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hjh Supreme Court No. 85410-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERICK DESHUM JORDAN,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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 ORIGINAL

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A. INTRODUCTION

In Washington, when self-defense is raised, it becomes an element of the substantive charged offense, and the State bears the burden of proving its absence beyond a reasonable doubt. The trial court enhanced petitioner Erick Deshum Jordan's SRA offender score with a Texas conviction for the crime of voluntary manslaughter to which Jordan had claimed self-defense. The law of self-defense in Texas at the time that Jordan was convicted (1) imposed a more stringent burden of production than is required in Washington, (2) permitted the use of deadly force only to combat deadly force or an attempt to use deadly force, and (3) imposed a duty to retreat.

This Court should hold that the significant differences between the self-defense element in Texas and Washington precluded the use of this conviction to elevate Jordan's SRA offender score. The resulting sentence violated his right to due process because he received increased punishment for conduct that may not have been a crime in Washington.

B. ISSUES PRESENTED FOR REVIEW

1. Does the use of foreign convictions that are not legally comparable to Washington offenses to increase the SRA offender score violate the Fourteenth Amendment right to due process of law because it

permits punishment to be enhanced based conduct that may not have led to conviction in Washington State?

2. Because self-defense, when raised in a Washington case, becomes an element of the substantive offense that the State must disprove beyond a reasonable doubt, should this Court hold that the State's attempt to increase Jordan's punishment based on a Texas conviction in which he claimed self-defense requires consideration of the Texas definition of self-defense in its comparability analysis? Where the law of self-defense at the time that Jordan was convicted was fundamentally different and more restrictive than in Washington, did the use of the Texas conviction to elevate Jordan's offender score and presumptive standard range violate his right to due process?

C. STATEMENT OF THE CASE

Erick Deshum Jordan was convicted in King County Superior Court of one count of murder in the second degree with a firearm enhancement and one count of unlawful possession of a firearm. At sentencing, the State alleged that Jordan's SRA offender score on the murder conviction was eight points, and on the unlawful possession of a firearm conviction six points. The State based this calculation on four

prior adult felony convictions obtained in Washington¹ and a prior juvenile conviction for “voluntary manslaughter,” obtained in Limestone, Texas, in 1992.

Jordan objected to the inclusion of the Texas conviction in his offender score and argued that the crime was not comparable to a Washington felony. CP 146, 150; RP 7-8.² The trial court ruled that the crime was comparable to the Washington offense of murder in the second degree, explaining, “a person under that factual scenario would be convicted of murder in the second degree in Washington.” RP 19-20. Based on the court’s calculation of Jordan’s offender score, his standard sentence range for the murder conviction was 317-417 months incarceration,³ and for the unlawful possession of a firearm count 57-75 months incarceration. Had the prior Texas conviction been excluded from Jordan’s offender score, his properly-calculated standard range for the murder conviction would have been 245-325 months incarceration, and 36-48 months for the unlawful possession of a firearm conviction. The

¹ One of Jordan’s prior convictions was for robbery in the second degree, which, as a prior violent felony, adds two points to the SRA offender score.

² Only the transcript of the sentencing hearing on January 16, 2009, is cited in this brief. Citations to the hearing are referenced as “RP” followed by page number.

³ The ordinary standard range for the offense would have been 257-357 months incarceration; the adjustment reflects the five-year firearm enhancement.

court imposed concurrent high-end sentences of 417 months and 75 months, respectively. CP 155.

In a partially-published opinion, the Court of Appeals held that (1) self defense is not a non-statutory element of the offense and thus not germane to the comparability analysis; and (2) the prior Texas conviction for voluntary manslaughter was legally comparable to the Washington crime of manslaughter in the first degree. Slip Op. at 2-9. This Court has granted Jordan's petition for review.

D. ARGUMENT

1. **Principles of due process require a fair sentencing proceeding.**

Fundamental principles of due process require fair sentencing proceedings. Mitchell v. United States, 526 U.S. 324, 329, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999); U.S. Const. amend. XIV; Const. art. I, § 3. Due process thus "prohibit[s] a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record." State v. Ford, 147 Wn.2d 472, 481, 973 P.2d 452 (1999). "[M]isinformation, misunderstanding, or material false assumptions 'as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.'" Ford, 147 Wn.2d at 481 (citation omitted).

Where the State seeks to enhance a defendant's sentence by the use of prior convictions, principles of due process require the State to prove both the existence and classification of those convictions. Ford, 137 Wn.2d at 480-481; accord State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). As this Court stated,

The burden lies with the State because it is "inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove."

Hunley, 175 Wn.2d at 910 (quoting In re the Personal Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)); see also id. at 915 (Ford and its progeny rest upon a judicial interpretation of the constitution).

2. The right to a fair sentencing proceeding requires the State to prove the existence and comparability of out-of-state prior convictions before they may be used to increase punishment.

The Sentencing Reform Act of 1981 permits criminal sentences to be enhanced by the use of convictions obtained in other states. RCW 9.94A.525(3). First, however, they must be classified: "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." Id.; Ford, 137 Wn.2d at 483. The statute permits the use of federal convictions to increase the offender score, even where there is no clearly comparable

offense under Washington law.⁴ RCW 9.94A.525(3). By contrast, no similar provision exists with regard to out-of-state convictions. Where out-of-state convictions are not clearly comparable to Washington offenses, they must be excluded from the SRA offender score.

To determine whether a foreign conviction is comparable to a Washington offense, the court engages in a two-step analysis. First, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d at 479 (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). If the elements of the foreign conviction are comparable to the elements of a Washington offense on their face, the foreign offense counts toward the offender score as if it were the comparable Washington offense. In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements of the prior offense are not comparable, or are broader than the pertinent crime in Washington, then the court may look to the facts admitted by the defendant or proved by indictment or trial to determine if the prior offenses are comparable. Id. at 256-57.

As recent precedent from the United States Supreme Court makes clear, however, this inquiry must be limited to ensure it does not infringe

⁴ If there is no clearly comparable offense under Washington law, or if the crime is one subject to exclusively federal jurisdiction, it is treated like a Class C felony. RCW 9.94A.525(3).

upon the Sixth Amendment right to a jury determination of the facts necessary to increase punishment. Descamps v. United States, ___ U.S. ___, ___ S.Ct ___, ___ L.Ed.2d ___, 2013 WL 3064407, 7 (June 20, 2013).⁵ Even during the “factual” analysis, the focus remains upon the elements, rather than the facts of the underlying crime; the analysis functions as a mechanism for comparing elements “when a statute lists multiple, alternative elements, and so effectively creates ‘several different ... crimes.’” Id. The goal is “to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense.” Id. Any further inquiry risks contravening the Sixth Amendment right to a jury trial. Id. at 10

While it may be necessary to look into the record of a foreign conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.

Morley, 134 Wn.2d at 606.

As this Court explained in Lavery:

Where the foreign statute is broader than Washington’s, [an examination of the underlying facts] may not be possible because there may have been no incentive for the

⁵ At the time of this writing, only pin citations to the Westlaw reporter were available.

accused to have attempted to prove that he did not commit the narrower offense.

Lavery, 154 Wn.2d at 257 (citation omitted); compare Descamps, 2013 WL 3064407 at 5 (“if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form”).

The concern is that substantive differences in the criminal law of foreign jurisdictions may result in the defendant being punished for conduct for which he may have had a legitimate defense in Washington. See Lavery, 154 Wn.2d at 258 (“Lavery had no motivation in the earlier conviction to pursue defenses that would have been available to him under the robbery statute but were unavailable in the federal prosecution”). Such an outcome violates the Fourteenth Amendment guarantee of due process. See Lavery, 154 Wn.2d at 257.

3. When it is raised, self-defense becomes an element of a substantive offense, the absence of which the State bears the burden of proving beyond a reasonable doubt.

The right to self-defense in Washington has long-standing roots in our common-law jurisprudence, and is codified by statute. State v. McCullum, 98 Wn.2d 484, 491, 656 P.2d 1064 (1983); State v. Meyer, 96 Wash. 257, 264, 164 P. 926 (1917); RCW 9A.16.020. The use, attempt, or offer to use force in Washington is lawful

[w]hen used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.020(3).

The Legislature has also codified the right to commit homicide in self-defense:

Homicide is ... justifiable when committed either:

(1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or

(2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.

RCW 9A.16.050.

“A self defense claim is ‘predicated upon the right of every citizen to reasonably defend himself against unwarranted attack.’” State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Thus, in Washington, a killing done in self defense is a lawful act. McCullum, 98 Wn.2d at 492. This Court held in McCullum that changes to the criminal code that placed the self-defense component of a homicide charge in a separate section of the

statute⁶ did not alter the State's burden with respect to the charge or its elements:

By removing the words “unless it is excusable or justifiable” from the definition of homicide and including self-defense under the provisions of RCW 9A.16, entitled “Defenses”, the Legislature merely relieved the State of the time-consuming and unnecessary task of alleging and proving negative propositions which may not be involved in each case. Once the issue of self-defense is properly raised, however, the absence of self-defense becomes another element of the offense which the State must prove beyond a reasonable doubt.

Id. at 493-94.

This Court further explained, “Since self-defense is explicitly made a ‘lawful’ act under Washington law ... it negates the element of ‘unlawfulness’ contained within Washington's statutory definition of criminal intent.” Id. at 495 (internal citations omitted). This Court held that because self-defense, when raised, is an element and an “essential ingredient of the crime charged,” the State must prove that the defendant did not act in self-defense beyond a reasonable doubt. Id. at 496.

This Court has not deviated from this rule. See State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2008) (constitutional requirement that

⁶ Under Washington's old criminal code, homicide was murder or manslaughter unless it was “excusable or justifiable.” Laws of 1909, ch. 249, §§ 140, 141, 143, pp. 930–31. With the adoption of a new criminal code in 1975, the Legislature removed this language from the definition of homicide and instead included it in a separate section entitled “defenses.” McCullum, 96 Wn.2d at 491.

jury be instructed as to each element charged applies to self-defense); City of Bremerton v. Widell, 146 Wn.2d 561, 570, 51 P.3d 733 (2002) (reiterating that “self-defense is a statutory defense and, as such, once properly raised, the absence of self-defense becomes another element of the offense which the State must prove beyond a reasonable doubt”); State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (a claim that homicide was justifiable because done in self defense requires jury “to consider the conditions as they appeared to the slayer, taking into consideration all the facts and circumstances known to the slayer at the time and prior to the incident”); State v. Wanrow, 88 Wn.2d 221, 234, 559 P.2d 548 (1977) (same).

4. Because self-defense is an element, and because the law of self-defense in Texas at the time Jordan was convicted was fundamentally more restrictive than in Washington, Jordan’s prior Texas conviction was not comparable to a Washington offense and should have been excluded from his offender score.

Notwithstanding this Court’s explicit holdings in McCullum and subsequent decisions, the Court of Appeals held that the absence of self-defense “is not a true ‘element’ of murder or manslaughter.” Slip Op. at 4. The Court instead averred that “[r]eferences to the absence of self-defense as an element serve as shorthand for the principle that the State bears the burden to disprove the defense once properly raised.” Id. The Court cited

McCullum as authority for this pronouncement, even though McCullum held precisely the opposite.⁷ McCullum, 98 Wn.2d at 493-94.

As this Court in McCullum held, the significance of the 1975 statutory changes was only that they relieved the State from the burden of pleading and proving the absence of self-defense in every case, even when it might not be an issue. Id. But it was clear from this Court's decision in that case and from subsequent decisions treating the issue, cited infra, that self-defense remains an element of the substantive offense, even if it appears in a different statute – much like attempt, conspiracy, or solicitation. See Chapter 9A.28 RCW.

The implications from self-defense's unique role at common law and by statute as an element of a substantive charge are manifold. Because, when raised, self-defense is an element, the State must prove its absence beyond a reasonable doubt. McCullum, 98 Wn.2d at 493-94. An accused person is entitled to an instruction on self-defense so long as there is some evidence, from any source, to support the defense. McCullum, 98 Wn.2d at 488. In a homicide prosecution, the accused must show only that he feared "great personal injury" in order for his use of deadly force to

⁷ In fact, the word "element" does not appear anywhere in the Sixth Amendment. It is just "shorthand" for 'facts that the state must prove to obtain a conviction.' See Alleyne v. United States, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2013 WL 2922116, 4 (June 17, 2013) ("Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt").

be lawful. RCW 9A.16.050(1). A jury evaluating the reasonableness of a claim of self-defense considers not only the events immediately surrounding the killing, but also those known substantially before the killing. Allery, 101 Wn.2d at 595; Wanrow, 88 Wn.2d at 234. And, in Washington, a person has no duty to retreat from an assault when he is in a place where he has a right to be, but may repel force with force. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); Meyer, 96 Wash. at 264.

- a. The right to self-defense in Texas when Jordan was convicted was substantially more restrictive than in Washington.

In Texas, when Jordan was convicted of voluntary manslaughter, the law of self-defense was different and considerably more restrictive than it is in Washington. His self-defense claim could only succeed if Jordan used deadly force because it appeared necessary to protect himself or a third person against another person's use or attempted use of unlawful deadly force. CP 55. Texas law required Jordan to show that a reasonable person in his situation would not have retreated. Tex. Penal Code Ann. § 9.32 (Vernon 1974 and Vernon Supp. 1991);⁸ Broussard v. State, 809

⁸ Tex. Penal Code Ann. § 9.32 (1991) provided, in pertinent part:

A person is justified in using deadly force against another:

....

S.W. 2d 556, 558 (1991); CP 55. To obtain an instruction on self-defense, Jordan had to present affirmative proof that he acted in self-defense. Saxton v. State, 804 S.W.2d 910, 913-14 (Tex. 1991). And the legitimacy of a claim of self-defense or defense of others in Texas was restricted to the circumstances immediately surrounding the use of force. Nance v. State, 807 S.W. 855, 863 (Tex. 1991) (holding that woman was barred from raising a claim of defense of others where she attempted to rescue her son from her ex-husband, who she believed had sexually assaulted her son, had physically abused and raped her, and who she believed was stalking her with a loaded gun); compare with Allery, 101 Wn.2d at 594-95. The Texas jury deciding the charge of voluntary manslaughter against Jordan was instructed consistent with these limitations.⁹

b. The differences between the law of self-defense in Texas and in Washington prevented the prior conviction from being comparable to any crime in Washington.

The goal of the comparability analysis under the SRA is “to ensure that defendants with prior convictions are treated similarly, regardless of

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- (2) if a reasonable person in the actor's situation would not have retreated; and
 - (3) when and to the degree he reasonably believes the deadly force is immediately necessary;
 - (A) to protect himself against the other's use or attempted use of unlawful deadly force.

⁹ A copy of pertinent instructions issued to Jordan’s Texas jury is attached to this brief.

where those convictions occurred.” Morley, 134 Wn.2d at 602. This concern – that similarly situated defendants be treated alike with regard to punishment for prior conduct – goes hand-in-hand with the strong interest in ensuring punishment is based upon reliable information, and is rooted in due process. Hunley, 175 Wn.2d at 910, 915; Ford, 147 Wn.2d at 481-92.¹⁰

i. The crime was not legally comparable to any crime in Washington.

Here, the elements of Jordan’s Texas prosecution for voluntary manslaughter necessarily included the element that his use of deadly force was not justifiable, as the same conduct if prosecuted in Washington would have included this element. McCullum, 98 Wn.2d at 493-94. As shown, the statutory definition of self-defense in Texas would have permitted Jordan to be convicted if the jury found he had a duty to retreat. He also could have been convicted if the jury found that he had not produced enough evidence to show he was acting in self-defense, or if the jury had concluded that the victim had threatened not deadly force, but

¹⁰ The Court of Appeals believed that “[c]omparison of out-of-state offenses in calculating an offender score ... is a statutory mandate, not a constitutional one.” Slip Op. 4. This misses the point and, more importantly, fundamentally mistakes this Court’s precedent. In light of Descamps and Alleyne, it also rests on a flawed premise. As this Court reemphasized in Hunley, the right to a valid sentence is grounded in due process. Hunley, 175 Wn.2d at 910, 915.

great personal injury. In Texas, therefore, Jordan could have been convicted based on a broader range of conduct than would have been possible in Washington.

ii. Because the foreign offense is broader than any potentially comparable Washington crime, no factual analysis is possible.

The substantial and substantive differences between the law of self-defense in Texas and Washington compel the conclusion that the Texas offense of voluntary manslaughter is broader than any potentially comparable Washington crime. Thus, any further effort to determine whether Jordan's conduct would have resulted in conviction if he had been tried in Washington violates due process and the Sixth Amendment right to a jury trial. Compare Descamps, 2013 WL 3064407 at 5, 7¹¹ (if foreign statute sweeps more broadly than generic offense, "a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form"); Lavery, 154 Wn.2d at 258 ("Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable").

¹¹ As discussed *infra*, constitutional limitations preclude courts from engaging in an extensive factual analysis to determine whether the defendant's conduct would have constituted a crime in Washington. Descamps, ___ 2013 WL 3064407 at 5-10; Morley, 134 Wn.2d at 606.

Because the Texas offense criminalized a broader range of conduct than any potentially comparable Washington offense, similar to Lavery, Jordan had “no incentive ... to prove that he did not commit the narrower offense.”¹² This Court should conclude that the inclusion of the Texas conviction for voluntary manslaughter in Jordan’s SRA offender score resulted in Jordan being punished for conduct that may not have resulted in conviction in Washington. The resulting sentence violated due process.

¹² It is of course possible that Jordan did prove that he committed the narrower offense, but the Texas jury could not have acquitted him on this basis.

E. CONCLUSION

The absence of self-defense in Washington, when raised, is an element of a criminal charge that the State must disprove beyond a reasonable doubt. This Court should hold that in appropriate cases, self-defense is properly considered in a comparison of the elements of out-of-state convictions with potentially comparable Washington offenses. Here, fundamental differences between the law of self-defense in Texas and Washington permitted Jordan to be convicted in Texas based on conduct that may not have resulted in conviction in Washington. This Court should hold that Jordan's prior Texas conviction for voluntary manslaughter was thus not comparable to any Washington crime, and that the use of the crime to elevate his SRA offender score violated due process.

DATED this 28th day of June, 2013.

Respectfully submitted:



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State v. Jordan, No. 85410-6

Appendix

IN THE 87TH JUDICIAL DISTRICT COURT

LIMESTONE COUNTY, TEXAS

NO. J-195-A

IN THE MATTER OF ERICK DESHUN JORDAN

FILED
AT 3:37 O'CLOCK P. M.

AUG 26 92

Wray D. Budde
DIST. CLERK, LIMESTONE CO, TEX

CHARGE OF THE COURT

PHOTOCOPY

MEMBERS OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions of the Court in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court; that is, what you have seen and heard in this courtroom, together with the law as given by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss or concern yourselves with the effect of your answers.

4. You are instructed that your verdict in this case must be a unanimous vote.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror, or any other juror, who observes a

violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in the questions in a sense which varies from the meaning commonly understood, you will be given in this charge a proper legal definition, which you are bound to accept in place of any other definition or meaning.

You are instructed that a child has engaged in delinquent conduct under the laws of the State of Texas if a minor ten years of age or older and under the age of seventeen years violates any penal law of this state of the grade of felony or misdemeanor punishable by confinement in jail. However, such an offense when committed by a juvenile is delinquent conduct.

The juvenile respondent, Erick DeShun Jordan, stands charged with the offense of murder, alleged to have been committed on or about the 26th day of July, 1992. To this charge the juvenile respondent has entered a general denial by saying, "Not True."

You are now instructed in the law applicable to this case as follows:

Our law provides that a person commits murder if he intentionally or knowingly causes the death of an individual.

A person commits the offense of voluntary manslaughter if he intentionally or knowingly causes the death of an individual, except that he causes the death under the immediate influence of sudden passion arising from an adequate cause.

"SUDDEN PASSION" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed, which passion arises at the time of the offense and is not solely the result of former provocation.

"ADEQUATE CAUSE" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

"DEADLY WEAPON" means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

"BODILY INJURY" means physical pain, illness, or any impairment of physical condition.

"SERIOUS BODILY INJURY" means bodily injury that creates a

substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

You are instructed that you may consider all relevant facts and circumstances surrounding the death, if any, and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense, if any.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 26th day of July, 1992, in Limestone County, Texas, the juvenile respondent, Erick Deshun Jordan, did intentionally or knowingly cause the death of an individual, Juan Gillespie, by shooting him with a deadly weapon; to-wit: a pistol, and that the juvenile respondent, in so acting, was not acting under the immediate influence of sudden passion arising from an adequate cause, then you will find that the juvenile respondent did engage in delinquent conduct by committing the offense of murder.

Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the juvenile respondent of having engaged in delinquent conduct by committing murder and answer Question No. 1 "We do not", and next consider whether the juvenile respondent engaged in delinquent conduct by committing the offense of voluntary manslaughter.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 26th day of July, 1992, in Limestone County, Texas, the juvenile respondent, Erick Deshun Jordan, did intentionally or knowingly cause the death of an individual, Juan Gillespie, by shooting him with a deadly weapon; to-wit: a pistol, but you further find and believe from the facts and circumstances in the case that the juvenile respondent, in killing the deceased, if he did, acted under the immediate influence of sudden passion arising from an adequate cause, or if you have a reasonable doubt as to whether he so acted under the immediate influence of a sudden passion arising from an adequate cause, then you will find

that the juvenile respondent did engage in delinquent conduct by committing the offense of voluntary manslaughter.

Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the juvenile respondent of having engaged in delinquent conduct by committing voluntary manslaughter and answer Question No. 2 "We do not."

If you find from the evidence beyond a reasonable doubt that the juvenile respondent engaged in delinquent conduct by committing either murder or voluntary manslaughter, but you have a reasonable doubt as to which of said offenses he committed, then you must resolve that doubt in the juvenile respondent's favor and find that he committed the lesser offense of voluntary manslaughter.

If you have a reasonable doubt as to whether the juvenile respondent engaged in delinquent conduct by committing any offense defined in this charge, then you will acquit the juvenile respondent and answer the questions hereinafter set forth "We do not."

You are instructed that under our law a person is justified in using force or deadly force against another to protect a third person if, under the circumstances as he reasonably believes them to be, such person would be justified in using force or deadly force to protect himself against the unlawful force or deadly force of another which he reasonably believes to be threatening the third person he seeks to protect, and he reasonably believes that his intervention is immediately necessary to protect the third person.

It is appropriate, therefore, that the court instruct you first on the law of self defense before instructing you on the right of a person to defend a third person.

A person is justified in using force to protect himself against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. A person is justified in using deadly force against another if he would be justified in using force against the other in the first place, as above set out, and when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force and if a person in his situation would not have retreated.

By the term "REASONABLE BELIEF" as herein used is meant a belief that would be held by an ordinary and prudent person in the same circumstances as the juvenile respondent.

By the term "DEADLY FORCE" is meant force that is intended or known by the person using it to cause, or in the manner of its use or intended use is capable of causing death or serious bodily injury.

When a person is attacked with unlawful deadly force, or he reasonably believes he is under attack or attempted attack with unlawful deadly force, and there is created in the mind of such person a reasonable expectation or fear of death or serious bodily injury, then the law excuses or justifies such person in resorting to deadly force by any means at his command to the degree that he reasonably believes immediately necessary, viewed from his standpoint at the time, to protect himself from such attack or attempted attack, as a person has a right to defend his life and person from apparent danger as fully and to the same extent as he would had the danger been real, provided that he acted upon a reasonable apprehension of danger, as it appeared to him from his standpoint at the time, and that he reasonably believed such deadly force was immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly force.

So it is, in the case of a person acting against another in defense of a third person, it is not necessary that there be actual danger to such third person, as a person acting in his defense would have the right to defend him from apparent danger as fully and to the same extent as he would have were the danger real, provided he acted upon a reasonable apprehension of danger to such third person, as it appeared to him from his standpoint at the time, and that he reasonably believed such deadly force by his intervention on behalf of such third person was immediately necessary to protect such person from another's use or attempted use of unlawful deadly force, and provided it reasonably appeared to such person acting, as seen from his viewpoint alone, that a reasonable person in the situation of the person being defended would not have retreated to avoid using deadly force in his own defense.

You are instructed that it is your duty to consider evidence of all the relevant facts and circumstances surrounding the alleged killing and the previous relationship existing between the deceased and the accused, and in considering all the foregoing, you should place yourselves in juvenile respondent's position and view the circumstances from his standpoint alone at the time in question.

By the term "REASONABLE PERSON," applied to one in the situation of a third party being defended, is meant an ordinary and prudent person in the same circumstances as such third party.

Now, if you find from the evidence beyond a reasonable doubt that the juvenile respondent, Erick Deshun Jordan, did kill Juan Gillespie by shooting him with a firearm; to-wit: a pistol, as

alleged, but you further find from the evidence, or you have a reasonable doubt thereof, that, viewed from the standpoint of the juvenile respondent at the time, from the words or conduct, or both of Juan Gillespie, it reasonably appeared to the juvenile respondent that his life or the life or person of Michael Williams was in danger and there was created in juvenile respondent's mind a reasonable expectation or fear of his or Michael Williams's death or serious bodily injury from the use of unlawful deadly force at the hands of Juan Gillespie and that juvenile respondent reasonably believed that under the circumstances then existing, a reasonable person in his or Michael Williams's situation would not have retreated before using deadly force in his own defense, and that the juvenile respondent, acting under such apprehension and reasonably believing that the use of deadly force, by his intervention, on his part was immediately necessary to protect himself or Michael Williams against Juan Gillespie's use or attempted use of unlawful deadly force, and that he, therefore, shot Juan Gillespie, then you will find the juvenile respondent did not engage in delinquent conduct; or if you have a reasonable doubt as to whether the juvenile respondent was acting in defense of himself or Michael Williams on said occasion under such foregoing circumstances, then you should give the juvenile respondent the benefit of that doubt and acquit him by answering the Questions hereinafter set forth "We do not."

An accomplice, as the term is hereinafter used, means any person connected with the crime charged, as a party thereto, and includes all persons who are connected with the crime, as such parties, by unlawful act or omission on their part transpiring either before or during the time of the commission of the offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible or by both. Mere presence alone will not constitute one a party to an offense.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, or aids or attempts to aid the other person to commit the offense. The term "conduct" means any act or omission and its accompanying mental state.

The witnesses, Elliott Mitchell and Edrick Hervey, are accomplices, if any offense was committed, and you cannot find that the juvenile respondent engaged in delinquent conduct upon their testimony unless you first believe that their testimony is true and shows that the juvenile respondent has engaged in delinquent conduct, and then you cannot find that the juvenile respondent engaged in delinquent conduct upon said testimony unless you further believe that there is other evidence in the case, outside of the evidence of the said Elliott Mitchell and Edrick Hervey tending to connect the juvenile respondent with the

offense committed, if you find that an offense was committed, and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the juvenile respondent with its commission, and then from all of the evidence you must believe beyond a reasonable doubt that the juvenile respondent has engaged in delinquent conduct.

Now, bearing in mind the foregoing definitions and instructions, you will answer the following Questions.

Question No. 1

Do you find from the evidence beyond a reasonable doubt that on or about the 26th day of July, 1992, in Limestone County, Texas, the juvenile respondent, Erick Dahun Jordan, did engage in delinquent conduct by intentionally or knowingly causing the death of an individual, Juan Gillespie, by shooting him with a deadly weapon; to-wit: a pistol, and that the juvenile respondent, in so acting, was not acting under the immediate influence of sudden passion arising from an adequate cause?

Answer "We do" or "We do not."

Answer: We do not.

If you have answered Question No. 1 "We do not", then consider Question No. 2. If you have answered Question No. 1 "We do", then you must answer Question No. 2 "We do not."

Question No. 2

Do you find from the evidence beyond a reasonable doubt that on or about the 26th day of July, 1992, in Limestone County, Texas, the juvenile respondent, Erick Dahun Jordan, did engage in delinquent conduct by intentionally or knowingly causing the death of an individual, Juan Gillespie, by shooting him with a deadly weapon; to-wit: a pistol, and that in so acting he was acting under the immediate influence of sudden passion arising from an adequate cause?

Answer "We do" or "We do not."

Answer: We do.

You are instructed that a petition alleging delinquent conduct and a grand jury certification thereof is the means whereby a juvenile respondent is brought to trial. It is not evidence that the juvenile respondent engaged in delinquent conduct or committed the offense alleged, nor can it be considered by you in passing upon the questions of whether the juvenile respondent engaged in delinquent conduct.

The burden of proof rests upon the state throughout the trial and never shifts to the juvenile respondent. The juvenile respondent is presumed to be innocent until the state proves beyond a reasonable doubt each element of an offense. The fact that the juvenile respondent has been detained or charged with the offense gives rise to no inference that he engaged in delinquent conduct. The law does not require a juvenile respondent to prove he did not engage in delinquent conduct or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the juvenile respondent unless the jurors are satisfied beyond a reasonable doubt that the juvenile respondent engaged in delinquent conduct after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the juvenile respondent engaged in delinquent conduct and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the juvenile respondent by answering the questions hereinafter set forth "We do not."

It is not required that the prosecution prove that the juvenile respondent engaged in delinquent conduct beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the juvenile respondent's having engaged in delinquent conduct.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to the juvenile respondent's having engaged in delinquent conduct after considering all the evidence before you, and these instructions, you will acquit the juvenile respondent by answering the questions hereinafter set forth "We do not."

You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

After you retire to the jury room, you should select one of your members as your Presiding Juror. The first thing the presiding juror will do is to have this charge read aloud and then

you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror:

1. To preside during your deliberations;
2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
3. To write out and hand the bailiff any communication concerning the case which you desire to have delivered to the judge;
4. To vote on the questions; and,
5. To write your answers to the questions in the spaces provided.

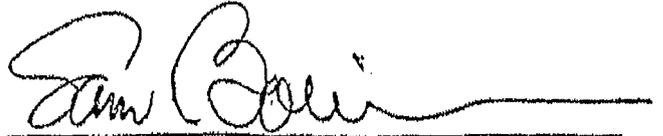
As to the manner of deliberation, you are further instructed as follows:

1. In order to return a verdict, each juror must agree thereto.
2. Jurors have a duty to consult with one another to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment.
3. Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors.
4. In the course of deliberations, a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous.
5. No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff of this Court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, inform the judge of such fact immediately.

When you have answered all of the foregoing questions which you are required to answer under the instructions of the judge; when your presiding juror has placed your answers in the spaces provided; and when the following certificate has been signed in accordance with the instructions in this charge, you will advise the bailiff at the door of the jury room that you have reached a verdict, and when directed to do so, you will return into court with your verdict.

#J-195-A

A handwritten signature in cursive script, appearing to read "Sam Bournias", with a long horizontal line extending to the right.

SAM BOURNIAS, Judge Presiding

IN THE 87TH JUDICIAL DISTRICT COURT

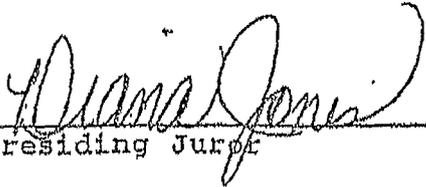
LIMESTONE COUNTY, TEXAS

NO. J-195-A

IN THE MATTER OF ERICK DESHUN JORDAN

CERTIFICATE OF THE JURY

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.



Presiding Juror

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.) NO. 85410-6
)
 ERICK JORDAN,)
)
 Petitioner.)

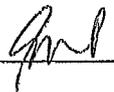
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JUNE, 2013, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DONNA WISE, DPA) (X) U.S. MAIL
 KING COUNTY PROSECUTOR'S OFFICE) () HAND DELIVERY
 APPELLATE UNIT) () _____
 516 THIRD AVENUE, W-554
 SEATTLE, WA 98104

[X] ERICK JORDAN) (X) U.S. MAIL
 768393) () HAND DELIVERY
 WASHINGTON STATE PENITENTIARY) () _____
 1313 N 13TH AVE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JUNE, 2013.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Cc: Wise, Donna; Susan Wilk
Subject: RE: 854106-JORDAN-SUPPLEMENTAL BRIEF

Rec'd 6-28-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [<mailto:maria@washapp.org>]
Sent: Friday, June 28, 2013 3:09 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Wise, Donna; Susan Wilk
Subject: 854106-JORDAN-SUPPLEMENTAL BRIEF

State v. Erick Jordan
No. 85410-6

Please accept the attached documents for filing in the above-subject case:

Supplemental Brief of Petitioner

Susan F. Wilk - WSBA #28250
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By

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