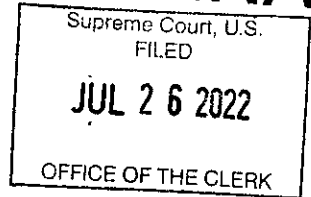


22-5556
No. _____

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

Mehmet Ali Whicker — PETITIONER
(Your Name)

vs.

State of Washington — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Washington State Court of Appeals Division One
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mehmet Ali Whicker
(Your Name)

1313 North 13th Ave
(Address)

Walla Walla, WA 99362
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Should the court be allowed to answer jury questions by reaching into other facets of the law and by applying meaning to a question via the court's perceived implications?

A.) Whicker's right to due process of law was violated when the Trial Court made an extraordinary interruption into the jury's deliberations to sua sponte answer a question that the jury never asked.

B.) Whicker's 14th Amendment right to be free from arbitrary and capricious action was violated when the trial court submitted an instruction to the jury that the State later admitted had no provable value.

LIST OF PARTIES

- ☒ 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

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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).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was June 1, 2022.
A copy of that decision appears at Appendix _____.

☐ 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).

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.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits 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 Washington State Division 1 appeals court appears at Appendix 2 to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment Six
United States Constitution Amendment Fourteen
Washington State Constitution, Article IV § 16
Washington RCW 9A.08.020
Washington RCW 9A.73.030

~~STATEMENT OF THE CASE~~

STATEMENT OF THE CASE

In October of 2019 a jury trial was held in a Washington State King County Superior Court where petitioner faced the charge of second degree felony murder. Counsel for the defense at all times was attorney Jim Conroy from the Northwest Defender's Division. Representing the State at all times was DPA Mary Barbosa from the King County Prosecutor's Office.

The trial lasted for four weeks during which time both parties argued extensively about relevant jury instructions. See Report of Proceedings 562-577, 595-615. One of the elements that the State was required to prove was that "Jesse Gonzales (the decedent) was not a participant in the crime of assault in the second degree." This requirement is in item number three of Washington State's 'to convict' pattern jury instructions, WPIC 27.04. After jury deliberations began the jury sent out a question to the judge about item number three in the to convict instructions asking for the definition of a participant. The State noted that it had forgotten to include a jury instruction defining a participant in the instructions packet. Over the defendant's objection the court gave a supplemental instruction which read: "A participant in a crime is a person who is involved in committing that crime either as a participant or an accomplice. A victim of a crime is not a participant in that crime."

Ultimately, the defendant was convicted of second degree felony murder. He filed an appeal in the Court of Appeals of the State of Washington, Division 1. The Court of Appeals affirmed the defendant's conviction filing its unpublished opinion on June 7, 2021. An order denying motion for reconsideration was entered on July 27, 2021. An order denying petition for review was entered in The Washington State Supreme Court on May 4, 2022.

REASONS FOR GRANTING THE PETITION

Whicker's sixth and fourteenth amendment rights to due process were violated when the trial court implemented a bizarre procedure to remedy a pattern jury instruction the State admits is nonsensical.

2.) Whicker's right to due process of law was violated when the trial court made an extraordinary interruption into the jury's deliberations to ~~sub~~ sponte answer a question that the jury never asked.

Due process requires that the accused receive a fair trial by an impartial jury free from outside influences. *Sheppard v. Maxwell*, 384 U.S. 333, 362, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966) The United States Supreme Court has held that when the consequences of a courtroom practice is that an unacceptable risk is presented of impermissible factors coming into play there is inherent prejudice to a defendant's constitutional right to a fair trial and reversal is required. *Holbrook v. Flynn*, 475 U.S. at 570 L.Ed.2d 525, 106 S.Ct. 1340 (1986) To resolve the jury's question the State offered its own relevant jury instruction that it had previously forgotten. Instead, the trial court interpreted the jury's question in a way that opened up a new phase of arguments about the merits of the case by reaching into other facets of the law.

Generally accepted is the proposition that a trial judge has discretion whether to give further instructions to the jury after deliberations have started. *Wash. Super. Ct. Crim. R.* (f)(1) While the trial court's supplemental instruction

accurately explained the law under Washington State's RCW 9A.08.020 it still violated Whicker's constitutional right to a fair trial by an impartial jury when it made unconstitutional comments on the evidence by not only defining a "participant" but also informing the jury that "a victim of a crime is not a participant in that crime." Clerks Papers 163; RP 684 IRP 239-65

The Court of Appeals relies on *State v. Ransom* in its opinion stating that "no new theory of the case or claim had been introduced because the State had already argued during closing arguments that Goncalves was not a participant in the crime." *State v. Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990) holds that supplemental instructions should not go beyond matters that had been or could have been argued to the jury. However, the Court of Appeals opinion misses a fundamental aspect of the proceedings. The State offered a left out jury instruction that explained the definition of a participant which would have easily resolved the inquiry. Instead, the trial court used the jury's question as an opportunity to insert factual information about the deceased being a victim and conveyed its opinion about the merits of the case when it provided a new jury instruction that neither side had ever asked for or discussed.

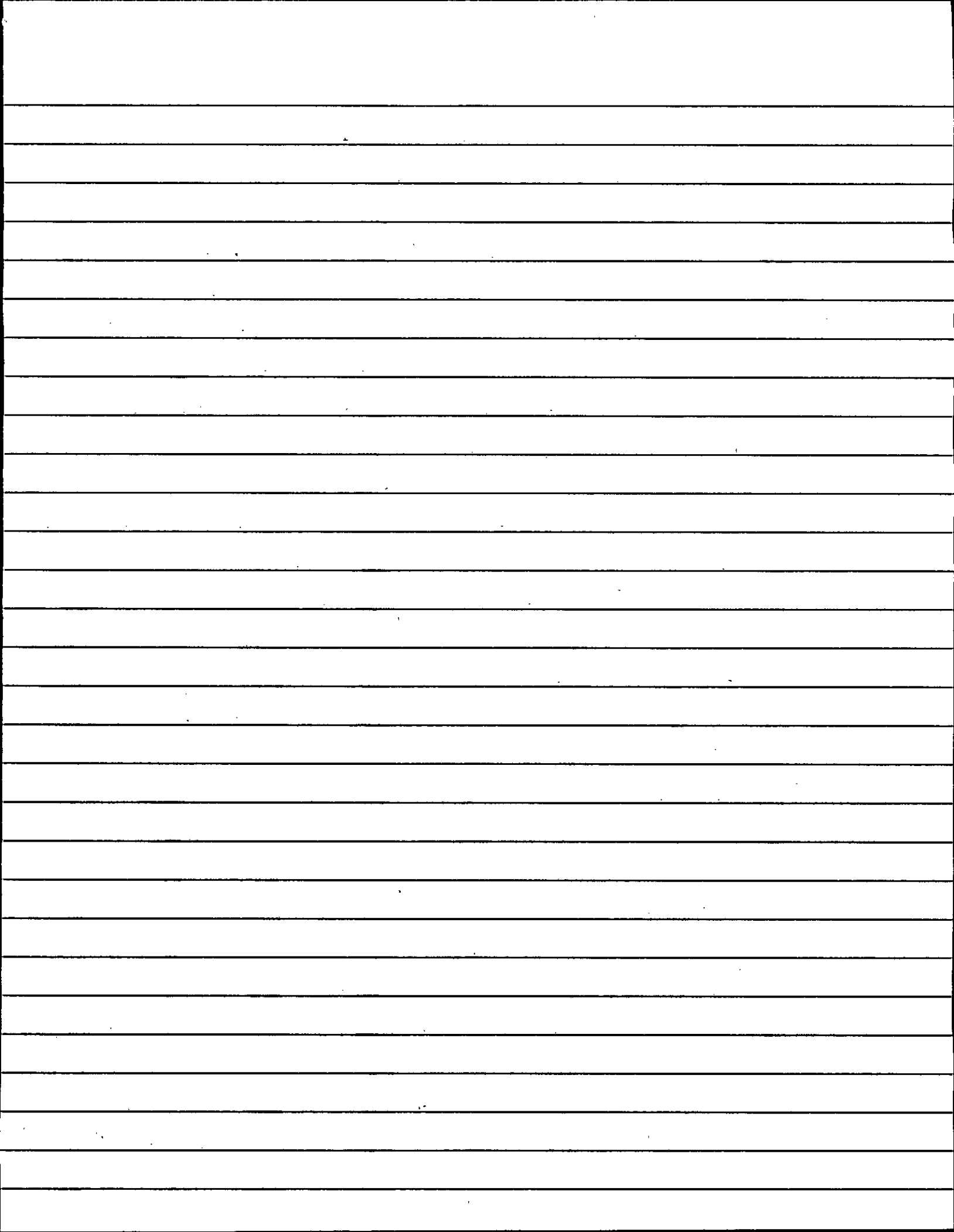
Unconstitutional comments on the evidence include instructions to the jury on factual matters and comments that convey to the jury the court's personal opinions on the evidence. Const. art IV, § 16; *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Throughout the trial Whicker's defense was self defense. In a murder case where the defendant raised a claim of self defense it was for the jury to decide who the victim of the assault was. The trial court

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improperly intervened during jury deliberations when it commented on the evidence by sua sponte answering a different question than the one the jury asked.

Further, the trial court implemented a prejudicial procedure when answering the jury's question. After the jurors had been brought back out from deliberations, resealed and given the supplemental instruction chosen by the court the State then stood up and began to argue the facts of the case again. Counsel for the defense observed this and objected. The court overruled and outside of the jury's presence Mr. Conroy said, "I believe the State started to go back and argue the facts of the case." RP 637-38 In response the trial court said "that's exactly what I intended to happen." RP 638

The Court of Appeals reasoning that the trial court's supplemental instruction did not constitute unconstitutional comments on the evidence because it accurately conveyed a state law is erroneous and condenses the proceedings down into something much neater than what actually took place in the courtroom. To constitute a comment on the evidence it must appear that the court's attitude towards the merits of the cause are reasonably inferable from the nature or manner of the questions asked and the things being said. *State v. Brown*, 31 Wn.2d 475, 197 P.2d 590, 202 P.2d 461 (1948) By intentionally resolving the jury's question in a way that paved a straight path to further explanation on the merits the trial court demonstrated its support for the State's theory that Jesse Gonçalves was the victim of an assault.

It is not beyond the scope of possibility or reasoning that a trial court could convey its opinion by use of the law. After all a court's opinion would have to be structured in legal terms if it were to mean anything at all.



B.) Whicker's 14th Amendment right to be free from arbitrary and capricious action was violated when the trial court submitted an instruction to the jury that the State later admitted had no provable value.

To convict Whicker of felony murder the jury had to find that he caused Conceives death in the course of and in furtherance of a felony or in immediate flight from a felony. The alleged underlying felony in this case was assault in the second degree when Whicker stabbed Conceives with a knife.

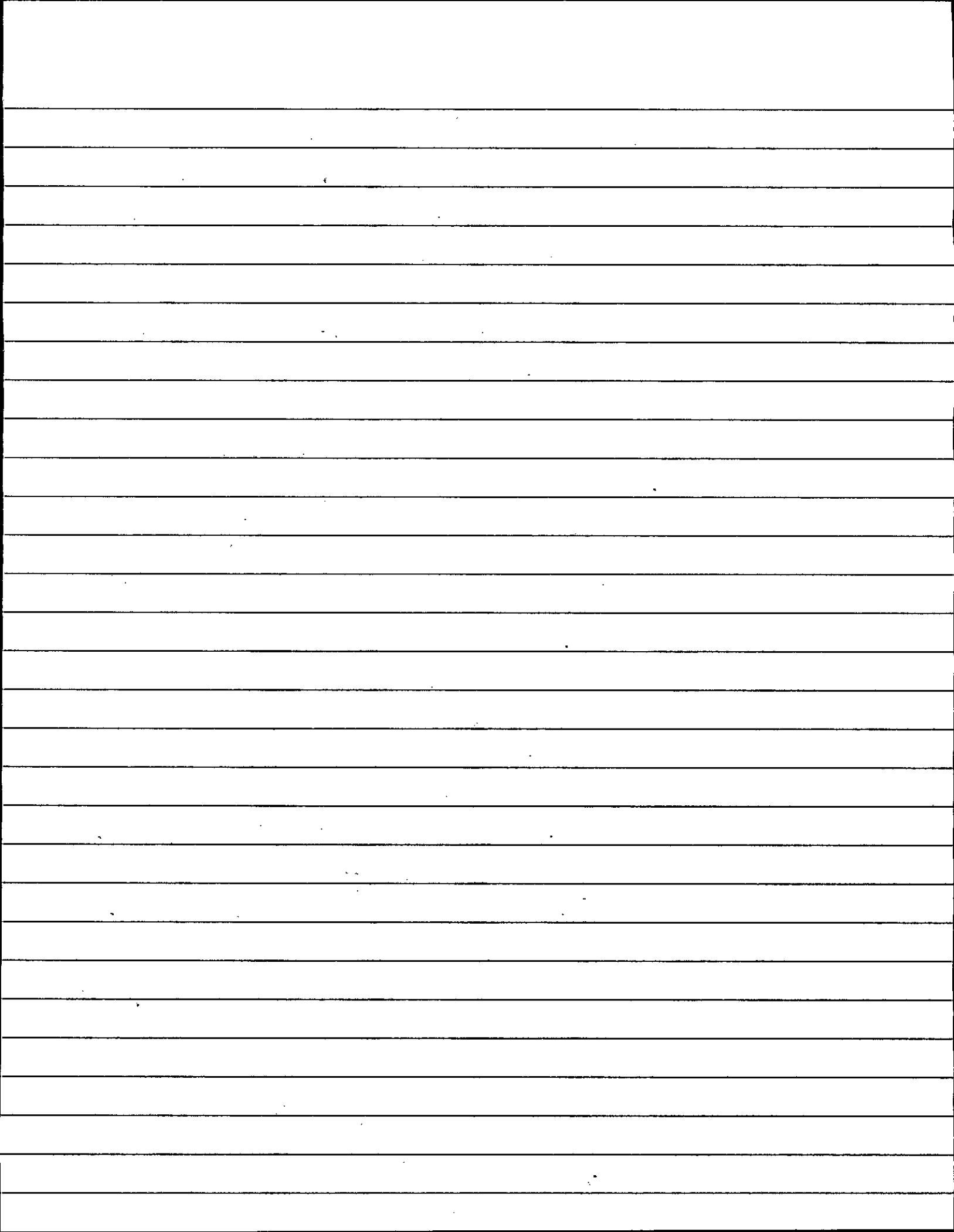
Washington State's "to convict" pattern jury instruction for second degree felony murder with assault in the second degree as the underlying felony reads:

- 1.) That on or about said date the defendant committed assault in the second degree;
- 2.) That the defendant caused the death of said victim in the course of and in furtherance of such crime or in immediate flight from such crime;
- 3.) That said victim was not a participant in the crime of assault in the second degree; and
- 4.) That any of these acts occurred in the State of Washington.

WPIC 27.04

These instructions are the same no matter if the underlying felony in the charge is robbery, rape, assault, etc.

In the context of second degree felony murder where assault in the second degree is the underlying felony item number three in Washington State's to convict jury instruction provides a conflict for any layperson seated on the jury. Essentially it requires



9.
jurors to decide whether or not the decedent in a case took part in the same assault that led to his or her own demise. At best this portion of the instruction is confusing. In this case where the defendant raised a claim of self defense it actually required the court's interpretation when the jury asked a question about a participant.

The essence of due process is protection of the individual against arbitrary action by the government. *Ohio Bell Telephone Co. v. Public Utilities Com.* 301 U.S. 292, 302, 81 L.Ed. 1093, 57 S.Ct. 724 (1937). In *re personal Restraint of Andress* the Washington Supreme Court ruled that second degree assault should not be included within the felony murder statute because it did not make sense with the "in furtherance" language. See *Andress*, 147 Wn.2d 602 (2004). Nonetheless, the State has still been allowed to prosecute second degree felony murder with assault in the second degree as the underlying felony and the 'to convict' jury instruction is the same no matter what predicate offense is alleged.

In its response to the petitioner's brief on direct appeal the State's remarks essentially express that the issue boils down to a simple exercise in logic stating that, "common sense would dictate that Goncalves was not a participant in his own murder." CP Page 40. Jury instructions read as a whole must make the relevant legal standard manifestly apparent to the average juror. *State v. Gilly*, 101 Wn.2d at 595 (quoting *State v. Painter*, 27 Wn.2d 708, 715 620 P.2d 1001 (1980)). The instruction did not ask if Goncalves participated in a murder. It asked if he participated in assault in the second

degree. In a case of self defense this portion of the instruction turns on itself and becomes a minefield. Assuming for the sake of argument that Gonçalves truly was the victim of an assault it would go without saying that he did not take part in his own demise. However, the State's position misses a glaringly obvious point which is that the instruction the jury asked about never actually made sense in the first place because it is tied to a portion of the murder statute that the Washington State Supreme Court previously ruled against in *Andress*.

Nothing in the law is meant to be superfluous. In *State v. Wanrow* the Washington Supreme Court observed that the legislature excluded certain "incoming telephone calls to police and fire stations" from operations of RCW 9A.03.030 which disallows a political subdivision of the state to record a "private communication" between two or more individuals without first obtaining the consent of all participants. The court said in its opinion; "there would be no purpose in enacting this exclusion unless the legislature believed such communications were otherwise within the scope of the section." *State v. Wanrow* 88 Wn.2d 221; 559 P.2d 548 (1977)

Jury instructions are derived from their relevant RCW's which are constructed by Washington State legislature. The standard for clarity in a jury instruction is higher than for a statute. *Illery*, 101 Wash.2d at 595, 682 P.2d 312. If the legislature is proactive enough to amend a statute in preservation of its integrity like in *Wanrow* then the corollary rule should be the elimination of extraneous language from pattern jury instructions when their relevant statutes are

revised and amended. Instead, the Washington legislature has taken curative action to add assault in the second degree to its felony murder statute without any revision to the 'to convict' jury instruction that would more narrowly fit the allegations at trial. The result is that the defendant in a serious case is left susceptible to a set of instructions featuring unnecessary language that serves no purpose.

The right to be free from arbitrary and capricious government action is itself a fundamental right irrespective of any other constitutional right. *Williams v. Seattle Sch. Dist. No. 1* 97 Wn.2d 215, 222, 643 P.2d 426 (1982) accord *Dep't of Corrections v. Appeals Board*, 92 Wn.2d 484, 489, 967 P.2d 6 (1998). In a case with such severe implications the state's actions could not be more arbitrary. First, the trial court provided an instruction to the jury that the State admits is nonsensical. This instruction required further explanation and was in regards to the felony murder statute amended to include assault over the State Supreme Court's ruling. Then, on rebuttal the State argues that the violation of Whicker's rights is just a matter of common sense.

This is not an isolated incident. Second degree felony murder with assault in the second degree as the predicate felony uses the same 'to convict' jury instruction every time. Even when the defense raises a claim of self defense accepted by the court. Therefore, without this court's intervention criminal defendants in Washington State will continue to have their due process rights violated by procedures that undermine fairness and protection.

CONCLUSION

For the above reasons the petition for a writ of certiorari should be granted.

Respectfully submitted

Mehmet Ali Whicker

Mehmet Ali Whicker

This 25th day of July 2022

NOTE: If needed petitioner can provide further information for Report of Proceedings citations and Clerk's papers citations.