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NO. _____

KING COUNTY SUPERIOR COURT NO. 00-1-11382-6A KNT

IN THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MICHAEL SCOTT, Petitioner.

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

The Honorable Brian Gain, Judge

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF THE PETITIONER

Michael Scott, defendant, request this court to accept review of the Superior Court decision designated in Part B of this motion.

B. DECISION

Petitioner seeks review of the Order Granting the State Permission to Amend the Information to Manslaughter in the First Degree of the King County Superior Court, the Honorable Brian Gain, entered on June 13, 2005. A copy of the Court's written ruling is in the Appendix to this motion at A-1. A copy of the transcript of the court's ruling has been ordered, but not received. The Defense will supplement this motion once received. (Appendix B). A copy of Defense Exhibit 1 (Complete Jury Instruction Packet) is attached as Appendix C.

C. ISSUES PRESENTED FOR REVIEW

1. If a jury is clearly instructed that it can find the defendant guilty of both second degree felony murder and second degree intentional murder and further instructed that it can convict the defendant of manslaughter in the first or second degree as a lesser included offense of intentional murder, and verdict forms are provided for manslaughter in the first and second degree, as well as verdict forms for second degree murder, does it violate the state and federal double jeopardy clauses to retry the defendant on a charge of manslaughter if the jury leaves the verdict forms for intentional murder and manslaughter in the first and second degree blank?
2. Does the state waive any claim that the jury did not acquit the defendant of manslaughter where it left the verdict form for that crime blank by not seeking clarification before the jury was discharged?

D. STATEMENT OF THE CASE

On December 15, 2000 the King County Prosecutor's Office filed an information charging Mr. Scott with second degree felony murder based on the underlying crime of

second degree assault.¹ On April 15, 2002 the King County Prosecutor's Office filed an Amended Information charging Mr. Scott with an alternative means (Intentional) of Murder in the Second Degree.²

In April of 2002, the case proceeded to trial before the Honorable Judge Carol Shapira. At trial's conclusion, the jury was instructed that Mr. Scott could be convicted of Murder in the Second Degree under two alternative means. Specifically, the jury was instructed:

A person commits the crime of Murder in the Second Degree (intentional murder) when with intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.

A person also commits the crime of Murder in the Second Degree (felony murder) when he or she commits or attempts to commit Assault in the Second Degree and in the course of and in furtherance of such crime or in immediate flight from such crime he or she causes the death of a person. (See Appendix D, Jury Instruction Nos. 7 and 8).

In addition, as to the alternative prong of "intentional" Murder in the Second Degree, the jury was provided instructions on the lesser included offenses of Manslaughter in the First and Second Degree.³

Verdict Form A (Murder in the Second Degree) set out two specific directives for the jury to follow. First, the jury was to determine whether Mr. Scott was guilty or not guilty of Murder in the Second Degree. Next, if the jury concluded that Mr. Scott was guilty of Murder in the Second Degree, the jury was directed to answer the special interrogatory as

¹ That the defendant MICHAEL ADRIAN SCOTT in King County, Washington on or about December 10, 2000, while committing and attempting to commit the crime of Assault in the Second Degree, and in the course of or in furtherance of said crime and in immediate flight there from, did cause the death on or about December 10, 2000 of Mark Cano, a human being who was not a participant in the offense.

² The State indicated the "Amended Information more accurately reflects the Defendant's Conduct."

³ See Appendix F, Jury Instruction Nos. 18, 19, 20, 21, and 22.

to the means (i.e., intentional, felony murder, or both) that supported the conviction of the Murder in the Second Degree. Verdict Form A stated:

We, the jury, find the defendant MICHAEL ANDRIAN SCOTT guilty of the crime of Murder in the Second Degree as charged in Count I, state that we unanimously agreed that the defendant committed (mark neither, one, or both as applicable):

_____ Intentional Murder

_____ Felony Murder

The jury was also provided with Verdict Form B (Manslaughter in the First Degree) and Verdict Form C (Manslaughter in the Second Degree). To guide the jury, the court gave Jury Instruction #24, which stated:

When completing the verdict forms, you will first consider the crime of Murder in the Second Degree (intentional) and Murder in the Second Degree (felony) as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words “not guilty” or the word “guilty,” according to the decision you reach. If you find the defendant guilty on verdict form A you must fill in the blanks set forth on that form as special interrogatories. If you cannot agree on a verdict, do not fill in the blanks provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B and C. If you find the defendant not guilty of the crime of Murder in the Second Degree (intentional), or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Manslaughter in the First Degree.

The jury found Mr. Scott guilty of second degree murder, but checked only the felony murder alternative means.⁴ The intentional murder interrogatory was left blank, as was both manslaughter verdicts.

On June 10, 2002 Mr. Scott was sentenced to Felony Murder in the Second Degree. The Judgment and Sentence unambiguously indicates that Mr. Scott was found

⁴ See Verdict Form A.

guilty on April 29, 2002 by jury verdict of Murder in the Second Degree pursuant to RCW 9A.32.050(1)(b) - the felony murder prong.⁵

On March 15, 2005, pursuant to the Washington Supreme Court's decision in *In Re Personal Restraint Petition of Andress*, 147 Wn.2d 602, 604, 56 P.3d 981 (2002) and *In Re Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004), an order was signed vacating Mr. Scott's conviction of Felony Assault Murder in the Second Degree.

The State, on May 2, 2005, filed an amended information charging Mr. Scott, again, with the charge of Intentional Murder in the Second Degree. The defense objected and set a motion hearing to dismiss the amended information. At the motion hearing, which was heard on June 13, 2005 the State conceded that the Double Jeopardy Clause prohibited it from re-filing a charge of Intentional Murder in the Second Degree since there was an implied acquittal. The Court concluded the State was barred from re-filing Intentional Murder in the Second Degree. The State then moved to file a second amended information charging Mr. Scott with one Count of Manslaughter in the First Degree. The Defense objected, but the court granted the motion. This appeal follows.

E. ARGUMENTS WHY REVIEW SHOULD BE GRANTED

I. REVIEW SHOULD BE GRANTED BECAUSE THIS CASE MEETS ALL OF THE CRITERIA OF RAP 2.3(B). THE COURT COMMITTED OBVIOUS AND PROBABLE ERROR AND SO FAR DEPARTED FROM THE USUAL COURSE OF JUDICIAL CONDUCT AS TO CALL FOR REVIEW BY THIS COURT

The primary conclusion of law supporting the trial court's order allowing the State to re-file Manslaughter in the First Degree after a jury had ample opportunity to reach a

⁵ See Page 1 of the Judgment and Sentence.

finding of guilt to the same charge, but did not, is inconsistent with the Double Jeopardy Clause of the United States Constitution, Washington State Constitution Article I, Sec. 9, *State v. Davis*, 190 Wash. 164, 67 P.2d 894 (1937), *State v. Hescoek*, 98 Wn.App. 600, 989 P.2d 1251 (1999), and *State v. Daniels*, 124 Wn.App. 830, 103 P.3d 249 (2004). The court's conclusion is obvious error, probable error and, in reaching this conclusion, the trial court so far departed from the usual course of judicial proceedings as to call for supervisory review by this Court. Acknowledging such potential error, the trial court encouraged the parties to stay the proceeding and seek discretionary review to the Washington Supreme Court. (See Order attached).

The Double Jeopardy Clause of the United States Constitution guarantees that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., Amend. V. The Washington State Constitution has a similar provision, stating that "[n]o person shall be . . . twice put in jeopardy for the same offense." Wash. Const. Article I, Sec. 9. The Double Jeopardy Clause protects against three abuses by the government: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 306-07, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984); See also *State v. Gocken*, 127 Wn.2d 95, 97, 896 P.2d 1267 (1995). "The primary goal of barring reprosecution after acquittal is to prevent the State from mounting successive prosecutions and thereby wearing down the defendant." *Lydon*, 466 U.S. at 307.

The Double Jeopardy Clause bars a second prosecution for the same offense when three elements are satisfied: (1) jeopardy previously attached; (b) jeopardy previously

terminated; and (3) the defendant is again in jeopardy of the same offense. *State v. Corrado*, 81 Wn.App. 640, 645, 915 P.2d 1121 (1996), *reviewed denied*, 138 Wn.2d 1011, 989 P.2d 1138 (1996). Generally, jeopardy attaches in a jury trial when the jury is sworn. *Corrado*, 81 Wn.App. at 646. Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally final. *Corrado*, 81 Wn.App. at 646. There is no dispute that jeopardy attached in this case.

The State, by filing the amended information of Manslaughter in the First Degree is seeking to place Mr. Scott – again – in jeopardy for a crime in which the State has already charged and a jury rejected. The court need only look to *State v. Davis*, 190 Wash. 164, 67 P.2d 894 (1937), *State v. Hescock*, 98 Wn.App. 600, 989 P.2d 1251 (1999), and *State v. Daniels*, 124 Wn.App. 830, 103 P.3d 249 (2004) to conclude the State’s action is prohibited.

In *Davis*, the defendant was charged with three counts: vehicular homicide, driving while intoxicated, and reckless driving. The jury returned a not guilty verdict as to count I (vehicular homicide) and did not return a verdict as to the other counts (DWI and reckless driving). The jury foreman indicated to the court that a “verdict had been reached on count one, but that the jurors could not agree upon verdict on counts two and three.” *Davis*, 190 Wash. at 165. The judge proceeded to discharge the jury without explanation. The trial court granted the defense motion to dismiss counts two and three. The State appealed. *Davis*, 190 Wash. at 165 – 166. The Washington Supreme Court, in affirming the trial court’s ruling to dismiss the counts, noted:

It is a general rule, supported by the great weight of authority, that, where an indictment or information contains two or more counts and the jury either convicts or acquits upon one and is silent as to the other, and the record does not

show the reason for the discharge of the jury, the accused cannot again be put upon trial as to those counts.

Davis, 190 Wash. at 166.

Similarly, here the jury was directed to indicate which prong it found applicable in convicting Mr. Scott of Murder in the Second Degree. The verdict form is clear: the jury checked “Felony Murder” (assault) and left the “intentional” prong silent and the manslaughter verdict forms blank as well. Since the jury was silent as an alternative means and the lesser included offenses, and the jury was discharged, Mr. Scott cannot again be tried for the same offense.

In *State v. Hescoek*, 98 Wn.App. 600, the defendant was charged with one count of forgery by two alternative means: RCW 9A.60.202(1)(a) and RCW 9A.60.020(1)(b). The court concluded that Mr. Hescoek, a juvenile, was guilty of both means of forgery. The court’s written finding, however, found Mr. Hescoek guilty of only one means, and was silent as to the other. *Hescoek*, 98 Wn. App at 604. On appeal, Hescoek argued, and the State conceded, there was insufficient evidence to support the conviction. The State, however, urged the appellate court to remand the case for the trial court to determine whether Hescoek violated the alternative means. Hescoek countered that such a remand would violate double jeopardy. The Court of Appeals sided with Hescoek, concluding that the trier of fact had a full opportunity to convict Hescoek but failed to do so, and thus the judge’s silence as to the alternative means constituted an implicit acquittal, invoking double jeopardy protections. *Hescoek*, 98 Wn.App at 602.

In *State v. Daniels*, 124 Wn.App 830, 103 P.3d 249 (2004), the defendant was charged with one count of homicide by abuse and one count of second degree murder – domestic violence (felony murder) based on the alternative predicate offenses of second

degree assault or first degree criminal mistreatment. After trial, the court provided the jury with two verdict forms. On Verdict Form A, which the jury left blank, stated, “We, the jury, find the defendant _____ (Not Guilty or Guilty, of the crime of homicide by abuse as charged in Count I.” *Daniels*, 124 Wn. App at 836-837. Verdict Form B, which the presiding juror filled out and signed, stated:

We, the jury, having found the defendant, Carissa M. Daniels, not guilty of the crime of homicide by abuse as charged in Count I, or being unable to unanimously agree as to that charge, find the defendant Guilty of the alternatively charged crime of murder in the Second Degree. *Id.* at 837.

On appeal, the defense argued that by leaving the verdict form blank, the jury implicitly acquitted her on the homicide by abuse charge, and thus double jeopardy barred the State from retrial on that charge. *Daniels*, 124 Wn.App. at 842. After reviewing *State v. Davis* and *State v. Hescock*, the court of appeals agreed and concluded:

The jury had ample opportunity to convict Daniels but it left the corresponding verdict form blank. Moreover, the record insufficiently shows why the court dismissed the jury without reaching a decision on homicide by abuse. Under these facts, the jury’s silence constitutes an implicit acquittal.

Daniels, 124 Wn.App. at 844.

In Mr. Scott’s case the State conceded, and the court agreed, that the Double Jeopardy Clause prohibits it from re-filing a charge of Intentional Murder in the Second Degree because there is an implied acquittal of that charge. The State, however, moved to file an amended information re-charging Mr. Scott on one count of Manslaughter in the First Degree. The court concluded that although the jury was given instructions and verdict forms of Manslaughter charges, the jury never reached a verdict and therefore there was no implied acquittal for double jeopardy purposes. This is in error.

The State’s primary argument, and apparently the court’s finding, relies on a single sentence in a packet of twenty-four (24) jury instructions. The State contends that

the jury never considered the issue of whether Mr. Scott was guilty of the Manslaughter charges because a single sentence in jury instruction #24 discouraged the jury from further deliberation. However, a complete reading of jury instruction number 24 does not support this proposition. Jury Instruction Number 24 states:

. . . If you find the defendant guilty on verdict form A, do not use verdict form B and C. If you find the defendant not guilty of the crime of Murder in the Second Degree (intentional), or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Manslaughter in the First Degree. (emphasis added).

Jury Instruction Number 24 directed the jury to consider the Manslaughter verdicts if it found the defendant not guilty of Intentional Murder in the Second Degree. The State has conceded that the jury, by leaving the ‘intentional’ prong blank, implicitly acquitted Mr. Scott of Intentional Murder in the Second Degree. Thus, after full consideration, the jury did not find Mr. Scott guilty of Intentional Murder in the Second Degree, and were therefore directed to consider the lesser-included offenses of Manslaughter.

The State’s argument is premised on the assumption that the jury did not read, understand, or thoroughly follow the instructions. Courts have consistently held that, without some evidence to the contrary, the courts will presume the juries follow all instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001), *Degroot v. Berkley Constr., Inc.*, 83 Wn.App 125, 131, 920 P.2d 619 (1996), *State v. Lord*, 117 829, 861, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 121 L.Ed.2d 112, 113 S.Ct. 164 (1992). The State has not presented any evidence to overcome this presumption. In another instruction, the jury was specifically ordered to “consider the instructions as a whole and

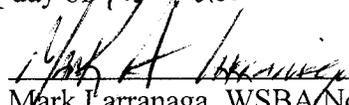
should not place undue emphasis on any particular instruction or part thereof.”⁶ (emphasis added). Ironically, the State is now seeking to do what the jury was instructed it could not: place undue emphasis on a single part of an instruction.

Moreover, the verdicts on First Degree Manslaughter and Second Degree Manslaughter became unconditionally final when the jury was discharged. *State v. Corrado*, 81 Wn. App. at 646. The state neither sought to have the jury continue deliberating on those charges nor sought to have the judge declare a mistrial as to those charges. Certainly without having sought to have the jury deliberate further or a mistrial, the state could not have sought retrial on those charges. The fact that the second degree felony murder conviction was vacated should not revive these otherwise unconditionally final verdicts.

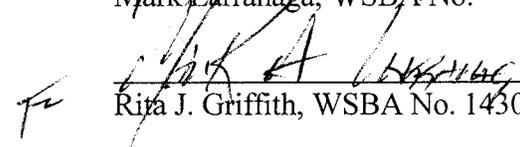
F. CONCLUSION

For the reasons set forth above, petitioner urges this Court to grant discretionary review, reverse the order of the trial court and remand the case for imposition of a standard range sentence. The trial court’s order constitutes obvious error, probable error that substantially alters the status quo and limits Mr. Scott’s ability to act and so far departs from the usual course of judicial conduct as to call for review by this Court.

DATED this 21st day of July, 2005



Mark Larranaga, WSBA No.



Rita J. Griffith, WSBA No. 1430

⁶ Jury Instruction No. 1.

Appendix A

THE SUPERIOR COURT FOR THE STATE OF WASHINGTON, KING COUNTY

STATE OF WASHINGTON,

) Case No.: 00-1-11382-6A KNT

Plaintiff,

vs.

) FINDINGS OF FACT AND CONCLUSION
) OF LAW

MICHAEL SCOTT,

Defendant

THIS MATTER having come before the Honorable Brian Gain following a Defense Motion to Dismiss the Amended Information, the Defendant being present and represented by his attorney, Mark A. Larrañaga, and the State being represented by Mary Barbosa, and the Court having been fully informed by reviewing the records and files herein and by having heard the argument of counsel for both parties, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On December 15, 2000, the King County Prosecutor's Office charged Mr. Scott with one count of Felony Murder in the Second Degree (Assault).
2. On April 15, 2002, the King County Prosecutor's Office filed an amended information charging Mr. Scott with one count of Murder in the Second Degree alleging alternative means (e.g., Felony Assault and/or intentional).

- 1 3. The case proceeded to trial in April 2002, at which the jury found Mr. Scott guilty of
2 Murder in the Second Degree based on Felony Assault.
- 3 4. The jury, during deliberation, left blank the jury verdict for Intentional Murder in the
4 Second Degree, Manslaughter in the First Degree, and Manslaughter in the Second
5 Degree. Moreover, the record does not indicate the reason for the discharge of the jury.
- 6 5. On June 10, 2002 Mr. Scott was sentenced to Felony Murder in the Second Degree.
- 7 6. On March 15, 2005, pursuant to *In Re Personal Restraint Petition of Andress*, 147
8 Wn.2d 602, 604, 56 P.3d 981 (2002) and *In Re Personal Restraint of Hinton*, 152 Wn.2d
9 853, 100 P.3d 801 (2004), an order was signed vacating Mr. Scott's conviction of Felony
10 Murder in the Second Degree.
- 11 7. On May 2, 2005 the King County Prosecutor's Office filed an amended information re-
12 charging Mr. Scott with Intentional Murder in the Second Degree.
- 13 8. On June 13, 2005, prior to oral argument on the defense Motion to Dismiss the Amended
14 Information, the State conceded the Double Jeopardy Clause prohibited it from charging
15 Mr. Scott with Intentional Murder in the Second Degree and consequently dismissed the
16 charge.
- 17 9. During the same hearing, the State then sought to file an amended information charging
18 Mr. Scott with Manslaughter in the First Degree. The defense objected and oral argument
19 ensued.

20 CONCLUSION OF LAW

- 21 1. Because the jury left blank Verdict Form A as to Intentional Murder in the Second
22 Degree, the State concedes, and the court agrees, that Mr. Scott is acquitted as to
23 Intentional Murder in the Second Degree.
- 24 2. Since Mr. Scott was acquitted on the charge of Intentional Murder in the Second
25 Degree, the Double Jeopardy Clause prohibits the State from re-charging Mr. Scott

1 with the same offense. Consequently, the court granted both parties motion to dismiss
 2 the charge of Intentional Murder in the Second Degree. *State v. Davis*, 190 Wash.
 3 164, 67 P.2d 894(1937) *State v. Hescocck*, 98 Wn.App. 600, 989 P.2d 1251 (1999).
 4 *State v. Daniels*, 124 Wn.App. 830, 103 P.3d 249 (2004).

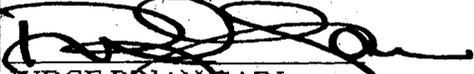
5 3. Manslaughter in the First Degree is not a lesser included offense of Felony Murder
 6 (Assault) in the Second Degree.

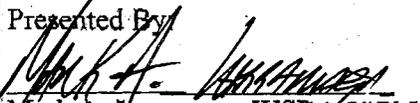
7 4. Although the jury also left blank the Verdict Forms B and C (Manslaughter in the
 8 First and Second Degree) and there is nothing on the record to show the reason for
 9 the jury's discharge, there is no implied acquittal as to these charges and the Double
 10 Jeopardy does not bar the State from charging Mr. Scott with Manslaughter in the

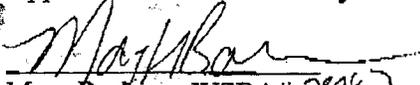
11 First Degree. *Jury did not consider manslaughter charges, as instructed, because they convicted of murder 2^o.* mmB

12 5. The court concludes to further the interest of justice, judicial economy; because there
 13 is a conflict or inconsistency among appellate decisions; and an issue of public
 14 importance which requires prompt and ultimate determination is presented, the trial
 15 should be stayed and direct review by the Washington Supreme Court should be
 16 sought.

17 DATED this 29th Day of June, 2005.

18 
 19 JUDGE BRIAN GAIN

20 Presented By
 21 
 22 Mark A. Larranaga, WSBA 22715
 Attorney for Defendant

23 Approved to Form and Entry:
 24 
 25 Mary Barbosa, WSBA# 24187
 Prosecuting Attorney

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON

Plaintiff,

NO. 00-1-11382-6 A KWT

vs.

ORDER ON CRIMINAL
MOTION

Michael Scott

(ORCM)

Defendant.

The above-entitled Court, having heard a

motion by state to amend information to Manslaughter
in the first degree and by defense to preclude
amendment and dismiss information.

IT IS HEREBY ORDERED that Double Jeopardy does not preclude retrial
on manslaughter as jury followed court's instructions
and did not consider manslaughter charges. There was
no implied acquittal of manslaughter charges. Intentional
murder in the second degree charge is dismissed.
State's motion to amend information to Manslaughter
in the first degree is granted.

DATED: June 13, 2005

Mark B. [Signature]
Deputy Prosecuting Attorney

[Signature]
Attorney for the Defendant

Order on Criminal Motion (ORCM) Objector NOTED

[Signature]
JUDGE

05/02

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON

Plaintiff,

NO. 00-1-11382-6 A KWT

vs.

ORDER ON CRIMINAL
MOTION

Michael Scott

Defendant.

(ORCM)

The above-entitled Court, having heard a
motion by defense to stay proceedings so defense

can seek direct ~~discuss~~ review by the Washington
Supreme Court.

IT IS HEREBY ORDERED that

the proceedings are stayed so defense can seek
direct discussiary review to the Washington Supreme Court.

DATED: June 13, 2005

Maya [Signature]
Deputy Prosecuting Attorney

[Signature]
Attorney for the Defendant

Order on Criminal Motion (ORCM)

[Signature]
JUDGE

05/02

Appendix B

Appendix C

No. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits

admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 6

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

No.

7

A person commits the crime of Murder in the Second Degree (intentional murder) when with intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.

A person also commits the crime of Murder in the Second Degree (felony murder) when he or she commits or attempts to commit Assault in the Second Degree and in the course of and in furtherance of such crime or in immediate flight from such crime he or she causes the death of a person.

NO. 8

To convict the defendant Michael Scott of the crime of Murder in the Second Degree each of the following elements of the crime must be proved beyond a reasonable doubt:

Intentional Murder:

(1) That on or about the 10th day of December, 2000, the defendant:

(a) Strangled Mark Cano; and

(b) Acted with intent to cause the death of Mark Cano;

and

(c) That Mark Cano died as a result of the defendant's acts;

OR

Felony Murder:

(2) That on or about the 10th day of December, 2000, Mark Cano was killed, and

(a) That the defendant was committing or attempting to commit assault in the second degree, and

(b) That the defendant caused the death of Mark Cano in the course of and in furtherance of such crime or in immediate flight from such crime;

AND

(3) That the acts occurred in the State of Washington.

If you find from the evidence that either elements (1) (a), (b), and (c) or (2) (a) and (b), and element (3) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. Elements (1) (a-c) and (2) (a-b) are

alternatives and only one need be proved. You must unanimously agree that either (1) (a-c) or (2) (a-b) has been proved. You are not required to unanimously agree which of either (1) (a-c) or (2) (a-b) has been proved.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to elements (1) (a-c) and (2) (a-b), or (3), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

No. 10

A person commits the crime of Assault in the Second Degree when he intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.

No. 11

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

INSTRUCTION NO. 2

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

INSTRUCTION NO. B

A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.

INSTRUCTION NO. 14

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 15

A person commits the crime of attempted assault in the second degree when, with intent to commit that crime, he does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 16

A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

No. 17

Deadly weapon means any weapon, device, instrument, substance or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury.

No. 18

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Murder in the Second Degree (intentional) necessarily includes the lesser crimes of Manslaughter in the First Degree and Manslaughter in the Second Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more ~~degrees~~ crimes that person is guilty, he or she shall be convicted only of the lowest ~~degree~~ crime.

INSTRUCTION NO. 19

A person commits the crime of manslaughter in the first degree when he recklessly causes the death of another person.

No. 20

To convict the defendant of the crime of Manslaughter in the First Degree, as a lesser-included crime of Murder in the Second Degree (intentional), each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 10th day of December, 2000, the defendant strangled Mark Cano;
- (2) That the defendant's conduct was reckless;
- (3) That Mark Cano died as a result of defendant's acts; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

A person commits the crime of manslaughter in the second degree when, with criminal negligence, he causes the death of another person.

No. 22

To convict the defendant of the crime of Manslaughter in the Second Degree, as a lesser-included crime of Manslaughter in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 10th day of December, 2000, the defendant strangled Mark Cano ;

(2) That the defendant's conduct was criminal negligence;

(3) That Mark Cano died as a result of defendant's acts; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 23

A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Criminal negligence is also established if a person acts intentionally or knowingly or recklessly.

No. 24

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreperson. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and three verdict forms, A and B and C.

When completing the verdict forms, you will first consider the crime of Murder in the Second Degree (intentional) and Murder in the Second Degree (felony) as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you find the defendant guilty on verdict form A you must then fill in the blanks set forth on that form as special interrogatories. If you cannot agree on a verdict, do not fill in the blanks provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B or C. If you find the defendant not guilty of the crime of Murder in the Second Degree (intentional), or if after full and careful consideration of the evidence you cannot

agree on that crime, you will consider the lesser crime of Manslaughter in the First Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

If you find the defendant guilty on verdict form B, do not use verdict form C. If you find the defendant not guilty of the crime of Murder in the Second Degree (intentional) and Manslaughter in the First Degree, or if after full and careful consideration of the evidence you cannot agree on those crimes, you will consider the lesser crime of Manslaughter in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form C the words "not guilty" or the word "guilty," according to the decision you reach.

If you find the defendant guilty of the crime of manslaughter but have a reasonable doubt as to which of two or more degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on verdict form B and to find the defendant guilty of the lesser included crime of Manslaughter in the Second Degree on verdict form C.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The

foreperson will sign it and notify the bailiff, who will conduct
you into court to declare your verdict.

4/25/02
Carl Sel

FILED
KING COUNTY, WASHINGTON
APR 29 2002
SUPERIOR COURT CLERK
BY JOSEPH MASON
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

| | | |
|----------------------|---|----------------------|
| STATE OF WASHINGTON |) | |
| |) | No. 00-1-11382-6 SEA |
| Plaintiff, |) | |
| |) | VERDICT FORM A |
| vs. |) | |
| |) | |
| MICHAEL ADRIAN SCOTT |) | |
| |) | |
| Defendant. |) | |

We, the jury, find the defendant MICHAEL ADRIAN SCOTT
Guilty (write in not guilty or guilty) of the crime
of Murder in the Second Degree as charged in Count I.

If you find the defendant guilty of Murder in the Second
Degree as charged in Count I, respond to the following SPECIAL
INTERROGATORY:

We, the jury, having found the defendant MICHAEL ADRIAN SCOTT
guilty of the crime of Murder in the Second Degree as charged in
Count I, state that we unanimously agreed that the defendant
committed (mark neither, one, or both as applicable):

Intentional Murder
 Felony Murder

Callie Peterson
Foreperson

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
JUL 1 2005
CLERK OF COURT
JUL 1 2005
JUL 1 2005

STATE OF WASHINGTON,)

Respondent,

) Superior Court No. 77310-6

) King County Superior Court No.
) 00-1-11382-6A KNT

vs.)

MICHAEL SCOTT,)

Petitioner.)

) Supplemental Materials for
) Defense Motion for Discretionary
) Review

Attached is supplement material for the Defense's Motion for Discretionary Review filed with the Washington Supreme Court on July 1, 2005. Specifically, the attached document is a copy of the transcript of the parties' oral argument and the trial court's ruling, which had not been completed at the time of filing the Motion for Discretionary Review. The defense did reference the transcript as Appendix B with a note that it would supplement the motion once received. Defense Motion for Discretionary Review, page 1.

DATED this 29 day of July, 2005.

Mark H. Larranaga
Mark Larranaga, WSBA No. 22715

Rita J. Griffith
Rita J. Griffith, WSBA No. 1430

CERTIFICATE OF SERVICE

I certify that on the 29th of July, 2005, I caused a true and correct copy of the following documents:

1. Supplemental Materials For Defense Motion for Discretionary Review

to be served on the following via prepaid first class mail:

Washington Supreme Court Clerk
Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Counsel for the Respondent:

Mary Barbosa
King County Prosecutor Office
Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

Co-counsel for the Appellant
Rita J. Griffith, PLLC
1305 NE 45th Street, #205
Seattle, WA 98105
(206) 547-1742

Client:

Michael Scott
c/o Regional Justice Center
401 4th Avenue North
Kent, Washington 98032-2312


Mark Larranaga DATE 7/29/05 at Seattle, WA