr. Thomas testified he was not physically capable of doing that. RP 350.

degree, for placing his hand on Jache's shoulder.[2] The trial court noted:

> Well, if the jury determined that the firearm was never pointed at Mr. Cocchi; it was only displayed. ... And that they saw him as putting his hand on Mr. Cocchi's shoulder that that's an assault IV and a display of firearm. It's not an assault II.

RP 496. The court gave the defense instructions, including self-defense, and two definitions of assault in a single instruction. RP 463-87, 523-31.[3] Instruction No. 13 required conviction of felony assault if the jury found "the defendant assaulted [JC] **with** a deadly weapon."[4]

The jury convicted as charged.

Mr. Thomas brought a Motion for New Trial for ineffective assistance of counsel and incorrect jury instructions: Instruction No. 11, defining assault, did not require the act be done "with unlawful force" in the second definition; and the to-convict instruction, combined with both

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[2] Discussing instructions, defense counsel said "I hate instructions." He agreed with the court's comment that instructions are "the most confusing thing that humans have devised." RP 486.

[3] Instr. No. 11, Slip Op. at 5. Instructions No. 11, 13 and 14 are attached in App. A.

[4] Slip Op. at 4 (emphasis added).

definitions of assault in one instruction, permitted the jury to convict Mr. Thomas of the felony even if they believed he only committed a misdemeanor assault. CP 50-62.

Trial counsel testified he failed to review the WPIC comments requiring "with unlawful force" when he proposed Instruction No. 11, and had no strategic purpose for omitting the phrase.

> I believed if the jury found Mr. Thomas pointed the gun, he would be guilty of assault 2. However, if it did not believe he pointed the gun, but only that he displayed or brandished the gun, he was guilty only of unlawful display of a weapon. It would be possible for the jury also to find assault 4 based on an impermissible touching by putting his hand on Mr. Cocci's shoulder.

CP 47.[5] After the verdict the court invited jurors to stay and talk about the case with counsel. A juror said it was very easy to be guilty of felony assault, depending on what "with" meant in Instruction No. 13. Some jurors interpreted the instructions to mean if Mr. Thomas impermissibly

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[5] *See, e.g., State v. Byrd*, 125 Wn.2d 707, 887 P.2d 396 (1995) (distinguishing between pointing the gun and merely displaying it); *State v. Cardenas-Muratalla*, 179 Wn. App. 307, 309-10, 319 P.3d 811 (2014) (anonymous tip that gun was shown without suggestion of pointing or threat does not justify a *Terry* stop).

touched Jache on the shoulder "with" the firearm in his hand, he had committed an "assault" "with a firearm." Trial counsel had never considered the instructions could be interpreted to permit a felony conviction for facts only sufficient to be misdemeanors. If he had, he would have separated the misdemeanor definition of assault from the felony definition. He had no strategic purpose for combining them in a single instruction. CP 45-49. The State conceded it was error to omit "without lawful force" from the assault definition. RP(5/15) 7.

The trial court denied the motion. The court concluded it could not say any instructional error affected the verdict unless he had something specific from the jurors saying so. RP(5/15) at 11-17. On reconsideration, the defense provided just such declarations from jurors. CP 86-88. The court again denied a new trial, choosing to "leave it to some other court." RP(8/7) 62-63.

3. COURT OF APPEALS OPINION

The Court of Appeals reversed the conviction, holding counsel was ineffective in proposing jury instructions that permitted the jury to convict his

client of a felony even if it found only facts sufficient for misdemeanors. It concluded "taken as a whole," the instructions did not relieve the State of its burden to disprove self-defense.

D. ANSWER TO STATE'S PETITION FOR REVIEW

1. THE COURT OF APPEALS PROPERLY CONSIDERED THE MISLEADING EFFECT OF THE INSTRUCTIONS UNDER THE SPECIFIC FACTS OF THIS CASE.

The Legislature intends statutory definitions of crimes to "safeguard conduct that is without culpability from condemnation as criminal" and "to differentiate on reasonable grounds between serious and minor offenses." RCW 9A.04.020(1).[6] The court's instructions must be clear enough to permit the jury to apply the law accurately to the specific facts of a case.

Instruction 13 required the jury to convict of assault in the second degree if it found "the defendant assaulted Jache Cocchi, with a deadly weapon." Slip Op. at 4. The conviction thus turned on the meaning of "assault" in Instruction No. 11 and "with" in Instruction No. 13.

The primary fact in dispute at trial was whether Mr. Thomas pointed the gun at Jache -- as

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[6] The text of this statute is in App. B.

evidence of an intent to cause fear. Pet. at 12; Slip Op. at 4, 7. The State argues it also intended a felony conviction if Mr. Thomas "us[ed] his firearm in a manner intended to create apprehension of the requisite harm in Jache." Pet. at 12. Both of these theories fall under the second definition of assault: "an act done with the intent to create in another apprehension and fear of bodily injury." CP 21.

The Court of Appeals opinion did not limit the State's theory to pointing the gun, but to this second definition.

> Using the definition [of assault] in the first paragraph, a juror could find that Thomas committed an "assault" of JC by grabbing his shoulder and could then conclude that the assault was "with a deadly weapon" because Thomas was holding his gun at the time. ... The facts a juror found to support such reasoning would constitute fourth degree assault, or possibly fourth degree assault and unlawful display of a weapon--both of which are misdemeanors.
>
> ... Given the two definitions of assault, a juror may have understood that Thomas was guilty of committing "assault" with a deadly weapon, even if the juror did not find that Thomas intended to put JC in fear and apprehension that he was about to be shot.

Slip Op. at 7. It also found the special verdict that he was armed "does not demonstrate that the

assault he committed was by pointing the firearm at JC **or otherwise intentionally putting him in fear of bodily injury**." Slip Op. at 8 (emphasis added).

The problem here was with the first assault definition combined with the felony to-convict. If the jury found touching Jache's shoulder was an assault under the first definition, these instructions then permitted it to convict him of the felony--assault "with" a deadly weapon--if he merely held the firearm, even if he didn't use it to commit the touching. The trial court acknowledged such findings would not be a felony. "It's not an assault II." RP 496. *See also* App't's Brief at 38-39 (Webster's 28 definitions of "with" gives ten definitions before "by means of".)

The Court of Appeals decided this case on the narrowest of grounds. Given the specific unusual facts and the distinct defense theory, defense counsel was ineffective in proposing instructions that permitted the jury to convict his client of a felony even if it found facts only sufficient to be two misdemeanors.

The State argues the proposed instruction was an accurate statement of the law.

> But an accurate statement of law can be confusing when it is applied to circumstances different from those that existed when the statement of law was first made.

State v. Carson, ___ Wn.2d ___, ___ P.3d ___ (Slip Op. No. 90308-5, 9/17/2015) at 11. Jury instructions are incorrect if they do not adequately articulate the law to be applied to the specific facts of the case. The WPIC instructions

> provide a neutral starting point for the preparation of instructions that are individually tailored for a particular case. Trial judges and attorneys must consider whether modifications are needed to fit the individual case.

WPIC 0.10.

If defense counsel proposed these erroneous instructions without a strategic purpose and without thinking through how a jury would interpret them, then he provided deficient performance. *State v. Kyllo*, 166 Wn.2d 856, 215 P.3d 177 (2009).

The law requires reversal if instructions permit the jury to convict of a felony based on facts that would support only the a misdemeanor. *State v. Byrd, supra*. Thus counsel's deficient performance offering the instructions is prejudicial. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

The State does not distinguish *Byrd* or *Kyllo* in its Petition; nor does it show how the Court of Appeals opinion conflicts with *Strickland*. Slip Op. at 3, 7-8. This Court should deny review.

2. THE COURT DID NOT BASE ITS DECISION ON THE JURY'S THOUGHT PROCESSES.

The Court of Appeals did not reach its decision in this case because of what the jury actually thought. It reached its opinion considering how a hypothetical juror could interpret the law from the instructions. If the instructions permitted a felony verdict based on facts only sufficient for a misdemeanor, then they were erroneous. *Byrd, supra.*

While the jurors' thinking "inheres in the verdict" and so is not itself a basis for challenging the conviction, here it nonetheless illustrates how the instructions were constitutionally inadequate. Thus it is similar to the courts' reliance on jury inquiries.[7] The trial

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[7] *See, e.g., State v. Byrd*, 72 Wn. App. 774, 781, 868 P.2d 158 (1994), *aff'd*, 125 Wn.2d 707, 887 P.2d 396 (1995) (jury's inquiry "probably arose from the failure of the instructions to distinguish clearly between unlawful display and second degree assault when applied to Byrd's version of what happened").

court specifically required the jury's declarations below, and the defense provided it. In this case, this information illustrated perfectly the problems with the instructions. Considering it for illustrative purposes, as the Court of Appeals did, is perfectly proper. Slip Op. at 6-7. It does not warrant this Court's review.

E. ADDITIONAL ISSUES PRESENTED FOR REVIEW IF THE COURT GRANTS REVIEW

1. In a self-defense assault case, if the to-convict instruction does not include "unlawful force" or the absence of self-defense, either directly or incorporated by reference, does it relieve the State of its burden of proving the absence of self-defense?

2. Was counsel ineffective for omitting "with unlawful force" from the assault definition when it was the only way to incorporate that element into the to-convict instruction?

3. Should this Court overrule *State v. Hoffman*, 116 Wn.2d 51, 109, 804 P.2d 577 (1991)?

F. GROUNDS FOR REVIEW AND ARGUMENT

WHEN NEITHER THE TO-CONVICT NOR THE ASSAULT DEFINITION INCLUDES "WITH UNLAWFUL FORCE," THE TO-CONVICT INSTRUCTION REQUIRES A CONVICTION WITHOUT REQUIRING THE JURY TO CONSIDER SELF-DEFENSE. THE COURT OF APPEALS OPINION HOLDING A SEPARATE SELF-DEFENSE INSTRUCTION IS ADEQUATE CONFLICTS WITH DECISIONS BY THIS COURT AND PRESENTS A SIGNIFICANT ISSUE OF CONSTITUTIONAL LAW. RAP 13.4(b)(1), (3).

The Court of Appeals properly acknowledged:

> Once the issue of self-defense is properly raised, the absence of self-defense "becomes another element of the offense which the State must prove beyond a reasonable doubt." *State v. McCullum*, 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983).
>
> Jury instructions on self-defense must more than adequately convey the law. Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864. "The jury should be informed in some unambiguous way that the State must prove absence of self-defense beyond a reasonable doubt." *State v. Acosta*, 101 Wn.2d 612, 621-22, 683 P.2d 1069 (1984).
>
> ...
>
> Because the jury has the right to regard the to-convict instruction as a complete statement of the law, it should state all elements the State is required to prove. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

Slip Op. at 8-9.

> Including the State's burden to disprove self-defense in the to-convict instruction may well be a preferred practice. On its face, instruction 13 imposed upon the jury a duty to render a verdict of guilty if the State proved an

> assault with a deadly weapon occurred in Washington. Because there was a claim of self-defense, instruction 13 standing alone would likely constitute manifest constitutional error. *Acosta*, 101 Wn.2d at 615 ... .
>
> But instruction 13 did not stand alone. If a separate instruction is used to state the State's obligation to prove the absence of self-defense, omitting similar language from the to-convict instruction is not reversible error. *State v. Hoffman*, 116 Wn.2d 51, 109, 804 P.2d 577 (1991).

Slip Op. at 9-10.

The Court of Appeals thus discovered the direct conflict between *Hoffman* and *Smith*. *Smith* reaffirmed *State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 845 (1953), again reaffirmed in *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005): every element must be included in the to-convict instruction; it is not adequate to make the jury search other instructions for elements. *McCullum* and all its self-defense progeny have consistently held the absence of self-defense is an "element" the State must prove beyond a reasonable doubt. *Hoffman* nonetheless concluded it was sufficient to list it only in a separate instruction -- with no discussion of any cases or the to-convict "duty to return a verdict of guilty."

For cases of assault and self-defense, the WPIC scheme of instructions relies on the term "assault" in the "to convict" instruction to lead the jury to the instruction defining assault. CP 21, 23. Each definition of assault then requires "unlawful use of force." WPIC 35.50. From there, the jury would turn to the instruction defining the "lawful use of force." Instruction No. 14; CP 24. Although convoluted, the jury eventually would combine all three instructions to understand the law of self-defense.

Without the phrase "unlawful use of force," the instructions never refer the jury to self-defense, Instruction No. 14. Instead, No. 13 imposes a "duty to return a verdict of guilty" without ever considering Instruction No. 14.

And if the jurors separately read Instruction No. 14, they would find it in direct conflict with Instruction No. 13. No. 13's "duty to return a verdict of guilty" without considering self-defense or lawful use of force, directly conflicts with No. 14's separate duty to return a verdict of not guilty if the State fails to prove the absence of lawful force.

Omitting "unlawful use of force" from the assault definition here violated the pattern instructions' specific directions. The WPIC 35.50 provides the phrase "with unlawful force" as a bracketed option. The Note on Use provides:

> Include the phrase "with unlawful force" if there is a claim of self defense or other lawful use of force.

WPIC 35.50. The Commentary further provides:

> **Unlawful use of force.** The phrase "with unlawful force" has been bracketed in all three paragraphs. The definition of "assault" includes the requirement that it be committed with unlawful force. ... If there is a claim of self defense or other lawful use of force, the instruction on that defense will define the term "lawful."

Id. Defense counsel admitted he had not researched this aspect of the WPICs and had no strategic purpose for omitting the phrase. CP 47.

The Court of Appeals, the State and the court below all acknowledge that "defense counsel should have included the phrase 'with unlawful force' in both paragraphs of instruction 11" defining assault. Slip Op. at 12.

> The inclusion of the phrase "with unlawful force" in one definition of assault but not the other does have the potential to be confusing and misleading when looked at in isolation from the other instructions. It is also

> problematic that the phrase was omitted from the very definition of assault the State was relying on to obtain the conviction.

Slip Op. at 13. Nevertheless, the Court held the separate pattern instruction on self-defense solved the problem, citing only *Hoffman*. *Id.*

Reading instructions "as a whole" does not simply mean reducing the instructions to a pile of words or sentences with no relationship to one another. The instructions are language with meaning, placed in specific pages, with words that refer to and incorporate others. The "to convict" instruction in particular, is self-contained: it requires the jury to convict if it finds **each element listed there** is proven. This Court has long recognized that the "to convict" instruction must include every "element." *Mills*, *Smith*, *Emmanuel*. Due process requires the State bear the burden of proving every element beyond a reasonable doubt.[8] Omitting this element relieves that burden.

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[8] U.S. Const., amends. 5, 14; Const., art. I, § 3; *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Hoffman involved a charge of aggravated first degree murder and first degree assault. The Court concluded there was no prejudicial error to exclude the lack of self-defense from the "to convict" instruction for murder. The Court did not address the instructions either defining or setting out the elements of assault; the appellant did not challenge the sufficiency of those instructions.

Hoffman does not control here. The Court noted the WPIC Committee recommended a separate instruction on self-defense for murder. But for assault, as here, the WPIC Committee explicitly requires "unlawful force" in the definition of assault, with no reference to *Hoffman*. WPIC 35.50. Even on Hoffman's murder count, the Court did not address the language instructing the jury it had a "duty to return a verdict of guilty" without considering the defense.

This Court may overrule prior decisions when they are incorrect and harmful. *State v. Guzman Nuñez*, 174 Wn.2d 707, 713, 285 P.3d 21 (2012). *Hoffman* directly conflicts with *Mills*, *Smith* and *Emmanuel*. *Hoffman*'s holding on this point relied solely on the WPIC pattern instructions for murder,

which "are not authoritative primary sources of the law." WPIC 0.10.

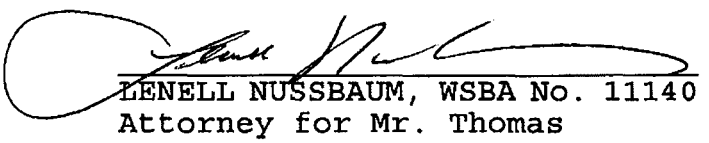
Many of this Court's later opinions challenge the viability of *Hoffman*. Hoffman was convicted of killing and shooting at two police officers who were trying to arrest the defendants. Under *State v. Valentine*, 132 Wn.2d 1, 935 P.2d 1294 (1997), decided six years later, the law would not permit self-defense in such a case. Thus any discussion of self-defense instructions is at most dictum.

The law of self-defense also has changed enormously in the 23 years since *Hoffman*, requiring that its holding be reconsidered. *See, e.g.: State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993); *State v. LeFaber*, 128 Wn.2d 896, 899-900, 913 P.2d 369 (1996); *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997); *State v. Kyllo, supra*

G. CONCLUSION

This Court should deny review. If it grants review for the State, however, it also should grant review of the additional issues presented above.

DATED this 18th day of September, 2015.



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APPENDIX A
JURY INSTRUCTIONS

INSTRUCTION NO. 11

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

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

An act is not an assault, if it is done with the consent of the person alleged to be assaulted.

CP 21 (emphases added).

INSTRUCTION NO. 13

To convict the defendant of the crime of assault in the second degree, each of **the following elements** of the crime must be proved beyond a reasonable doubt:

(1) That on or about 19th day of July, 2011, the defendant assaulted Jache Cocchi, with a deadly weapon; and

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

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

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

CP 23 (emphases added).

INSTRUCTION NO. 14

It is a defense to a charge of Assault in the Second Degree, Assault in the Fourth Degree and Unlawful Display of a Weapon that the **force** offered to be used was **lawful** as defined in this instruction.

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

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

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

CP 24 (emphases added).

APPENDIX B

STATUTORY PROVISIONS

(1) The general purposes of the provisions governing the definition of offenses are:

(a) To forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests;

(b) To safeguard conduct that is without culpability from condemnation as criminal;

(c) To give fair warning of the nature of the conduct declared to constitute an offense;

(d) To differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.

RCW 9A.04.020(1).

CERTIFICATE OF SERVICE

I certify that on this date I served a copy of this pleading, as well as the United States Mail Service to the following individuals, postage prepaid, addressed as indicated:

Ms. Kimberly Thulin
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I declare under penalty of perjury under the laws of the State of Washington that the above statement is true and correct to the best of my knowledge.

9-18-2015-SEATTLE, WA
Date and Place

ALEXANDRA FAST

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Subject: State of Washington v. Joshua Thomas 92110-5

Please accept for filing the attached "Answer to Petition for Review With Additional Issues if Review is Granted" in regards to State of Washington v. Joshua Thomas. A certificate of service is attached to the pleading.

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