

NO. 72376-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE PERSONAL RESTRAINT OF FELIX V. SITTHIVONG

STATE OF WASHINGTON,

Respondent,

v.

FELIX V. SITTHIVONG,

Petitioner.

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Court of Appeals
Division I
State of Washington

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

SUPPLEMENTAL BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION

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A. SUMMARY OF PETITION.

Felix Sitthivong's constitutional right to a fair jury trial was actually and substantially prejudiced by the trial court's refusal to instruct on the lesser included offense of manslaughter where the State separately charged him with homicide by extreme indifference. He is entitled to reversal of his conviction on that charge.

B. ISSUES ON REVIEW.

1. Whether the trial court erred in refusing to instruct the jury on the lesser offense of manslaughter where Mr. Sitthivong was charged with first degree murder by extreme indifference?

2. Whether Mr. Sitthivong has suffered actual and substantial prejudice by the failure to instruct on manslaughter?

C. FACTS RELEVANT TO PETITION.

1. The State's case. The prosecution argued Mr. Sitthivong shot at two men, Landon Nguyen and Yousouf Ahmach, without provocation after encountering them on a Seattle sidewalk and asking if they knew someone named "Sonny." 13RP 32, 41-42.¹ The prosecution alleged Mr. Sitthivong missed his intended targets and that Steve Sok's

¹ The bulk of the witness testimony was consistent. 5RP 93-94, 101, 104, 119 (Landon Nguyen); 5RP 142-43, 156, 178, 183 (Yousouf Ahmach); 7RP 54-55 (Kenrique Thomas); 7RP 194-95 (Ron Battles); 8RP 125-28 (Nam Nguyen); 9RP 175-79 (Phillip Thomas).

death was the result of a premeditated intent to kill which constituted murder in the first degree. 13RP 40-43. The jury did not reach a verdict on that charge, but found Mr. Sitthivong guilty of the lesser offense of murder in the second degree based on a simple intent to kill without premeditation. CP 86-89, 124, 137.²

The prosecution separately alleged that Mr. Sitthivong committed murder in the first degree by extreme indifference by “[f]iring a gun on a crowded street.” 13RP 49-51; CP 113-14. After the trial court declined to instruct on the lesser offense of manslaughter, the jury returned a verdict of guilty to the charge of murder in the first degree by extreme indifference. CP 132.

2. Sitthivong’s defense.

Felix Sitthivong, then 24 years old, went out with friends in the Belltown neighborhood of Seattle. 12RP 41-45, 82. He testified they spent an hour at one bar and then went to another. 12RP 46-47. Mr. Sitthivong acknowledged he was intoxicated and became more so at the second bar. 12RP 47-48, 91.

Mr. Sitthivong testified that while having a cigarette outside the second bar, he and a friend Jason Lee were confronted by a group of

² The jury also rejected allegations of premeditation in the context of the attempted murder charges in counts 3 and 4 relating to Landon Nguyen and

five to six men, including the decedent Steve Sok, and Landon Nguyen. He described them as “rowdy” and antagonizing Jason. 12RP 48-49, 95. Eventually there was some shouting back and forth and they told Mr. Sitthivong “to shut the fuck up or they’re going to fuck me up and kill me.” 12RP 49-50, 98.³

Mr. Sitthivong testified his group of friends decided to leave and go to another bar. 12RP 52. While Jason took his girlfriend home, Mr. Sitthivong rode with the others to the “V-Bar.” Id. at 53-54, 109. While driving to the new bar, however, he saw the same group of men who had just been bothering them. They made eye contact with Mr. Sitthivong. Id. at 55-56. When Mr. Sitthivong’s group missed their turn, they drove around the block and again saw the men, now walking down the sidewalk toward the bar. Id. at 57-58.

Mr. Sitthivong testified that after they had parked, he “didn’t want to look like a wuss.” 12RP 61, 99. Because he was scared, he obtained a gun from one of his companions and walked toward the sidewalk. Id. at 61-62, 84, 100, 113. When Mr. Sitthivong looked around the corner, he saw Steve Sok, Landon Nguyen, and a third

Yousouf Ahmach. 13RP 48-49; CP 128-30, 134-35.

³ Mr. Sitthivong’s companions described a similar confrontation, but said that it had occurred earlier in the evening at another bar. 6RP 218-25; 7RP 27-32, 166-71; 8RP 90-95; 10RP 32-39.

person walking back toward him. Id. at 63-64, 178. “I don’t know if there was more people with them but that’s who I saw.” Id. at 64.⁴

Mr. Sitthivong testified he “froze” as Steve Sok came up and was verbally aggressive and heated. 12RP 114, 178-79.

[T]hey came up and they were just like what’s up, where’s your friend now. You know, just giving me a hard time. Calling me a little bitch.

Id. Mr. Sitthivong testified the Steve Sok’s group appeared “agitated” and he could feel “tension.” Id. at 66-67.⁵

Mr. Sitthivong testified that at one point, perhaps after his companions came up behind him, Mr. Sok’s group appeared to start walking back to the bar, but then turned around. Id. at 65-67. When he looked up, Mr. Sitthivong saw Steve Sok and Landon Nguyen each pull out guns. Id. at 67-69. Mr. Sitthivong estimated they were 30 to 40 yards or more away when he saw the guns. Id. at 70-72, 129-31, 136.

Mr. Sitthivong testified he was positive these men had guns. Although he was not sure who shot first, he testified that he reacted by pulling out the gun he was carrying and shooting. 12RP 72, 137, 141. Mr. Sitthivong testified he focused on the gun that was pointed at him

⁴ The State’s witnesses described the verbal confrontation as being between Landon Nguyen and Yousouf Ahmach. 7RP 54-55, 195; 8RP 124.

⁵ Nam Nguyen said the two men looked like they wanted to fight although he did not see any weapons. 8RP 125-26. 130.

after the second man slipped into a doorway. Id. 72-74, 135.⁶ He did not remember how many shots were fired, but he believed at least one of the two people shot at him. Id. 75, 146.

Mr. Sitthivong testified that throughout the incident he was focused on the two men in front of him, although he was unsure which ducked out of sight and which was left pointing the gun at him.

10/31/RP 118, 138-39. Mr. Sitthivong testified he did not see Mr. Thomas on the sidewalk. 12RP 71, 139-40. Mr. Sitthivong testified he did not see other people between him and Mr. Sok because he was focused on the gun. 12RP 143.

Mr. Sitthivong testified he “wasn’t trying to hit anybody.” 12RP 151.

I was shooting to cover and to protect myself. Not to kill anybody, no to harm anybody. I just wanted to get out of there.

Id. Mr. Sitthivong testified he simply aimed “towards the area of where I saw the gun.” Id. at 152. Although he fired the gun in the direction of the person pointing a gun at him, “I wasn’t trying to hit them, I wasn’t trying to kill them...” Id. “I wasn’t trying to hit them.” Id. at 153. When asked if his eyes were open or closed, Mr. Sitthivong described it as a

⁶ Phillip Nguyen testified he was with Mr. Sok when the shooting started and ducked into the entryway of the bar. 5RP 197, 208-09.

“[l]ittle of both.” Id. at 153. He also testified he was moving as he fired. Id. at 154. “I wasn’t really aiming. I was just – I just pointed and I shot and I just wanted to get the heck out of there, sir.” Id. at 153.

3. Trial court refuses to instruct on manslaughter on Count V.

Mr. Sitthivong proposed lesser included instructions of both first and second degree manslaughter for the jury on each of the murder and attempted murder counts. 12RP 186-88. As to the murder and attempted murder offenses charged in Counts I, III and IV, the State agreed the offenses each met the legal test, but argued the evidence failed to establish only the lesser offenses may have been committed. 12RP 188-89. Judge Reitschel concluded the evidence supported an instruction for first degree manslaughter, but not second degree manslaughter at to Counts I, III and IV. 12RP 190.

As to the charge of first degree murder by extreme indifference in Count V, Mr. Sitthivong argued it was “entirely possible that the jury believe he was acting in self-defense but they’re not convinced the State has completely disproved self-defense beyond a reasonable doubt, but there’s a recklessness that Mr. Sitthivong demonstrated by – as Mr. Herschowitz explained during his opening statement that nothing could be more extreme indifference than generally just firing a weapon and

spraying people down the street. And we think that that's a clear sign of recklessness that the jury should be able to consider." 12RP 190-91.

The prosecutor argued the result was controlled by State v. Pastrana,⁷ and State v. Pettus,⁸ holding certain similar conduct could not support conviction for only the lesser offenses. 12RP 191-92. Mr. Sitthivong argued that even under Pastrana the evidence supported a jury's finding that his behavior was reckless while harboring a doubt about the extreme indifference requirement. 12RP 193. Ultimately, the trial court declined to instruct on manslaughter as a lesser offense of the extreme indifference charge "based on the number of people at the location, the number of shots, the timing of the shots, the location of the individuals who were involved, I am not going to allow the lesser as to Count V." 12RP 195.

Mr. Sitthivong supplemented his objection with briefing the following day, but the trial court adhered to its ruling and declined to instruct on manslaughter as a lesser offense of homicide by extreme indifference. CP 70-73; 13RP 5-8.

⁷ State v. Pastrana, 94 Wn.App. 463, 972 P.2d 557 (1999).

⁸ State v. Pettus, 89 Wn.App. 688, 951 P.2d 284 (1998).

4. Post-conviction proceedings.

On direct appeal, this Court affirmed the trial court's refusal to instruct on first degree manslaughter by unpublished opinion filed June 17, 2013. (CoA No. 68030-7-I). Relying on Pastrana and Pettus, the Court held:

Sitthivong's actions demonstrated not mere recklessness regarding human life but extreme indifference, an aggravated form of recklessness.... This conduct, when measured against Pettus and Pastrana, shows that the trial court was well within its discretion to deny the requested instruction.

Slip op at 8. The Washington Supreme Court denied review of Mr. Sitthivong's direct appeal on December 11, 2013, and the mandate issued on January 15, 2014.

Mr. Sitthivong timely filed a pro se personal restraint petition on July 3, 2014, alleging violations of his constitutional rights to due process, right to present a defense, and his right to a fair trial, citing the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and Article 1, sections 3, 21, and 22 of the Washington Constitution. Petition at 2. He asserted, *inter alia*, he was prejudiced by the failure to instruct on first degree manslaughter as a lesser included offense of the homicide by extreme indifference alternative. Id. This in turn precluded him from effectively presenting his defense which was,

inter alia, based on his reckless conduct following a potential act of self-defense. Petition at 3-4; See also 12RP 189-91, 193; CP 70-73. Mr. Sitthivong noted in particular that where the jury instructions have the effect of relieving the State of its burden of proof it violates the defendant's due process rights. Petition at 3.

This Court dismissed the petition. However, the Washington Supreme Court granted discretionary review and remanded for reconsideration in light of its decision in State v. Henderson, 182 Wn.2d 734, 344 P.3d 1207 (2015). Mr. Sitthivong urges the Court to grant his petition and vacate the conviction for homicide by extreme indifference.

D. ARGUMENT.

1. SITTHIVONG IS UNLAWFULLY RESTRAINED
AND ENTITLED TO RELIEF

RAP 16.4 requires the appellate court grant relief to a petitioner under a "restraint" that is "unlawful."⁹ Mr. Sitthivong remains under restraint as he is confined, in the custody of the

⁹ RAP 16.4(a):

Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioner's restraint is unlawful for one or more of the reasons defined in section (c).

Department of Corrections, following his conviction and sentencing in King County Superior Court No. 10-1-04298-5 SEA, serving a sentence of 778.5 months (64.875 years).¹⁰

Mr. Sitthivong's restraint is unlawful because his conviction for homicide by extreme indifference was obtained in violation of Washington law and his rights to due process and a fair trial.¹¹ See State v. Henderson, 182 Wn.2d 734, 344 P.3d 1207 (2015).

¹⁰ RAP 16.4(b):

A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

¹¹ RAP 16.4(c) provides that the restraint must be unlawful for one or more of the following reasons:

- (1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or
- (2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or
- (3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or
- (4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government,

Mr. Sitthivong is entitled to relief because this error actually and substantially prejudiced his rights to a fair trial. In re Wilson, 169 Wn.App. 379, 387, 279 P.3d 990 (2012) (reversing for instructional error and ineffective assistance); In re Pers. Restraint of Davis, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004).

2. SITTHIVONG'S RESTRAINT IS UNLAWFUL WHERE HIS CONVICTION WAS OBTAINED IN VIOLATION OF WASHINGTON LAW AND HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL THROUGH A PROPERLY INSTRUCTED JURY

As a personal restraint petitioner, Mr. Sitthivong may obtain relief by demonstrating either a constitutional violation or a violation of the laws of the state of Washington. RAP 16.4(c)(2), (6); In re Riefschnieder, 130 Wn.App. 498, 501, 123 P.3d 496 (2005) (citing In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148, 866 P.2d 8 (1994)).

In Washington a defendant in a criminal trial is entitled to have the jury instructed on a lesser included offense when (1) each of the

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- and sufficient reasons exist to require retroactive application of the changed legal standard; or
- (5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or
 - (6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or
 - (7) Other grounds exist to challenge the legality of the restraint of petitioner.

elements of the lesser included offense is a necessary element of the charged offense and (2) the evidence in the case supports an inference that the lesser crime was committed. Henderson, 182 Wn.2d at 742, (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.382 (1978)).

In Henderson, the Washington Supreme Court observed that there was no dispute that first prong of the Workman test was met because the elements of first degree manslaughter are necessary elements of first degree murder by extreme indifference. 182 Wn.2d at 742. It was error, therefore, to deny lesser included offense instructions supported by the record because a defendant is entitled to have his theory of the case submitted to the jury, with appropriate instructions, when the theory is supported by the evidence in the record and the elements of the lesser are necessary elements of the greater.¹²

Workman, 90 Wn.2d at 447-48; State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994); State v. Griffith, 91 Wn.2d 572, 574-75, 589 P.2d 799 (1979), (citing Langan v. Valicopeters, Inc., 88 Wn.2d 855, 567 P.2d 218 (1977); Board of Regents v. Fredrick & Nelson, 90 Wn.2d 82,

¹² WA Const. art. I, sec 22 preserves a defendant's "right to be informed of the charges against him and to be tried only for the offenses charged." RCW 10.61.006 permits a defendant to be convicted of an offense that is a lesser included offense of the crime charged. RCW 10.61.003 permits conviction of an inferior degree of the offense.

579 P.2d 346 (1978)); Hester v. Watson, 74 Wn.2d 924, 448 P.2d 320 (1968); WA Const. art 1, sec 22.¹³

A jury must, therefore, be allowed to consider a lesser included offense if the evidence, when viewed in the light most favorable to the defendant, raises an inference that the defendant may have committed the lesser crime instead of the greater crime. Henderson, 182 Wn.2d at 736, (citing State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)). If the jury could rationally find the defendant guilty of the lesser offense and not the greater, the jury must be instructed on the lesser. Henderson, 182 Wn.2d at 736. Therefore, “a requested jury instruction on a lesser included or inferior degree offense should be administered ’[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” Fernandez-Medina, at 456, (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing Beck v. Alabama, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980))).

¹³ WA Const. art. I, sec 22:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all

In Mr. Sitthivong's case, there is again no dispute that the lesser offenses of manslaughter are legally included in the offense of homicide by extreme indifference. Henderson, 182 Wn.2d at 742. 12RP 190-95. Instead the trial court summarily concluded the evidence satisfied the greater offense without considering it in the light most favorable to the defense.

On this particular count, based upon the number of people at the location, the number of shots, the timing of the shots, the location of the individuals who were involved, I am not going to allow the lesser as to Count V.

12RP 195. While this may be sufficient to establish extreme indifference, Mr. Sitthivong argued that his conduct, intentions and actions, when viewed in light most favorable to him as the requesting party, could well leave a doubt as to whether he committed the greater offense.

Appellate review of the trial court's decision regarding the second prong of the Workman rule is for abuse of discretion. Henderson, 182 Wn.2d at 743 (citing State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)). The trial court abuses its discretion when its decision is based on the incorrect legal standard. Henderson, 182 Wn.2d at 743 (citing State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192

cases....

(2013)). As in Henderson, the trial court failed to consider the evidence in the light most favorable to the defendant and applied the same “incorrect legal standard” based on the same “outdated case law.” 182 Wn.2d at 743.

a. Relying on *Pettus* and *Pastrana* resulted in the application of incorrect legal standard and an abuse of discretion.

The record indicates fails to establish Judge Reitschel applied the correct legal standard for determining recklessness and instead references to *Pettus* and *Pastrana* indicate her reliance on the “outdated caselaw” and the “incorrect legal standard.” She specifically notes that she had “reviewed the *Petrano* [sic] case” in ruling on the Mr. Sitthivong’s objection to the failure to instruct on the lesser offense. 11/1/11RP 6-7. The prosecutor specifically invokes this same misguided precedent, arguing that “in this situation under *Petrano* [sic] (phonetic) the actions of the defendant took were so extreme beyond just recklessness.” *Id.* at 7. Following the State’s invitation, the trial court elected to “adhere to its earlier ruling.” 11/1/11RP 8.

Here, as in Henderson,

The trial court erroneously relied on older Court of Appeals cases that applied the broader and more general definition of recklessness, which is when a person disregards a substantial risk that a *wrongful act* may occur. In those prior cases, the Court of Appeals affirmed

the trial courts' refusal to instruct on first degree manslaughter, concluding that a grave risk of death was much more serious than a substantial risk of a wrongful act. But those holdings are no longer valid because we have clarified that the proper definition of recklessness in the context of manslaughter is disregarding a substantial risk that a *homicide* may occur, not simply the risk of any wrongful act.

182 Wn.2d 743-44 (original emphasis).

Critically, the trial court in Mr. Sitthivong's case looked to the Pastrana opinion, which in turn cited Pettus, and specifically relied on the incorrect definition of recklessness. Having relied on the improper standard, "We do not know what those courts would have decided when faced with a very different question." 182 Wn.2d 744.

Having established "the trial court in this case applied the incorrect legal standard based on outdated case law," "the proper question under our current case law is whether a rational jury could have found [the defendant's] actions constituted a *disregard of substantial risk that a homicide may occur* but not *an extreme indifference that created a grave risk of death*." Henderson, 182 Wn.2d 743-44. As the Court noted, "This is a fairly difficult question because those two definitions are so similar. Id. at 744. In Mr. Sitthivong's case, a rational jury could have reasonably concluded he acted "with a disregard for a substantial risk of a homicide, rather than an extreme

indifference that caused a grave risk of death.” See Henderson, 182 Wn.2d at 745 (citing State v. Henderson, 180 Wn.App. 138, 148, 321 P.3d 298 (2014)).

b. The evidence, viewed in the light most favorable to Mr. Sitthivong raised an inference that he committed manslaughter, not murder.

Critical to this analysis is the requirement that the evidence be viewed in the most favorable to the defendant. See Fernandez-Medina, 141 Wn.2d 455-56. Where the evidence includes conflicting eyewitness testimony and physical evidence, the significance of these differences drives the result because it becomes impossible to say that no jury could rationally find first degree manslaughter instead of first degree murder by extreme indifference. Henderson, 182 Wn.2d at 745-46.

As with Henderson, the evidence that supports a finding of manslaughter rather than murder includes:

1. The number of people on the sidewalk. Testimony about the number and location of people varied widely. Some witnesses testified about there being anywhere from 10 to 15 people in the area and others guessed there might have been 30 people on the sidewalk. 8RP 127 (Nam Nguyen testified there were about 30 people on the sidewalk in the area); 6RP 164-66 (Officer Evans testified he noticed 10 to 15 other people in the area).

Mr. Sitthivong's testimony, however, described only three people "in the line of fire" all of whom would be subject to his self-defense claim. 12RP 63-64, 70-71, 143. The Lessig video in particular showed only a few – four people below him and several people on the other side. 12RP at 193 (noted by prosecutor). As with Henderson, where testimony indicated there were only three people outside the house at the time of the shooting, Mr. Sitthivong's testimony that he only saw Sok and Nguyen on the sidewalk and believed both drew weapons, and that there was a potentially menacing third person in the street, is entitled full credit and supports a similar inference he only committed manslaughter. Henderson, 182 Wn.2d at 745.

2. Location of the bullet strikes. In Henderson, the Court found it significant that no bullets or bullet strikes were found inside the house where the majority of partygoers were located. 182 Wn.2d at 745. In Mr. Sitthivong's case, however, this factor must be considered in conjunction with his claim of self-defense. To the extent that Steve Sok and Phillip Thomas were relatively close together, this supports a finding that only the lesser offense of manslaughter was committed because there was a relatively narrow field of fire which did not endanger the bulk of other people described.

3. Most of the shots did not land near people. This factor appears to duplicate the previous consideration and, as noted, the circumstances alleged here may indicate a lesser degree of culpability in light of the evidence presented. In the alternative, the gunshot wound Steve Sok suffered may have been caused by a ricocheting bullet. 8RP 205, 211, 220. The condition and features of the wound suggested the bullet may have struck something else before striking Sok. 8RP 209-11, 221-24. While no less tragic, this would support an inference that the shots were not necessarily fired at or near the people.

Other witness testimony also described additional potential shooters and lends credence to the Mr. Sittihvong's self-defense claim. Mr. Thomas in particular recalled muzzle flashes by a shooter who had come out of the bar. 9RP 186, 197-98, 201-02. Other witnesses described a shooter that did not necessarily match Mr. Sittihvong. Officer Evans was nearby when the shooting occurred and saw the shooter when the shots rang out. 6RP 75-77, 157, 161-66. He described the shooter as a dark-skinned male wearing a white t-shirt, blue jeans and stocking cap. 6RP 164, 184. He pursued the shooter, but the officer soon lost sight of him. 6RP 165, 167-69, 184, 187.

Brandon Valdez saw the shooter from about half a block away, and described him as probably a man of color, about six feet tall,

wearing a white shirt. 8RP 67-69; Ex 81. On the other hand, Landon Nguyen told the officers the shooter was a bald Asian man. 6RP 25, 40, 55, 68. A jury might well find then that Mr. Sitthivong faced a significant threat, but acted recklessly in his response without concluding he “disregarded the grave risk of death” and “engaged in that conduct under circumstances manifesting an extreme indifference to human life.” CP 113-14.

Moreover, if there was another shooter as several witnesses testified, the “circumstances” under which Mr. Sitthivong acted may not have involved the “extreme indifference to human life” that is required. The reasonableness of his actions, when viewing the evidence in a light most favorably to the defense, in the face of an active and aggressive shooter or shooters may well demonstrate less than the *extreme indifference* that is required to find first degree murder. See e.g. State v. Shaffer, 135 Wn.2d 355, 358, 957 P.2d 214 (1998).

Because Mr. Sitthivong’s testimony must be credited for purposes evaluating the *mens rea* under the factual prong, Steve Sok’s prior threats to kill, the fear of imminent death, the limits of his vision and the impact of his focus on the weapon, Mr. Sitthivong established his theory for acquittal on the greater offense in favor of conviction for the lesser. Henderson, 182 Wn.2d at 745-56. A reasonable jury could

find that under these circumstances, his conduct did not display the extreme indifference which is essential to the first degree murder, but was reckless for purposes of establishing manslaughter.

4. Testimony the defendant shot from a distance. In Henderson, the Court found it particularly significant that Henderson shot from the street rather than closer to the house.¹⁴ 128 Wn.2d at 745-46. In Mr. Sitthivong's case, he testified he was 30 to 40 yards (90-100 feet) away when he saw the two men's guns and perhaps even 40-50 yards away. 12RP 70, 136. Viewing this evidence in the light most favorable to Mr. Sitthivong, a jury could have rationally concluded he acted merely with "disregard for a substantial risk of homicide" rather than "extreme indifference that caused a grave risk of death." In the same way the Henderson "jury could have concluded [he] intended to scare those in the house by erratically firing his gun rather than aiming at the security people in the yard," Mr. Sitthivong's jury could have concluded his reflexive act of seeing the gun and then pulling out the gun he was carrying and shooting, did not display "extreme indifference" in light of his claim of self-defense or that the risk was not "grave" in light of the

¹⁴ Although the opinion does do not describe the distance, typical Tacoma area residential setbacks are 20-25 feet. See e.g. City of Tacoma Zoning Reference Guide 2015 available at: http://cms.cityoftacoma.org/Planning/Zoning_booklet_FINAL_2015update.pdf.

distance and limited number of people he described in his testimony.

See 182 Wn.2d at 745-46.

Given the relative similarity of the two scenarios and the definitions at issue, it appears there is little to differentiate between the two cases. As defense counsel explained generally:

It seems that one theory as to why only manslaughter first degree was committed is because based upon Mr. Sitthivong's testimony, it would appear that he should have been aware of facts, that is, facts of other persons standing on the street, Mr. Thomas for one, Mr. Thomas' girlfriend for another. That in the course of his decision -making as to whether or not to fire his firearm, and it could be viewed either as recklessness or it could be viewed as negligence, either one of those.

12RP 187. It bears repeating too that Mr. Sitthivong is entitled to have the evidence viewed in light most favorable to his request and the inference he committed only the lesser offense. Henderson, 182 Wn.2d at 745, (citing Ferndez-Medina, 141 Wn.2d at 455-56). Speaking again generally, defense counsel explained:

We just believe that the State's focusing on ignoring certain facts. I think along with what Mr. Sitthivong testified to, he said that he was unaware of Ms. Jarju; that is, Mr. Thomas' girlfriend walking hand in hand right outside the V-Bar. He opens fire. Whether he was aware of them or not, the fact is it seems to me he should have been aware of it. And the lack of his awareness could be nothing other than recklessness which would be a Manslaughter I

12RP 189. Speaking specifically to the extreme indifference allegation

in Count V, counsel noted:

for the same reason we think that under extreme difference or the facts that would include Manslaughter I, it's clear recklessness and only recklessness, that is, entirely possible that the jury believe he was acting in self-defense but they're not convinced the State has completely disproved self-defense beyond a reasonable doubt, but there's a recklessness that Mr. Sitthivong demonstrated by – as Mr. Herschkowitz explained during his opening statement that nothing could be more extreme indifference than generally just firing a weapon and spraying people down the street. And we think that that's a clear sign of recklessness that the jury should be able to consider.

12RP 190-91. Counsel concluded, “there's considerable evidence that his behavior was reckless but doesn't go to the extreme indifference prong only. The Court should give the Manslaughter I instruction.”

12RP at 193.

In support, Mr. Sitthivong testified he fired the gun because he was afraid he was going to be killed. 12RP 113-14 (scared), 134 (scared), 155 (expected to be shot dead). He testified he believed there were two people with guns firing at him and he was firing back. 12RP 69, 72-74, 135 (sees two guns). He also testified Steve Sok had previously threatened to kill him. 12RP 98.

In light of the considerable similarity between these two offenses, and viewing the conflicting evidence in light most favorable

to Mr. Sitthivong, a rational jury could have found he committed first degree manslaughter and not first degree murder by extreme indifference. He was therefore entitled to a jury instruction on first degree manslaughter. Henderson, 182 Wn.2d at 746.

c. Where two degrees of an offense are so close as to indistinguishable, defendants have a right to conviction of the lesser degree.

The prosecution must prove every element of the crime charged beyond a reasonable doubt. State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). At the same time, a defendant is entitled to instructions on any theory which is supported by evidence, or the lack of it. State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). RCW 9A.04.100(2) then provides in part that “[w]hen a crime has been proven against a person, and there exists a reasonable doubt as to which of the two or more degrees he or she is guilty, he or she *shall* be convicted only of the lowest degree.” (emphasis added).

This is significant because where the prosecutor is given unfettered discretion to charge two identical alternatives with different punishments, the right to equal protection is implicated. State v. Zornes, 78 Wn.2d 9, 475 P.2d 109 (1970). Zornes held that under the Fourteenth Amendment and WA Const. Art. 1, sec. 12, acts defining the same offense for the same conduct but prescribing different punishments violate an individual's right

to equal protection. While subsequent U.S. Supreme Court decision limits Zornes its value under the Fourteenth Amendment, its place under Washington law remains significant.¹⁵ Where the elements of two statutes are similar, presumably the prosecutor is confronted with no considerations as to under which statute to proceed. Thus, the prosecutor's discretion is unfettered. *See Zornes*, 78 Wn.2d at 23; State v. Canady, 69 Wn.2d 886, 421 P.2d 347 (1966).

No equal protection violation occurs when the crimes the prosecutor has the discretion to charge require proof of different elements. In re Taylor, 105 Wn.2d 67, 68, 711 P.2d 345 (1985). The doctrine of constitutional avoidance requires the reviewing court interpreting the statute find a meaningful difference between the manslaughter and murder by extreme indifference offenses.

3. SITTHIVONG SUFFERED ACTUAL AND SUBSTANTIAL PREJUDICE FROM THE CONSTITUTIONAL ERROR.

To obtain relief for an error on collateral attack, a defendant must demonstrate by a preponderance of the evidence that he was

¹⁵ In *Batchelder*, the Supreme Court reiterated that selectivity in the enforcement of criminal laws is subject to constitutional constraints, however, it found the ability to choose to proceed under identical statutes prescribing different penalties does not improperly empower the government to predetermine ultimate criminal sanctions. Batchelder, at 125.

actually and substantially prejudiced by the error. In re Wilson, 169 Wn.App. 379, 386-87, 279 P.3d 990 (2012) (providing relief for erroneous accomplice liability instruction); In re Brockie, 178 Wn.2d 532, 536, 309 P.3d 498 (2013); In re Pers. Restraint of Cook, 114 Wn.2d 802, 810, 792 P.2d 506 (1990).

Mr. Sitthivong suffered such prejudice because giving juries in criminal trials the option of convicting defendants of lesser included offenses when warranted by the evidence “is crucial to the integrity of our criminal justice system...” State v. Henderson, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015), (citing Keeble v. United States, 412 U.S. 205, 212, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973)).

A reviewing court determines actual prejudice “in light of the totality of circumstances.” In re Pers. Restraint of Music, 104 Wn.2d 189, 191, 704 P.2d 144 (1985). Those circumstances include “the jury instructions given, the arguments of counsel, weight of evidence of guilt, and other relevant factors in evaluating whether a particular instruction caused actual prejudice.” Id.; Brockie, 178 Wn.2d at 539.

Mr. Sitthivong had a right to have the jury instructed on appropriate lesser included offenses including manslaughter as a lesser

offense of murder by extreme indifference. The failure to do so created the very real possibility that the jury would convict simply because it knows something was wrong, but not necessarily what was charged particularly where the two legal standards are “so similar.” Henderson, 182 Wn.2d at 744. In this case, instruction on the manslaughter as to Count V was critical because it served to define the essential distinctions between these two degrees of culpability. Evaluating those relative degrees of culpability against each other was essential to the jury’s performance of its function. Keeble, 412 U.S. at 212; Shaffer, supra.

While the jury may have rejected the defense on Count 1, this does not answer the question of whether conduct outside the protections of reasonable exercise of the right to self-defense was otherwise reckless in the context of this alternative charging theory. In Count I, the jury did rejected the self-defense claim in the context of rejecting the State’s charge of first degree murder based on premeditation and finding the lesser offense was committed. CP 84-90, 124.

The jury should have been provided the same alternative in its consideration of the first degree murder as charged in Count V. Unfortunately, it was not and was further instructed that its verdict on one count should affect another. CP 83 (“A separate crime is charged in

each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.”)

The jury was also instructed that “When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted of the lowest degree.” CP 87, 90. Furthermore, the jury did not have a meaningful opportunity to consider manslaughter with regard to count 1 because the instructions precluded consideration of the lesser offense where there was a guilty verdict as to murder in the second degree. CP 90.

Instruction 20 provides that “A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great personal injury, although it afterwards might develop that he person was mistaken as to the extent of the danger.” CP 97. In considering the counts separately then, the jury could reasonably have concluded the firing was reckless, rather than a reflection of the “grave indifference” required to establish murder in the first degree. The unique and extraordinary *mens rea* reflected by the “extreme indifference” requirement can viewed far differently where the defendant was

working to protect his own life and those of his companions. Shaffer, supra.

4. MR. SITTHIVONG IS ENTITLED TO RELIEF

Mr. Sitthivong timely presented his request for relief and has established he was actually and substantially prejudiced by the denial of his request for a lesser included offense instruction for manslaughter. Following his conviction and sentencing in 2011, Mr. Sitthivong appealed to this Court. (CoA No. 68030-7-I). This Court affirmed his conviction by unpublished opinion filed on June 17, 2013. An order denying his petition for review was entered in the Supreme Court on December 11, 2013. This Court then issued its mandate on January 15, 2014.

Mr. Sitthivong filed his petition in the current matter on July 3, 2014, i.e., less than one year after his underlying conviction became final. RCW 10.73.090.¹⁶ Furthermore, he has demonstrated actual and substantial prejudice to his right to a fair trial. He is, therefore, entitled to relief. RAP 16.4.

¹⁶ RAP 16.4(d) outlines the following restrictions on the court's ability to grant relief:

The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, or .100. No more than one

E. CONCLUSION.

Mr. Sitthivong requests this Court provide relief from his unlawful restraint by reversing his conviction for murder by extreme indifference, and remanding for a new trial.

DATED this 21st day of October, 2016.

Respectfully submitted,

s/ David L. Donnan

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Attorneys for Petitioner

petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

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

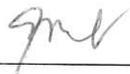
IN RE THE PERSONAL RESTRAINT PETITION OF)	
)	
FELIX SITTHIVONG,)	NO. 72376-6-I
)	
Petitioner.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF OCTOBER, 2016, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION** 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 [donna.wise@kingcounty.gov] [PAOAppellateUnitMail@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] FELIX SITTHIVONG 354579 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF OCTOBER, 2016.

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