NO. 99979-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL EARL MILLER,

Petitioner.

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello

No. 18-1-03704-4

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

It is well-settled in Washington that deadly force may be used in self-defense only if a defendant reasonably fears great personal injury. Unable to meet this standard, Michael Earl Miller seeks to change it. But his case illustrates the wisdom of the standard that Washington courts apply to the use of deadly force. Miller jeopardized the lives of two members of his home owners association, while they were posing no risk to him. After a brief physical altercation at the entry of Miller's home, the two men walked away, stood on a public road, and deliberated whether to call the police. After retreating to the safety of his home, Miller retrieved a large-caliber, long-barreled revolver purchased for protection against Alaskan bears and shot at the men and his neighbors. It is not in the public interest to soften the self-defense standard to allow individuals to shoot at people who do not present a risk of great personal injury.

In addition, the lower courts properly concluded that Miller's front porch was part of his "place of abode." Miller's complaint of a conflict in differing Court of Appeals opinions is without merit where there is no case which would suggest that the five foot landing at the door to his trailer is a structure separate from his abode.

The jury instructions tightly adhered to this Court's precedent in applying the evidentiary standard applicable to deadly force. The Court of Appeals properly upheld the conviction and rejected Miller's argument that the standard applied to deadly force should be lowered to the level applied to non-lethal means of self-defense. Further, the Court of Appeals properly distinguished the cases regarding what constitutes a place of abode that Miller complains are in conflict with each other. The petition for this Court's review should therefore be denied.

II. RESTATEMENT OF THE ISSUES

A. Should this Court deny review where this Court previously held that deadly force may be used in self-defense only if the defendant feared "great personal injury" and the trial court properly applied this standard?

B. Should this Court deny review where Miller has not demonstrated a conflict with precedent or matter of substantial public interest by arguing, contrary to all precedent, that the entry to a trailer home is not part of the abode?

III. STATEMENT OF THE CASE

A. From the Safety of His Porch, Miller Shot at Two Unarmed Men Standing on the Public Road in Front of His House

Michael Earl Miller lived in a resident-owned, cooperative mobile home park. 2RP 380[1]. He was frequently drunk, unfriendly, and

[1] "1RP" refers to the consecutively numbered Verbatim Report of Proceedings of pretrial hearings. "2RP" refers to the consecutively numbered Verbatim Report of Proceedings of the trial and sentencing.

unneighborly. 2RP 222-24. Miller was disgruntled with the home owner association's procedures regarding a deceased neighbor's property. 2RP 324-27. On September 14, 2018, home owner association leaders Steve Aitchison and Vernon Frye went to Miller's home to reassure him. 2RP 267, 284, 328-29, 383, 387. Although Miller never had any problems with either man, he felt surrounded because Aitchison knocked on Miller's door, while Frye remained by the truck parked on the road. 2RP 290, 417, 425-26, 716-16, 746.

As Aitchison knocked on Miller's door, Miller burst through the door, "put his hand on [Aitchison's] throat" and yelled, "Get the F off my property." 2RP 268-69, 390-92, 422-23. The two men fought and fell to the ground. 2RP 515-16. Miller then threw a punch, Aitchison's foot slipped through the plywood porch, and they ended up on the ground with Miller still yelling profanities and swinging as Aitchison lay on top of Miller's back. 2RP 203-04, 225, 255-56, 270-71, 391-92, 424-25. During the altercation, Aitchison twice mentioned calling the police. 2RP 204, 220, 272, 392-93. Aitchison let Miller up and walked away. 2RP 516.

Miller went back into his home while shouting more expletives. 2RP 204-05, 271. He became "concerned," because although the men left, they did not immediately drive away from their spot on a public road. 2RP 722, 753-54. Although Miller recognized that he "probably" could have called

the police at that point, he was angry. 2RP 749-52. A few minutes later, Miller emerged with a long-barreled revolver which was purchased for protection against Alaskan bears, pointed the gun directly at Aitchison, and fired. 2RP 204-06, 331-323, 395, 740-41. He then turned and shot at Frye. 2RP 206, 211-12, 252, 273-77. The first bullet passed between Aitchison's legs and hit the driver's door of Aitchison's truck. 2RP 140-41, 206-07, 339, 398, 435, 488. Aitchison broke through a gate as he ran for his life. 2RP 395-99. Frye broke through a fence, taking cover behind a building. 2RP 213-14, 273-75 ("trying not to have holes blown through me"). Even after the men ran, Miller kept shooting because he was afraid "they were going to come back." 2RP 518, 758. Mr Aitchison was not in possession of a weapon during this incident. 2RP 233, 416.

After the police arrived and placed Miller under arrest, he made a statement that acknowledged that he had fired his gun toward Aitchison and Frye. 2RP 516-18. He volunteered that he fired several rounds "[b]ecause Vernon went one way, Steve went the other." 2RP 727. Miller also admitted to firing one or two more shots. 2RP 518.

B. Miller Was Tried and Convicted of the Second Degree Assaults of Aitchison and Frye

The State charged Miller with three counts of first degree assault, each with a firearm sentencing enhancement. CP 1-2. At trial, Miller asked for a self-defense instruction. 2RP 774, 777-78. The defense requested the

court include language of "actual danger of injury" in Instruction 26. 2RP 774, 777-78. The judge appears to have made those modifications. 2RP 784. Miller did not object to the modified instructions, which stated:

> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.
>
> Actual danger is not necessary.

2RP 785, CP 55.

The defense also proposed instructing the jury on the offense of Unlawful Display of a Weapon. CP 23-26; 2RP 773. Defense counsel acknowledged that a person could not commit the offense in his own abode, but argued that Miller's front porch was not part of the abode. 2RP 773-74. The trial court denied the request, holding that the porch was part of the abode under *State v. Haley*, 35 Wn. App. 96, 665 P.2d 1375 (1983). 2RP 775-76.

Following deliberations, the jury convicted Miller of the lesser included offenses of second degree assaults against Mr. Aitchison and Mr. Frye. CP 65-73, 78. The Court of Appeals affirmed the convictions.

IV. ARGUMENT

A. Washington Courts Have Consistently Held That Deadly Use Of Force May Be Used Only If The Defendant Fears "Great Personal Injury"

It is well settled that deadly force may only be used in self-defense if the defendant reasonably believes he or she is threatened with death or "great personal injury." *E.g., State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997). Both the trial court and Court of Appeals[2] relied on this long-standing principle in reaching their decisions. In addition, other Washington courts have long relied on this principle. As this rule is clear and unequivocal, no clarification is necessary from this Court. In addition, the "great personal injury" standard comports with sound policy considerations: as a society, it makes little sense to condone the use of deadly force in response to a perceived, minor threat. In addition, basing the self-defense standard on the crime charged—rather than the force used—would have the perverse result of incentivizing the State to increase the severity of the charge to change the self-defense standard. Because this Court has spoken

[2] Miller had no right to any self-defense instruction.

Persons may use the degree of force necessary to protect themselves that a reasonably prudent person would use under the conditions appearing to them at the time. *Walden*, 131 Wn.2d at 474; *State v. Hill*, 76 Wn.2d 557, 566, 458 P.2d 171, 176 (1969); *State v. Bailey*, 22 Wn. App. 646, 650, 591 P.2d 1212, 1214 (1979). Miller did not act as a reasonably prudent person would because he was not in imminent threat of any injury. It was completely unnecessary to shoot at persons on a public road from the safety of his home, and to continue shooting as they ran away. As a matter of law, his actions were an unjustifiable use of deadly force.

on this issue, the appellate courts have consistently applied the rule, and policy considerations show that this Court adopted a sensible rule, there is no basis for review under RAP 13.4(b).

This Court has repeatedly held that "[d] eadly force may only be used in self-defense if the defendant reasonably believes he or she is threatened with death or 'great personal injury'" *Walden*, 131 Wn.2d at 474, (citing RCW 9A.16.050(1)). Twelve years later, the "great personal injury" standard was expressly reaffirmed in *State v. Kyllo* 166 Wn.2d 856, 866-67, 215 P.3d 177 (2009), which held that the term "great personal injury" describes "the type of harm that, if reasonably apprehended by the defendant, would justify use of deadly force in self-defense." The Court of Appeals properly applied this long-standing principle in concluding that Miller used deadly force when he shot a firearm at Aitchison and Frye. *State v. Miller*, No. 54288-9-II, 2021 WL 2444946, at *1 (Wash. Ct. App. Jun. 15, 2021) (unpublished). Therefore, the "great personal injury" standard was appropriate in Miller's case under *Walden* and *Kyllo*. *Walden*, 131 Wn.2d at 474; *Kyllo*, 166 Wn.2d at 866-67.

Miller incorrectly claims that his case is comparable to *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007), and that *Woods* conflicts with this Court's opinion in *Walden*, 131 Wn.2d 469. Pet. 10. He is mistaken. Critically, *Woods* did not involve the use of deadly force. Woods

was charged and convicted of third degree assault after he stabbed the victim in the shoulder, causing the victim to need three stitches. *Woods*, 138 Wn. App. at 194-96. After being stabbed, the victim yelled and chased Woods with a hammer. *Id*. at 195-96. The *Woods* Court found that the facts of this particular case did not establish the use of deadly force:

> The term "great bodily harm" places too high of a standard for one who tries to defend himself against a danger less than great bodily harm but that still threatens injury. *Where the defendant raises a defense of self-defense for use of nondeadly force, WPIC 17.04 is not an accurate statement of the law* because it impermissibly restricts the jury from considering whether the defendant reasonably believed the battery at issue would result in mere injury.

Id. at 201 (quoting *State v. L.B.*, 132 Wn. App. 948, 953, 135 P.3d 508 (2006) (emphasis added). Because *Woods* did not involve the use of deadly force, it is distinguishable from *Walden*. *See Woods*, 138 Wn. App. at 201; *see also Walden*, 131 Wn.2d at 474. *Woods* held only that where the defendant raised self-defense for the use of *non-deadly force*, the "great personal injury" standard was not appropriate. *Woods*, 134 Wn. App. at 201.

Washington courts have long relied on *Walden* to properly conclude that when a defendant uses deadly force, "great personal injury" is the proper standard. For example, Division One of the Court of Appeals held in *State v. Barquet*, No. 5775-3-I, 2008 WL 434879, at *2 (Wash. Ct. App. Feb. 19, 2008) (unpublished) that "[t]he law does not allow the use of

deadly force any time a defendant perceives her or she is about to be injured. Instead, the law permits a defendant to use the amount of force necessary to protect oneself or another. Thus, the heightened standard of 'great personal injury' is proper because [the defendants], like *Walden*, were charged with assault in the first degree with a deadly weapon." (internal citations omitted).

Division One considered a nearly identical argument to Miller's in *State v. Twigg*, No. 56561-3-I, 2007 WL 512531, at *1 (Wash. Ct. App. Feb. 20, 2007) (unpublished). In *Twigg*, a jury convicted the defendant of first degree assault while armed with a deadly weapon, rejecting his self-defense claim. Twigg challenged the trial court's decision to instruct the jury on the use of force using the "imminent danger of death or great personal injury" standard approved in *Walden*. *Twigg*, 2007 WL 512531, at *1. Twigg contended that the "great personal injury" standard is limited to homicide and attempted homicide cases. *Id*. Division One rejected his argument, holding that "[i]n *State v. Walden*, the court expressly approved using an imminent danger of death or great personal injury standard in defining the use of force in an assault case where, as here, the victim is unarmed." *Id.* (internal citations omitted). Notably, *Barquet* and *Twigg* were both issued prior to this Court expressly reaffirming the *Walden* rule in its *Kyllo* decision in 2009.

Miller's argument that the "deadly force" standard should only be used if the victim actually dies is inconsistent with *Walden*. Pet. 9. In *Walden*, this Court concluded that "[d]eadly force may only be used in self-defense if the defendant reasonably believes he or she is threatened with death or 'great personal injuiry'" *Walden*, 131 Wn.2d at 474 (citing RCW 9A.16.050(1)). *Walden* distinguished between the defendant's use of deadly force or non-deadly force. It did not turn on whether the victim died or survived.

In essence, Miller is requesting that this Court lower the self-defense standard applicable to use of deadly force. This would be contrary to public policy. Shooting at people creates a risk of death to the target as well as others in the vicinity. The risk created by the decision to use a gun in response to a minor provocation is not negated if the intended target survives. A contrary result would condone increased use of weapons and needlessly jeopardize public safety. In addition, Miller's argument that the "deadly force" standard should only be used in the context of homicide-related charges would incentivize the State to bring a charge of attempted homicide to increase the self-defense standard.

These absurd results reinforce the wisdom of this Court's previous rulings in *Walden* and *Kyllo*. The law should not allow the use of deadly force any time a defendant perceives he or she is about to be injured. Rather,

under *Walden*, the law permits a defendant to use only a proportionate amount of force necessary to protect oneself. *See Walden*, 131 Wn.2d at 474.

In other words, there are compelling public policy reasons for the Court's application of the "great personal injury" standard. When an individual turns a gun against another, the self-defense standard properly balances the right to use that weapon for self-protection against the extreme risk to the victim's life. Miller seeks to overturn this longstanding policy balance, and instead base the self-defense standard on whether the prosecutor opts to charge the shooting as an assault or an attempted homicide. This Court should decline to revisit this well-settled rule.

B. There is No Basis for Review Under RAP 13.4(b) Where the Court of Appeals Properly Distinguished *Smith* From *Haley* and the Two Opinions Are Not in Conflict

Contrary to Miller's argument, there is no case law suggesting that the five foot landing at the door to his trailer is a structure separate from his abode. As a result, there is no conflict for this Court to review.

In situations analogous to Miller's front porch, the courts have recognized that this portion of the home is not a separate abode. Miller argues that this Court should grant review to resolve an alleged disagreement between the Court of Appeals, asserting that different interpretations of the "place of abode" exception under RCW 9.41.270(3)(a)

are in conflict with each other. Pet. 15. He is mistaken, as there is no conflict.

In *State v. Haley*, 35 Wn. App. 96, 665 P.2d 1375 (1983), Division Three of the Court of Appeals held that the deck attached to the defendant's home constituted an extension of the Haley's "abode." *Haley*, 5 Wn. App. at 96-98. The Court concluded, "[f]rom the description given of the deck and its surroundings, and in light of the rule that criminal statutes are to be construed strictly against the State and in favor of the accused …, we hold the deck was an extension of the dwelling and therefore a part of the abode." *Id*. at 98.

In *State v. Smith*, 118 Wn. App. 480, 93 P.3d 877 (2003), Division One held that the defendant's backyard did not qualify as his "place of abode." *Smith*, 18 Wn. App., at 484-85. Notably, Smith's conduct occurred on land, and not on any structure attached to his residence. *Id*. The *Smith* Court distinguished the backyard from the deck addressed in *Haley* by explaining that the yard was "not an extension of Smith's residence." *Id*. at 484 n. 8. The Court further reasoned that because "yards typically abut neighboring properties," the behavior in the yard intentionally "traverse[d] the fence to communicate threats." *Id*.

Consistent with *Smith* and *Haley*, the appellate courts focused on the relationship to the home in determining the nature of a detached garage.

State v. Owens, 180 Wn. App 846, 849, 324 P.3d 757 (2014). In *Owens*, the defendant walked with a rifle from the back door of his house to a detached garage 20 to 30 feet away from the house. *Owens*, 180 Wn. App. at 849. The Court suggested that RCW 9.41.270(3)(a) could apply to a "structure attached to [defendant's] residence." *Id*. at 855. However, the Court concluded that under the facts of that case the defendant "was neither inside his residence nor on a structure attached to his residence." *Id*.

Here, the Court of Appeals properly distinguished the facts of *Smith* and *Haley*, and concluded that Miller's porch was attached to and part of his mobile home. *Miller*, 2021 WL 2444946, at *6-7. It adopted the reasoning in *Owens* that a structure attached to a residence can constitute a place of abode. *Id*. (citing *Owens*, 180 Wn. App. at 855). The Court of Appeals noted that "an attached porch is significantly different from the backyard in *Smith* or the area between a house and a detached garage in *Owens*." *Miller*, 2021 WL 2444946, at *6. Under the specific facts of Miller's case, the Court of Appeals properly concluded that Miller's front porch was part of his "place of abode" and that RCW 9.41.270(3)(a) would prevent him from being prosecuted for the unlawful display of a weapon. *Id*. at 7.

Miller's front porch is even more a part of his home than Haley's broad deck with a swimming pool. It is a few square feet, with a short

landing to search for one's keys between climbing the steps and entering the trailer. Exh. 11, 17; 2RP 392 (two and a half feet off the ground), 423 (five or six feet long, barely enough room for two people).

The Court of Appeals decision is consistent with *Haley* and *Owens* and is not in conflict with *Smith*. There is no error. The trial court could not instruct the jury on Unlawful Display. As a matter of law, the crime could not be committed from the porch, which is a structure attached to the residence and properly construed as being part of Miller's abode. As *Haley* and *Smith* are not in conflict, this Court has no basis for accepting review.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny the petition for review.

RESPECTFULLY SUBMITTED this 13th day of August, 2021.

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PIERCE COUNTY PROSECUTING ATTORNEY

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