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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 95599-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

FERNANDO JACA-ORTIZ

Respondent.

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RESPONSE TO STATE'S PETITION FOR REVIEW OF THE  
COURT OF APPEALS FEBRUARY 18, 2018 DECISION IN  
STATE V. JACA-ORTIZ

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**RULES, STATUTES, AND OTHERS**

RAP 13.4..... 1, 2, 3

A. IDENTITY OF RESPONDING PARTY

Fernando Jaca-Ortiz by and through his attorney, Lise Ellner, asks this court to deny the state's petition for review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of appeals correctly ruled that the trial court erred by failing to provide a defense of another instruction because contrary to the state's assertions, Jaca-Ortiz provided evidence of this defense and the issue raised does not meet the criteria for review under RAP 13.4(b) because there is no conflict with the Court of Appeals decision in this case and *State v. Walker*, 136 Wn.2d 767, 966 P.2d 883 (1998) and *State v. Aleshire*, 89 Wn.2d 67, 69, 568 P.2d 799 (1977) (*overruled on other grounds in Matter of Dowling*, 89 Wn.2d 67, 568 P.2d 799 (1977)).

C. ISSUE PRESENTED FOR REVIEW

The Court of Appeals correctly ruled that the trial erred by refusing to provide a defense of others instruction where Jaca-Ortiz presented evidence in support of this instruction.

D. STATEMENT OF THE CASE

Respondent adopts and incorporates by reference the statement of the case set forth in his opening brief.

E. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The state cannot meet the criteria for review set forth RAP 13.4(b). RAP 13.4(b) (2) provides for review in relevant part as follows:

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

.....

(1) If the decision is in conflict with a decision of the Supreme Court.

Contrary to the state's petition for review, there is no conflict between the Court of Appeals ruling in this case and *Walker*, and *Aleshire*. Accordingly, the issues in this case do not meet the criteria under RAP 13.4(b) criteria.

1. The Decision in *State v. Jaca-Ortiz* is not in Conflict With a Supreme Court Case.

There are no grounds for review in this case. The state erroneously argues in its petition that this case conflicts with *Walker* and *Aleshire*, but that is incorrect.

The Court of Appeals correctly distinguished *Aleshire* as follows.

The State relies on ..... *State v. Aleshire*, 89 Wn.2d 67, 568 P.2d 799 (1977), *abrogated in part on other grounds by State v. Dowling*, 98 Wn.2d 542, 656 P.2d 497 (1983), to support its argument that Jaca-Ortiz was not entitled to the self-defense instruction because he denied striking anyone. .... [But] in *Aleshire*, the only evidence that suggested self-defense was the defendant's own statement that he repudiated at trial. 89 Wn.2d at 71. Here, in contrast, the State's evidence supported a defense of another claim. And, as stated above, we consider all of the evidence, not just the defense evidence, when evaluating whether there was an adequate factual basis for the jury instruction. *Fisher*, 185 Wn.2d at 849, 851. Accordingly, these cases do not show that Jaca-Ortiz's claim that he did not strike anyone was sufficient to justify the trial court's refusal to give the defense of another instruction.

Court of Appeals Opinion at 8. *Aleshire* is not on point and not in conflict with the Court of Appeals opinion in this case. Accordingly, the state's petition fails to satisfy the criteria set forth in RAP 13.4(b)(1).

On direct appeal, the state did not rely on *Walker* for any part of its argument. This Court in *Walker* provided a clear analysis of the

criteria for giving a self-defense instruction- which were established in

Jaca-Ortiz's case:

*Walden* and *Painter* stand for the proposition that one could reasonably fear great bodily harm or death from an unarmed assailant, depending on the circumstances. It is possible this rule of law was not fully applied by the Court of Appeals when it ruled on Walker's self-defense claim. After reviewing the law of self-defense, the appellate court held:

Walker was not entitled to use deadly force. A simple assault, viewed objectively, does not justify one's use of deadly force in defense. In essence, Walker took a knife to a fistfight.

*State v. Walker*, No. 17650-5-II, slip op. at 5 (Wash.Ct.App. May 10, 1996). In making this ruling, the appellate court makes no reference to what a reasonable person *may have perceived in Defendant's situation*-it merely states a person may not use deadly force to defend against a fistfight. The Court of Appeals' statement regarding the fistfight implies no defendant could *ever* reasonably fear great bodily harm as a result of a beating with the naked hands. This implication omits the subjective aspect of the inquiry, thereby conflicting with *Walden*.

*Walker*, 136 Wn.2d at 776-77.

The Court in *Walker* reiterated that once a defendant presents "some" evidence that he felt he was in imminent danger of serious injury, he is entitled to a defense of others or self-defense instruction. Id. This decision to permit or deny a jury instruction is reviewable only

for abuse of discretion. *Id.* In *Walker's* case, Walker never presented any evidence that his opponent was armed with anything other than his fists and the victim never threatened to kill Walker, but rather threatened to "kick the shit out of" him and Walker only asserted that he began to fear for his life after the fistfight began. *Walker*, 136 Wn.2d at 778.

By contrast, Jaca-Ortiz presented evidence that he was struck with a car jack, struggled to take this weapon from Misael, and that Misael threatened to kill him. (Opinion at 3-4; Opening brief at 7-8). The state apparently believes that this was insufficient to warrant a defense of others or self-instruction but neither *Walker* nor *Aleshire* support this assertion because in each of those cases, there was no evidence that either defendant feared for their life.

For these reasons, the Court of Appeals was correct and the state presents hollow claims in its petition for review which this Court should deny.

F. CONCLUSION

For the reasons stated herein this Court should deny the state's petition for review.



DATED THIS 16<sup>th</sup> day of April 2018.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



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LISE ELLNER, WSBA 20955  
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Cowlitz County Prosecutor's Office [appeals@co.cowlitz.wa.us](mailto:appeals@co.cowlitz.wa.us) and Fernando Jaca-Ortiz/DOC#390750, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 on April 16, 2018. Service was made electronically to the prosecutor and to Fernando Jaca-Ortiz by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

**LAW OFFICES OF LISE ELLNER**

**April 16, 2018 - 11:12 AM**

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