19-8882

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE DONALD HATT JR. — PETITIONER
(Your Name)

vs.

STATE OF WASHINGTON — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION 1
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

GEORGE DONALD HATT JR.
(Your Name)

1830 Eagle Crest Way
(Address)

Clallam Bay, WA. 98326
(City, State, Zip Code)

N/A
(Phone Number)

## QUESTIONS PRESENTED

1. Did the First Aggressor Jury Instruction, issued sua sponte, violate due process by relieving the state of its burden to disprove self-defense?

2. Does the record reflect an insufficiency of evidence to support the juries verdict of guilt?

3. Did the error, recognized by the court of appeals, for the introduction of a first aggressor instruction sua sponte, create prejudice affecting the substantial rights of the petitioner?

4. Did the court of appeals decision discourage the reasonable use of force against home invaders and encourage homeowners to shoot to kill, even where the homeowner concludes that more measured action is reasonable?

## LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

Burks v. United States,437 U.S.1,98 S.Ct.2141,57 L.Ed.2d 1 (1978)

Chapman v. California,386 U.S.18,87 S,Ct.824,17 L.Ed.2d 705 (1967)

Jackson v. Virginia,443 U.S.307,99 S.Ct.628,61 L.Ed.2d 560 (1970)

Waddington v. Sarausad,555 U.S.179,190,129 S.Ct.823,172 L.Ed.2d 532 (2009)

Williams v. Taylor,529 U.S.362,405,120 S.Ct.1495,146 L.Ed.2d 389 (2000)

In re Winship,397 U.S.358,90 S.Ct.1068,25 L.Ed.2d 368 (1970)

United States v. Gaudin,515 U.S.506,510,115 S.Ct.2310,132 L.Ed.2d182 (1993)

Coher v. Thomas,825 F.3d 1103,1112 (9th Cir.2016)

United States v. Nevils,598 F.3d 1158,1167 (9th Cir.2010)

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## INDEX TO APPENDICES

## TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the State Supreme court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

## JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was 4/1/2020. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Amendment XIV; provides due process protection to the accused against conviction except upon proof beyond a reasonable doubt. It is for this reason that the sufficiency of the evidence is a question of constitutional law. A petitioner may challenge the substance of the state courts findings and attempt to show that those findings were not supported by substantial evidence.

28 U.S.C.S. §2111 (1976); applies to jury instructions as well as other errors which affect the substantial rights of the accused.

U.S. Constitutional Amendment V; when there is no adequate proof of an illegal shooting to withstand constitutional sufficiency challenge, the verdict must be reversed. Furthermore, the charge of murder must be dismissed with prejudice. Re-trial on the charge would violate Double Jeopardy.

Burks v.United States,437 U.S.1,98 S.Ct.2141,57L.Ed.2d 1(1978) and Chapman v.California,386 U.S.18,87 S.Ct.824,17L.Ed.2d 705(1967) are cited as remedies to this writ.

Williams v.Taylor,529 U.S.362,405,120 S.Ct.1495,146L.Ed.2d 389(2000) is cited as a Standard of Review.

## STATEMENT OF THE CASE

1. Undisputed facts-Andrew Spencer invaded George Hatt's property and violently assaulted Jared Fincher, a member of Mr.Hatt's household, beating and kicking him,bloodied, to the ground.

In the cold dark of night, Andrew Spencer arrived, uninvited, to the Granite Falls property of George Hatt. Spencer exited his vehicle and immediatly began assaulting Jared Fincher, eventually towering over him and kicking him as he lay on the ground near unconciousness and bleeding. On the drive over to Hatt's home, Spencer asked the person in the car with him, Ms.Lowenberg, how she dealt with confrontation. 5/3/17RP at 827-29, 841-43 (opening statements);5/16/17RP at 95-97, 123-25 (closing); see 5/5/17RP at 1079-80, 1109.

As Fincher himself testified, that night, after dark, he was working on his vehicle when Spencer arrived, exited his car, and attacked him unprovoked, taking Fincher to the ground with numerous punches. Spencer continued to hit and kick him as he tried to crawl away in the mud. Fincher was covered in blood as a result and suffered multiple injuries. 5/3/17RP at 873-74, 876-79; 5/4/17RP at 906-08, 914-15, 972 (testimony of Fincher).

The Court of Appeals described Mr.Hatt's testimony:

[Hatt] saw Spencer approach Fincher with his left hand in the pocket of his hoodie. Fincher and Spencer looked like they were about to shake hands, but Spencer pulled Fincher toward him and hit him with his left hand. Hatt testified that he thought Spencer had a gun in his left hand and had pistol whipped Fincher. He saw Fincher go down and went to his safe to retceive a gun. Hatt turned on a television that showed a live feed from the outside security cameras. On the screen, he could see Fincher scrambling on his hands and knees toward the stairwell while Spencer continued to punch and kick him. Hatt ran out the door to the exterior stairwell and saw Spencer kick Fincher in the side while Fincher was on the ground.

He saw a lot of blood on Fincher. Hatt still thought Spencer had a gun in his left hand that was aimed down, so he started yelling, "Hey, hey, hey," as he came down the stairs. Spencer turned toward Hatt, and Hatt fired a shot into the air. Hatt testified that Spencer got an angry look on his face, took a step toward him, and seemed to be raising his left hand. Hatt fired a second shot at Spencer. After Spencer went down, Hatt moved to kick the gun out of Spencer's hand and realized that Spencer had a black glove on his hand and was holding a black metal bar about one inch in diameter and four to six inches long. (Decision at pp.7-8)

2. Instruction and conviction. The State charged Mr.Hatt, inter alia with premeditated murder of Andrew Spencer. CP 1102-03;see CP 527-32. The jury was instructed on self-defense, on lawful use of force in defense of another, and in resistance to a felony, including assault with a deadly weapon.CP 384-87,388-92,394. Then, after both the state and defense had rest their case, and NOT at the request of the state, but on the trial court judge's sua sponte decision, the jury was given a first aggressor instruction. CP 393. The jury found Mr.Hatt guilty of premeditated first degree murder. CP 361. Under these instructions, it was permitted to do so even if it found that Hatt was acting in defense of another.

3. The Court of Appeals had reasoned that Spencer may have paused his violent attack at the moment Mr. Hatt came down the stairs and fired a warning shot,and therefore, that warning shot was first aggression.

The trial court reasoned that if, Hatt's first shot, a warning in defense of another, caused Spencer's focus to "turn on him [Hatt]," then Hatt had done an act likely to provoke a belligerent response.5/16/17RP at 16-18, 31("I cannot see how giving a self defense instruction I wouldn't be obliged also to give the first aggressor instruction.")5/16/17RP at 31. The Court of Appeals ruled that although the judge was wrong believing it was required to give a first aggressor instruction, that the instruction was not in error.see Decision at pp.19-20.

The Court of Appeals reasoned that Hatt would be the first aggressor if Mr.Spencer had momentarily stopped kicking the bleeding, prone victim at the time Mr. Hatt fired a warning shot to ward off the assailant:

> The jury could have credited both Fincher's testimony that the fight was over and Hatt's testimony that Spencer turned toward him after the first shot and he feared for his life, in which case the jury could have concluded that he provoked the need to act in self-defense. Decision, at pp.20.

The problem with the Court of Appeals reasoning is that they base it on "conflicting evidence...whether Hatt initiated the altercation." In fact, Hatt testified that less than five seconds transpired from the moment he ran down the stairs untill both shots had been fired. Finchers testimony revealed that any period of time that the attack was over was at best a split second before he heard the gun shots. Keep in mind that Fincher was in the fetal position, barely concious and did not see what happened.5/3/17 RP at 878-881; 5/4/17RP at 909-910.
Counsel for Mr.Hatt did object to the judge's sua sponte issue of the instruction.

## REASONS FOR GRANTING THE PETITION

1. Did the first aggressor jury instruction, issued sua sponte, violate due process by relieving the state of its burden to disprove self-defense?

Petitioner would contend that the answer is yes. That is, the instruction was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the state of its burden of disproving self-defense. Waddington v. Sarausad, 555 U.S. 179, 190, 129 S.Ct. 823, 172 L.Ed.2d 532 (2009). Just as the trial court judge incorrectly believed he was required to give the jury a first aggressor instruction because Mr. Hatt fired a warning shot, So too is it likely that the jury applied the same incorrect line of reason. This is why the state is not entitled to a first aggressor instruction which vitiates valid self-defense claims, based on the defendant's lawful use of force, such as in defense of another. That being the case, it is not reasonable to presume that a jury would automatically know that an act engaged in, in defense, cannot also be an act of first aggression. In other words, the alleged first aggression act cannot be part of the defense used in the act of defending. This is why first aggressor instructions should be given sparingly- only in the breach. In deciding this case, the Court of Appeals reiterated the principle that courts should use care in giving an aggressor instruction because it can "affect the State's burden to disprove a claim of self-defense beyond a reasonable doubt." Decision at pp.18. That is precisely what happened here, the jury instructions, tainted by the erroneous application of the aggressor instruction, prevented the jury from reaching Hatt's highly viable defense and ultimately relieved the State of its burden to disprove self-defense.

2. Does the record reflect an insufficiency of evidence to support the juries verdict of guilt?

Petitioner would contend the answer is yes. That is, the evidence, taken as a whole, was insufficient to support the juries verdict. Rather than drawing their conclusion from any reasonable inference, the states case hinged on an absured line of speculation. United States v. Gaudin, 515 U.S.506,510,115 S.Ct.2310,132 L.Ed.2d 182 (1993); United States v. Nevils, 598 F.3d 1158,1167 (9th Cir.2010).

A fact based challenge of evidence "fall into two main catagories: First, a petitioner may challenge the substance of the State courts findings and attempt to show that those findings were not supported by substantial evidence in the state court record. Second, a petitioner may challenge the fact finding process itself on the ground that it was deficient in some material way." Coher v. Thomas, 825 F.3d 1103,1112 (9th Cir.2016).

When we look to the testimony evidence presented by the only three people present; Mr. Hatt 5/15/17RP at 2044-2229; Mr.Fincher5/3/17RP at 873- 5/4/17Rp at 972; Ms.Lowenberg 5/3/17RP at 827-843, we find that their testimonies are not in conflict with each other. Mr. Hatt sees the assault that Mr.Fincher is experiencing. Ms. Lowenberg expresses the violent nature of Mr.Spencer's visit. The attack upon Mr.Fincher is one sided. It is not a fight. It is unprovoked. Mr. Spencer's presence is uninvited and with malicious intent. It is for these facts that it is unreasonable to assume that Mr.Spencer's brief pause in his violent attack upon Mr. Fincher could be perceived as an end to the violence he perpetuated. An even bigger stretch to comprehend is a guilty verdict of premeditated murder in the first degree. There was no evidence presented that showed Mr. Hatt potentially lured MR.Spencer to his residence. There was no conversation or amount of time that

transpired where one could infere that even the briefest of thought took place to make Mr. Hatt's act in defense of himself and Mr. Fincher a premeditated murder. Only an illogical amount of speculation could lead one to a conclusion that the evidence was sufficient to prove Mr. Hatt initiated the conflict. In re Winship,397U.S.358,90S.Ct.1068,25 L.Ed.2d368(1970);Jackson v.Virginia443U.S.307,99S.Ct.628,61L.Ed.2d560(1970)

3. Did the error, recognized by the Court of Appeals, for the introduction of a first aggressor instruction sua sponte, create prejudice affecting the substantial rights of the petitioner?

Petitioner would contend the answer is yes. That is, under the "harmless error" rule any error by the trial court in a proceeding must be disreguarded unless it affects the "substantial rights of the parties." 28 U.S.C.S. §2111 (1976).

The Court of Appeals also agreed that it was an error to give an aggressor instruction for the reason the trial court expressed. The Court of Appeals also noted that an aggressor instruction is warranted only in few situations, reasoning, "the parties can sufficiently argue their theories of the case without the instruction." Decision, at p.18-20. Nevertheless, the court then went on to say the instruction was warranted because of conflicting testimony.Decision at p20. Accepting the Court of Appeals reasoning as to why the trial courts reason for issuing the first aggressor was erroneous, we will now discuss how the Court of Appeals decision is also not a trivial error, that may have affected the defendant's substantial rights. The Court of Appeals reasoned that the assault upon Jared Fincher was "over" at the time that Mr. Hatt fired the warning shot into the air. The problem with that line of reasoning is that "over" is only that particular moment of time where a pause of milliseconds happened after a continuous barrage of kicks and punches took place. Fincher testified that Spencer paused in his assault and said, "noww we can talk." But this phrase he said was uttered"right around the same time that he heard the shots."

Fincher was in a fetal position on the ground and did not see what was happening. But what he experienced he said happened all at the same time. 5/3/17RP at 878-881; 5/4/17RP at 909-910. There is just no basis for which it is reasonable to assume that Mr. Spencer violent intentions had suddenly become passive and no longer a threat to Mr. Hatt and the other people at his home. It is for this very reason that the first aggressor instruction influenced the jurors with prejudice that affected the substantial rights of the defendant.

4. Did the Court of Appeals decision discourage the reasonable use of force against home invaders and encourage home owners to shoot to kill, even where the home owner concludes that more measured action is reasonable?

Petitioner would contend the answer is yes. That is, Under the Court of Appeals decision in this case they have actively discouraged the measured use of force. If the home owners firing of a warning shot allows the court to give the jury a first aggressor instruction, this will disqualify the defendant from being acquitted even if the jury believed that he ultimately acted in his own self-defense or the defense of another when the attacker, enraged instead of curtailed, then turns on the home owner with an apparent gun in his hand. Home owners would find themselves in a different kind of Hobson's choice. Immediately shoot to kill because a measured display of force would result in a conviction for murder.

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In closing it should be noted that had the defense been notified of an aggressor instruction prior to trial it would have allowed them to present their theory of defense differently. For example: They would have called Lea Espy as a witness. She was present on the night in question as well as being present during previous altercations with Mr.Spencer. Also, the State presented their theory of the case as if Hatt shot Spencer twice. For this reason, counsel for the defense focused on

State's experts to show that the evidence did not reflect that Spencer was shot twice. Having jumped that hurtle and resting their case, the first aggressor instruction was a suprise from out of nowhere. One in which they now could not present a defense against. There was no evidence that Mr.Hatt acted intentionally to provoke an assault from Spencer. In fact, the evidence shows that Hatt's initial conduct in defense of Fincher was a measured action calibrated to stop any further violence with only that force which was necessary. Had the trial court judge been guided by Isbell, Holland, or Curley Rules regarding sufficiency of the evidence, the jury would have not been led to believe that a warning shot in defense of another could be an act likely to provoke a belligerent response.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

George Donald Hatt Jr.

Date: 4/20/20