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NO. 93357-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

AARON MYLAN

Respondent.

ON DISCRETIONARY REVIEW FROM THE COURT OF

APPEALS, DIVISION TWO,

Court of Appeals No. 47253-8-II

Clallam County Superior Court No. 14-1-00325-0

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF THE MOVING PARTY

Respondent Aaron Mylan moves this Court for the relief designated in Part 2 of this motion.

B. COURT OF APPEALS DECISION RELIEF REQUESTED

Mr. Mylan requests this Court deny the state's petition for review of the Court of Appeals decision in 47253-8-II filed March 15, 2016 which reversed Mr. Mylan's convictions and remanded for a new trial based on ineffective assistance of counsel.

C. ANSWER TO STATE'S ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals decision finding counsel ineffective is consistent with precedent. The state's contention in its petition for review to the contrary is without merit.

2. The Court of Appeals decision finding that counsel was ineffective for failing to propose a necessity instruction is consistent with precedent. The state's contention in its petition for review to the contrary is without merit.

3. The Court of Appeals in this case properly relied on the necessity instruction adopted in *Lemon, Jeffrey*.

4. Our Courts are not required to follow federal analysis of protections afforded under federal case law.

5. The Court of Appeals decision finding that counsel was ineffective for failing to propose a necessity instruction is consistent with *State v. Grier*.

6. The Court of Appeals correctly determined that Mr. Mylan was denied effective assistance of counsel and the Court of Appeals decision is not in conflict with any other precedential authority.

D. STATEMENT OF THE CASE

Diamond Mueller, a heroin dealer from Forks, Washington, testified that he met Mylan at a gas station in Forks and gave him a ride down "A" road, a hang-out for people living in Forks. 2RP 77, 79. According to Mueller, Mylan asked him about drugs in the Fork's area but did not ask for any for himself. 2RP 77. Muller claimed that Mylan pulled a gun on him and yelled at Mueller to pull over. 2RP 79. According to Mueller, he grabbed the gun from Mylan and it discharged, but Mylan regained control of the gun and started hitting Mueller in the face. 2RP 79. Mueller woke up in a ditch and tried to start his truck. 2RP 82.

Before August 24, 2014, Mylan, a good friend of Rachelle Cabe, never met Mueller, Cabe's heroin dealer. 4RP 17, 23, 31, 32. Mylan and Cabe hung out all day on August 24, 2014 until Cabe started to get "sick" from heroin withdrawals, at which time she insisted on meeting with her dealer Mueller but felt too. 4RP 32-34, 37. Mylan agreed to meet Mueller at a gas station instead of Cabe going on her own. 4RP 34-35. Mylan did not ask for a ride but asked to talk to Mueller because he wanted him to stop selling drugs to Cabe. 4RP 38. Mylan however, acquiesced and entered the truck. During the drive, Mueller offered Mylan heroin which he rejected because he does not use heroin. 4RP 37.

When Mylan explained that he did not want Mueller to sell to Cabe, Mueller became angry, hit the brakes and repeated "so you do not want me to sell to Rachelle because she has a kid?". 4RP 44. When Mylan responded "yeah", Mueller grabbed a pistol from under his seat and slammed on the brakes to point the gun at Mylan's head. 4RP 44. Mueller told Mylan that "he was tired of people fucking with him" and that Mylan was not "going to tell him who to deal with and not to deal with." 4RP 45.

Mueller told Mylan if he had a problem with that he would be shot; Mylan remained quiet and Mueller began to lower the pistol away from Mylan's head. 4RP 45. Mylan shifted back in his seat and quietly looked a Mueller afraid to provoke him. 4RP 46. Mueller looked away for a moment and Mylan grabbed the pistol and struggled to gain control of it. 4RP 47. The gun discharged and the magazine ejected during the struggle, but Mylan was ultimately able to wrestle the gun from Mueller while Mueller tried to hit Mylan with the magazine. Mylan was able to knock Mueller out of the truck with the gun. 4RP 47-54, 92-93.

After Mueller rolled out of the truck, Mylan tried to drive the truck, but it got stuck in a ditch. While in the driver's seat, the pistol rolled onto Mylan's foot. 4RP 56. In fight or flight, panic mode, terrified that Mueller would shoot him, Mylan grabbed the gun and ran into the wood, where he flung the gun into the bushes. 4RP 57, 72, 82, 97-101.

E. ARGUMENT WHY STATE'S PETITION FOR REVIEW SHOULD BE DENIED.

Contrary to the state's assertion in its petition for review, the state cannot meet the criteria set forth in RAP 13.4(b) because the

Court of Appeals underlying decision is not in conflict with any Washington State cases, and specifically, not in conflict with *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992); *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) or *State v. Jeffrey*, 77 Wn.App. 222, 225, 889 P.2d 956 (1995).

1. Ineffective Assistance of Counsel

The Court of Appeals correctly determined that Mylan was denied effective assistance of counsel. Court of Appeals Op. at p. 6. Contrary to the state's argument that the Court ignored the possibility that trial counsel's decisions were based on trial strategy as required under *State v. Grier*, that is precisely what the Court of Appeals considered. The Court of Appeals expressly held that counsel's decision not to request a necessity defense was a complete failure to defend on the fire arm charge that could not have been a tactical decision. Court of Appeals Op. at p. 10-11

"Deficient performance is not shown by matters that go to trial strategy or tactics." *Hendrickson*, 129 Wn.2d at 77-78. Therefore, defense counsel's failure to request a necessity instruction is not deficient performance if the decision to do so was a matter of trial strategy. The State argues that defense counsel's choice to argue self-defense rather than necessity was a legitimate trial strategy. We disagree.

The State argues that arguing self-defense was a strategic choice to seek acquittal of the assault and robbery charges at the expense of risking the lesser conviction of unlawful possession of a firearm. But, Mylan's counsel was not required to choose between arguing self-defense and the defense of necessity. The State does not point to any legal conflict between these defenses, nor are we aware of any. Therefore, we conclude that defense counsel was not prohibited from requesting a necessity defense instruction to defend Mylan against the unlawful possession of a firearm charge by virtue of seeking a theory of self-defense for the assault charges.

Once the State's argument falls away, **no trial strategy explains defense counsel's failure to request a necessity instruction on the unlawful possession of a firearm charge.** Mylan's trial counsel failed to defend that charge at all.

(Emphasis Added) Id.

This analysis is not in conflict with *Strickland*¹ or the State Supreme Court decisions cited in *Grier* requiring the defense to establish that trial counsel did not have a "conceivable legitimate tactic explaining counsel's performance". *Grier*, 171 Wn.2d at 42. The Court of Appeals correctly explained that counsel's complete failure to defend Mylan on the fire arm charge was prejudicial ineffective assistance of counsel. Here, rather than being in conflict with precedent, the state simply disagrees with

¹ *Strickland v. Washington*, 466 U.S. 668, 687, 105 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

the Court of Appeals decision, which does not fit the criteria for granting discretionary review in this Court.

2. Necessity Defense.

Again contrary to the state's assertion in its petition for review, the Court of Appeals did not expand the test for a necessity defense in *Jeffrey*. The Court of Appeals in this case precisely mirrors the *Lemon* Court's criteria. Opinion at pp. 7-10.

Lemon must demonstrate that: (1) he was under unlawful and present threat of death or serious bodily injury; (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative; and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm

United States v. Lemon, 824 F.2d 763, 765 (9th Cir. 1987).

The evidence, taken in the light most favorable to Mylan, supports each element of the *Lemon* test by a preponderance of the evidence. **Mylan was under an unlawful present threat of death or serious bodily injury**, he did not recklessly place himself in that situation, he had no reasonable legal alternative to his actions, and threat of harm from Mueller was the direct cause for his momentary possession and disposal of the gun. Therefore, we hold that Mylan was entitled to a necessity instruction based on the evidence.

(Emphasis added) Court of Appeals Opinion at p 10. This is the Court of Appeals holding.

The Court in *Jeffrey* indicated that “[u]nder federal case law, a defendant is entitled to a necessity instruction for the crime of unlawful possession of a firearm if he can satisfy four factors similar to those articulated in *Diana* and *Gallegos*². (Emphasis added) *Jeffrey*, 77 Wn.App. at 225.

And rather than adopting the *Lemon* criteria, the Court in *Jeffrey* stated, “[w]e are persuaded a situation can arise that will permit necessity as a defense. We therefore hold the necessity instruction as set out in *Lemon* can in certain circumstances be a defense to the crime of unlawful possession of a firearm.” *Jeffrey*, 77 Wn.App. at 226.

Citing *Lemon*, *Gallegos*, and *Diana*, which cited to WPIC 18.02, the Court in *Jeffrey* set forth the defense proposed jury instruction that mirrored the then existing WPIC and held that trial court erred by refusing the defense proposed instruction:

² *State v. Gallegos*, 73 Wn.App. 644, 651, 871 P.2d 621 (1994); *State v. Diana*, 24 Wn.App. 908, 604 P.2d 1312 (1979)(citing WPIC 18.02)).

1. The Defendant reasonably believed he or another was under unlawful and present threat of death or serious bodily injury; and
2. The Defendant did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; and
3. The Defendant had no reasonable legal alternative; and
4. There was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

This defense must be established by a preponderance of the evidence.

Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

Jeffrey, 77 Wn.App. at 224.

The State Supreme Court WPIC instructions committee continues to approve the necessity defense instruction inclusion “(1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; ...” WPIC 18.02 (3ed) (2014).

Furthermore, in the notes following WPIC18.02 (3ed) (2014), the Committee expressly acknowledges *Jeffrey*, 77 Wn.App. at 224-22. More recently than *Jeffrey*, in 2005, Division Two of the Court of Appeals in *State v. Parker*, 124 Wn.App. 352, 354-55, 110

P.3d 1152 (2005) used the WPIC necessity instruction including the “reasonable belief” language. *Parker*, 127 Wn.App. at 354.

Contrary to the state’s implied assertion, Washington courts are not required to follow federal courts’ analysis of federal issues. *Acharya v. Microsoft Corp.*, 189 Wnn.App. 243, 253, 354 P.3d 908 (2015). Rather our Courts follow federal analysis “only if [[they] find its reasoning persuasive.” *Acharya*, 189 Wnn.App. at 253 (quoting *Washburn v. City of Federal Way*, 178 Wn.2d 732, 750, 310 P.3d 1275 (2013)).

The state’s contentions that Court of Appeals decision is contrary to State or Federal precedent is without any legal merit.

F. CONCLUSION

The state’s arguments in favor of the petition for review are meritless. Accordingly, this Court should deny review.

DATED 28th day of July 2016.

Respectfully submitted,



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Attorney for Respondent

I, Lise Ellner, a person over the age of 18 years of age, served the Clallam County Prosecutor's Office (prosecutor@co.clallam.wa.us and jespinoza@co.clallam.wa.us) and Aaron Mylan (DOC #345724 MCC PO Box 777 Monroe, WA 98272) a true copy of the document to which this certificate is affixed, on July, 28, 2016 Service was made by depositing in the mails of the United States of America, properly stamped and addressed to Mr. Mylan and electronically to the prosecutor.



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Attached is Respondent's Answer to Petition for Review.

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