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SUPREME COURT
STATE OF WASHINGTON
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NO. 96574-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL BACKEMEYER
Respondent.

ANSWER TO PETITION FOR REVIEW

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RULES, STATUTES, AND OTHERS

A. IDENTITY OF RESPONDING PARTY

Respondent Michael Backemeyer through his attorney, Lise Ellner, asks this court to deny review of the Court of Appeals decision designated in Part B of this answer.

B. COURT OF APPEALS DECISION

Michael Backemeyer requests this Court deny review of the Court of Appeals opinion in *State v. Backemeyer*, 428 P.3d 366 (2018).

C. ISSUES PRESENTED FOR REVIEW

1. The state fails to raise legitimate issues for review under RAP 13.4(b).

2. The Court of Appeals correctly determined counsel was prejudicially ineffective.

D. STATEMENT OF THE CASE

In the interests of judicial economy, Mr. Backemeyer adopts the statement of the case set forth in the Court of Appeals published opinion.

E. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

In addition to the following argument, Mr. Backemeyer adopts the arguments set forth in his opening brief.

1. This Court Should Deny Review

This Court should deny the state's petition for review because it fails to satisfy the criteria set forth in RAP 13.4(b). The state argued that its petition satisfies RAP 13.4(b)(1) (2), (3). But this is incorrect. RAP 13.4(b) provides in relevant part as follows:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

The state mischaracterizes the facts and law. The Court's decision does not conflict with any published or unpublished opinion and does not create a significant question of constitutional law because the issue decided: ineffective assistance of counsel was neither novel nor contrary to law.

The state argues that Mr. Backemeyer's case conflicts with

State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988); *State v. Hatley*, 41 Wn. App. 789, 793-94, 706 P.2d 1083 (1985), and *State v. Bockman*, 37 Wn. App. 474, 682 P.2d 925 (1084). This is incorrect because none of these cases addressed the issue of effective assistance of counsel. Rather the question in *Ng*, related to whether the court's failure to include duress language in its "to convict" robbery instruction deprived Ng of a fair trial where the state's burden to disprove duress was unclear. This issue is irrelevant to the question of effective assistance of counsel and has no bearing on Backemeyer's case.

Similarly, *Hatley* also did not consider effective assistance of counsel but rather relates to whether jury instructions when read together properly instructed the jury on the issue at hand. This issue like that in *Ng* is not in issue in Backemeyer's case. *Bockman*, 37 Wn. App. 474, too is unrelated to the issue of effective assistance of counsel. In *Bockman t*he defendant requested a self-defense instruction but failed to present evidence of self-defense, thus the instruction was not warranted. The jury sent the following jury note:

If the defendants leave the scene of a second degree

> burglary, then an assault occurred by a third party, are those two then guilty by association of first degree burglary? Also clarification of the definition of immediate flight.

Bockman, 37 Wn. App. at 492-93. The court did not provide a substantive answer to the jury question but told the jury, "You have received all of the Court's instructions." Id. The jury did not send a second note indicating confusion but rather returned a unanimous verdict. Id.

Bockman also unsuccessfully argued that the court improperly shifted the burden to the defense to prove a lack of knowledge based on a defense proposed instruction. The court held that the instruction did not shift the burden of proof but rather complied with the WPIC. *Bockman,* 37 Wn. App. at 493. Mr. Backemeyer's case does not conflict with *Bockman.*

In sum, the state fails to raise any legitimate grounds for review. Accordingly, this court should deny the petition for review.

2. Court of Appeals Correctly Determined Backemeyer was Denied his Constitutional Right to Effective Assistance of Counsel

The issue in Backemeyer's case considered effective assistance of counsel and did not invade or consider the jury's

thought processes. The jury sent 2 questions to the judge expressing confusion regarding the issue of self-defense. CP 30-31. The court provided 2 separate instructions related to self-defense. CP 3-26. After the first question, the judge instructed the jury to re-read the jury instructions. CP 30. The jury again sent a note expressing confusion about the issue of self-defense. CP 31. The court again sent the same message that failed to clarify the issue for the jury: "please read the instructions". CP 31. Instruction 14 provided the answer to the jury's question. The jury had clearly not read jury instruction 14 because that instruction answered the jury's questions. *Backemeyer*, 428 P.3d at 370-71. This conclusion is not a matter of "divine" knowledge, as the state suggested in its petition for review but rather a matter of simple logic.

The Court of Appeals correctly determined that counsel's performance was constitutionally deficient when it became manifest that the jury did not understand the law of self-defense and counsel agreed response did not provide the jury any clarity. *Backemeyer*, 428 P.3d at 370-71.

a. Standard of review

A claim of ineffective assistance of counsel is a mixed

question of law and fact, which we review de novo. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

b. Ineffective assistance of counsel

To meaningfully protect an accused's right to counsel, an accused is entitled to effective assistance of counsel. *Strickland*, 466 U.S. at 686. Courts apply a two-pronged test to determine if counsel provided effective assistance: (1) whether counsel performed deficiently, and whether the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

(i) Deficient performance

Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, the presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson,* 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the

state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.").

(ii) Prejudice

Second, the defendant must show prejudice--"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas,* 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (*citing Strickland*, 466 U.S. at 694).

The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. (*citing Strickland*, 466 U.S. at 693). Courts look to the facts of the individual case to see if the *Strickland* test has been met. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

c. Backemeyer's case

After the jury's first question to the court, defense counsel expressed his suspicion that the jury's confusion might lead it to convict without understanding Backemeyer's right to self-defense. *Backemeyer*, 428 P.3d at 370. Counsel's suspicion was confirmed when the jury asked its second question. Id. The jury's second question was whether Backemeyer's commission of an illegal act negated his right to use self-defense. *Backemeyer*, 428 P.3d at 369. The jury clearly did not understand the law on self-defense and had not reviewed instruction 14, the self-defense instruction. Had the jury read that instruction, the jury would not have asked the second question because instruction 14 clearly allowed a person who had committed an illegal act to defend himself. *Backemeyer*, 428 P.3d at 370.

The Court of Appeals correctly concluded that defense counsel had no legitimate strategy for agreeing to again tell the jury to merely "Please read your instructions[]", because this instruction did not remedy the jury's confusion. RP 514. It was clear that the jury had not read instruction 14 after the court had just instructed it to read the instructions, and equally clear that the jury remained

confused after being told to read the instructions again. *Backemeyer*, 428 P.3d at 370-71.

Jury instructions are generally sufficient if they "inform the jury of the applicable law, [do] not mislead the jury, and permit each party to argue its theory of the case." *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011) (*quoting State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007)). When instructions are misleading, the defendant is denied his right to present his theory of the case. Id.

For example, in *LeFaber,* 1the trial court provided a self-defense jury instruction that was ambiguous as to whether the state had to disprove the defendant reasonably believed there was imminent danger of harm or that there was actually imminent danger of harm. Although unpreserved, the Court reviewed the claim of error and reversed, reasoning the instruction was misleading so as to deprive the defendant of his ability to argue his theory of the case. *LeFaber,* 128 Wn.2d at 903.

Here, the instructions mislead the jury because as in *LeFaber,* the jury did not understand the law on self-defense.

1*State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (2009) (abrogated on other grounds).

Backemeyer' s liberty rested on his assertion that his actions were lawful self-defense. For this reason, it was paramount for the jury to understand the law of self-defense. *Backemeyer*, 428 P.3d at 370-71. The record is manifestly clear that the jury did not review instruction 14, which set forth the law of self-defense. Id. The rebuttable presumption that the jury understands and follows the court's instructions was overcome. *Backemeyer*, 428 P.3d at 370-71.

Not once, but twice, the jury sent questions to the court that were plainly answerable if the jury had reviewed the self-defense instruction. The repeated jury questions show that the jury's verdict likely depended on whether Backemeyer' s status as a trespasser or a criminal precluded his right to self-defense. The correct answer, based on instruction 14, was that Backemeyer's status did not preclude his right to self-defense. But the jury's verdict shows that it believed Backemeyer's status did preclude his right to self-defense. *Backemeyer*, 428 P.3d at 370-71.

Effective representation requires defense counsel to do more than provide the same generic response that had failed to assist the jury. *Backemeyer*, 428 P.3d at 370 ((2018) (*citing*

Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed. 350 (1946)) ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."); *see also United States v. Hayes*, 794 F.2d 1348, 1352 (9th Cir. 1986) ("[T]he [trial] court has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue.").

Here, the Court of Appeals was correct to hold that defense counsel should have asked the trial court to specifically instruct the jury to review instruction 14. *Backemeyer*, 428 P.3d at 371. That instruction directly answered the jury's questions. Moreover, the trial court would have granted counsel's request to clarify if counsel asked because the court's "refusal would have been contrary to its responsibility to ensure that the jury understood the law." *Bollenbach*, 326 U.S. at 612-13; *Backemeyer*, 428 P.3d at 370.

The Court of Appeals correctly concluded that counsel was prejudicially ineffective for failing to request the judge instruct the jury to read instruction 14. *Backemeyer*, 428 P.3d at 370-71. This Court should deny the state's petition for review because it fails to present an argument for review under RAP 13.4(b). The state merely mischaracterizes the facts, arguments, and the Court of

Appeals' correct analysis of the parameters of the effective assistance of counsel issue.

d. Dissent

Judge Korsmo in his dissent disagreed with the majority on three different grounds. First Judge Korsmo asserts that the court did not err in twice instructing the jury to "re-read the instructions". *Backemeyer*, 428 P.3d at 371-72. This may be correct but does not alter the issue regarding whether counsel was ineffective for failing to provide adequate representation- an issue distinct form whether or not the court erred.

Second, the Court of Appeals did not misread the import of instruction 162 (no duty to retreat). Rather the dissent seems to misunderstand that defense counsel has an obligation to ensure that the defendant is able to argue his theory of the case

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2 Court's instruction 16 explained when a person is not required to retreat:

> It is lawful for a person who is in a place *where that person has a right to be* and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force.

CP at 21 (emphasis added).

without the jury being confused or misled. And the corollary is that the court has an obligation to ensure the defendant receives a fair trial. When the jury is confused both counsel and the court have failed. *Bollenbach*, 326 U.S. at 612-13*; Hayes*, 794 F.2d at 1352.

Third, contrary to the dissent's view, there was a factual basis for giving instruction 16. Once the court gave the instruction, and the ensuing jury confusion became apparent, counsel was required to request the court remedy the confusion. 3 Counsel did not request the instruction to create confusion, and if he did, then under *Strickland*, his performance was both

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3 Invited Error Doctrine Does Not Apply

When instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review. *State v. Kyllo*, 166 Wn.2d 856, 861, 215 P.3d 177 (2009) (misstatement of law on self-defense-reversible error). Here, even though defense counsel requested instruction 14 which the jury either did not understand or did not read, this does not preclude appellate review because the ongoing confusion was the result of counsel's failure to request the court provide an appropriately clarifying instruction in accordance with CrR 6.15. *Kyllo*, 166 Wn.2d at 861; See also, *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201 (2004) (this Court found ineffective assistance of counsel where the defense counsel requested an inadequate self-defense instruction, which decreased the State's burden to disprove self-defense. Since Mr. Rodriguez maintained that any error that occurred was the result of ineffectiveness of counsel, the invited error doctrine did not apply. *Rodriguez*, 121 Wn. App. 180, 87 P.3d at 1203).

deficient and prejudicial. *Kyllo,* 166 Wn.2d at 864 "Jury instructions on self-defense must more than adequately convey the law." *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

Both the dissent in *Backemeyer* and the prosecutor fail to understand that the jury instructions, read as a whole, "must make the relevant legal standard manifestly apparent to the average juror." Id.; *LeFaber*, 128 Wn.2d at 900. Here, it was abundantly clear that the jury was confused. Under CrR 6.15 the court had a duty to remedy the confusion, and counsel was required to request clarification.

F. CONCLUSION

For the reasons stated herein and in the opening brief, this Court should deny review.

DATED THIS 23rd day of January 2019.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER

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LISE ELLNER, WSBA 20955
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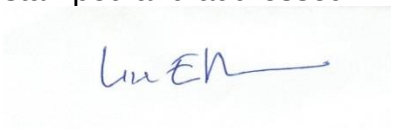
I, Lise Ellner, a person over the age of 18 years of age, served the Spokane County Prosecutor's Office SCPAappeals@spokanecounty.org and Michael Backemeyer/DOC#398556, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 on January 23, 2019. Service was made electronically to the prosecutor and to Michael Backemeyer by depositing in the mails of the United States of America, properly stamped and addressed.



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LAW OFFICES OF LISE ELLNER

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