

Case NO. 17-6792

IN THE
SUPREME COURT OF THE UNITED STATES

WILFRED WARREN SHEPPARD,
Petitioner

v.

THE STATE OF TEXAS,
Respondents

On Petition for Writ of Certiorari to the , Texas Court of Criminal Appeals,
PD-0470-17, Texas Court of Appeals, Third District at Austin, Case No.
03-16-00702-CR, From The District Court of Bell County, 27th Judicial
District Case No. 72147, Honorable John Gauntt, Judge Presiding

PETITIONER'S SUPPLEMENTAL BRIEF

Wilfred Sheppard
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Telephone: 254-368-6603
Dated: November 20, 2017

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	iii
INDEX OF AUTHORITIES.....	iv
PETITION FOR WRIT OF CERTIORAL.....	v
OPINION BELOW.....	v
JURISDICTION.....	v
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	v
STATEMENT OF THE CASE.....	vi
REASONS FOR GRANTING THE WRIT	
I. The duty of the jury as the executive judge of the facts has been undermined in this case. The court decided on all issues despite my selection of a jury trial.	
II. The Third Court of Appeals decision conflicts with the Criminal Court of Appeals in decisions on the same issue?	
III. Ineffective assistance of counsel.	
ARGUMENT	1
CONCLUSION	20
PRAYER FOR RELIEF.....	20
APPENDIX A: MEMORANDUM OF OPINION	
APPENDIX B: WITNESS STATEMENT AND TRIAL TESTIMONY COMPARISON	
APPENDIX C: MOTION TO DISMISS CRIMINAL MISCHIEF CASE	
FILED: AUG. 17, 2015 DISTRICT COURT, BELL COUNTY	

QUESTION PRESENTED

Whether the Third Court of Appeals ruling on ineffective assistance of counsel and denial of a new trial in my case, conflicts with the decisions of the Texas Court of Criminal Appeals, application of the standard for ineffective assistance of counsel's claims set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

PARTIES TO THE PROCEEDINGS

The sole petitioner here is Wilfred Sheppard

IDENTITY OF TRIAL COURT JUDGE,

The Honorable John Gauntt
Judge 27th District Court
P.O. Box 909
Belton, Texas 76513

PARTIES TO THE JUDGMENT APPEALED

Wilfred Warren Sheppard, Appellant

The State of Texas, Appellee

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RULE 29.6 STATEMENT
(Not Applicable)

INDEX OF AUTHORITIES

Bufkin v. State, 207 S.W. 3d 779,782(Tex. Crim. App. 2006).

Farmer v. State, 411 S.W. 3d 901, 906(Tex. Crim. App. 2013).

Williams v. State, Nos. 03-14-0028----00229-CR, 2016 WL 370019, at *4(Tex. App.---Austin Jan. 27, 2016, no pet)

Harper v. State, 508 S.W.3d 461,467 (Tex. App.---Fort Worth 2015, pet. ref'd).

Stefenoff v. State, 78 S.W. 3d 496,501(Tex. App---Austin 2002, pet. Ref'd). In other words, the harm

Pennington v. State, 54 S.W. 3d 852,856 (Tex. App.----Fort Worth 2001, pet ref'd)

Trotty v. State, 787 S. W. 2d 629,630 (Tex. App.-Ft. Worth 1990)

Parker v. State, 2014 WL 436176.*n.15(Tex-App.2014)

PETITION FOR A WRIT OF CERTIORARI

I, Wilfred Sheppard, respectfully petitions for a writ of certiorari to review the judgment of the Third Court of Appeals, Austin Texas in No.03-16-00702.

OPINION BELOW

The opinion of the Third Court of Appeals is unpublished.

JURISDICTION

(i) The Third Court of Appeals, issued its initial decision on May 11, 2017.
(ii) The Texas Court of Criminal Appeals refused my Petition for Discretionary Review on June 28, 2017 and denied my Motion for Rehearing on September 13, 2017. (iv) This Court has Jurisdiction under 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides in relevant part: "The trial of all crimes, except in cases of impeachment, shall be jury."

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

28 U.S.C. : 1291 provides in relevant part: “The courts of appeal (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States....”

STATEMENT OF THE CASE

I was indicted for criminal mischief. A jury found me guilty and made an affirmative criminal mischief finding. The trial court assessed punishment at 12 months confinement in state jail.

Upon submission to the Court of Appeals, I contend that my trial counsel was ineffective for failing to request an instruction on self defense/necessity because the damage caused was a result of repelling an assault initiated by the complainant.

The Court of Appeals rejected my arguments cited under controlling precedent in *Vasquez v. State*, 830 S.W. 2d 948 (Tex.Crim.App.1992), finding there was no error of the trial court to charge the jury of my right to self defense/necessity to repel an assault.

I filed a petition for discretionary review in the Texas Court of Criminal Appeals, which was refused on June 28, 2017 and a motion for rehearing which was denied on September 13, 2017. A mandate was issued by the

ARGUMENT

**TO THE HONORABLE JUSTICES,
UNITED STATES SUPREME COURT:**

Pursuant Rule 15, Supreme Court Rules, I submit this Supplemental brief to my petition for Writ of Certiorari for the courts review.

**I. THE MEMORANDUM OF OPINION RENDERED BY THE
THIRD COURT OF APPEALS CONTAINS A CRUCIAL FACTUAL
ERROR WHICH APPEARS TO MISAPPLY THE APPLICATION OF
A STATUTE: SECTION 9.22 "NECESSITY."**

The Memorandum of Opinion contains crucial factual error, which I believe leads to the misapplication of the above stated statute.

1. **The Court contends:** that my reliance on *Vasquez* is misplaced, because I freely admitted to hitting or running over Timothy's motorcycle and, thereby, *initiating* the criminal conduct at issue, before Timothy allegedly threatened to get his gun in response to Sheppard's own actions.
2. **The Court contends:** None of the testimony showed that Sheppard's repeated crashing in to or driving over Timothy's motorcycle was immediately necessary to avoid imminent harm or that a prudent person in Sheppard's circumstances would believe that it was"

These contentions are *false* in their accusations that, I *initiated the criminal conduct at issue*, the court misconstrues the trial testimony provided in the record, there was "**in fact**" a reasonable belief of an "immediate need" to "avoid imminent harm," from an aggravated assault initiated by Mr. Timothy Garland.

The Court excludes the *initial crime* of, Aggravated Assault, carried out with the use of a "shovel" by Mr. Garland, *prior to* me running over his motorcycle. This is the *critical detail* that changes the charge in the case from a criminal act, to an act of "necessity." Any prudent person would have a defensive reaction if they were assaulted with a "shovel."

The trial testimony provided below shows that, he struck at my vehicle, causing damage, but the major factor is that I occupied my vehicle at the time and the attack was aimed at me, which raised my level of **“threat of imminent bodily harm”** which was near and present. Point being, Garland did not strike at my vehicle because he knew it was empty, he struck it based on the fact that he knew I was in it, and thus, **“threatened me with imminent bodily harm.”** the attack was close and raised my level of a threat. Whether he was successful or not in his attempts, his **“intent”** was clear.

Mr. Garland provoked the act that led to “reasonable belief” that “imminent harm” was clear and present, which led to an “immediate necessity” to self defense, which led to the damage caused to his motorcycle. The **“fact”** that Garland knowingly and intentionally provoked my reaction, should negate the criminal liability I incur in this case.

Three witnesses testify that I did not provoke Mr. Garland’s malicious act. I was not the aggressor in this case. Mr. Pedro Luebanos, specifically testifies that I showed no **“intent”** to damage a motorcycle when I arrived at my jobsite.

This is the **“fact”** misapplied by the Court in this case, I showed no **“intent”** to cause damage to Garland’s motorcycle until I **“reasonably believed”** there was an **intent** to harm me, this directly affects the opinion and the application of the statute. Mr. Garland should be held liable for the result of his aggressive actions.

I present my case to the Honorable Justices as follows:

Tex. Penal Code, Sec. 22.01. (a)(2)

ASSAULT. (a) A person commits an offense if the person:

- (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person’s spouse; or
- (2) intentionally and knowingly threatens another with imminent bodily injury, including the persons spouse; or
- (3) intentionally or knowingly causes physical contact with another when

the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Sec. 22.02.

AGGRAVATED ASSAULT. (a) A person commits an offense if the person commits assault as defined in Sec. 22.01 and the person:

- (1) causes serious bodily injury to another, including the person's spouse; or
- (2) uses or exhibit's a deadly weapon during the commission of the assault.** *(note: in this case a "shovel.")*

Texas Penal Code - PENAL: 6.03 Definition of Culpable Mental States

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Texas Penal Code - 9.31. Self Defense

SELF DEFENSE, (a)(1)(B)

(a) Except as provided in Subsection(b), a person is justified in using force against another when and to the degree the actor reasonably believes the use of force was immediately necessary to protect the actor against the other's use or attempted use of unlawful force. The actor's belief that the force was immediately necessary as described by this subsection presumed to be reasonable if the actor:

(1) Knew or had reason to believe that the person against whom the force was used:

(B) Unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor, from the actor's occupied habitation,

vehicle, or place of business or employment; or

(B)(2) Did not provoke the person against whom the force was used. and

(3) was not otherwise engaged in criminal activity. Other than a Class C misdemeanor that is in violation of a law or ordinance regulating, traffic at the time the force was used.

(b) The use of force against another is not justified:

(1) in response to verbal provocation alone;

(e) A person who has the right to be present at the location where the force is used, who has not provoked the person against whom the force is used, and who is not engaged in criminal activity at the time the force is used is not required to retreat before using force as described by this section.

(f) For the purposes of Subsection (a), in determining whether the actor described by Subsection (e) reasonably believed that the use of force was necessary, a finder of fact may not consider whether the actor failed to retreat.

SELF DEFENSE , THE INSTANT CASE:

1. Mr. Garland admits to striking my vehicle with a “Shovel”(Intentional and Known use of unlawful force).

2. I occupied my vehicle at the time the force was used. (The unlawful use of force was aimed at me, in an **attempt to remove me from my vehicle, ie...it was an attempt to provoke/induce me to get out of my vehicle to pursue his desire for confrontation at that present time.**

3. Witness; Mr. Antonio Martinez, testifies he **heard arguing and **heard the sound** from the impact of the shovel striking my vehicle.(verifies verbal and physical provocation) He also testifies he did not see me approach Mr. Garland in any offensive way. (Evidence I **did not provoke** the assault.) He also testifies that the motorcycle was standing upright and I knocked it down, **after my vehicle was struck.** (evidence I did not strike the first blow..ie....hit Garlands motorcycle first or on purpose.)**

Witness: Pablo Luebanos, testifies he **did not** see me **provoke** the assault, and I **did not arrive** at the jobsite **with intent** to cause damage to a motorcycle. The first thing he heard as I passed by was the loud thump from the shovel striking my vehicle.

Witness: Mr. Brandon Garland, testifies this happened out of the blue, and his father is vocal, and could have said something he did not hear at the time because he was not paying attention.

The exhibits in the record show that I was building a project, permitted by the city of Killeen. (I was at work, and had a right to be at the location. I was not engaged in criminal activity. I was not required to retreat when Mr. Garland assaulted me, and had a right to self defense. I had a reasonable belief that he was there to harm me at the time, and had an “immediate necessity” to defend myself against “imminent harm”.) *Trotty v. State*, 787 S.W. 2d.629,630 (Tex. App.-Ft. Worth 1990) Indeed, “a plea of justification based upon necessity is similar to a plea of self-defense...” *see also Parker v. State*, 2014 WL 436176.*n.15(Tex-App.2014) (Describing the defense of necessity as “similar to the defense of self defense).

The record provides evidence of an aggravated assault committed by Mr, Garland and I raised this issue in a filed pre-trial Motion to Dismiss, (CR#13) which was never introduced by my trial attorney, Robert O. Harris III, It is my belief, that my trial attorney’s failure to;

1. Request a jury “necessity” instruction, or object to one not given,
2. Recognize Mr. Garland’s aggravated assault, was not just a reckless act.
3. Not address the motion to dismiss, prior to trial.
3. Did not call Witnesses to testify on my behalf and did not inform me of my right to have witnesses present to testify on my behalf during the punishment phase.
4. Provide me with an option to choose Jury or Judge for sentencing.

All amounts to “ineffective assistance of council” and contributed to what I believe is a miscarriage of justice in this case by wrongful conviction.

- **Trial testimony and record evidence is provided for the Court’s review:**

The record provides "*fact*", that Mr. Garland admits to the USAA insurance agent, Alejandro Trevino, during a phone interview pertaining to the incident, that he knowingly and intentionally struck my vehicle, with a "**shovel**", while I occupied it. (in other words, the attack was near, present, and aimed towards me, and raised my level of "threat of imminent bodily injury). his act was the **initial threat** that led to all other incidents. (RR IV: 152-153).

Q. - Okay. Now immediately below that 7-10-13 at 15:13 hours, which is 11 min after you talked to Mr. Sheppard, you then made contact with Timothy Garland, did you not?

A. - I telephoned him, yes, sir.

Q. - And if you look at the bottom of the page about three lines up on that self stating statement, **Mr. Garland says he did it with a shovel**. Did hit it a couple of times with a shovel. **Did Mr. Garland say that, or is that a miss type on your part?**

A. - It says I asked Garland if he hit and I---- that means the named insured truck with hammer. He said he didn't even have a hammer as he was doing yard work. He said he hit it with a shovel a couple of times.

Q.- You would agree that this is Mr. Garland's statement so he could have said anything he wanted to. He could have said hand, hammer, shovel pickax. In other words, "shovel" is his word and not your word.

A. - That's correct.

Q. - Okay, well you haven't been present for the testimony, but Mr. Garland previously testified that he only struck the vehicle with his hand, punched it, and now I have a document that says at least he told you in the course of your investigation that he in fact used a shovel.

A. - That's correct.

Q. - "Definitely on purpose," would that pertain to him striking the vehicle With a shovel or his motorcycle getting run over or both?

A. - In this case picking the subject would be Garland so he said that it was definitely on purpose.

Sec. 22.02.

AGGRAVATED ASSAULT. (a) A person commits an offense if the person commits assault as defined in Sec. 22.01 and the person:

**(1) causes serious bodily injury to another, including the person's spouse; or
(2) uses or exhibit's a deadly weapon during the commission of the assault.**

Evidence that I did not initiate contact with Mr. Garland and that I was in my truck at the initial threat.

Mr. Garland intentionally strikes my vehicle with a shovel, while I occupied it, this is an aggressive act towards me and my property, and creates an apprehension, "reasonable belief" in me that I am in the path of "imminent harm" which is clear and present.

Stefenoff v. State, 78 S.W. 3d 496,501(Tex. App----Austin 2002, pet. Ref'd). In other words, the harm must be "something at the point of happening, not about to happen."-----

In a "split second decision, [made] without time to consider the law" I initially run over the motorcycle. (a non-deliberative action made without time to consider the law).

Sheppard: (RR: IV-99)

Q. - And he then strikes the vehicle.

A. - Yes.

Q. - And you knock the motorcycle down.

A. - Yes, in self defense, I did, yes.

Sheppard: (RR:IV-128,129)

Q. - Mr. Sheppard, last but not least, in this particular event would you say that you were the first aggressor, meaning you struck the first blow? Or would you say that Timothy Garland struck the first blow?

A. - Timothy Garland initiated contact with my vehicle first.

Q. - And when you say "initiated contact"-----

A. - Yes Sir.

Q. - ----you're making direct reference to the striking of the side of your vehicle?

A. - Yes, sir. Yes sir.

Q. - After that occurred, then the next events that came after that were all brought about or began by that single event.

A. - As a matter of fact, that was the ignition of all events that occurred that day. I clearly stated that my intent was to go check on my workers at my job site and I have provided documents to prove that. I had no interest in Mr. Garland being on Dodge City Drive.

Q. - So you are telling the jury they need to find you not guilty because he started it.

A. - I am telling the jury I did what I felt was necessary to defend myself at the time, sir.

Subsequent strikes to the motorcycle only occurred after Mr. Garland enhanced his intent to harm me with the use of gunfire.

Recall, the "reasonable belief" of "imminent harm" is already clear and present, it was established when Mr. Garland struck my vehicle with a shovel while I occupied it. *Harper v. State*, 508 S.W.3d 461,467 (Tex. App.--Fort Worth 2015, pet. ref'd). "[I]mmenent harm contemplates a reaction to a circumstance that must be the result of a 'split second

decision [made] without time to consider the law" and requires "an immediate, non-deliberative action made without hesitation or thought of the legal consequence.

I had every reason to believe Mr. Garland had a gun and would use it to harm me, based on the fact that he had already took aggressive actions towards me with a shovel, combined with verbal threats of gunfire. this was the initial point of "immediate necessity."

Sheppard (RR:IV-99,100,101,104)

Q. - And did you then travel a short distance and back up again?

A. - No, clarification on that. Remember, my **initial intent was to check on my workers**. So as that event occurred, I redirected my attention back to my workers and what they were doing. And at that particular point Garland yelled out that I was going to pay for that, and he----mark my words, he was going to his glove compartment to retrieve a gun. And his sons begged him profusely not to go get it or shoot at me one. But those are the events that occurred.

Q. - So he had the ability to produce a firearm and/or-----

A. - Oh, yeah, I was in danger. After that particular point, sir, after that loud sound, I was in danger, yes. And I strongly believe that his intent was to physically harm me in some way or form.

Q. - What I am trying to determine sir, is when did you run over the motorcycle a second time?

A.- Well, after he threatened me with a gun. Because I figured if he was going to threaten me with a gun or come after me to shoot me, I wanted to make sure that I disabled any further progress to be able to come after me. Once I left the area for safety, yes.

Q.- And after the second time was there a third time that you ran over the vehicle? Motorcycle?

A. - As I stated, sir, in a **flash surprise** and anger, you know, I cannot recall.

But I know that it was more than one time that I did run it over: The initial time, after I did hear the damage that was incurred to my vehicle, and then to disable his mobility to be able to chase me out after.

Q. - And you wanted to disable his ability for what sir?

A. - Because he said he had a gun. He was going to come after me and shoot me.

Q. - You are aware, sir, that when the police came and they searched everything and they never located a weapon.

A. - Right. as I stated, I mean, whether he had one or not that was his threat to me so I--- at that particular point I just ---- I had to believe what was being yelled at, you know.

Q. - And you reacted at that time.

A. - I sure did. I did. I felt like my life and was in danger and my physical well being along with my property was in danger, and I defended myself, yes.

(RR:IV-123)

Q. - Your theory is that you then have the right to defend yourself against that motorcycle, right?

A. - I have the right to defend myself against people who attack me, sir. Yes

Q. - And attacking your truck is attacking you?

A. - I'm in my truck so I take that as an assault towards me; yes, sir.

A. - Well, had Mr. Garland not assaulted me to begin with we wouldn't have the incident initially to even talk about sir.

(RR:IV-115)

Q.- (By Mr. Barnes) How many times did you ram the truck that supposedly

had the gun in it so he couldn't come after you?

A. Well, his sons were driving the truck, sir. There were two vehicles there, okay? So he's on his motorcycle and the sons were operating the truck. There are two different operators on the scene. Correct.

Q. - Well he wouldn't get in the truck and come after you?

A. - Well, as I stated, sir, my attention wasn't focused on that. As I testified earlier, it was the son and his couple of brothers so I don't know how many occupants the truck holds, so I don't know whether Mr. Garland would have fit or not. I just know that there were, you know, his family was there, his three or four sons, and it was him on his motorcycle.

(RR:IV-124)

Q. - When did he break in to your truck and attack you?

A. - I felt like I was under attack sir.

Q. - But what about if you are driving up that lane of traffic and you are in it and they back out into you. Now all of a sudden it's an assault?

A. - Well, if they are intentionally doing it, it is an assault. If they happen to just back up and they backed into my vehicle,

(RR:IV-125)

---it is not an assault. So I guess the operative word here is "intent." Mr. Garland intended to hit my vehicle because he knew that I was in it so that is an assault in my definition.

Tex. Penal Code, Sec. 22.01. (a)(2)

ASSAULT. (a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse; or

(2) intentionally and knowingly threatens another with imminent

bodily injury, including the persons spouse; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

“A defendant’s testimony alone is sufficient to raise a defensive issue requiring an instruction in the jury charge.” *Pennington v. State*, 54 S.W. 3d 852,856 (Tex. App.---Fort Worth 2001, pet ref’d); *see also id.* at 858 (stating that “[t]he fact that Pennington’s testimony concerning her necessity defense was feeble, contradicted, impeached, or not credible, does not eradicate her entitlement to a defensive instruction”).

“Reasonable belief” refers to a “belief that would be held by any ordinary man in the same circumstances as the actor.” Texas Penal Code: 1.07(a)(42).

Special Note: Reasonable Belief

“ It is not necessary that there should be actual danger, as a person has the right to defend his life and person from apparent danger as fully and to the same extent as he would have were the danger real, **as it reasonably appeared to him from his standpoint at the time.**”

The court in *Pennington* held it was reversible error for the trial court to have refused to give a “necessity” instruction. *See also, Miller v. State*. 815 S. W. 2d 582, 585 (Tex. Crim. App. 1991)(“It is well-settled that as a general rule an accused has the right to an instruction on any defensive issue raised by the evidence, whether such evidence is weak, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of this evidence.”) *see also, Cooke v. State*, 201 S.W. 3d. 36,38(Tex. Crim. App.1999)(same); *Hamel v. State*, 916 S.W.2d 491,493(Tex. Crim. App. 1996)(same).

- Witness Testimony I did not provoke the aggravated assault initiated by Mr. Garland.

Three witnesses provide testimony that I did not demonstrate any aggressive acts towards Garland or **intent** to damage his motorcycle, **prior to** his aggressive act.

WITNESS #1 : Pedro Luebanos (RR: IV- 60)

Q. - Thank You. Was there anytime that you saw, heard or felt that gave you an indication Mr. Sheppard **intended** to run over the motorcycle?

A. - All three times?

Q. - Well, no, before that happened. What I am saying is, Did you hear him say, I'm going to get you Garland, or I am going to hit your motorcycle?

A. - No. I did not speak to him.

WITNESS #2 : Antonio Martinez (RR:IV-137,138)

Q. - Okay. Did he ever observe the gentleman driving the pick up truck to get out of the pickup and make any aggressive gesture toward the gentleman who struck the side of the pickup?

A.- No. no. We were back towards the construction site. You know the less we hear, the less we know, the less we got involved, it is better for us.

Q. - Okay. In the course of the arguing and the noise, did he observe any act by either Mr. Sheppard or the other gentleman, Mr. Garland. And when I say any acting, striking, hitting anything of that nature?

A. - A problem y'all have already discussed. My boss was coming in the vehicle. And we did hear a sound, and the gentleman was walking. And we did hear a sound and then-----and then the incident with the motorcycle, that he hit the motorcycle. And then as the arguing was getting bigger we just got further away.

Q. - Okay. Well, obviously, the truck and the man standing beside it so that's all he saw, correct?

A. - Yes.

Q. - And **after the vehicle was struck,** did it continue down the street for a short distance.

A. - A little bit.

Q. - And then did it back up and back into the motorcycle knocking the motorcycle down?

A. - Yes.

(CRUCIAL NOTE: This testimony verifies that the motorcycle was standing at the time of hearing the impact from the shovel hitting my truck, Point being, Mr. Garland struck my truck and then his motorcycle was knocked down, verifying that he was the aggressor who initiated the contact. This answers the question asked of the USAA Insurance investigator as to whether it was Garland who struck my vehicle on purpose first or I struck his motorcycle first. "Recall Garland said he did it on purpose, we now know he struck my truck on purpose first, validating the investigator's response that Garland **initiated** contact provoking my reaction, Garland and two witnesses have now confirmed I was not the aggressor and I was provoked, my criminal liability should be negated with this evidence. My conviction is a miscarriage of justice and should be reversed.)

WITNESS #2: Brandon Garland (RR: IV-80)

Q. - Brandon, would you agree with me that this entire event was out of the blue? I mean, nobody saw it coming, nobody knew it was coming. There wasn't any plan to meet the defendant there. any of that correct?

A. - Not to my knowledge, no, sir.

Q. - Okay. Is your father a vocal individual or does it take a lot to get him to talk?

A. - No. he is pretty vocal.

Q. - Okay. So is it possible that he may have said something that you weren't paying attention at the time?

A. - Yes, sir.

II. THE RECORD EVIDENCE MEETS THE REQUIREMENT FOR A SECTION 9.22 "NECESSITY" INSTRUCTION.

Memorandum of Opinion

When determining whether a defensive instruction should have been provided, appellate courts "view the evidence in the light favorable to the defendant's requested instruction." *Bufkin v. State*, 207 S.W. 3d 779,782(Tex. Crim. App. 2006). In general, a defendant is entitled to a jury instruction on a defensive issue if the defensive issue **"is raised by the evidence, regardless of the strength or credibility of that evidence."** *Farmer v. State*, 411 S.W. 3d 901, 906(Tex. Crim. App. 2013). However, an instruction "is not required" if the evidence "does not establish the defense." *Williams v. State*, Nos. 03-14-0028---00229-CR, 2016 WL 370019, at *4(Tex. App.---Austin Jan. 27, 2016, no pet.)(mem. Op., not designed for publication).

Under the Penal Code, "[c]onduct is justified" by necessity if the following requirements are present:

- (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
- (2) the desirability and urgency of avoiding the harm clearly outweigh, according to the standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
- (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

Tex. Penal Code ; 9.22

To raise the defense, there must be evidence of a reasonable belief of both immediate necessity and imminent harm." *Harper v. State*, 508 S.W.3d 461,467 (Tex. App.---Fort Worth 2015, pet. ref'd). "[I]mminent harm contemplates a **reaction to a circumstance** that must be the result of a **'split second decision [made]** without time to consider the law" and requires "an immediate, non-deliberative action made without hesitation or thought of the legal consequence. *Stefenoff v. State*, 78 S.W. 3d 496,501(Tex. App---Austin 2002, pet. Ref'd). In other words, the harm must be "something at the point of happening, not about to happen."---

In this case the, only legal defense I have to the charge against me is “**necessity**.” My testimony, that I acted out of “**necessity**” to prevent imminent bodily injury, initiated by an attack with a shovel, combined with threats and gestures of gun violence. fully supports that defense, and the trial court was required to give the instruction “regardless of what the trial court may or may not [have thought] about the credibility of the evidence. *See, e.g. Miller*, 815 S.W. 2d at 585. *CF. Vasquez*, 830 S.W. 2d at 949-51.

Under controlling precedent from the Court of Criminal Appeals in *Vasquez v. State*, 830 S.W. 2d 948 (Tex. Crim. App. 1992), the failure by my trial counsel to request a “**necessity**” instruction amounted to ineffective assistance of counsel and requires a new trial.

Counsel should have recognized that appellant’s testimony was Sufficient to raise the defense, and that appellant had nothing to lose by requesting a defensive instruction.

Id. at 951. Likewise, the Court of Criminal Appeals held that a new trial was justified:

Because the evidence did raise the defensive issue of necessity, and because appellant’s counsel failed to request a jury instruction on the issue, the jury was precluded from giving effect to appellant’s defense. That in itself undermines our confidence in the conviction sufficiently to convince us that the result of the trial might have been different had the instruction been requested and given.

Despite my testimony that I acted out of “**necessity**,” supported by the testimony stated above, my trial defense counsel did not request a “**necessity**” instruction nor did he object to the trial court’s failure to give such an instruction. (RR V:4) The lack of a justification was seized upon by the state in its closing arguments and presented an unfair advantage:

You’ll see nowhere in that law the judge gave you that if he was acting in self defense you find him not guilty because he is not entitled to that. There is no law for that, and when you are entitled to it, you get it. Nowhere is it in that Charge that says if you think he did it and its okay find him not guilty because its not there.

Nowhere in the law does it say if he is justified, find him not guilty. It says you are to determine: Did he run over the car? Did he hit the motorcycle? Did he destroy it? (RR V: 21-23)

My testimony, whether thought to be credible or not, certainly raised the defense of "necessity." I admitted to using my truck to damage Mr. Garland's motorcycle, but I testified it was in self defense, in response to an assault, initiated by Mr. Garland with a "shovel."

The act caused an apprehension of "imminent Harm", which was clear and present and I responded with an immediate, non-deliberative action, made without hesitation or thought of the legal consequences, to ensure my personal safety, as it appeared to me at the time

The Court's Opinion falsely depicts me as the *initiator* despite witness testimony in the record which proves otherwise, the correction of the error is crucial in the application of the defense statute of "necessity.", which I am entitled to in this case, and requires discretionary review of this Criminal Court of Appeals to prevent a miscarriage of justice by wrongful conviction.

The lower Courts appear to have turned a blind eye to the "**fact**" that, Mr. Garland intentionally and knowingly **initiated** a clear and present aggravated assault, with a "**shovel**," towards my personal well being, which witnesses testify, I did not provoke. The Court's demonstrate an "appearance of partiality" in failing to hold Mr. Garland liable for the result of his aggressive actions and convicting me of my defensive response to his attack. This is a gross mis-carriage of justice and should be corrected by this Criminal Court of Appeals.

For his deliberate, aggressive, unprovoked actions, Mr. Garland has been sentenced to "freedom," while I have been convicted and sentenced by the trial Judge, who I did not elect, to 12 months in prison (CR#41) with a \$100,000.00 bond (CR #46), for Criminal Mischief, because I reacted to an imminent threat, and did what I felt was necessary at the time to ensure my safety. And a jury was precluded from giving effect to my "necessity" defense, due to the lack of an instruction.

The State prosecutor belittled my Justification Defense that I was

pursuing.

“Self-defense? That has got to be the silliest thing that I have heard in a courtroom in a really long time, that he ran over the motorcycle in self-defense. I mean, really. Common sense. Reason.”

In my original Petition For Discretionary Review, I argue against a judicial process which demonstrated bias during trial and punishment, and that I was “*in fact*” treated unfairly, which deprived me of Due Process, and is now proven by record testimony.

- 1.) The Court’s opinion is incorrect, I did not elect to have the Judge issue punishment at sentencing, that decision was imposed on me by my trial attorney, Mr. Robert O. Harris III, despite my election of a jury trial. Evidence of this statement can be found on the Court of Appeals, Docket entries dated, November 17, 2016. In this filing, I specifically asked my appellate attorney, Mr. F. Clinton Broden, to correct the statement on the Notice of Appeal in reference to the imposition of punishment, in order to provide accurate information to the Court of Appeals.
- 2.) During the sentencing phase, the state produced a character witness from an unrelated case, represented by the same prosecuting attorney, Mr. William Nelson Barnes, who offered unsubstantiated/untried testimony against me.
- 3.) Judge Gauntt used unsubstantiated/untried testimony of the state’s witness to deviate from and enhance the punishment recommended from the Pre-Sentencing Investigation Report (PSI). The report dated June 24, 2016 recommended a community supervision plan. (see: Clerk’s record, Judges Docket, entry notes dated 9/19/16.)
- 4.) During the punishment phase, My trial attorney, Mr. Robert O. Harris III, **did not call witnesses on my behalf**, which is also misrepresented in the Courts opinion, and never informed me of my rights to **compulsory process for obtaining witnesses in my favor**, I was not informed the state’s witness was present to provide testimony until the time I arrived for hearing, This provided no time to contact witnesses in my favor and inform them of the hearing, In other words, I was ambushed by the presence of the state’s witness at sentencing with no opportunity to prepare a rebuttal defense. This

infringed on my rights to due process.

5.) My trial attorney did not request a “necessity” instruction”, nor did he Object to the trial court’s failure to give such an instruction. The jury was precluded from giving effect to my “necessity” defense.

The above stated events, create an “appearance of partiality and judicial bias.” and prove that I was “in fact” treated unfairly at trial.

A litigant is denied the fundamental fairness to which he is constitutionally entitled if a judge of his case is unfairly biased against him. However, a litigant is not denied due process by either the “appearance” of partiality or by circumstances which might lead one to speculate as to the judge’s impartiality. A litigant is denied due process if he is *in fact* treated unfairly.

The Supreme Court has ruled that ‘(e)very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which may lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.’ (citing *Tumey*)

The Due Process Clause of the U.S. Constitution **mandates** a right to a judicial process devoid from the partiality and bias of a judge/tribunal. *United States v. Sciuto*, 521 F. 2d. 842, 845 (7th Cir. 1996)(“The right to a tribunal free from bias or prejudice is based, not on section 455, but on the **Due Process Clause.**”

Section 455 goes beyond “due process.” Its requirement of avoiding even the appearance of partiality, even though bias or prejudice does not exist, is based on considerations over and above constitutional standards.

Section 455(a) requires a judge to recuse himself in any proceeding in which his impartiality might reasonably be questioned. *Taylor v. O’Grady*. 888 F. 2d 1189 (7TH Cir. 1989) (“It is important that the litigant not only actually receive justice, but that he believes that he has received justice.”) *Pfizer Inc. v. Lord*, 456 F. 2d 532 (8th Cir. 1972).

“ Recusal under Section 455 is self executing; a party need not file affidavits in support of recusal and the judge is **obligated** to recuse himself

sua sponte under the stated circumstances.” *Taylor v. O’Grady*, 888 F. 2d 1189 (7th Cir. 1989).

Acts forming the basis for a violation of the statute may also violate due process. *United States v. Balistreri*, 779 F. 2d 1191 (7th Cir. 1985) (“Section 455(a) of the Judicial Code, 28 U.S.C.; 455(a) is not intended to protect litigants from actual bias in their judge but rather promote public confidence in the impartiality of the judicial process

CONCLUSION

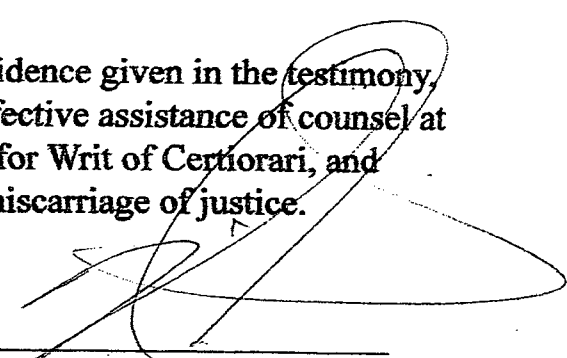
The testimony stated above provides evidence a defensive issue was present in this case, and the jury should have been given a “necessity” instruction at trial. *Pennington v. State*, 54 S.W. 3d 852, 856 (Tex. App.--Ft. Worth 2001, pet, Ref’d).

Under controlling precedent in the Criminal Court of Appeals, the jury was precluded from giving effect to my defense, *Vasquez v. State*, 830 S.W. 2d 948 (Tex. Crim. App. 1992). The lack of an instruction infringed on my rights to “due process”. The fact that my counsel did not request an instruction, and did not call witnesses to testify on my behalf in the punishment phase, amounted to ineffective assistance. I “*In fact*” was treated unfairly. The outcome of the trial might have been different had an instruction been requested and given.

PRAYER

For the foregoing reasons, based on the evidence given in the testimony, raising a defense of “necessity” and the ineffective assistance of counsel at trial, I pray this court GRANTS my petition for Writ of Certiorari, and VACATES, my conviction in this case as a miscarriage of justice.

Respectfully submitted,



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**Additional material
from this filing is
available in the
Clerk's Office.**