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No. 32729-5-II

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DIVISION II  
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STATE OF WASHINGTON  
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DEPUTY

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON**

**Respondent,**

**v.**

**Kenneth Kylo**

**Petitioner.**

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**REPLY TO RESPONDENT'S ADDITIONAL BRIEFING**

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**Kenneth Kylo #294467  
Washington State Reformatory B-237  
PO Box 777  
Monroe WA 98272**

**IN THE COURT OF APPEALS OF THE STATE OF**  
**WASHINGTON**  
**DIVISION II**

**STATE OF WASHINGTON,**  
**Respondent,**  
**Vs.**  
**Kenneth Kylo,**  
**Appellant.**

**CASE NO: 32729-5-II**  
**Appellant's Reply to**  
**Respondent's Supplemental**  
**Brief**

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Appellant, Kenneth Kylo, pro se, would bring to the Court's attention the following, regarding Respondent's Supplemental Brief submitted to this Court February 28<sup>th</sup>, 2007.

RESPONDENT ARGUES THAT AS NO DEFINITION FOR "GREAT BODILY HARM" WAS GIVEN, THE INSTRUCTION WAS NOT IMPROPER. RESPONDENT FAILS TO ACKNOWLEDGE THAT A DEFINITION FOR "SUBSTANTIAL BODILY HARM" WAS GIVEN.

Respondent argues that the present case is distinguishable from the cited cases because "in *Kyllo's* case, the jury was not given a definition for great bodily harm." (Brief of Respondent page 10.) Respondent ignores the fact that the jury was given an instruction for "substantial bodily harm." (Court's Instructions to the Jury #19). This instruction defined "substantial bodily harm" as substantial disfigurement, substantial loss or impairment of function or fracture of any bodily part.

It is reasonable that jurors would interchange substantial and great. In fact West's legal Thesaurus/Dictionary<sup>1</sup> uses many of the same terms to define both words. (Considerable, ample, large, abundant, big, major. )

Respondent is correct that the jury instructions, read as a whole, must make the relevant legal standard manifestly apparent to the

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<sup>1</sup> West Publishing Company, (1986)

average juror. (citing *State v. Walden*, 131 Wn. 2d 469, 932 P.2d 1237) The instructions in this case clearly do not meet that standard. The circumstance in the present case is essentially the same as the circumstances in *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201, (2004). Appellant's jury was given the exact same instruction and not given the proper definition for great bodily harm as it applies to self defense. When instructions 13 and 19 are read together the jury could clearly have believed that in order to find that Kylo acted in self defense he had to believe in good faith that he was in actual danger of substantial disfigurement, substantial loss or impairment of function or fracture of any bodily part. This dramatically changes the burden of proof and does not "more than adequately convey the law."

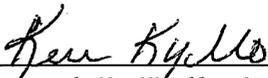
**COUNSEL'S PERFORMANCE WAS DEFICIENT AND THERE WAS NO TACTICAL REASON TO GIVE THE INSTRUCTION.**

Counsel has a duty to cite to relevant case law. *State v McGill* 112 Wn. App. 95, 102, 47 P.3d 173 (2002) Both *Walden* and *Rodriguez* had been decided prior to this case going to trial. A simple Westlaw search of the jury instructions in question would have

revealed the problems associated with this instruction and the Court would certainly have given the proper definition if requested. There can be no reasonable tactical reason for giving an instruction that incorrectly states that law and increases the defendant's burden of proof for self defense.

Dated this 5<sup>th</sup> day of March, 2007.

Respectfully submitted,

  
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Kenneth L. Kylo, Pro se