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DIVISION II

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STATE OF WASHINGTON

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NO. 39510-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DOUGLAS S. CHANTHABOULY, Appellant

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by finding that Douglas Chanthabouly was able to distinguish right from wrong on the day of the offense.
2. The trial court erred by finding that the defense had not met its burden of proving that Douglas Chanthabouly was not legally responsible for his act due to insanity.
3. The trial court erred by denying the motion for acquittal by reason of insanity.
4. The jury erred by convicting Douglas Chanthabouly of second degree murder where he should have been acquitted by reason of insanity.
5. Douglas Chanthabouly was deprived of effective assistance of counsel where defense counsel failed to propose a jury instruction defining the “right from wrong” prong of the legal insanity test.
6. Douglas Chanthabouly was denied his right to a fair and impartial jury when the trial judge cut off voir dire, denying the defendant the right to inquire into potential prejudice in the areas of self defense, race and gangs.

7. The “foreseeable impact” aggravating factor is unconstitutionally vague.
8. The trial court erred by denying the defense motion to dismiss the “foreseeable impact” aggravating factor as unconstitutionally vague.
9. The jury’s special verdict finding the “foreseeable impact” aggravating factor is not supported by substantial evidence.
10. Cumulative error deprived the defendant of a fair trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. DID THE TRIAL COURT ERR BY DENYING THE MOTION FOR ACQUITTAL BY REASON OF INSANITY AND THE JURY ERR BY REJECTING DOUGLAS’S INSANITY DEFENSE WHERE HE COMMITTED THE OFFENSE WHILE UNDER THE DELUSION THAT HE WAS ACTING IN SELF DEFENSE? (Assignments of Error 1, 2, 3, 4)
2. WAS THE DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO PROPOSE AN INSTRUCTION DEFINING THE “RIGHT AND WRONG” ELEMENT OF THE INSANITY TEST FOR THE JURY? (Assignment of Error 5)

3. DID THE TRIAL COURT DEPRIVE DOUGLAS CHANTHABOULY OF HIS DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL JURY BY DENYING HIM A FULL OPPORTUNITY TO CONDUCT VOIR DIRE? (Assignment of Error 6)
4. DID THE TRIAL COURT ERR BY DENYING THE MOTION TO DISMISS THE “FORESEEABLE IMPACT” AGGRAVATING FACTOR, WHERE THE FACTOR IS SO VAGUELY DEFINED THAT IT IS UNCONSTITUTIONAL? (Assignments of Error 7 & 8)
5. IS THERE SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE JURY’S FINDING THAT THIS CRIME CAUSED A COMMUNITY IMPACT THAT IS DISTINCTIVE FROM EVERY OTHER MURDER AND THAT THIS IMPACT WAS FORESEEABLE TO THE DEFENDANT? (Assignment of Error 9)
6. DID THE CUMULATIVE EFFECT OF THE ERRORS DEPRIVE THE DEFENDANT OF A FAIR TRIAL? (Assignment of Error 10)

III. SUMMARY OF THE CASE

This case arises from a shooting at Foss High School in Tacoma.

Douglas Chanthabouly,¹ a student at the school, was a diagnosed paranoid

¹ Both Douglas Chanthabouly and Samnang Kok will be hereinafter be referred to by their first names.

schizophrenic. In the delusional belief that a fellow student, Samnang Kok, was about to kill Douglas, Douglas shot Sam. Tragically, Sam died at the scene. Douglas was tried for first degree murder. His defense was a claim of not guilty by reason of insanity. He was convicted of second degree murder. This appeal follows.

IV. STATEMENT OF THE CASE

DOUGLAS CHANTHABOULY'S REALITY:

By the day of the offense, Douglas had lived in the paranoid delusion that he had been repeatedly attacked by gang members at school for years. RP3 17, RP10 1629. Over the two week Christmas vacation immediately before the offense, voices screamed at him day and night that the gang² was coming for him—would try to kill him. RP10 1629. In fear, he had locked himself into his room during the entire vacation. RP3 17, RP10 1629. Douglas did not believe he was mentally ill—his paranoid delusions and hallucinations were his reality. RP10 1628.

On January 3, 2007, the first day back to school following vacation, Douglas was terrified to go to school, and was afraid that he would be hurt or would have to hurt someone if he went. RP10 1660. He

² It was always a group in general that posed a threat, no one in specific. RP10 1629.

got a gun from his brother's room and decided to take it to school to defend himself. RP2 124, RP3 18-19, RP10 1631.

As Douglas walked down the hall that morning, he saw people in the halls pointing guns at him and his brother and the voices told him they would kill him. RP2 116. As Sam approached him in the hall, a voice in Douglas' head said Sam was in the gang. RP10 1633. He heard Sam say, "What's up, Blood." RP2 117, RP3 20, RP10 1633. This triggered in Douglas the belief that Sam was there to kill him—that he was part of the gang. RP2 117, RP3 20, RP10 1634. Douglas believed the harm to him was imminent. RP10 1636. Douglas believed Sam posed a mortal threat to him and his brother. RP2 121, RP3 20. He Shot Sam in the delusional belief that he was acting in self defense. RP2 69, RP8 1348, RP10 1634, 1636.

THE OFFENSE AND SUBSEQUENT ARREST:

On January 3, 2007, it was the first day back at school after winter break at Foss High School. RP4 609. Around 7:25 a.m., before school had started, Sam was walking down the hall when he met Douglas. RP5 835-36, RP6 1046. Witnesses disagree about whether anything was said between the boys either before or after the shots. Three witnesses heard nothing said between them before or after the shots. RP4 677, RP5 882, RP6 965. One student witness said after the shots, she heard Douglas say

“Boom, mother-F---er,” before shooting again. RP5 914-15, 917.

Another student witness said Douglas said “Now what, fool?” just before shooting. RP6 1041. No one testified that Sam spoke before the shooting. RP6 1047. Douglas shot Sam three times, then walked out of the building and away from the school. RP4 677, RP6 1044. Douglas was visibly unemotional as he walked away. RP5 880, RP6 1044. He did not acknowledge any of the other students present or try to hurt anyone as he left. RP4 677.

The school was placed in lockdown and police arrived within minutes. RP5 837, 840. School administrators tried to save Sam, but he had suffered fatal wounds and died at the scene. RP4 617, RP5 744.

Douglas was arrested two hours later just a few blocks from the school. RP5 790, RP6 1117, 1119. On the way to the police station, Douglas asked about how to become a police officer—saying he had always wanted to become one. RP5 796.

DOUGLAS’S STATEMENTS TO POLICE:

In the interview room at the police station, Detective David Devault observed that Douglas was disheveled and dirty, and his hands were shaking. RP5 748. His hair was long and greasy. RP5 748.

Douglas responded to questions, but would pause 5-7 seconds before answering. RP5 767.

Douglas initially denied being at school that morning, telling the detective that he had been at Hilltop looking for his “homies.” RP5 753. The detective pressed Douglas and he said then he had been at school, but denied being involved in the shooting. RP5 754.

But then Douglas began to talk about what happened. He said he carried a gun to school for protection. RP5 754. He admitted shooting Sam, but said he did not want to say why because it would be on the news and that would cause retaliation against his family. RP5 756-57, 761. He was very afraid that his family would be the target of a drive-by shooting. RP5 761.

Douglas said he “didn’t have any choice; he just had to do it.” RP5 757. He said he was worried about his brother, but would not tell the detective why. RP5 758. He worried that Sam’s “homies” would come after him. RP5 763.

Douglas asked if Washington has the death penalty. RP5 763. When told that it does, he said it did not matter because he would be killed in prison anyway. RP5 763.

Douglas told the detectives that Sam did not have a gun. RP5 760. He denied that he heard voices telling him to shoot. RP5 765. He denied being assaulted by gangs. RP5 768.

At one point in the hour-long interview, Douglas said he had talked more to the detectives than he had to anyone else in the past year. RP5 764.

Neither school officials nor family were aware of any animosity between Sam and Douglas. RP4 631, RP8 1459. There was no argument between the boys before the shots were fired. RP4 631. There is absolutely no evidence that gangs were involved in this case. RP5 785.

EVIDENCE OF INSANITY PRIOR TO THE OFFENSE

In 2004, Douglas repeatedly complained that he was being beat up by gang members, but there was never any evidence that this was real and he could not identify anyone specifically who was hurting him. RP8 1467-68, RP9 1499. By 2005, Douglas's family had begun to suspect that the reported abuse was in Douglas' mind and noticed that he had begun hearing voices. RP8 1469.

Douglas was first hospitalized in January of 2005, at age 16, when he attempted suicide by drinking cleaning products. RP2 65, RP8 1469, RP10 1620. Douglas said he had to kill himself because he was too afraid to go back to school—that he could not take it anymore. RP8 1469. He

was already paranoid and having visual and auditory hallucinations. RP2 65, RP8 1330-31.

Douglas was diagnosed with paranoid schizophrenia. RP2 65, RP10 1623. There was no evidence of drug use. RP8 1333. He was hospitalized for a few weeks, and then released to the community under the supervision of Comprehensive Mental Health. RP8 1470-71, RP10 1620, 1624, 1646. Hospital records show that when he was released to the community, his symptoms had not been controlled by medication. RP10 1620. After one year of being treated in the community, the funding ran out and Comprehensive Mental Health discharged Douglas to the care of his primary care doctor in January of 2006. RP8 1470-71; RP10 1646. Douglas's doctor, Dr. Oscar Ortega was never notified that Douglas was no longer under a psychiatrist's care. RP10 1728, 1731, 1734.

The nature of paranoid schizophrenia is that the person suffering from this disease appears totally normal to the untrained observer. RP2 92, RP8 1336. Paranoid schizophrenia cannot be cured and medication, at best, controls the symptoms. RP8 1339. It is also common for medication to stop working. RP8 1339. Whether on medication or not, the symptoms will fluctuate in severity. RP2 96. For some, medication does not work. RP2 105. Part of the disease is that the patient believes the delusions and

does not know or believe he is suffering from a mental disease. RP2 96, RP8 1340.

The records show that Douglas's symptoms fluctuated and were never completely controlled, even on medication. RP3 24, RP8 1340, RP10 1625. Even on medication, he still suffered from paranoid delusions and had auditory hallucinations. RP3 24. At his most symptomatic, Douglas would deny that he was hearing voices. RP8 1430-31.

In late 2006, Douglas was still hearing voices, talking to himself, and was getting worse. RP9 1502, 1505. His family saw him shut himself into his room and shout out at no one. RP9 1500. Douglas's mother said that he had been getting steadily worse—that the medication did not seem to help. RP8 1471. Dr. Ortega's records show that Douglas throughout 2006, he was still reporting hearing voices and was having trouble sleeping. RP 10 1729-30. Dr. Ortega never adjusted Douglas' medications or referred for psychiatric consult because he was not aware that Douglas was not already under psychiatric care. RP10 1734.

A student remembered that Douglas often talked to himself. RP6 1050. A teacher also remembered that she had seen Douglas talking to himself in the month before the shooting. RP8 1371.

EVIDENCE OF INSANITY FOLLOWING THE OFFENSE

Jail staff observed that when Douglas arrived at the jail, he was obviously suffering from his disease—he was internally preoccupied, indicating he was hearing voices and seeing hallucinations. RP2 107-11, RP8 1352, 1353, 1355. The treating physician at the jail, who saw Douglas for the first time two days after being booked into the jail, noted that he looked “bizarre” and “truly crazy” and that it was obvious to him that Douglas was hallucinating. RP8 1354-55. Jail staff also noted that it was clear that Douglas was suffering from command hallucinations. RP8 1356.

EXPERT TESTIMONY

Two experts testified both in the pre-trial hearing on the motion for acquittal and in the trial: Dr. Julie Gallagher for the State and Dr. Paul Leung for the defense. Both experts agreed that Douglas was suffering from a delusion at the time of his act that caused him to believe he and his family were in mortal danger and that he shot Sam in his delusional belief that he had to do this to save his own life. RP2 69, RP8 1348, RP10 1634, 1636. Both experts agree that Douglas was having hallucinations on the day of the shooting. RP8 1348, RP10 1636. The nature of hallucinations is that the person suffering from them thinks it is reality, they do not know that the hallucination is not real. RP8 1350. Both experts agree that on

the day of the offense, Douglas could not distinguish between his delusions and hallucinations and reality. RP3 15, RP8 1350, RP10 1638.

Both experts agreed that Douglas's actions were the product of his mental illness. RP3 64, RP8 1366, RP10 1637. Both experts believed that Douglas believed that there was a mortal threat to himself and his brother. RP8 1366. Both Dr. Leung and Dr. Gallagher testified that, as a result of his illness, Douglas was incapable of imagining the consequences of his actions before acting. RP8 1368, RP10 1637-38.

However, the experts disagreed about whether, legally, Douglas should be deemed to have understood that his act was wrong.

Dr. Gallagher testified that in her opinion, Douglas suffered from a mental disease; that he was experiencing symptoms of that disease at the time of the offense; that but for these symptoms (delusions), Douglas would not have committed the act. RP2 81, 121, RP8 1330, 1366.

However, Dr. Gallagher testified that because Douglas told her he knew his acts were legally wrong, this meant that he knew right from wrong under the legal test for insanity. RP2 73, RP8 1402-3. Dr. Gallagher also testified that Douglas believed he was nevertheless morally justified in his actions because his life was in danger. RP8 1410, RP2 77. Dr. Gallagher testified that Douglas did not believe what he did was wrong, did not

believe he had any choice but to shoot, and did not believe he could have acted differently. RP8 1435-36.

Dr. Leung testified that Douglas did not know the difference between right and wrong at the time of his act. RP3 25, RP10 1637. Dr. Leung opined that at the time of the act, Douglas's delusions were so fixed that he believed he would be killed and had to protect himself. RP3 26, 54, RP10 1714. Dr. Leung's opinion was that Douglas was not able to distinguish between right and wrong at the time of the offense. RP10 1637.

PROCEDURAL HISTORY

Douglas was charged by information with first-degree murder on January 4, 2007. CP 1-2. Following extensive treatment, he was found competent to stand trial on August 3, 2007. CP 3-22.

Under RCW 10.77.080, the defense moved pre-trial for acquittal by reason of insanity. CP 25-26. A hearing was held in which both Dr. Gallagher and Dr. Leung testified. See also, Supp. CP. Following the hearing, the trial court denied the motion, finding that Douglas did suffer from a mental disease, but that he was able to tell right from wrong. RP3 85-90, CP 121-22. The Judge cited the following facts in support of his finding that Douglas knew his act was wrong: Douglas called his act "murder" to the officers, that he talked about the death penalty and prison,

that he left the scene, and that the officers did not see that he was responding to auditory hallucinations. RP3 88-89. An order was entered denying the motion for acquittal by reason of insanity. CP 121-22.

A subsequent jury trial was held. Again, the defense was that Douglas was that under the law Douglas was not responsible for his actions because he suffered from a mental illness that had prevented him from being able to distinguish between right and wrong at the time of the offense.

The jury convicted Douglas of the lesser-included offense of murder in the second degree. CP 118. The jury also returned special verdicts finding that he was armed with a firearm and that “the crime involve[d] a destructive and foreseeable impact on persons other than the victim.” CP 119-20.

The trial judge sentenced Douglas to the maximum of the standard range, 220 months, with a 60 month firearm enhancement. CP 139, 141. The judge further ordered lifetime community custody, which exceeded the standard range sentence, based on the jury’s finding of an aggravating factor for “foreseeable impact.” CP 139, 141.

This appeal timely follows.

V. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY DENYING THE MOTION FOR ACQUITTAL BY REASON OF INSANITY AND THE JURY ERRED BY REJECTING DOUGLAS'S INSANITY DEFENSE WHERE HE COMMITTED THE OFFENSE WHILE UNDER THE DELUSION THAT HE WAS ACTING IN SELF DEFENSE.

When a defendant moves for acquittal on insanity grounds under RCW 10.77.080, the defendant bears the burden of proving by a preponderance of the evidence that he or she was insane at the time of the offense with which he or she is charged. *See also* RCW 10.77.030(2); RCW 9A.12.010(2); *State v. Wicks*, 98 Wn.2d 620, 621-22, 657 P.2d 781 (1983). If the defendant's motion to acquit is denied, the question of insanity may be submitted to the trier of fact in the same manner as other factual issues. RCW 10.77.080.

In determining whether to reverse a jury's rejection of an insanity defense, the court look to see whether, after considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence. *State v. Matthews*, 132 Wn.App. 936, 941, 135 P.3d 495 (2006), *review denied*, 160 Wn.2d 1004 (2007) (citing *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996)).

Washington follows the M'Naghten (M'Naghten's Case, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (H.L.1843)) rule for determining

insanity, which has been codified at RCW 9A.12.010. *See, e.g., State v. Wheaton*, 121 Wn.2d 347, 352 n.2, 850 P.2d 507 (1993) and *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475 n.3, 21 P.3d 707 (2001) (citing *M’Naghten*).

To establish the defense of insanity, it must be shown that:

(1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:

(a) He was unable to perceive the nature and quality of the act with which he is charged; or

(b) He was unable to tell right from wrong with reference to the particular act charged.

(2) The defense of insanity must be established by a preponderance of the evidence.

RCW 9A.12.010.

To establish an insanity defense, the defendant must prove by a preponderance of the evidence that, at the time he committed the act, he was unable to perceive the nature and quality of the act or to tell right from wrong with reference to the act. RCW 9A.12.010.

The “right from wrong” prong is not about whether the defendant believes the act is illegal or whether it was actually illegal, but rather wrong in a moral sense. In *State v. Crenshaw*, 98 Wn.2d 789, 793, 659 P.2d 488 (1983), the Court held that the “right from wrong” prong, looking back to *M’Naghten*, has a legal and moral component. Courts in

a number of jurisdictions have concluded under the *M'Naghten* rule that a defendant who is incapable of understanding that his act is morally wrong is not criminally liable merely because he believes the act is unlawful. See, e.g., *People v. Skinner*, 39 Cal.3d 765, 704 P.2d 752 (1985); *People v. Wood*, 12 N.Y.2d 69, 76, 236 N.Y.S.2d 44, 187 N.E.2d 116 (1962); *People v. Schmidt*, 216 N.Y. 324, 338-340, 110 N.E. 945 (1915); *State v. Kirkham*, Utah 2d 108, 110, 319 P.2d 859 (1958); cf. *State v. Allen*, 231 S.C. 391, 398, 98 S.E.2d 826 (1957); *State v. Carrigan*, 93 N.J.Law 268, 273, 108 A. 315 (1919).

The test is whether the defendant's acts, in light of his delusion, are morally wrong. In *M'Naghten*, Addressing the House of Lords, Lord Chief Justice Tindal described the relationship of delusional states to legal insanity:

The fourth question which your Lordships have proposed to us is this: "If a person, under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?" To which question **the answer must, of course, depend on the nature of the delusion:** but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, **we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment.** If his delusion was that the deceased had inflicted a serious

injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

Emphasis added. *M'Naghten's Case*, 8 Eng.Rep. 718, 10 Cl. & Fin. 200, 211 (1843).

Justice Cardozo, in an opinion for the New York Court of Appeal, eloquently expressed the underlying philosophy:

In the light of all these precedents, it is impossible, we think, to say that there is any decisive adjudication which limits the word 'wrong' in the statutory definition to legal as opposed to moral wrong.... The interpretation placed upon the statute by the trial judge may be tested by its consequences. A mother kills her infant child to whom she has been devotedly attached. She knows the nature and quality of the act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the sacrifice. *It seems a mockery to say that, within the meaning of the statute, she knows that the act is wrong.* If the definition propounded by the trial judge is right, it would be the duty of a jury to hold her responsible for the crime. We find nothing either in the history of the rule, or in its reason or purpose, or in judicial exposition of its meaning, to justify a conclusion so abhorrent. ...

Knowledge that an act is forbidden by law will in most cases permit the inference of knowledge that, according to the accepted standards of mankind, it is also condemned as an offense against good morals. Obedience to the law is itself a moral duty. If, however, there is an insane delusion that God has appeared to the defendant and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong.

People v. Schmidt, 216 N.Y. 324, 338-40, 110 N.E. 945, 949-50 (1915).

In this case, the evidence is uncontroverted that Douglas was acting under a delusion that Sam was about to kill him unless he first acted to shoot him—he believed he was acting in self defense. RP2 69, RP8 1348, RP10 1634, 1636. Both the trial judge and the prosecutor used an incorrect legal standard to evaluate whether Douglas understood that this act was “wrong” because they did not understand that it is not whether the act itself was legal or whether Douglas himself believed the act was illegal.

The question is whether society would judge that Douglas’s act in response to this delusion was morally wrong. The answer to that question is that it is not morally wrong to act in defense of your life. *See* RCW 9A.16.020(3). It is irrelevant whether Douglas knew about self defense as legal justification. It is also irrelevant whether an actual self defense claim existed.

M’Naghten makes clear that the right-versus-wrong test asks not whether *the defendant* believed he was justified based on his delusional view of reality, but whether *society* would judge his actions a moral response to his delusions. *See Crenshaw*, 98 Wn.2d at 797 (“[I]n discussing the term ‘moral’ wrong, it is important to note that it is society’s morals, and not the individual’s morals, that are the standard for judging moral wrong under *M’Naghten*.”) Although in some fact patterns,

such as in *Crenshaw*, moral wrong and legal wrong are one and the same, this is not true in the case of self defense, which is a legal justification to a crime but where, clearly, that legal justification did not actually exist. See *M'Naghten*.

The undisputed evidence is that Douglas was acting in the deluded belief that he was about to be killed by Sam when committed the offense. RP2 69, RP8 1348, RP10 1634, 1636. It is further undisputed that this delusion was caused by a mental disease or defect. RP3 64, RP8 1366, RP10 1637.

Yet the trial judge denied the motion for acquittal because Douglas's statements afterward seemed to show that he believed what he did was against the law. RP3 88-89. This is not the correct legal standard. Furthermore, Dr. Gallagher also based her conclusion that Douglas could distinguish right from wrong on the same statements, even though she also testified that Douglas believed he was acting in self defense. RP2 73, RP8 1402-3, 1410. Therefore, the trial judge and the state's expert used the wrong legal standard in evaluating whether Douglas could distinguish right from wrong. Under *M'Naghten*, which forms the basis for our statutory insanity defense, Douglas could not distinguish right from wrong because his delusional belief was that he was acting in self defense.

Therefore his motion for acquittal by reason of insanity should have been granted.

Further, because the evidence is undisputed that Douglas acted in the delusion of self defense, he should not have been convicted of second degree murder by the jury, but rather should have been acquitted by reason of insanity.

ISSUE 2: THE DEFENDANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO PROPOSE AN INSTRUCTION DEFINING THE “RIGHT AND WRONG” ELEMENT OF THE INSANITY TEST FOR THE JURY.

In this case, the State argued and the State’s expert testified (and the trial judge concluded) that if Douglas said he knew his act was against the law, then he is deemed to know the difference between right and wrong. But, as discussed in detail above, that is not the correct test where the defendant commits the act under a delusion that he is acting in self defense. This was the defense’s argument below, yet the defense never proposed a jury instruction that would have told the jury how to apply the “right and wrong” prong to this situation. Without an instruction, the jury did not know the law and could not understand the defense’s argument.

Effective assistance of counsel is guaranteed by both the U.S. Const., Sixth Amendment, and Wash. Const., art. 1, sect. 22. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984);

State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). The Sixth Amendment right of a criminal defendant to have a reasonably competent counsel is fundamental and helps ensure the fairness of our adversary process. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). This fundamental right to effective counsel ensures that a defendant's conviction will not stand if it was brought about as a result of legal representation that fell below an objective standard of reasonableness. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985 (2000).

To prevail, the defendant must show that his attorney was “not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment” and that the errors were so serious as to deprive him of a fair trial. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467,487, 965 P.2d 593 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The first element is met by showing counsel's conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the case would have been different. *Pirtle*, 136 Wn.2d at 487 (citing *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)). A “reasonable probability” means a

probability “sufficient to undermine confidence in the outcome.” *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case.” *Strickland*, 466 U.S. at 693.

An attorney’s failure to propose an appropriate jury instruction can constitute ineffective assistance. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001). But to establish ineffectiveness on this basis, the defendant must show that he is entitled to the instruction. *State v. Johnston*, 143 Wn.App. 1, 21, 177 P.3d 1127 (2007). A defendant is entitled to have the jury instructed on his theory of the case if there is evidence to support the theory. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

In *State v. Crenshaw*, the court held that no further jury instruction beyond the statutory definition of legal insanity was necessary. 98 Wn.2d 789, 804-5, 659 P.2d 488 (1983). However, in *Crenshaw*, the facts differed from this case in that the Crenshaw’s actions were both immoral and illegal and were not taken in self defense. *Id.* Furthermore, the court held in that case that the instruction given permitted the defense to argue their theory of the case. *Id.*

The court ruled in this case that the defense could not argue the law of self defense to the jury and could not argue that Douglas was acting in self defense, but could introduce evidence that his delusional belief was that he was acting in self defense. RP4 574. However, the jury was not instructed that a person who takes a life in the delusional belief that he was acting in self defense is, according to M’Naghten, legally incapable of distinguishing right from wrong. That meant that the defense could not argue its theory of the case, which was well founded in the law, to the jury.

If the jury had been properly instructed, there the undisputed evidence here is that Douglas shot Sam in the delusional belief that Sam was going to kill him. RP2 69, RP8 1348, RP10 1634, 1636. Although Douglas did not know about a legal self defense justification, and believed he had committed murder, it is undisputed that he also believed he was not wrong in taking that action because he believed he would otherwise have been killed. RP2 73, RP8 1402-3, RP8 1410, RP8 1435-36, RP10 1714, RP10 1637. Under M’Naghten, that meant that he was unable to distinguish right from wrong. But the jury did not know that—they were not instructed. Therefore, the error in failing to submit an additional jury instruction in this error would have changed the result in this case. Consequently, this error merits reversal.

ISSUE 3: THE TRIAL COURT DEPRIVED DOUGLAS OF HIS DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL JURY BY DEPRIVING HIM OF A FULL OPPORTUNITY TO CONDUCT VOIR DIRE.

The defense moved for mistrial when the judge cut off voir dire unexpectedly. RP 3/12/09 533. The defense objected to the arbitrary cutoff, arguing that by limiting voir dire, the court had denied the defense the opportunity to inquire into potential juror prejudice in issues of race, gangs and self defense. RP 3/12/09 533-34. The court denied the motion, ruling that gangs and self defense were not at issue. RP 3/12/09 549.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right of an accused in all criminal prosecutions to trial by an impartial jury. *Turner v. Murray*, 476 U.S. 28 36 n. 9, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). The Washington Constitution provides a similar guaranty. Wash. Const., art. I, sect. 3 and 22. Under the laws of Washington, the right to a jury trial includes the right to an unbiased and unprejudiced jury. *State v. Parnell*, 77 Wn.2d 503, 507, 463 P.2d 134 (1969). “The failure to accord an accused a fair hearing violates the minimal standards of due process.” *Parnell*, 77 Wn.2d at 507. “[M]ore important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it.” *Parnell*, at 508.

The process of voir dire in selecting an impartial jury is stated in CrR 6.4(b), which provides:

A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

Trial courts have discretion in determining how best to conduct voir dire. *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); see *United States v. Sarkisian*, 197 F.3d 966 (9th Cir.1999); see *State v. Laureano*, 101 Wn.2d 745, 758, 682 P.2d 889 (1984) (citing *State v. Robinson*, 75 Wn.2d 230, 231-32, 450 P.2d 180 (1969)). Voir dire “is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.” *Ristaino v. Ross*, 424 U.S. 589, 594-95, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976), (quoting *Connors v. United States*, 158 U.S. 408, 413, 15 S.Ct. 951, 39 L.Ed. 1033 (1895)). Although adequate voir dire is not easily the subject of appellate review, it is necessary to discover bias in prospective jurors and to assist the trial court in its responsibility to remove prospective jurors who will not be able to follow its instructions on the law. *Rosales-Lopez v. United States*, 451

U.S. 182, 188, 101 S.Ct. 1629, 68 L.Ed. 2d 22 (1981).

The trial court's abuses its discretion when the record reveals that the court's actions prejudiced the defendant's right to a fair trial by an impartial jury. *See United States v. Jones*, 722 F.2d 528, 529 (9th Cir. 1983). An accused has the right to carefully examine prospective jurors on voir dire to an extent necessary to afford the accused "every reasonable protection." *Laureano*, 101 Wn.2d at 758 (quoting *State v. Tharp*, 42 Wn.2d 494, 499, 256 P.2d 482 (1953)).

In *Ham v. South Carolina*, the Supreme Court explained the kind of circumstances that would require questioning prospective jurors to ensure the jury remains "indifferent" and able to render an unbiased decision. The defendant was an African American civil rights activist accused of marijuana possession. His defense was that law enforcement officers had framed him in retaliation for his civil rights activities and because of his race. The trial court denied the defendant's request to ask questions of prospective jurors concerning racial prejudice. The Supreme Court held the defendant was constitutionally entitled to question prospective jurors about their possible racial prejudice when the factual circumstances of the case raised a "reasonable possibility" that racial prejudice could influence the jury. *See Ham*, 409 U.S. at 525-29.

In this case, the trial judge informed the parties at the end of the

second day that they would not be permitted any further questioning. RP 3/12/09 537. The defense informed the court that it still had the areas of race, gangs and self defense to inquire into and asked for time the next morning to inquire into those areas. RP 3/12/09 537. The defense was not permitted any further time and the court proceeded to jury selection. RP 3/12/09 549.

The issue of self defense in particular was central in this case, not because there was an affirmative defense, but because Douglas' delusional belief was that he was acting in self defense. It was therefore essential that the defense be permitted to inquire into this area with the potential jurors. If, for example, a juror believed it is always immoral to take another life, even where such an act is done in defense of your own life, then this would impact that juror's ability to decide this case without bias. Therefore, limiting the defense's ability to inquire into potential bias of the jurors in this area deprived the defendant of his right to a fair and impartial jury. It was therefore an abuse of discretion to arbitrarily limit voir dire by cutting it off before the defense had the opportunity to inquire into potential bias regarding self defense.

ISSUE 4: THE TRIAL COURT ERRED BY DENYING THE MOTION TO DISMISS THE AGGRAVATING FACTOR OF “FORESEEABLE IMPACT”, WHERE THE FACTOR IS SO VAGUELY DEFINED THAT IT IS UNCONSTITUTIONAL.

The defense moved to dismiss the State’s proposed aggravating factor—foreseeable impact on others—because this factor is vaguely defined. RP 3/9/09 48. The trial court denied the motion. RP 3/9/09 71-73; 3/12/09 563-64.

The legislature has included in the list of factors that can justify an exceptional sentence that: “The offense involved a destructive and foreseeable impact on persons other than the victim.” RCW 9.94A.535(3)(r). There is no further definition or elaboration in the statute. The jury instruction tracks the statute exactly: “Whether the crime involved a destructive and foreseeable impact on persons other than the victim.” CP 114.

The due process doctrine of “void for vagueness” has two central principles: (1) criminality must be defined with sufficient specificity to put citizens on notice as to what conduct they must avoid; and (2) legislated crimes must not be susceptible to arbitrary and discriminatory application. *State v. Brayman*, 110 Wn.2d 183, 196, 751 P.2d 294 (1988); *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 1858-59, 75 L.Ed.2d 903 (1983). When a criminal statute fails to abide these requirements, the

statute is void under the Sixth Amendment and a conviction obtained under it is reversed. *See, e.g., Bellevue v. Miller*, 85 Wn.2d 539, 536 P.2d 603 (1975).

There is a strong presumption in favor of the statute's validity. *State v. Maciolek*, 101 Wn.2d 259, 263, 676 P.2d 996 (1984). Thus, "the party challenging the constitutionality of a legislative enactment has the burden of proving it is unconstitutionally vague . . . beyond a reasonable doubt." *Maciolek*, at 263.

In the past, the Washington Supreme Court has held that sentencing statutes cannot be challenged under due process vagueness challenge because there is no constitutionally protected liberty interest. *State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003). But, since *Baldwin* was decided, the U.S. Supreme court held that the constitutional protections of due process do apply to sentencing factors that increase the penalty beyond the standard range. *See Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt); *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (For *Apprendi* purposes, the "statutory maximum" is the maximum sentence a judge may impose based

solely on facts admitted by the defendant or reflected in the jury's verdict).

Although the Supreme Court has not directly addressed whether a vagueness challenge can be made under the Sixth Amendment to a sentencing statute, *Apprendi* and *Blakely* make it clear that the sentencing enhancement is to be treated as an element of the offense for purposes of the Sixth Amendment. As the Court held in *Apprendi*: "Merely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." 530 U.S. at 476. Therefore, *Baldwin* must be reconsidered in light of *Apprendi* and *Blakely* and the protections of the Sixth Amendment, including protection against vagueness, be applied.

The statute in this case is so broad that it gives the defendant no clear guideline of the exact "impact" the statute is aimed at. Now that juries are making the factual determinations with regard to aggravating factors, it is ever more important that the legislature clearly define the terms used to avoid arbitrary application of the statute. The application of this statute is bound to be wildly divergent depending on the jury's interpretation of such broad guidelines. This statute is an example of a court-created aggravating factor that was hastily made statutory after *Apprendi* and it has not been clearly defined for juries.

This statute is so broad and ill-defined that it fails both prongs of

the vagueness protection—it does not give fair warning of what conduct is prohibited and it is so vaguely defined that it will lead to arbitrarily different application. Therefore, 9.94A.535(3)(r) is unconstitutionally vague and therefore this section of the statute must be found void and the exceptional sentence imposed based on this statute reversed.

ISSUE 5: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY’S FINDING THAT THIS CRIME CAUSED A COMMUNITY IMPACT THAT IS DISTINCTIVE FROM EVERY OTHER MURDER AND THAT THIS IMPACT WAS FORESEEABLE TO THE DEFENDANT.

Even if the court finds that the statute is not impermissibly vague, then the exceptional sentence must still be reversed because there is insufficient evidence that this crime caused an impact on witnesses that is distinguishable from every other murder.

The “foreseeable impact” factor was previously recognized as a non-statutory aggravating factor. *See State v. Johnson*, 124 Wn.2d 57, 74-75, 873 P.2d 514 (1994). Courts have placed limitations on its application that show the wildly divergent definitions of the “impact.” For example, mere presence of others at the scene is insufficient—there must be a showing of actual emotional impact. *See State v. Morris*, 87 Wn.App. 654, 666, 943 P.2d 329 (1997); *State v. Coats*, 84 Wn.App. 623, 627-28, 929 P.2d 507 (1997) (finding of exceptional impact on victims deemed clearly erroneous where nothing in the record indicated heightened impact

on victims). The “impact” must be on people who were actually present. *See State v. Mulligan*, 87 Wn.App. 261, 941 P.2d 694 (1997). One court held that the “impact” on adult onlookers in a public place is not adequate—the impact must be on children, not adults. *State v. Way*, 88 Wn.App. 830, 834-35, 946 P.2d 1209 (1997).

In *State v. Way*, the court held that there was insufficient evidence to support this aggravating factor when Way had gone to a community college and shot his estranged wife as she exited the college building and also shot another student who had driven into the parking lot during the shooting. The Court notes that: “many students on campus heard or saw some of the shooting while taking cover for their safety.” *Way*, at 832. In sum, the Court held that: “substantial evidence in the record supported the court’s finding of a psychological impact on students,” who were “traumatized.” *Way*, at 833.

Nevertheless, the Court held that: “an exceptional sentence based on community impact requires that defendant’s actions impact others in a distinctive manner not usually associated with the commission of the offense in question.” 88 Wn. App. at 834. The Court held that:

the circumstances of this crime do not set it apart from many other murders committed in the presence of others. Violent crimes undoubtedly may cause psychological trauma to those unfortunate enough to witness the events. But that would be true if the crime were committed on a

public street, in a theater or shopping mall, or in many places of employment. The fact that this crime was committed in a public place in the presence of adult onlookers is not a basis for imposing an exceptional sentence.

Way, at 834.

In this case, the State was permitted, over defense objection, to inquire into the “impact” of the shooting on witnesses. RP5 817, 819, 846, 901-2, RP6 952, RP6 969. From this testimony, the following evidence of “impact” was submitted:

- Attendance after the event was light and some kids did not return.³ RP4 624, RP5 847.
- The principal and a teacher said they were personally affected, but did not elaborate. RP5 846-47, RP6 969. Neither of these witnesses actually saw the shooting. RP6 970.
- The assistant principal testified that he thinks about what happened often and worries whether school is a safe place. RP4 625. The other assistant principal testified that it gave her a feeling of insecurity at school. RP5 901-2.
- A teacher said hearing the shooting from inside his classroom caused him to have insomnia and to be afraid of his students. RP6 952-53.

³ There was no evidence connecting the reduction in attendance to this event.

- A student witness testified that seeing the shooting made her feel fearful and mortal. RP4 684.

In sum, only one child testified and her “impact” was that she felt “fearful” and “mortal” following the event. All of the other witnesses were adults who could only testify to a vague sense of insecurity.⁴ The “impact” the State proved here is a far less than the evidence of impact shown in *Hall*, where there was ample evidence of “trauma.” In every murder, there is an impact on witnesses. The State did not prove in this case that the impact was more severe than the average murder that takes place in public. It is not sufficient for the jury to imagine the impact—it must be proved by the State through actual testimony. The testimony in this case did not meet the burden of proof beyond a reasonable doubt. Therefore, the jury’s finding of a “foreseeable impact” is not supported by substantial evidence and must be reversed.

ISSUE 6: CUMULATIVE ERROR DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

The combined effects of error may require a new trial even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the

⁴ At least two witnesses cried when they were asked about the personal impact and the jury reacted with their own emotional response. RP6 985-86.

defendant a constitutionally fair trial under the federal and state constitutions. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996).

In this case, the court's errors in failing to instruct the jury on the correct standard to use in deciding whether Douglas was capable of distinguishing right from wrong when he acted in the delusional belief of self defense, and the defense attorney failing to propose jury instructions that would have correctly defined the standard for the jury, combined to deprive the defendant of a fair trial. This case involved an area of law that is complicated and the correct legal standard was never adequately explained or applied in this case. But for these errors, the jury would have acquitted Douglas on his insanity defense (see above). Therefore, cumulative error in this case deprived the defendant of his right to a fair trial and his conviction must be reversed.

VI. CONCLUSION

Douglas Chanthabouly suffers from paranoid schizophrenia. His severe and incurable illness, created in him a paranoid delusion that Sam Kok was about to kill him. In response to this delusion, Douglas shot Sam. Under the legal precedent defining legal insanity, Douglas was legally insane at the time he committed this offense. Therefore, it was

error for the court to fail to enter a verdict of not guilty by reason of insanity.

Furthermore, Douglas was denied a fair trial by the failure of his defense counsel and the court to instruct the jury on the correct legal standard for determining if a person understands the difference between right and wrong. His right to a fair and impartial jury was also violated by the judge's arbitrary cut off of voir dire, preventing the defense from inquiring into potential bias in the area of self defense.

Finally, the exceptional sentence imposed here was erroneous because the statute defining "foreseeable impact" is unconstitutionally vague and the evidence was insufficient to support application of this factor in this case.

For the reasons above, Douglas Chanthabouly asks that the court reverse his conviction for second degree murder and enter an acquittal by reason of insanity.

DATED: March 1, 2010

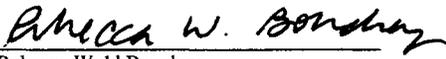
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CERTIFICATE OF SERVICE

I certify that on March 1, 2010, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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