STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 2

Case No. 2015AP000922

State of WISCONSIN,
Plaintiff-Respondent,
v.
TERRY SHANNON,
Defendant-Appellant.

No. 2006-CF 594.

On Appeal from the Judgment of Conviction, the Hon. Faye M. Flancher, Presiding, and the Decision and Order Denying Shannon's Motion for Post Conviction Relief pursuant to 974.06, the Hon. Faye M. Flancher Presiding, Entered in the Racine County Circuit Court.

Brief of Defendant-Appellant

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STATEMENT OF ISSUES

Is Shannon entitled to a new trial, under the standards governing ineffective assistance of counsel, trial court error or the interest of justice, when his trial counsel, appellate counsel, the State's attorney and the trial court are all in apparent agreement that a decision to waive lesser included offenses somehow negates the State's obligation to prove a lack of actual beliefs in the need for self-defense in a trial for First Degree Intentional Homicide, despite the undisputed fact that self-defense was put in issue by the trial evidence? The trial court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As this case turns on well settled law, oral argument is not requested. Publication is requested to clarify the circuit court's instructional obligations in trials for first degree intentional homicide, once self-defense is put in issue by the trial evidence.

STATEMENT OF THE CASE

This is a criminal prosecution. Terry Shannon seeks relief from a Judgment of Conviction following a Jury Trial entered on 12/18/2009 in the Circuit Court of Racine County, the Hon. Faye M. Flancher presiding. After his jury trial, Shannon was sentenced to Life in Prison without the eligibility for parole on Count 1 and 5 years in State Prison and 3 years extended supervision on Count 2.

Count 1: 940.01(1)(a)1st-Degree Intentional Homicide Felony A

Count 2: 941.20(3)(a) Discharge Firearm from Vehicle Felony F Consecutive to Count 1.

Shannon further appeals from the denial of his Motion for Post Conviction Relief Pursuant to 974.06 on 1/29/2015 in the Circuit Court of Racine County, the Hon. Faye M. Flancher presiding.

STATEMENT OF FACTS

Because this appeal turns on an error of law, the Statement of Facts will be brief. On May 7, 2006 Terry Shannon argued with a man named Bennie Smith at IHOP, in which Bennie wanted to fight and Terry did not. (See transcript 10/7/2009 p30-11:32-12) Shortly thereafter, Bennie, Calvin, Kinte and Courtney left the IHOP, they drove to "where Terry Shannon baby mama was living." See ***State v. Shannon*** [Antonio], 2014 WI App 1, 352 Wis. 2d 247, 841 N.W.2d 581 The Shannon's allegedly drove up to the other car in an attempt to clear the air, after Antonio called Courtney Taylor. (See transcript 10/7/2009 p39-4:40-10) Courtney testified that he pulled his gun before the Shannon's pulled up, but that it was Antonio who shot first and then he immediately returned fire. (See transcript 10/7/2009 p43-20:44-20) It is undisputed that shots were fired by both Antonio and multiple parties from Bennies car, possibly even the fatal shot that killed Bennie Smith, whose death was the catalyst of this prosecution.

Terry and Antonio Shannon were both charged on May 11, 2006, with 940.01 first-degree intentional homicide and 941.20(3)(a) discharging a firearm from a vehicle, both charges as party to a crime. The joined cases proceeded to trial and the jury found both brothers guilty of both charges. On January 22, 2010, Shannon was sentenced to life imprisonment without parole.

Post conviction counsel, Susan Alesia filed no post conviction motions challenging the effectiveness of trial counsel, erroneous jury instructions or anything else, choosing instead to file a direct appeal on December 16, 2011, denied on December 5, 2012 in Appeal No. 2011AP1825-CR, in which the claims made were failure to disclose an opinion of the medical examiner, and the admission of evidence found at their Shannon's residences at a later date. Neither claim was anywhere near the magnitude of the claim below.

SUMMARY OF THE ARGUMENT

Terry Shannon was convicted of First Degree Intentional Homicide, with an abundance of self-defense evidence in issue, without the jury being asked if the State had satisfied its third element of the offense: If the State had disproven **actual** beliefs in the need for self-defense, beyond a reasonable doubt. By statute and case law alike, the existence of actual beliefs in the need for self-defense precludes such a finding.

ARGUMENT

Because this case turns on well settled law, Shannon will open by providing same:

A. Excepts of applicable law

Because this Motion and Petition is being brought under **974.06**; there is no time limit. The only limitation under **974.06** is that Shannon must be "in custody under sentence of

a court." 974.06(1) See ***State v. Bell***, 122 Wis. 2d 427, 362 N.W.2d 443 (Ct. App. 1984). Shannon meets this criterion.

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Wisconsin State Statutes Provide:

940.01 First-degree intentional homicide.

(1) Offenses. (a) Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.

(2) Mitigating circumstances. The following are affirmative defenses to prosecution under this section which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:

(a) *Adequate provocation.* Death was caused under the influence of adequate provocation as defined in s. 939.44.

(b) *Unnecessary defensive force.* Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.

(c) *Prevention of felony.* Death was caused because the actor believed that the force used was necessary in the exercise of the privilege to prevent or terminate the commission of a felony, if that belief was unreasonable.

(d) *Coercion; necessity.* Death was caused in the exercise of a privilege under s. 939.45(1).

(3) Burden of proof. When the existence of an affirmative defense under sub. (2) has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt under sub. (1).

Genova v. State, 91 Wis. 2d 595, 606-07, 283 N.W.2d 483, 488 (Ct. App. 1979) provides that:

> It is axiomatic that the burden of persuasion can never be shifted from the state to the defendant in a criminal ***607** case. Equally unequivocal is the principle that the state has the burden of proving, by a quantum evidence described as beyond a reasonable doubt, every element of the crime for which the defendant is prosecuted. ***Genova v. State***, 91 Wis. 2d 595, 606-07, 283 N.W.2d 483, 488 (Ct. App. 1979)
>
> The important point to be made is that a "presumption" in a criminal case is constitutionally impermissible if:
>
> 1. It shifts the burden of persuasion to the defendant; or
>
> 2. It relieves the state of its burden to establish beyond a reasonable doubt every element of the crime or negate every defense; or
>
> 3. It relieves the jury of its duty to find every element of the crime beyond a reasonable doubt from its own independent consideration of the evidence.
>
> Each of the above results is proscribed statutorily by sec. 903.03(3), Stats.

Self-defense as an excuse or justification is a privilege that "impose[s] a heavy burden on prosecutors." ***State v. Dundon***, 226 Wis. 2d 654, 24 (1999). Once self-defense is raised, "the only issue at trial [is] the defendant's state of mind." ***State v. Daniels***, 160 Wis.2d 85, 92 (1991). In a prosecution for 940.01, and despite its label as an affirmative defense, once self defense is raised by the evidence, "the lack of the defense becomes an element of the crime." ***State v. Schmidt***, 2012 WI App 113, ¶ 8, 344 Wis. 2d 336, 343, 824 N.W.2d 839, 843 (citing ***State v. Head***, 2002 WI 99, ¶¶ 106–07, 255 Wis.2d 194, 648 N.W.2d 413;)

The Wisconsin Supreme Court has provided all of the guidance necessary to rule on this appeal in ***State v. Head***, 2002 WI 99, 255 Wis. 2d 194, 246-48, 648 N.W.2d 413, 438-39. It should be noted that Justice Prosser authored the Decision, that there was no dissent whatsoever, and that "*The Importance of Clarity, supra* at 1347" referenced therein was authored contemporaneously with the enactment of the revised homicide statutes, and is therefore persuasive authority when construing the statutes, even if the Supreme

Court hadn't relied on it specifically in ***State v. Head*** as you will see below:

> ¶ 111 Debra Head argues that a Defendant attempting to place self-defense in issue should be required to meet a burden of production, not a burden of persuasion. We agree. This court addressed the procedure for raising a mitigating circumstance with an objective threshold in ***State v. Felton***, 110 Wis.2d 485, 329 N.W.2d 161 (1983), a case in which a Defendant claimed that she had killed her husband in the "heat of passion." The court stated that:
>
> The burden upon the Defendant where a heat-of-passion defense is projected is merely the burden of production as opposed to the burden of persuasion. *It is* ***247** *for the accused to come forward with some evidence* in rebuttal of the state's case—evidence sufficient to raise the issue of the provocation defense. The burden of persuasion, of course, always remains upon the state.
>
> ****439** ***Felton***, 110 Wis.2d at 507, 329 N.W.2d 161 (emphasis added).[14]
> ¶ 112 We concluded in *Felton* that to place a mitigating factor in issue, there need be only "some" evidence supporting the defense. *Id.*
>
> ¶ 113 This court expounded on the "some"-evidence standard in ***State v. Mendoza***, 80 Wis.2d 122, 258 N.W.2d 260 (1977),[15] where we examined the showing required to warrant the submission of a manslaughter instruction to the jury. The court stated that in determining whether to submit an instruction regarding imperfect self-defense, the circuit court must determine whether a reasonable construction of the evidence will support the Defendant's theory "viewed in the most favorable light it will 'reasonably admit of from the standpoint of the accused.' " *Id.* at 153, 258 N.W.2d 260 (quoting ***Ross v. State***, 61 Wis.2d 160, 172, 211 N.W.2d 827 (1973)). The court concluded that if the evidence viewed most favorably to the Defendant supported the Defendant's theory, it was the role of the jury to determine whether to believe the Defendant's theory. *Id.* In other words, "if under any reasonable view of the evidence the jury could have a reasonable doubt as to the nonexistence of ***248** the mitigating circumstance, the burden has been met." ***The Importance of Clarity, supra*** at 1347. *See* ***State v. Head***, 2002 WI 99, 255 Wis. 2d 194, 246-48, 648 N.W.2d 413, 438-39

"In other words, **if under any reasonable view of the evidence the jury could have a reasonable doubt as to the nonexistence of the mitigating circumstance, the burden has been met.**" In the case at bar, the burden of production

for "some evidence" of a need for self-defense is as undeniable as it is abundant. So much so that the State argued, and the Court of Appeals ultimately held, that there was such an abundance of Self-defense put in issue, that it was harmless error when the trial court erroneously excluded additional Self-defense evidence. (The following passage is taken from the codefendant, the Defendant's Brother's appeal.)

> "We conclude the error was harmless. First, the jury heard other testimony, including from Logan, that at least Bennie was out to get Terry. It heard that Kinte "got into it" with Terry at the IHOP, that the situation "escalated," that Terry and Bennie got into a confrontation in which both were "aggressive," that Bennie "wanted to fight" Terry but Terry repeatedly said, "I ain't gonna fight," and that when Bennie, Calvin, Kinte and Courtney left the IHOP, they drove to "where Terry Shannon baby mama was living." *See* ***State v. Shannon***, 2014 WI App 1, 352 Wis. 2d 247, 841 N.W.2d 581 review denied, 2014 WI 14, 843 N.W.2d 708

Hence, there can be absolutely no doubt the Defendant's burden of production to show that Self-defense was put in issue by the trial evidence was met. This is all that is required in trials for First Degree Intentional Homicide to trigger the State's obligation to disprove the mitigating circumstance beyond a reasonable doubt. In this case, the mitigating circumstance may have been an ***unreasonable*** belief in the need for self-defense or an unreasonable belief that the amount of force used was necessary:

> **940.01(2)(b)** *Unnecessary defensive force.* Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.

The trial evidence, "viewed most favorably to the Defendant", most certainly provides reasonable doubt as to the nonexistence of this mitigating circumstance, but no jury was ever asked this pivotal question. In order to secure a lawful conviction for first degree intentional homicide, the burden was on the State to prove the Shannons *felt* no such threat, despite the fact that no party disputes there were bullets flying in both directions. The final arbiter of this fact

was required to be the Jury in a trial for First Degree Intentional Homicide.

Arguments to the contrary were thoroughly vetted in ***State v. Head***, with at least one theoretic example that makes the Shannon's actions seem very reasonable indeed, by comparison:

> "Assistant Attorney General David J. Becker, a member of the Committee, explained the proposed amendment, stating that it was raised in reference to a hypothetical situation in which a paranoid psychotic killed a girl scout delivering cookies because he unreasonably believed she was carrying not cookies but a bomb. *Id.* at 10–11. Becker explained that "under the WDAA proposal, one could still escape liability for first degree murder by believing one's life to be in danger, regardless of the reasonableness of that belief. However, ***241** there must be a reasonable belief that the victim has unlawfully interfered with his person." *Id.* at 11. Becker expressed his belief that the then-current manslaughter statute applied only to actions undertaken "in the exercise of the privilege of self-defense." *Id.*****436**
>
> ¶ 97 The Judicial Council entertained a motion to insert the words "in the exercise of the privilege of self-defense" into the draft of the second-degree intentional homicide statute. The motion was defeated, 6 to 5 with 1 abstention. *Id.* at 13.
>
> ¶ 98 The issue was raised again in a letter from Attorney General Bronson C. La Follette to Senator Lynn S. Adelman. La Follette wrote that he supported the "comprehensive revision of Wisconsin's homicide statutes prepared by the Judicial Council." Letter from Attorney General Bronson C. La Follette to Lynn S. Adelman, Chairperson of the Senate Committee on Judiciary and Consumer Affairs (August 16, 1985). However, La Follette asked Senator Adelman's committee to restore the phrase "in the exercise of the privilege of self-defense or defense of others." La Follette wrote:
>
> I make that suggestion because of concern about the person who kills another having no objective basis for resorting to self-defense of any sort (e.g., the paranoid psychotic who shoots down the girl scout approaching his front door, believing the box of cookies she is carrying to be a bomb intended to destroy him). The Judicial Council's proposal would appear to allow such a person to escape conviction of first-degree intentional homicide (present first-degree murder). Application of the mitigating circumstance of unnecessary defensive force ought at least to be conditioned on a reasonable belief that some unlawful interference with the person, though perhaps not one justifying

> resort to deadly force, was threatened. The restoration of the ***242** words, "in the exercise of the privilege of self-defense or defense of others," is designed to impose that requirement.
>
> ¶ 99 Tellingly, even though both the Wisconsin District Attorneys Association and the Department of Justice specifically asked to amend the proposed second-degree intentional homicide revision by inserting a "reasonable belief of an unlawful interference" threshold, neither the Judicial Council nor the legislature inserted such a requirement. Instead, the Judicial Council's bill was introduced without language establishing a reasonableness threshold, and the legislature enacted it in the same form. In effect, the legislature accepted the Judicial Council's bill in toto. *See* ***State v. Head***, 2002 WI 99, 255 Wis. 2d 194, 240-42, 648 N.W.2d 413, 435-36

B. Shannon met his burden of production of some evidence of a self-defense, but the Jury was not properly instructed that the State must disprove actual beliefs in the need for same.

Now clearly, if "the paranoid psychotic who shoots down the girl scout approaching his front door, believing the box of cookies she is carrying to be a bomb intended to destroy him" can't be lawfully convicted of 1st Degree, because of his own subjective beliefs, neither could these Defendants be. Since the State chose to charge the Shannons with 1st-Degree Intentional Homicide, rather than 2nd Degree, the State took on the additional burden of proving the non-existence of the Shannon's own subjective beliefs that their actions were necessary, regardless of whether or not they were reasonable.

It is beyond a reasonable doubt that the State did NOT meet this burden in the case at bar, because the jury was only instructed as follows:

> The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself.
>
> A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offence.

(See transcript 10/13/2009 137:22-138:8, Appendix A)

This is a clear cut error of law, which relieved the State of its statutory burden of disproving the defendant's actual beliefs in the need for self-defense, as required in trials for first degree intentional homicide. "To properly exercise its discretion, a circuit court must apply the correct standard of law to the facts at hand." ***State v. Head***, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413. And there can be no doubt that the wrong standard of law was applied to the single most pivotal aspect of this case.

Head goes on to drive this point completely home:

> Based on the plain language of Wis. Stat. § 940.05(2), supported by the legislative history and articulated public policy behind the statute, we conclude that when imperfect self-defense is placed in issue by the trial evidence, the state has the burden to prove that the person had no **actual** belief that she was in imminent danger of death or great bodily harm, or no **actual** belief that the amount of force she used was necessary to prevent or terminate this interference. If the jury concludes that the person had an **actual but unreasonable** belief that she was in imminent danger of death or great bodily harm, the person is not guilty of first-degree intentional homicide *See* ***State v. Head***, 2002 WI 99, 255 Wis. 2d 194, 244, 648 N.W.2d 413, 437 (**Emphasis added**)

It should be noted that Debra Head shot an unarmed man, twice, who was laying in his bed several feet away, under covers, because she feared he would close that distance, take away the gun she'd been pointing at him since he woke up, and shoot her with it. He hadn't even threatened to do so. Debra Head was entitled to let a jury decide if the State had disproven beyond a reasonable doubt her state of mind, no matter how unreasonable her beliefs may have been. So too were the Shannons, but just like in ***State v. Head***, the jury was not asked this most pivotal question. Unless and until a jury decides if State has disproven Terry Shannon's State of mind regarding his "actual beliefs" in the need for self-defense, he cannot be lawfully convicted of First Degree Intentional Homicide in the State of Wisconsin.

D. The circuit court should have used Jury Instruction 1014.

Avoiding this error would have been no more difficult than applying the appropriate Jury Instruction when the jury was charged: WIS JI-CRIMINAL 1014 reads very clearly:

> **State's Burden of Proof**
>
> Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following **three** elements were present.
>
> **Elements of First Degree Intentional Homicide that the State Must Prove**
>
> 1. The defendant caused the Death of Benny Smith. Cause means that the defendant's act was a substantial factor in producing the death.
>
> 2. The defendant acted with the intent to kill Benny Smith or another human being.
>
> 3. The defendant did not **actually** believe that the force used was necessary to prevent imminent death or great bodily harm to himself. (See Exhibit B) (**emphasis added**)

WIS JI-CRIMINAL 1014 goes on to explain the meaning of an Actual Belief:

> **Actual Belief That The Force Used Was Necessary**
>
> The third element of first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself. This requires the State to prove either:
>
> 1) that the defendant did not **actually** believe he was in imminent danger of death or great bodily harm; or
>
> 2) that the defendant did not **actually** believe the force used was necessary to prevent imminent danger of death or great bodily harm to himself.
>
> When first degree intentional homicide is considered, the reasonableness of the defendant's belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide.
> (**emphasis added**)

E. Relative Reasonableness Was Irrelevant, and this was an easy fix.

In the case at bar, no party requested that second degree intentional homicide be considered, so the reasonableness of the defendant's beliefs were irrelevant, or rather should have been irrelevant. "If the jury concludes that the person had an actual but unreasonable belief that she was in imminent danger of death or great bodily harm, the person is not guilty of first-degree intentional homicide." *See* ***State v. Head***, 2002 WI 99, 255 Wis. 2d 194, 244, 648 N.W.2d 413, 437. A proper modification of the jury instructions to account for the lack of lesser included offenses being requested, merely required a deletion of the last sentence:

> "Whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide."

F. The trial court in the case at bar skipped the 3rd element of first degree intentional homicide altogether. Instead, it informed the jury:

> "Before you may find the defendants guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following **two** elements were present: One, the defendant caused the death of Benny Smith. Cause means that the defendant's acts were a substantial factor in producing the death. And two, that the defendants acted with the intent to kill Benny Smith. (See transcript 10/13/2009 134:19-135:2, Appendix A) (**emphasis added**)

As near as the trial court's instructions came to charging the jury with the third required element was as follows:

> "Self-defense is an issue in this case for both charges. The law of self-defense allows the defendant to threaten or intentionally use force against another only if the defendant believed that there was an actual or imminent unlawful interference with the defendant's person and the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference and the defendant's beliefs were **reasonable**.

> The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant **reasonably believed** that the force used was necessary to prevent imminent death or great bodily harm to himself.
>
> A belief may be **reasonable** even though mistaken. In determining whether the defendant's beliefs were **reasonable**, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.
>
> The **reasonableness** of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.
>
> The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense. (**emphasis added**) 10/13/2009 134:19-135:2, Appendix A

Clearly these instructions would command any jury to believe that the State need only disprove the existence of **reasonable**, rather than **actual** beliefs as required by statute for a first degree intentional homicide conviction, once self-defense is put in issue by the trial evidence. Meanwhile, if even one juror believed Shannon actually, but unreasonably believed his actions were necessary, Shannon could not be found guilty of first degree intentional homicide.

G. Ineffective assistance of trial counsel:

Incorporating the argument above in its entirety to provide a backdrop, trial counsel was apparently oblivious to the fact first degree intentional homicide trials require the State to disprove **actual** beliefs once self-defense is put in issue by the trial evidence:

> Q. Okay, you didn't specifically recall. Now, my next question to you is in a self-defense-- a pure self-defense argument, you presented to the jury a jury instruction or requested and it was accepted that a jury instruction required the jury to analyze this in terms of what a reasonable person would do under the circumstances that Mr. Shannon faced at the time, correct?
>
> A. True.

Q. And I believe during our investigation of this and in preparation for this Machner hearing, you had truthfully admitted that up until the point that we presented State v. Head to you that you never heard of that case before?

A. You are referring to the conversation, the short conversation I had with your assistant? He just said you ever heard of State v. Head and I think I said no, but and I certainly understood the concept of imperfect self-defense, perfect self-defense, that sort of thing.

(Transcript 1/29/2015 p51-24:52-19, Appendix C)

Clearly, trial counsel was not in fact familiar with "that sort of thing", or he would never have failed to object to a jury instruction that speaks exclusively about **reasonable** beliefs in the need for self-defense for a crime that requires the State to disprove **actual** beliefs. ***State v. Head*** is controlling law on the distinction, and no attorney could be effective in a self-defense first degree homicide case without becoming very familiar the controlling law on same. Suffice to say, it was clearly ineffective assistance of counsel to not request an appropriate jury instruction.

H. Ineffective assistance of appellate counsel:

Incorporating the arguments above in their entirety to provide a backdrop, appellate counsel was apparently oblivious to the fact first degree intentional homicide trials require the State to disprove actual beliefs once self-defense is put in issue by the trial evidence:

When asked by the State,

Q. "Attorney Alesia, you would agree that we don't get to the imperfect self-defense unless there's a lesser included that's asked for correct?

A. Yes. (Transcript 1/29/2015 p32:4-7, Appendix D)

This is a pivotal error of law made clearer on cross examination:

Q. Okay, and would you agree with me that when an analysis of perfect versus imperfect self-defense becomes an issue, it's the State of Wisconsin through the District Attorney's Office is required to disprove both imperfect and perfect self-defense?

A. I don't think a defendant is required to request a lesser included. I think a defendant can take an all-or-nothing approach to a trial.

Q. My question to you is when an imperfect versus perfect self-defense analysis is required—
A. Uh-huh.
Q. – it becomes the obligation of the State to disprove both imperfect and perfect self-defense?
A. No, I don't think so. If the defense doesn't want a second degree before the jury, I don't think they're required to do that, which would take the State out of its obligation as well. (Transcript 1/29/2015 p34:3-19, Appendix D)

This answer betrays a fundamental misunderstanding of the applicable law. As demonstrated above, the State's burden to disprove both perfect and imperfect self-defense is triggered by statute, by the mere introduction of plausible self-defense. Once self-defense is put in issue by the trial evidence, disproving self-defense becomes an element of the crime. It is not triggered or un-triggered by the defendant's choice not to pursue lesser included offenses, as "whether these beliefs are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide."

Had appellate counsel realized that the State did in fact have the burden of disproving both reasonable and unreasonable self-defense, she no doubt would have recognized the jury instructions as fatally flawed.

Even if we entertain the idea that a Defendant could reasonably choose to waive his right to have the State satisfy this third element of the crime of first degree intentional homicide; there would still need to be a colloquy on the record of the defendant knowingly and intelligently waiving same, and no such colloquy was performed. In reality however, this could never be knowingly and especially ***intelligently*** waived, as the defendant would receive no benefit whatsoever for the waiver, and would in fact be harmed.

Because this fatal flaw in the jury instructions is clearly stronger than those raised on direct appeal, the procedural bar indicated in ***State v. Escalona-Naranjo***, 185 Wis.2d 168 (1994) does not apply.

I. The Trial Court relied on the same erroneous interpretation of law as trial counsel:

Incorporating the arguments above in their entirety to provide a backdrop, the trial court was apparently oblivious to the fact first degree intentional homicide trials require the State to disprove actual beliefs once self-defense is put in issue by the trial evidence:

The trial court seemed to answer only as to what was presented orally, ignoring the 36 pages of argumentation Shannon had submitted pro se, as well as the more pointed 8 pages of argumentation provided by the undersigned in demonstrating the error.

The only explanation provided for the failure to charge the jury with the appropriate 3rd element of the crime, was:

> When he [trial counsel Birdsall] took this case Mr. Shannon had just withdrawn his plea to a second degree reckless homicide. It was clear from the start that this was an all or nothing case. Mr. Shannon and his brother decided to withdraw the pleas. The State didn't even object to the withdrawal of the pleas, and so we proceeded to trial.
>
> Mr. Shannon made it very clear to Mr. Birdsall that the case would go to trial. Mr. Birdsall testified that under all of the circumstances it would have been ridiculous trial strategy to ask for a lesser included in this case, as he testified the lesser included would have gotten the first degree intentional homicide down to a second degree intentional homicide, the penalty for which is still greater than the second degree reckless homicide that Mr. Shannon chose to walk away from.
> (Transcript 1/29/2015 p80-7:81-4, Appendix E)

From this explanation, we can only deduce the trial court was under multiple misconceptions of law.

1. The trial court apparently believes the State's burden of proof is not decided by statute, but rather by whether or not a lesser included offense is requested. The undersigned could find no case law to support a conclusion that the state's burden to disprove actual beliefs turns on whether or not the defendant employs an "all-or-nothing" approach. Neither trial nor appellate

counsel, nor the State or the trial court provided any such thing. Attempts to locate all-or-nothing strategies in Wisconsin, applied to First Degree Intention Homicide in this or any similar way proved fruitless.

2. The trial court, and trial counsel, both seemed to believe it would be "ridiculous" for a defendant that chooses not to plea **guilty** to a lesser offense might still wish to limit his exposure on a greater offense to which he's plead **not guilty**. With all due respect, that belief is "ridiculous", to the point the undersigned can only guess at what may have caused it? Is trial court and counsel under the impression that in order to escape a first degree intentional homicide conviction via second degree intentional homicide, one must admit guilt to the latter?

   One can certainly understand, knowing the State's heavy burden of disproving actual beliefs required for a first degree intentional homicide conviction, that a party might wish to forgo all lesser included offenses, in recognition that all lesser included offenses would all have smaller burdens of proof, which in turn would increase his or her chances of being convicted of something.

   But the way this trial unfolded, under seemingly all of the parties' erroneous interpretation of law, the State obtained the harshest penalty allowed by law in the State of Wisconsin, even as the jury instructions failed to put the State to its **actual** burden of proof on first degree intentional homicide. No one would or could knowingly and intelligently choose to waive a second degree intentional homicide instruction if doing so **actually** lowered the State's burden of proof from that of first to second degree intentional homicide. There could not possibly be a "strategic decision" made to that effect.

3. With respect to appellate counsel, apart from correctly identifying Attorney Alesia's credentials and pointing out she did some work on the case, the trial court provided only the following:

> She also agrees that you don't get to the imperfect self-defense unless the lesser included is asked for and it is a valid trial strategy at times not to ask for it.
> (Transcript 1/29/2015 p82:5-8)

This conclusion is technically completely accurate, but not in the way the trial court intended it. Whereas, the trial court was clearly operating under the mistaken belief that the State need only disprove reasonable beliefs, unless a lesser included is asked for; the truth is that reasonableness of beliefs is only relevant if the lesser included is indeed asked for.

4. Because of the trial court's erroneous interpretation of law, it never got to the second prejudice prong of the Strickland test. Prejudice: Shannon is currently serving a life sentence for First Degree Intentional Homicide despite the fact trial counsel and the trial court allowed him to be convicted of this crime without ever asking the jury if the State had met its actual burden to disprove **actual** beliefs in the need for self-defense.

CONCLUSION

For all of the above reasons, Shannon prays this court will set aside his unlawful conviction as a matter of well settled law.

Dated this 22nd day of February, 2016 in Milwaukee, Wisconsin.

Thomas W. Kurzynski
State Bar #1017095

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State v. Terry Shannon
Appeal Number 2015AP00922
Court of Appeals District 2

I, Thomas W. Kurzynski, certify that this brief is identical to the paper version submitted on February 22, 2016.

Date February 22, 2016

Signature _____
"s/" Thomas W. Kurzynski
Attorney for the Defendant-Appellant

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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