HB

293

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 293

BY REPRESENTATIVE FINKELSTEIN 1/4

Page 2, line 2, following "occupant":
Insert "reasonably"

Page 2, line 5, following "occupant":
Insert "reasonably"

Pass

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 293

BY REPRESENTATIVE FINKELSTEIN 1/2

Page 1, lines 8 to 9

Delete "is acting in self-defense against the threat of criminal assault in any degree or other offense against the person under AS 11.41"

Insert "reasonably believes the use of deadly force is necessary for self-defense against death, serious physical injury, kidnapping, sexual assault in the first degree, sexual assault in the second degree, or robbery in any degree"

OK

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Testimony on HB 293

Date Sent: 2/9/96 *No. of Pages Including Cover Sheet:* 2

Thank You,

Tammy R. Hall

Tammy R. Hall
Information Assistant

AMENDMENT

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BY REPRESENTATIVE FINKELSTEIN

3

Page 1, line 8

Delete "is acting in self-defense against the threat of"

Insert "reasonably believes the use of deadly force is necessary for self-defense against"

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 293

BY REPRESENTATIVE FINKELSTEIN

Page 1, lines 3 to 13
Delete entire section

Renumber the following section accordingly

FISCAL NOTE

STATE OF ALASKA **BILL NO:** HB 293

1996 LEGISLATIVE SESSION

Revision Date: _____ Dept. Affected: Public Safety

Title: Use of force in defense of persons and property. BRU: Alaska State Troopers

Component: Detachments

Sponsor: Representative Vezey

Requestor: House Judiciary **COMPONENT SERIAL NO.** 0799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ( ) Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 95) impact: $ _____

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

This bill will not have a fiscal impact on the Division of Alaska State Troopers.

Prepared By: Lt. Dan Lowden Phone 465-5505

Division: Alaska State Troopers Date: February 6, 1996

Approved by Commissioner: Ronald L. Otte Date: 2/8/96

Agency: Ronald L. Otte, Department of Public Safety

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SPONSOR STATEMENT

HB-293, "An Act relating to the use of force in defense of persons or property", provides that citizens may use force including deadly force to protect themselves in their homes.

Court cases throughout other jurisdictions affirm the principle that in his or her own home, a person does not have to retreat from a real or imagined threat to their safety.

In 162 ARIZ. 363, 783 P.2D 809, State of Arizona v Larry Vernon, The court of appeals, Brooks, J,. held that "crime prevention" defense is available only when home, its contents, or residents therein are being protected by use or threatened use of physical force or deadly physical force against another.

In 22 CAL.3D 12, *20, 582 P.2D 1000, **1004, 148 CAL.RPTR. 409, ***413, CALJIC No. 551 the court said.. "Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an honest conviction and fear that he is about to suffer death or great bodily harm, and if a reasonable man in a like situation seeing and knowing the same facts, would be justified in believing himself in like danger, and if the person so confronted acts in self-defense upon such appearances and from such fear and honest convictions, his right of self-defense is the same whether the danger is real or merely apparent."

In CALJIC No. 5.50" " A person who is threatened with an attack that justifies the exercise of the right of SELF-DEFENSE, need not RETREAT. In the exercise of his right of self-defense, he may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and he may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.

The precedents are clear, a person may use deadly force in defense of their home

The Alaska Supreme Court requires the trial judge to instruct on self-defense even when the evidence supporting the defendant's self-defense claim was weak or implausible.

Houston v. State. 602 P.2d 1124, 1126 n.6 (Alaska 1978). See, e.g., Willett v. State. 836 P.2d 955, 958 (Alaska App. 1992); Carson v. State. 736 P.2d 356,359 (Alaska App. 1987)

On the surface, the present statutes seem to allow this defense at this time.

Alaska Statute 11.81.335(2)(b) states " A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety to others, the person can avoid the necessity of using deadly force by retreating, except their is no duty to retreat if the person is

(1) on premises which the person owns or leases and the person is not the initial aggressor.

Contrary to these decisions and in accord with AS 11. 81.330 and AS 11.81.900(b)(23) the Court of Appeals of the State of Alaska in Van Ha v. State of Alaska No. A-4818, opinion No. 1400 - March 31, 1995, stated that .."a defendant claiming self-defense as justification for the use of force must prove that he or she acted to avoid what he or she reasonably perceived to be a threat of imminent harm. A defendant's reasonable belief that harm will come at some future time is not sufficient to support a claim of self-defense or defense of others." To continue.." The defendant's use of force against his enemy is authorized only when the defendant actually and reasonably believes that the enemy's threatened attack is imminent." AS 11.81.900(b)(23); Paul v. State. 655 at 777, 778 n.8.

In this decision, the court furthers elaborates upon how the determination of reasonableness is defined.

"[T]he determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation"[.] Such terms encompass more than the physical movements of the potential assailant. ... [T]hese terms include any relevant knowledge the defendant had about the person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure [or commit a crime upon] him or that the use of deadly force was necessary under the circumstances."

This bill is intended to clarify the intent of the legislature, that a person has a right to be secure in their person and property, in their own home.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

XI VAN HA, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-4818 Trial Court No. 3AN-91-4014 Cr O P I N I O N [No. 1400 - March 31, 1995]

Appeal from the Superior Court, Third Judicial District, Anchorage, Milton M. Souter, Judge.

Appearances: David B. Koch, Assistant Public Defender, and John B. Salemi, Public Defender, Anchorage, for Appellant. James L. Hanley, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, and Coats and Mannheimer, Judges.

MANNHEIMER, Judge.
COATS, Judge, dissenting.

Xi Van Ha[1] appeals his conviction for second-degree murder, AS 11.41.110(a)(1). As explained in more detail below, the superior court refused to allow Ha to argue self-defense to the

[1] In a Vietnamese name, the first name is the family name. Thus, the appellant's family name is "Xi". However, in all of the court documents in this case, Xi Van Ha is referred to as Mr. Ha. To avoid confusion, we will continue to refer to him in this manner.

jury. The court allowed Ha to argue heat of passion to the jury, but the court instructed the jurors that they should evaluate the extent of the victim's provocation and the extent of Ha's opportunity to calm himself from the point of view of a "mentally healthy" person. On appeal, Ha contends that the superior court should have instructed the jury on self-defense, and he contends that the court should have allowed the jury to consider evidence of Ha's mental abnormality when they assessed his heat of passion defense. We conclude that the superior court correctly resolved these issues, and thus we affirm Ha's conviction.

Ha came to the United States from Vietnam in 1980. He lived in California for ten years and then, in 1990, he moved to Dillingham, where he worked as a fisherman, a trade he had pursued both in his native country and in Malaysia. Despite his years in the United States, Ha's English remained rudimentary.

On June 7, 1991, Ha was employed to fish aboard the F/V (fishing vessel) Ultimate. After work on June 7th, Ha and his long-time friend Tran Gioi were socializing in the Willow Tree Bar in Dillingham. Later that evening they were joined by other Vietnamese fishermen. Among the new arrivals were Ly Van Hop and Buu Van Truong. Ha knew Buu and his family from the Vietnamese community in California, and he was also aware that Buu and Ly were roommates in Dillingham.

The men shared drinks in the Willow Tree; Ha later testified that he thought Buu was drunk by the time they left the bar. Ha, Tran, Ly, and Buu returned together to the Ultimate after Ha volunteered to reheat some leftover food. Ha later testified

that his invitation to cook food was directed only to Tran and Ly. Ha did not wish to socialize with Buu because Buu was known as a violent person. According to Ha, Buu's family in California had a reputation for violence; Ha testified that, in California, Buu and his brothers (as well as other family members) had been known to threaten and beat people who crossed them. Knowing that Buu had been drinking, Ha suspected that Buu would be even more prone to violence.

The four men reached the boat and went aboard; Ha started the generator to heat the stove. While they waited for the stove to heat up, Ha's friend Tran lay down on a bunk, while Buu's friend Ly went out on deck. After about fifteen minutes, Buu began to get impatient that the food was not yet heated. He began to harass Ha, swearing at Ha and making comments such as "fuck your mother". Ha started swearing at Buu and told him to get off the boat. In response, Buu began to beat Ha. Ly ran in from the deck to assist Buu. Ly held Ha's arms to his side while Buu continued to beat him. Buu seized Ha by the hair and struck his face and head repeatedly with his fists.

As the beating continued, Ha began shouting for help. He yelled to his friend Tran, "Gioi, come out and ... fight: Buu is hitting me and killing me!" At one point, Ha yelled, "I'm dying!" When Tran heard Ha's cries for help, he rose from his bunk and came to Ha's aid. Tran physically separated Buu from Ha, but Buu was able to strike Ha four or five more times before he was pulled away. Ha testified that, at times during the beating, Buu hit him so hard

that he fell down. Ha also testified that the attack left him with blurred vision.

Buu and Ly left the Ultimate, but they returned a few minutes later. This time, Buu was armed with a hammer. Buu came at Ha, screaming, "I'm going to kill you, and I will strike you until you die!" Buu swung the hammer at Ha's head, but Ha jumped from the Ultimate to the F/V Misty, which was berthed alongside. When Buu followed Ha onto the Misty, Ha ran into the cabin and held the door closed. Buu stood outside the cabin and, through the glass in the door, he shouted, "Fuck your mother! I will strike you and I will kill you!"

Buu continued his tirade for four or five minutes until Ha's friend Tran ran aboard the Misty and grabbed the hammer from Buu's hand. Ly came aboard too and escorted Buu away. Ha remained on the Misty for several minutes before returning to the Ultimate.

That night, Ha could not sleep. He feared that Buu was bound to return and kill him as he had promised. Tran attempted to reassure Ha, but Ha remained awake after his friend fell asleep. Ha's head was throbbing in pain. He paced throughout the boat.

As he paced, Ha remembered that there was a rifle aboard the Misty; Ha had previously used this weapon to shoot at birds while he was fishing. Ha went back to the Misty, retrieved the weapon, and loaded it.

Ha later testified that he was "very frightened". He lay awake on his bunk throughout the night, with the rifle at his side, "the voice of Mr. Buu ... resounding in [his] ears". Tran awoke and left the boat around 7:00 or 8:00 the next morning. Ha continued

to lie awake on his bunk, thinking about Buu, the rifle still underneath his blanket. Several hours later (around 8:00 in the morning), Victor Sifsof, the owner of the boat, came aboard.

Ha was still lying on his bunk when Sifsof arrived. Sifsof spoke to Ha about mending nets that day, but Ha's head was still giving him great pain. Ha told Sifsof about the beating he had received from Buu and Ly the night before — that his head still hurt and his vision was still blurred. Sifsof saw that Ha was still very upset, even though he was acting sluggish. Ha told Sifsof that the two men who had attacked him worked on a boat owned by Billy Johnson, another local fisherman. Sifsof told Ha that he would speak to Johnson about his employees.

Around 10:00 that morning, Ha and Sifsof moved the Ultimate to a different location in preparation for the upcoming fishing opening. While the men were working, Ha left the rifle in his bunk. The Ultimate's new location happened to be closer to Johnson's boat, the boat on which Buu worked. Sifsof then left Ha alone on the Ultimate. The pain in Ha's head grew worse, and Ha became more frightened, realizing that he was closer to Buu. In his head, Ha heard Buu's voice becoming stronger and stronger, and he became more and more frightened. He lay down to try to sleep, but he found he could not. Ha tried to think of someone who could help him, but he was unable to think of anyone who could. Ha testified that Buu's voice remained in his head; he stated, "I [did] not think that I should call the police to help me — [b]ecause [Buu's] voice was just so ferocious and it stayed in my ears."

Finally, Ha retrieved the rifle from his bunk, left the Ultimate, and went in search of Buu. He kept the rifle hidden underneath his jacket. Ha later testified, "[M]y head was controlling my actions, and it was commanding me to go kill [Buu]."

Shortly after noon, Ha went to where he believed Buu was working. When he discovered that Buu was not there, Ha sat down for a while to wait for him. Ha then loitered in the vicinity of Buu's boat, where he was observed by other Vietnamese fishermen, including Buu's friend Ly. Ly saw Ha carrying a long object concealed under his jacket. Although Ha apparently did not remember speaking to anyone at the boat, Ly testified that he approached Ha and spoke to him. After learning that Ha was searching for Buu, Ly begged Ha to go back home. Ha refused.

A little later, Ha encountered his friend Charlie Tran. Tran observed that Ha was trembling and pale. Tran asked what was wrong and Ha responded, with seeming difficulty, that Buu had assaulted him and threatened to kill him. When Tran asked Ha what he was carrying under his coat, Ha told him, "This is none of your business." Tran urged Ha to let the incident pass, but Ha replied, "How can I let it go? Last night he beat me up and told me he was going to kill me; he already threatened to kill me. If he doesn't kill me today, he'll kill me tomorrow."

At 1:30 in the afternoon, Ha spotted Buu returning from a grocery store, carrying a bag of groceries. With Buu's voice still speaking in his head, Ha pulled out his rifle and ran towards Buu from behind. Ha repeatedly shot Buu in the back, firing the

rifle thirteen times until he had emptied the weapon of ammunition. Buu was struck by seven of these rounds; he died immediately.

At trial, Ha testified that, after shooting Buu, he simply turned around and went back to the Ultimate. In contrast, another witness to the shooting testified that Ha walked up to Buu's body, kicked dirt on it, and then, in English, swore at Buu and said to the corpse, "I told you I was going to kill you."

Upon his return to the Ultimate, Ha changed his shirt, replaced the rifle in his bed, and hid. The police arrived and searched the boat, but they did not find Ha. Later, Ha heard Victor Sifsof's voice. Ha emerged, holding his head, and explained to Sifsof that he might have to go to jail. Sifsof advised Ha to obtain an interpreter and go to the police, but Ha was reluctant to do this. Eventually, the police returned to the boat, found Ha, and arrested him.

Ha was indicted and tried for first-degree murder. The jury was instructed on the lesser included offenses of second-degree murder and manslaughter (under a heat of passion theory). The jury ultimately acquitted Ha of first-degree murder but found him guilty of second-degree murder.

Should the Trial Court Have Instructed the Jury on Self-Defense?

From the beginning of trial, Ha argued that he had acted in self-defense. In the defense opening statement to the jury (which was delivered immediately after the prosecutor's opening

statement), Ha's attorney described how Buu had attacked Ha and threatened him with death; the attorney then continued:

> DEFENSE ATTORNEY: [V]iolence was not uncommon for Buu. You will hear about this man and his dark, brooding, combative nature. ... And I invite your close scrutiny and attention as the evidence comes in regarding [Buu's] character, because you will come to understand and appreciate not only the dark, dangerous, deadly side of this man, but also the significance of his threats. For anyone who knew Buu did not take his threats lightly. A threat from Buu that he would kill you was as good, had as much weight, as a kiss on [the] cheek by a ... Mafia godfather. That's how deadly Buu's threats were.
>
> . . . .
>
> From knowing Buu, [Ha] knew that there was no escape. You see, Buu comes from ... a family of thugs who have a reputation for violence and extortion. You will hear that. ... [Ha knew that] he would have to deal with the family, or with Buu himself. Today, tomorrow, they would stalk him down.

At the close of the evidence, Ha submitted proposed instructions on self-defense, but Superior Court Judge Milton M. Souter questioned whether the evidence supported all the elements of self-defense. Specifically, Judge Souter questioned whether there was any evidence that Ha faced imminent harm when he shot Buu.

> THE COURT: There's something missing from the [proposed] self-defense instructions that I've already read, and that is the requirement of imminency of harm coming from the aggressor. ... [AS] 11.81.330 states, [in] part (a), [that] "a person may use ... force upon another when and to the extent that person reasonably believes it is necessary for self-defense against what the person reasonably believes to be the use of unlawful force by the other". ... And [if] you look to [AS] 11.81.900[(b)],

> subpart [(23)], ... "'force' means any bodily impact, restraint, or confinement, or the threat of imminent bodily impact, restraint, or confinement". ... So it's clear to me [that] ... the definition of "force" ... includes the requirement of imminency of threat of use of force as part of the definition. ... It's not included in any of these self-defense instructions that I've seen.
>
> And I don't even know if self-defense is appropriate ... in this case, because I'm not aware of any evidence that shows any imminency of [harm]. ... Bearing in mind that the altercation ... between these two men took place a good twelve hours before the killing[,] given the fact that it's uncontradicted that the defendant stalked this man for over an hour before he killed him[, and] [g]iven the fact [that] there's absolutely no evidence that the victim approached the defendant in the hour or hour and a half before the shooting, there was no imminency here at all. ... I don't see it. And I'm going to want to be hearing argument on that.

Ha's attorney responded:

> DEFENSE ATTORNEY: I think "imminency" [is viewed through] the eyes of the person asserting justifiable force. Not whether ... an independent person such as the judge looking at the evidence would see ... imminency under the facts, but whether in [the] defendant's mind he felt that he was in imminent danger. I think there's been overwhelming evidence ... that he was in imminent fear.

Ha's attorney then analogized Ha's case to cases involving the "battered woman syndrome". The defense attorney claimed that, in cases where battered women shot their husbands while they slept,

courts had ruled that the trial juries should receive instructions on self-defense.[2] The defense attorney told Judge Souter:

> DEFENSE ATTORNEY: [T]he fact that Buu was shot from behind is irrelevant, just like the fact that a husband is shot while he's asleep. I think what the court has to [ask], and what the jury has to [ask], is, did the defendant feel that he was in imminent fear for his own safety? That's the first prong of self-defense. And then, on the second prong, ... would a reasonable person under like circumstances, another person who was in the situation of the defendant, given [the defendant's] background, experience, and what have you — how would that person feel? ... The jury may find that [Ha] was in imminent fear, but they may find that the reasonable person would not have been. ... [Nonetheless], I think we meet the "some evidence" test. ... [This is] an issue for the jury to decide.

Despite the defense attorney's argument, Judge Souter ruled that he would not instruct the jury on self-defense. He found that there was not a "single shred of evidence [to indicate] any imminency of harm or threat of harm facing [the defendant] at the time that he stalked [the victim] for an hour to an hour and a half, and shot him in the back and killed him. ... It's absolutely, abundantly clear to me that an essential element of the self-defense justification [is] totally missing in this case."

The next morning, Ha's attorney renewed his argument for self-defense. He pointed to the evidence tending to prove that Ha had been in fear for his life and that a reasonable person in Ha's position would also have been afraid. The defense attorney argued,

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[2] As explained below, this is not an accurate characterization of the current law.

> DEFENSE ATTORNEY: You'd have to [ask] how would another Vietnamese, knowing how Vietnamese behave, knowing how, when Vietnamese make a public threat, that they carry it out and that you should take those threats seriously, knowing that this person making the threat has a violent temper [and] usually carries out his [threats]. You've got to take all of those circumstances into consideration and then ask yourself, would another person under those circumstances act the same way?

However, Judge Souter again concluded that the evidence did not justify an instruction on self-defense.

> THE COURT: The evidence in this case is absolutely devoid of any evidence that there was ... any threat of imminent harm from Mr. Buu to this defendant. The evidence is absolutely clear ... that this defendant, even according to his own testimony, stalked the victim, looking for him for better than an hour before he ... shot him in the back, gunned him down. ... The victim was unarmed. Any threat of harm ... had been made twelve to thirteen hours earlier. This is the uncontradicted state of this record. To an objective third-party observer, that could not possibly amount to imminency of threat of harm. ... [I]f somebody beats you up and threatens to hurt you some more, the next day you can stalk them down and kill them? That's not the law of this state[.]

Judge Souter then noted a second ground for denying the requested self-defense instruction: the evidence showed that Ha had been the aggressor during the afternoon encounter with Buu on June 8th. Because AS 11.81.330(a) declares that self-defense is not available to the aggressor in a conflict, Judge Souter ruled that

Ha's uncontroverted status as the aggressor on June 8th was another reason for not giving self-defense instructions.[3]

In Alaska, all use of force in self-defense is governed by AS 11.81.330(a). If the force used in self-defense rises to the level of deadly force as defined in AS 11.81.900(b)(12), then a claim of self-defense must additionally satisfy the requirements of AS 11.81.335. Section 335(a) limits deadly force to situations in which (1) the force is justified under AS 11.81.330 and (2) the actor "reasonably believes [that] the use of deadly force is necessary for self defense against death, serious physical injury", or one of the serious felonies listed in the statute. Section 335(b) declares that, even when the use of deadly force would be justified under section 335(a), a person must still refrain from using deadly force "if the person knows that, with complete ... safety ... , the person can avoid the necessity of using deadly force by retreating".[4]

Under Alaska law, a trial judge's obligation to instruct the jury on self-defense arises only if there is some evidence

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[3] Because there was no renewal of conflict on the afternoon of June 8th (other than Ha's act of shooting Buu), a conclusion that Ha was the aggressor at that encounter is really a restatement of the conclusion that Ha faced no imminent danger. Ha's status as the aggressor would have been important if there had been evidence that, during the encounter on the afternoon of June 8th, Buu had said or done something that reasonably put Ha in fear of imminent bodily harm. If that had been the case, then it would have been important whether Ha had been the aggressor on that occasion. Under the facts of this case, however, imminency of harm is the real issue.

[4] The statute makes exceptions for (1) people who are in their own homes and who do not initiate the conflict, and (2) police officers or private citizens assisting police officers in the performance of their duties.

tending to prove each element of the defense. AS 11.81.900(b)-(15)(A). The rule was the same before the enactment of the present criminal code:

> It is well recognized that the burden is on the defendant to produce some evidence in support of a claim of self-defense before he will be entitled to a jury instruction. Bangs v. State, 608 P.2d 1, 5 (Alaska 1980); Toomey v. State, 581 P.2d 1124, 1126 (Alaska 1978); Folger v. State, 648 P.2d 111 (Alaska App. 1982).

Paul v. State, 655 P.2d 772, 775 (Alaska App. 1982). Nevertheless,

> The burden to produce some evidence of self-defense is not ... a heavy one; this standard is satisfied when self-defense has fairly been called into issue. ... A jury question will be presented and [a self-defense] instruction required if the evidence, when viewed in the light most favorable to the accused, might arguably lead a juror to entertain a reasonable doubt as to the defendant's guilt.

Paul, 655 P.2d at 775.

While the "some evidence" test may not be exacting in terms of the amount of evidence needed, the defendant's evidence must address all the legal elements of self-defense.

> [T]he trial court must ... determine whether or not [the evidence, viewed in the light most favorable to the defendant,] is adequate to raise the self-defense issue and, if believed, would <u>under the legal tests applied to a claim of self-defense</u> permit a reasonable doubt as to guilt[.]

State v. Millet, 273 A.2d 504, 508 (Maine 1971) (quoted in Paul, 655 P.2d at 775 n.4) (emphasis added).

In this case, Judge Souter ruled that Ha failed to meet the requirements of the general statute, AS 11.81.330, because there was no evidence that Ha faced imminent peril. On appeal, Ha claims that Judge Souter misconstrued the requirement of "imminency".

Both at common law and under modern statutes, a person claiming self-defense as a justification for assaulting someone else has to show, not only that he or she reasonably feared harm at the hands of the other person, but also that he or she reasonably feared that the threatened harm was imminent.

> Case law and legislation concerning self-defense require that the defendant reasonably believe his adversary's violence to be almost immediately forthcoming. Most of the modern codes require that the defendant reasonably perceive an "imminent" use of force, although other language making the same point is sometimes found.

Wayne R. LaFave and Austin W. Scott, Substantive Criminal Law (1986), § 5.7(d), "Imminence of Attack", Vol. 1, pp. 655-56. See also Rollin M. Perkins and Ronald N. Boyce, Criminal Law (3rd ed. 1982), Ch. 10, Sec. 4, "Self-Defense", p. 1114. ("The danger must be, or appear to be, pressing and urgent. A fear of danger at some future time is not sufficient.")

Alaska's self-defense statute, AS 11.81.330(a), does not specifically mention the requirement of imminency:

> A person may use ... force upon another when and to the extent the person reasonably believes it is necessary for self defense against what the person reasonably believes to be the use of unlawful force by the other, unless
>
> . . . .

(3) the person claiming the defense of justification was the initial aggressor.

LaFave & Scott cites this statute as one of the few "self-defense provisions in the modern codes [that] fail to address [the requirement of imminency] explicitly". LaFave and Scott, Substantive Criminal Law, § 5.7(d), Vol. 1, p. 656 n.38. However, as Judge Souter correctly perceived, AS 11.81.330 can be silent on this point because the legislature placed the requirement of imminency in the statutory definition of "force" contained in AS 11.81.900(b)(23):

> "[F]orce" means any bodily impact, restraint, or confinement[,] or the threat of imminent bodily impact, restraint, or confinement[;] "force" includes deadly and non-deadly force[.]

The interrelationship of these statutes is explicitly noted in the legislative commentary to the self-defense statutes, AS 11.81.330-335: "Since force is defined to include the threat of imminent bodily impact, a person may defend himself from threats of imminent impact as well as actual impact." 1978 Senate Journal, Supp. No. 47 (June 12), p. 126.

Ha argues that the imminency of a defendant's peril must be judged from the standpoint of the defendant. Ha contends that a reasonable person in Ha's position — a person who had heard Buu threaten his life and who knew the vicious propensities of Buu and his criminal family — would reasonably fear that Buu or one of his relatives would inevitably come some day to carry out Buu's threat to kill Ha.

Viewing the evidence in the light most favorable to Ha, we agree that there was sufficient evidence that a reasonable person

in Ha's position would have feared death or serious physical injury from Buu. Buu had threatened Ha with death. Buu was a violent man who nursed grudges and who was likely to carry out his threat someday. Moreover, the evidence suggested that Buu came from a violent, criminal clan, and that Buu's relatives might very well help Buu carry out the threat — or might carry it out themselves if Buu was unable. In sum, Ha produced evidence to justify the remarks his attorney made during the defense opening statement:

> DEFENSE ATTORNEY: A threat from Buu that he would kill you was as good, had as much weight, as a kiss on [the] cheek by a ... Mafia godfather. That's how deadly Buu's threats were.
>
> . . . .
>
> From knowing Buu, [Ha] knew that there was no escape. ... Buu comes from ... a family of thugs who have a reputation for violence and extortion. ... [Ha knew that] he would have to deal with the family, or with Buu himself. Today, tomorrow, they would stalk him down.

However, "inevitable" harm is not the same as "imminent" harm. Even though Ha may have reasonably feared that Buu (or one of Buu's relatives) would someday kill him, a reasonable fear of future harm does not authorize a person to hunt down and kill an enemy.

This court discussed the requirement of imminency in a footnote in Paul; the court noted that a trial judge is authorized to reject self-defense instructions

> where there is some evidence that the defendant acted to defend himself, but no evidence of imminent peril. An example of circumstances under which self-defense instructions might be denied based on lack of imminent peril may be found in "battered wife syndrome" homicides. Typically, these cases involve a battered wife

> who kills her husband in his sleep. Although in such instances there is commonly ample evidence to support a finding that the killing was motivated by fear and that the fear was as real and as urgent at the time of the killing as it was when the husband was awake and actually capable of immediate physical abuse, cases have uniformly refused to apply self-defense to this category of crime. The basis of the refusal has been lack of an immediate threat of harm.

Paul, 655 P.2d at 778 n.8.

A recent case illustrating this principle is State v. Stewart, 763 P.2d 572 (Kan. 1988). The defendant in that case had been subjected to years of horrifying treatment by her husband. He had repeatedly sexually abused her, beaten her, and threatened to kill her. When she ran away, he found her and brought her back. One evening, as her husband slept, the defendant heard voices repeating the phrase, "Kill or be killed." Responding to these voices, and to "get this over with, this misery and this torment", she took a revolver and shot her husband to death. Id. at 574-75.

The Kansas court held that, under these facts, the defendant had failed to establish the imminency of any threatened harm, and thus the trial judge should not have instructed the jury on self-defense.

> No one can attack and kill another because he may fear injury at some future time. The perceived imminent danger [must] occur ... during the time in which the defendant and the deceased were engaged in their final conflict.
>
> . . . .
>
> Because of [a] prior history of abuse, and [because of] the difference in strength and size between the abused and the abuser, the

> accused in such cases may choose to defend during a momentary lull in the abuse, rather than during [an active] conflict. ... However, in order to warrant the giving of a self-defense instruction, the facts of the case must still show that the spouse was in imminent danger close to the time of the killing.

Stewart, 763 P.2d at 577 (citations omitted).

The Kansas court agreed that evidence of a prior history of abuse and evidence of a woman's knowledge of her husband's personal characteristics and propensity for violence was relevant to show that the husband's conduct on a particular occasion gave the woman reason to fear that another episode of abuse was about to commence. Id. at 577. The court also agreed that the test for self-defense is whether a reasonable person in the defendant's position would have perceived defensive action as necessary. Specifically, "in cases involving battered spouses, the objective test is how a reasonably prudent battered wife would perceive the aggressor's demeanor". Id. at 579. However, the court found Stewart's case to be distinguishable from other spousal abuse cases in which (1) the wife shot the husband during a contemporaneous violent confrontation, or in which (2) the husband's words or actions gave the wife good cause to believe that she was about to be attacked. Id. at 577-79.

> We must, therefore, hold that when a battered woman kills her sleeping spouse when there is no imminent danger, the killing is not reasonably necessary and a self-defense instruction may not be given. To hold otherwise ... would in effect allow the execution of the abuser for past or future acts and conduct.

Stewart, 763 P.2d at 579.[5]

Turning from cases involving battered spouses and children, the case of State v. Buggs, 806 P.2d 1381 (Ariz. App. 1990), illustrates the requirement of imminency under facts more analogous to Ha's case. Buggs was involved in a pool hall fight; he was kicked and stabbed by three men and a woman. One of Buggs's friends grabbed him and helped him to safety on the other side of the building. There, the friend handed Buggs a pistol and told him to "take care of himself". Id. at 1383. Buggs returned to the front of the pool hall, found the woman and two of the men who had

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[5] Accord, State v. Reid, 747 P.2d 560 (Ariz. 1987) (The defendant's father had subjected her to years of physical and sexual abuse. To prevent further abuse, the defendant shot and killed her father while he slept. Held: the defendant was not entitled to a self-defense instruction.); Jahnke v. State, 682 P.2d 991, 995-97, 1006-07 (Wyo. 1984) (The defendant's father had mentally and physically abused him for years. The defendant lay in ambush for his father one night as the father returned home from a restaurant, then shot and killed him. Held: the defendant was not entitled to a self-defense instruction because he had no reason to believe that he was in imminent danger.); State v. Norman, 378 S.E.2d 8, 13-16 (N.C. 1989) (The defendant had suffered long-term abuse at the hands of her husband. Each time she attempted to escape, he found her and beat her. On the day of the shooting, the husband beat the defendant throughout the day and threatened to kill or mutilate her. In the afternoon, the defendant shot her husband while he was taking a nap. Held: the defendant was not entitled to self-defense instructions because there was no evidence that she reasonably believed that death or great bodily harm was imminent.); Whipple v. State, 523 N.E.2d 1363, 1365-67 (Ind. 1988) (The seventeen-year-old defendant and his sister had suffered years of mental and physical abuse at the hands of their parents. The defendant retaliated by killing first his mother and then his father with an axe. The defendant claimed that he had acted in self-defense because he and his sister "lived in an ongoing atmosphere of imminent danger of serious bodily harm and fear of death". Held: the defendant was not entitled to self-defense instructions because there was no evidence that the defendant reasonably believed that he or his sister faced imminent danger.).

assaulted him, and began firing his pistol at them. He succeeded in wounding the woman. Id.

Buggs was charged with aggravated assault, and he claimed self-defense. He presented evidence that the men he had fought with were members of a street gang called the "Crips", and that these men and their fellow gang members would eventually find him and finish what they had begun:

> At various points in his testimony, the defendant elaborated on his fear of the Crips. When asked why he felt he was in danger when he returned to the [pool hall] parking lot, he said: "Because I know the Crips, I know what they do. You have to get them before they get you. ... [S]ee, I've been on the streets a long time, I have seen how the Crips act, I know what they do, and they get you in a position where you don't [have] protection, [and] they will wipe you."

Buggs, 806 P.2d at 1383.

The Arizona court acknowledged that a defendant is entitled to a self-defense instruction "if there is the slightest evidence of justification for his act". Id. However, the court found no evidence that the defendant had been in danger of imminent harm from his enemies.

> [When] the defendant shot in the direction of the Crips, they were not advancing upon or physically menacing him in any way. Characterized most strongly for the defendant, all that the evidence showed was that the defendant thought the two men he shot at were highly dangerous individuals who meant to do him harm, and who ... had to be eradicated right away to prevent them from gaining an advantage over him and injuring him at some later time. The question is, does this kind of threat justify

> the defendant's action? We believe it does not.
>
> . . . .
>
> We have not found any case that would allow a claim of self-defense under the circumstances presented here. While we agree that a victim's past acts and reputation for violence will often be relevant on the question of the reasonableness of a defendant's use of force in self-defense, ... one may resort to deadly force only if it is necessary to prevent immediate harm. The defendant's "self-defense" in this case was nothing more than a "preemptive strike" against the men he feared.

Buggs, 806 P.2d at 1384-85.

The Arizona court conceded that there might be times when the requirement of imminency should be relaxed. The court referred to an example described in LaFave & Scott, § 5.7(d), Vol. 1, p. 656, of a kidnapping victim who is informed that he will be killed at the end of the week and whose best opportunity to escape this fate is to kill his kidnapper early in the week. Under such circumstances, LaFave suggests, "[t]he proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier — as early as is required to defend himself effectively". Id.

However, the Arizona court found that the case in front of them was readily distinguishable from LaFave's example:

> Here, when the defendant returned to the area of the confrontation and fired his pistol at the men who had kicked him, he was not under their domination and control, and they gave no signal that they intended to renew their

> attack. Our conclusion is in line with settled authority to the effect that after a fight has broken off, one cannot pursue and kill merely because he once feared for his life.

Buggs, 806 P.2d at 1385 (citations omitted). The court therefore ruled that Buggs was not entitled to an instruction on self-defense. Id.

Hernandez v. State, 861 P.2d 814 (Kan. 1993), is in accord with Buggs. In Hernandez, the defendant's sister was having marital problems and wanted to leave her husband. The sister's husband threatened her with violence if she left him or if she contacted the police. To support his sister, the defendant went to confront the husband. When the husband told the defendant to mind his own business, the defendant shot him. Charged with murder, Hernandez claimed that he acted in defense of another (his sister), because his brother-in-law would have killed or seriously injured the sister in the near future. The court held that defense of others was not available to the defendant because he had no reason to believe that his brother-in-law posed a threat of imminent harm to his sister. Id. at 820.

Also in accord with Buggs is State v. Mize, 340 S.E.2d 439 (N.C. 1986). A man named McDonald had spent the day looking for Mize because he believed that Mize had raped his girlfriend. All during that day, Mize hid. When night came, Mize went to McDonald's residence, woke him up, and shot him. Mize claimed that he had acted in self-defense because he reasonably believed that McDonald would eventually find him and try to kill him. The court answered:

> Here, although the victim had pursued [the] defendant during the day approximately eight hours before the killing, defendant Mize was in no imminent danger when McDonald was at home asleep. When Mize went to McDonald's trailer with his shotgun, this was a new confrontation. Therefore, even if Mize believed it was necessary to kill McDonald to avoid his own imminent death, that belief was unreasonable.

Mize, 340 S.E.2d at 442 (citations omitted).

Consistent with the above authorities, and in accord with the wording of AS 11.81.330 and AS 11.81.900(b)(23), we hold that a defendant claiming self-defense as justification for the use of force must prove that he or she acted to avoid what he or she reasonably perceived to be a threat of imminent harm. A defendant's reasonable belief that harm will come at some future time is not sufficient to support a claim of self-defense or defense of others.

Ha's evidence supported the conclusion that he reasonably believed that Buu would someday harm him. But the requirement of imminency limits the scope of authorized self-defense. A defendant may actually and reasonably believe that, sooner or later, his enemy will choose an opportune moment to attack and kill him. Nevertheless, as Judge Souter noted, the law does not allow a defendant to seek out and kill his enemy so that he no longer has to live in fear. The defendant's use of force against his enemy is authorized only when the defendant actually and reasonably believes that the enemy's threatened attack is imminent. AS 11.81.900(b)(23); Paul v. State, 655 at 777, 778 n.8.

Ha argues that, when determining whether a defendant reasonably believed that harm was imminent, the trial judge and the

jury must consider the circumstances as they appeared to the defendant. Ha contends that, in his case, these circumstances include "[Ha's] past experiences, his knowledge of [Buu], as well as [Ha's] physical and mental condition". We agree with Ha up to a point.

A defendant's knowledge of the deceased's violent nature must be considered when judging the reasonableness of the defendant's actions and perceptions. Byrd v. State, 626 P.2d 1057, 1058 (Alaska 1980). And we agree with Ha that the reasonableness of his perception of imminent harm must be evaluated, not just based on Buu's words and actions on the specific occasion when Ha killed him, but also based on Ha's knowledge of Buu's propensities and past conduct.

> [T]he determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation"[.] Such terms encompass more than the physical movements of the potential assailant. ... [T]hese terms include any relevant knowledge the defendant had about the person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure [or commit a crime upon] him or that the use of deadly force was necessary under the circumstances.

People v. Goetz, 497 N.E.2d 41, 52 (N.Y. 1986) (citations omitted).

Thus, Ha is correct when he asserts that the reasonableness of his belief that he faced imminent harm must be analyzed in light of the severe beating that Ha had sustained at Buu's hands twelve hours before, in light of Buu's earlier repeated threats to

kill Ha, and in light of Ha's knowledge of Buu and his family, whose criminal history indicated that Buu's threats should be taken seriously. And, to the extent that an understanding of Vietnamese culture was relevant to evaluating Buu's motivation or readiness to kill Ha, this too was a proper matter to be considered.

However, Ha argues that, because of his cultural background and his poor command of English, he felt that it would be useless to go to the police for help and that he had "no viable alternatives" to killing Buu. The evidence at Ha's trial shows that Ha had ample opportunity to inform others of his conflict with Buu and to seek their assistance. During the twelve or thirteen hours between the fight on board the Ultimate and the shooting, Buu left Ha completely alone. During this period, Ha had conversations with the skipper of his fishing boat and with various acquaintances in the Vietnamese community. Moreover, even assuming that Ha believed it would be pointless to speak with any of these people about Buu's threats, this does nothing to establish that Buu posed an imminent danger to Ha or that Ha could have reasonably believed that Buu posed such a danger. Ha's argument is simply another way of saying that Ha believed Buu would inevitably kill him if Ha did not act first. As we have said, a reasonable fear of future harm does not justify killing one's enemy.

Ha also appears to argue that Vietnamese culture teaches that all police are corrupt, that one can expect no help from the authorities, and that people must take the law into their own hands to resolve personal disputes. Assuming for purposes of argument that Ha's characterization of Vietnamese culture is accurate, and

further assuming that Ha believed all these things, this still does not establish that Ha reasonably believed that Buu posed an imminent danger to him. To the extent that Ha might be arguing that the law of self-defense should make exceptions for people whose culture encourages vendettas, killings to assuage personal honor, or preemptive killings to forestall future harm, we reject Ha's argument.

Ha next contends that Judge Souter (and ultimately the jury) should have evaluated the imminency of harm from the point of view of someone who was not thinking clearly. Ha argues that, because of his extreme fear and because he had possibly sustained brain injury during Buu's earlier attack, he was subjectively convinced that Buu was about to kill him at any moment. Assuming this is true, this would not establish the reasonableness of Ha's subjective perception. (In fact, if Ha is arguing that he would not have perceived an imminent danger were it not for his mental abnormality, his argument establishes that he was acting unreasonably.)

When the law says that the reasonableness of self-defense must be evaluated from the point of view of the defendant, this does not mean from the point of view of a mentally ill defendant. The reasonableness of a defendant's perceptions and actions must be evaluated from the point of view of a reasonable person in the defendant's situation, not a person suffering mental dysfunction. This distinction was elaborated in People v. Goetz:

> [The lower court concluded that] the appropriate test ... is whether a defendant's beliefs and reactions were "reasonable to him". Under

> that reading of the statute, a jury which believed a defendant's testimony that he felt that his own actions were warranted and were reasonable would have to acquit him, regardless of what anyone else in the defendant's situation might have concluded. Such an interpretation defies the ordinary meaning and significance of the term "reasonably" ... and misconstrues the clear intent of the Legislature[.]
>
> . . . .
>
> [There must] be a reasonable basis, viewed objectively, for the [defendant's] beliefs. ... [A] belief based upon mere fear or fancy ... or a delusion pure and simple would not satisfy the requirements of the statute.
>
> . . . .
>
> To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a ... defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.

Goetz, 497 N.E.2d at 47-48, 50 (emphasis in the original) (citations omitted). See also Werner v. State, 711 S.W.2d 639, 645 (Tex.Crim.App. 1986) ("[A] 'reasonable belief' [in the necessity of self-defense] is one that would be held by an 'ordinary and prudent [person] in the same circumstances as the actor.' ... [T]he test [incorporates] the 'ordinary prudent man test of tort law.'")

Thus, the reasonableness of Ha's belief in the imminence of danger must be evaluated from the point of view of a reasonable person in his situation — someone with Ha's pertinent knowledge of and experience with Buu, but someone whose perceptions were clear and rational. If the rule were otherwise, judges and juries would

be obliged to acquit defendants who killed under a psychotic delusion that they were about to suffer serious harm.

In this case, despite the evidence suggesting that Ha had good reason to fear future harm from Buu, there was no evidence that Ha was in imminent danger, or could have reasonably believed himself to be in imminent danger, when he hunted Buu through the streets of Dillingham and then shot him from behind while Buu was carrying groceries. Judge Souter therefore correctly declined to instruct the jury on self-defense.

Did the Trial Court Give a Proper Instruction on Heat of Passion?

Although Judge Souter ruled that Ha could not argue self-defense to the jury, the judge allowed Ha to argue that his homicide should be mitigated to manslaughter under the doctrine of heat of passion. This doctrine is codified in AS 11.41.115(a):

> In a prosecution [for first-degree murder] under AS 11.41.100(a)(1)(A) or [for second-degree murder under] AS 11.41.110(a)(1), it is a defense that the defendant acted in [the] heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim.

The term "serious provocation" is defined in AS 11.41.115(f)(2) as:

> conduct which is sufficient to excite an intense passion in a reasonable person in the defendant's situation, other than a person who is intoxicated, under the circumstances as the defendant reasonably believed them to be; insulting words, insulting gestures, or hearsay reports of conduct engaged in by the intended

> victim do not, alone or in combination with each other, constitute serious provocation.

This court has recognized that the "passion" spoken of in AS 11.41.115(a) encompasses more than rage — that it includes terror and other intense emotions. LaPierre v. State, 734 P.2d 997, 1001 (Alaska App. 1987). Thus, if Ha killed Buu while in great fear for his life, this could qualify as "heat of passion" assuming the other statutory conditions were met.

However, it is not sufficient that the defendant experience heat of passion. Under AS 11.41.115(f)(2), the defendant's passion must be caused by "conduct ... sufficient to excite an intense passion in a reasonable person in the defendant's situation ... under the circumstances as the defendant reasonably believed them to be". Moreover, under AS 11.41.115(a), the defendant's use of force must occur "before there [was] a reasonable opportunity for the [defendant's] passion to cool".[6]

When the heat of passion jury instructions were argued at Ha's trial, the prosecutor proposed an instruction that would define "reasonable person" as a "reasonably healthy person whose thinking is not influenced by mental difficulties that skew or affect his ability to form reasonable thought processes or act in a reasonable fashion". The prosecutor further proposed that the jury be told

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[6] Heat of passion does not require that the act of killing be reasonable, for a reasonable killing is no crime. "What is really meant by 'reasonable provocation' is provocation which causes a reasonable [person] to lose his [or her] normal self-control; and although a reasonable [person] who has thus lost control ... would not kill, yet his [or her] homicidal reaction to the provocation is at least understandable." W. LaFave and A. Scott, Substantive Criminal Law (1986), § 7.10, Vol. 2, p. 256.

that a "reasonable person" is someone "unaffected by cultural mores of foreign countries", and that the "reasonable person" standard incorporated "the cultural standards and legal rules of orderly conduct of the United States and the State of Alaska".

Ha's attorney took strong exception to the prosecutor's proposed instruction.

> DEFENSE ATTORNEY: [A]s far as a normal, healthy person, ... the court has allowed testimony to come in regarding [the defendant's] state of mind. I think the court has to allow the jury to consider that. Particularly in light of the court's ruling that heat of passion comes in. So I ... disagree with [the] interpretation that a reasonable person is some normal American devoid of the circumstances we have here. And the circumstances include someone's cultural background, because [this] may go to mitigating the [killing]. ... [T]he circumstances in this particular case [include] my client's knowledge of the deceased, the deceased's background for violence, his history for violence, his ... cultural history of carrying out threats, and in that particular culture people would take him seriously. So I think it would be wrong for the court to [instruct the jury] that a reasonable person is ... some normal American farm boy from Iowa.

Judge Souter agreed with the defense attorney that Ha's cultural background and knowledge were relevant when assessing the reasonableness of his actions. For this reason, Judge Souter ruled that he would give only the first part of the prosecutor's proposed instruction. The instruction, in its final form, read:

> When these instructions use the term "reasonable person" or "reasonably believe", they mean a reasonable, mentally healthy person whose thinking is not influenced by mental difficulties that skew or affect his ability to

form reasonable thought processes or to act in a reasonable fashion.

Ha's attorney continued to object to the abridged instruction, but in a conclusory fashion:

> DEFENSE ATTORNEY: [J]ust for clarification purposes, I take it this [instruction] is from one of the standard instructions?
>
> PROSECUTOR: I wrote it last night.
>
> THE COURT: I don't think it's standard at all.
>
> . . . .
>
> DEFENSE ATTORNEY: Precisely.
>
> . . . .
>
> THE COURT: [W]e could never make any progress in this world if we [always did] what has been done in the past.
>
> DEFENSE ATTORNEY: I agree, Judge, but I don't think the instruction follows the law. I don't think it follows the law.
>
> THE COURT: [T]his is an instance of giving an instruction specifically tailored to this case, and I believe it does state the law, so I shall give it over objection.
>
> DEFENSE ATTORNEY: I disagree[.] [I]t doesn't follow the law, but I've made my record.
>
> THE COURT: You've made your record.

On appeal, Ha argues that the jury instruction defining "reasonable person" was erroneous — that the reasonableness of his conduct should have been evaluated in light of his mental abnormality In particular, Ha relies on the expert testimony presented at his trial which indicated that, because of Buu's attack the night

before, Ha might have been suffering from "post-concussion syndrome", a mental condition brought on by head injury. According to this expert testimony, post-concussion syndrome causes the sufferer to have a lowered tolerance to stress and to be more susceptible to emotional instability. Ha argues that the reasonableness of his perceptions, reactions, and conduct should have been evaluated in light of this syndrome.

When the law tests the reasonableness of a defendant's actions, the issue is what a reasonable person would have done in the defendant's circumstances. As we indicated in our discussion of self-defense, a defendant's "circumstances" encompass the various aspects of a defendant's knowledge, experience, and physical situation. However, we agree with Judge Souter that the reasonableness of the defendant's conduct must not be evaluated by asking what a person suffering from mental abnormality would have thought or done.

> Some cases have considered whether the law should take into account, in measuring the adequacy of the provocation, the fact that the defendant possesses some peculiar mental or physical characteristic, not possessed by the ordinary person, which caused him, in the particular case, to lose self-control. It is quite uniformly held that the defendant's special mental qualities — as where, because of sunstroke or head injury, he is particularly excitable — are not to be considered.

LaFave and Scott, Substantive Criminal Law (1986), § 7.10, Vol. 2, p. 262.

In State v. Russo, 734 P.2d 156 (Haw. 1987), the defendant was charged with two counts of murder for shooting into a bar and

killing two patrons. He defended on the basis that he had an insane belief that "these guys were going to kill me unless I killed them". Id. at 160. Besides the defense of insanity, Russo also asked the trial judge to instruct the jury that his killings might be manslaughter under the Hawaii statute that mitigates a homicide committed "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation". Id. at 158. The trial judge rejected the proposed instruction, and the Hawaii Supreme Court affirmed:

> The [common-law] rule that provocation could, within narrow bounds, reduce murder to manslaughter, represented a limited concession to human weakness. While [Hawaii's statute] relaxes the rigorous objectivity of the common-law doctrine, it still requires that the actor's emotional distress be based on "reasonable explanation or excuse". This key phrase preserves the essentially objective character of the inquiry and erects a barrier against debilitating individualization of the legal standard.
>
> . . . .
>
> Granted, [Russo] may have been mentally or emotionally disturbed; but nothing Russo offered ... provided "a reasonable explanation or excuse" for his conduct under any test of reasonableness. ... A ruling that evidence of this nature ... furnishes a basis for mitigating the offense of murder to manslaughter would undermine the normative message of the criminal law[.]

Russo, 734 P.2d at 160 (citations omitted).

On appeal, Ha argues that his case should be viewed differently because there was at least some evidence that his mental abnormality stemmed from a head injury caused by Buu's earlier

assault. This proposed distinction (between unreasonable behavior stemming from pre-existing mental dysfunction and unreasonable behavior stemming from mental dysfunction caused by the victim's prior assault on the defendant) was not argued in the trial court, and we do not find plain error. As noted above, the law has traditionally refused to consider a defendant's mental abnormality when deciding heat of passion claims, and Ha cites no heat of passion cases which have accepted his proposed rule of law.

Conclusion

For the reasons explained above, we uphold Judge Souter's refusal to instruct the jury on self-defense, and we also uphold his decision to instruct the jury that Ha's mental abnormalities should not be considered when deciding Ha's claim of heat of passion.

The judgement of the superior court is AFFIRMED.

COATS, Judge, dissenting.

In Folger v. State, 648 P.2d 111 (Alaska App. 1982), we concluded that the trial judge erred in failing to give an instruction on self-defense. In that case, we stated:

> From his opening statement it appears that Folger's primary defense was self-defense. Although his defense was extremely weak, he did present evidence from which a reasonable juror could conclude that self-defense existed. It is obvious why a trial judge would be less than impressed with Folger's explanation for his use of a dangerous weapon. However, Folger was entitled to trial by jury and a jury should have been instructed on his self-defense claim.

Id. at 113-14 (footnote omitted). In a footnote we went on to say:

> We think a strong argument can be made that a trial judge should err on the side of giving instructions on self-defense so as to avoid a needless appellate issue in cases in which a weak case for self-defense is presented. We also think in a case such as this where self-defense is presented as a possible defense, there is a danger that the jury may consider its own understanding of what self-defense is in the absence of an instruction from the court. It seems preferable to have the jury correctly instructed.

Id. at 113-14 n.3. In reaching this decision in Folger, we relied on decisions of the Alaska Supreme Court which we concluded required the trial judge to instruct on self-defense even where the evidence supporting the defendant's self-defense claim was weak or implausible. Houston v. State, 602 P.2d 784, 785 (Alaska 1979); Toomey v. State, 581 P.2d 1124, 1126 n.6 (Alaska 1978). We have consistently adhered to this precedent. See, e.g., Willett v. State, 836 P.2d 955, 958 (Alaska App. 1992); Carson v. State, 736 P.2d 356, 359

(Alaska App. 1987). I see our decision in this case as a departure from that precedent and consequently dissent.

Ha's primary defense was self-defense. I agree that Ha's defense suffered severe problems because of the time that elapsed between Buu's assault and the moment when Ha shot Buu. There is little evidence that Ha had a need to defend himself from Buu at the time he shot Buu.

However, despite the problems with his defense, Ha was entitled to a jury trial, and it seems to me that it was Ha's right to have the jury decide his claim of self-defense based on proper instructions. Since Judge Souter did not instruct the jury on self-defense, this probably had the effect of taking Ha's defense from the jury. The jury either did not decide the issue of self-defense, or had to decide whether self-defense existed based upon their own understanding of the issue. Either result seems to me to be improper, and undermines Ha's right to a jury trial. I therefore conclude that Judge Souter erred in failing to instruct the jury on self-defense and that his action tended to deprive Ha of his right to a jury trial. I would reverse Ha's conviction.

No U.S. Supreme Court cases

Query - "self defense" /s retreat /p (home or residence)
Data base - PAC = Pacific Reporter

Citation	Rank(R)	Page(P)	Database	Mode
879 P.2d 19	R 1 OF 12	P 1 OF 37	PAC	TERM

(CITE AS: 879 P.2D 19)

The PEOPLE of the State of Colorado, Petitioner,

v.

Robert Farrell WILLNER, Respondent.

No. 93SC248.

Supreme Court of Colorado,

En Banc.

July 18, 1994.

Rehearing Denied Aug. 15, 1994.

Defendant was convicted by jury of first-degree murder and crime of violence for a shooting death while victim attempted to repossess defendant's pickup truck. The Court of Appeals reversed and remanded for new trial. Appeal was taken. The Supreme Court, Vollack, J., held that: (1) jury instructions accurately stated Colorado law on self-defense; (2) evidence supported instruction; and (3) admitting similar transaction evidence was not error.

Reversed and remanded with instructions.

Scott, J., dissented and filed opinion.

879 P.2d 19	R 1 OF 12	P 7 OF 37	PAC	TERM

(CITE AS: 879 P.2D 19)

People v. Willner

▌[4]
▌203 HOMICIDE
▌203VIII Trial
▌203VIII(C) Instructions
▌203k300 SELF-DEFENSE

▌203k300(15) k. Excluding or ignoring issues, defenses, or evidence as to duty to RETREAT.

Colo.,1994.

Defendant charged with murder for shooting death while victim attempted to repossess defendant's truck was not entitled to jury instruction explicitly explaining doctrine of no-retreat given that defendant was initial aggressor and had not withdrawn or communicated withdrawal to victim; defendant ran down street chasing truck as victim slowly backed away and fired shots while three or four houses away from defendant's HOME. West's C.R.S.A. ss 18-1-704(2)(a), 3(a), 18-3-102.

Citation	Rank(R)	Page(P)	Database	Mode
840 P.2d 1	R 2 OF 12	P 1 OF 79	PAC	TERM

(CITE AS: 840 P.2D 1)

Donna Lee BECHTEL, Appellant,

v.

STATE of Oklahoma, Appellee.

No. F-88-887.

Court of Criminal Appeals of Oklahoma.
Sept. 2, 1992.
Rehearing Denied Oct. 22, 1992.

After reversal of defendant's initial first-degree murder conviction by the Court of Criminal Appeals, ▌738 P.2d 559, defendant was again convicted in the District Court, Oklahoma County, Richard L. Freeman, J., of first-degree murder, and she appealed. The Court of Criminal Appeals, Johnson, J., held that: (1) battered woman syndrome is substantially scientifically accepted theory, for purposes of determining admissibility of evidence of such syndrome; (2) lapse of three and one-half years between defendant's fatal shooting of husband and psychological examination did not justify exclusion of expert testimony on battered woman syndrome in murder prosecution; and (3) defendant was entitled to requested instruction that State had burden to prove that defendant was not acting in self-defense.

Reversed and remanded.

Parks, J., filed opinion concurring in result.

who did not provoke another with intent to cause an altercation has no duty to RETREAT, but may stand firm and use the right of SELF-DEFENSE. Appellant's requested instruction reads: "In the law if Donna Lee Bechtel actually believed and had reasonable grounds to believe that she was in imminent danger of death or serious bodily harm and that deadly force was necessary to repel such danger, she was not required to retreat or consider whether she could retreat safely. No woman is required to leave her HOME to avoid an attack, even if the attacker is another member of the same household. A woman is entitled to stand her ground and use such force as is reasonably necessary under the circumstances to protect herself from serious bodily harm."

We note that the jury sent back the following inquiry regarding OUJI-CR 748: "Does this mean an active confrontation must be taking place at the time, i.e. fighting or bickering at the time?" The trial court responded: "You have everything before you that you are permitted to have."

4. HEARSAY AND THE BATTERED WOMAN SYNDROME

▌[18] The trial of this case was replete with objections based upon the Hearsay Rule. [FN15] Appellant attempted to offer testimony probative of the reasonableness of her apprehension of fear of the deceased. In so doing, she

STATE of Arizona, Appellee,
v.
Larry Vernon THOMASON, Appellant.
No. 1 CA-CR 11915.
Court of Appeals of Arizona,
Division 1, Department A.
Aug. 22, 1989.
Review Denied Dec. 19, 1989.

Defendant was convicted by jury in the Superior Court, Maricopa County, Cause No. CR-152816, Michael D. Ryan, J., of second-degree murder, and he appealed. The Court of Appeals, Brooks, J., held that "crime prevention" defense is available only when home, its contents, or residents therein are being protected by use or threatened use of physical force or deadly physical force against another.

Affirmed.

prevention statute he was permitted to use deadly physical force to prevent an aggravated assault. The prosecutor merely argued that the evidence did not support the applicability of s 13-411. The trial court refused the instruction without comment.

ARGUMENTS

On appeal, defendant continues to argue that the facts of this case fit within s 13-411. Because the jury was not instructed accordingly, he points out that he was deprived of the "no duty to retreat" provision of s 13-411(B) as well as the presumption in s 13-411(C) that one preventing a crime is acting reasonably. In other words, he contends that the self-defense instruction alone was not an adequate or complete statement of the defenses available to him.

The state answers by urging that defendant's requested instruction on crime prevention was adequately covered by the instruction on self-defense. The state does not address the fact that the instruction on SELF-DEFENSE did not include the absence of a duty to RETREAT or the presumption of reasonableness to which defendant would have been entitled under the crime prevention statute. We do not reach this issue, however, since we affirm the trial court's refusal of the instruction on other grounds. We find that s 13-411 is applicable only to persons protecting the HOME, its contents, or the residents within. Therefore, given the facts of the case before us, defendant was not

Elijah J. BROWN, Appellant,
v.
STATE of Alaska, Appellee.
No. A-93.
Court of Appeals of Alaska.
April 26, 1985.

Defendant was convicted before the Superior Court. Fourth Judicial District, Fairbanks, Jay Hodges, J., of assault in the first degree, and he appealed. The Court of Appeals, Bryner, C.J., held that: (1) sufficient evidence, although it was only defendant's own testimony, that defendant did not provoke dispute with erstwhile friend under circumstances that he knew or should have known would result in mortal combat existed to entitle defendant to have his self-defense claim, weak as it might be, properly determined by jury, and (2) placing burden of proof for self-defense upon defendant charged with assault was plain and prejudicial error.

Reversed.

Singleton, J., concurred in part, dissented in part, and filed an opinion.

CONCURRING/DISSENTING OPINION

that, with complete personal safety and with complete safety as to others, the person can avoid the necessity of using deadly force by retreating, except there is no duty to retreat if the person is

(1) on premises which he owns or leases and the person is not the initial aggressor; or

(2) a peace officer acting within the scope and authority of the officer's employment or a person assisting a peace officer under AS 11.81.380.

The shooting in this case took place in a bar that was not owned or leased to Brown. Brown was not acting as or on behalf of a peace officer at the time. Consequently, in order to present a question of SELF-DEFENSE to the jury, Brown was obligated to produce "some evidence" that he had attempted to RETREAT and thereby avoid his ultimate victim at the point when Brown reasonably became aware of the potential threat to his life and the possibility that he might have to resort to deadly force in SELF-DEFENSE. It seems to me the facts set out in Brown's brief establish that he recognized the potential need for deadly force in self-defense long before he entered the "party house" but did not avoid Miller at that point, though he could easily have done so. Brown sets out the facts as follows:

On November 4, 1982, around 6:00 p.m., E.J. went to Mary's apartment to deliver some mail to his daughter Linda. He gave her the mail and saw Miller

[his ultimate victim] and Mary [his wife] close together on adjoining couches. He had not noticed Miller's truck outside and was not expecting to see Miller there. E.J. asked what was going on and stated that Mary and Miller were the last people he expected to see so close together. Mary began yelling and Miller said he would leave. E.J. told him not to leave since E.J. was headed HOME. E.J. left and Miller followed him out. Miller pulled on E.J.'s sleeve; when E.J. turned, Miller put his hand on a .44 magnum in a holster beneath his parka. Miller threatened to blow E.J.'s "brains out" if he did anything. E.J. told Miller to take his hands off him and left.

After awhile, E.J. returned to Mary's apartment, determined to get to the bottom of the whole affair. Mary and E.J. argued and she told him to get out and not come back. Mr. Brown informed her that he was going to do just that.

Mr. Brown returned to his house. He decided that Miller's threat was too much and that he wanted and needed to talk to Miller. Because he knew that Miller was armed with a .44 pistol, E.J. took his .22 rifle with him. Mr. Brown took a cab to within a block of the party house. Although he did not know that Miller would be there, E.J. was afraid of what would happen if Miller saw him get out of the cab in front of the party house. Mr. Brown put two rounds in the rifle after he got out of the cab.

When E.J. walked into the party house, Miller was standing at the bar very

close to the door. E.J. told him that he wanted to talk to him about threatening him with the gun earlier. E.J.'s rifle was held in his left arm. When E.J. told Miller that he wanted to talk with him, Miller asked what he wanted to talk about. E.J. responded *677 that he thought they should talk about Miller's threat and why he had "pulled a gun" on E.J.. Miller took a partial step, pulled his .44 magnum and pointed it at Mr. Brown. Mr. Brown fired first, striking Miller in the chest. Miller shot at E.J., barely missing his head. Mr. Brown fired a second shot into the ceiling. Mr. Brown and Miller then struggled over Miller's gun which had live ammunition remaining. The struggle went outside where Brown was able to disarm Miller and kicked the .44 away. Leon Miller, E.M. Miller's brother, and Tyrone Burkhead, a patron of the party house, separated them.

Citations to the record and footnote omitted.

Even if we construe the record most favorably to Brown, it is clear that he realized that Miller presented a substantial threat of physical violence at the time of their first confrontation at Brown's wife's HOME. Nevertheless, Brown went to his own HOME, armed himself with a rifle, and sought Miller out to "talk to him [Miller] about threatening him [Brown] with a gun earlier." Under these circumstances, Brown's testimony establishes his recklessness. Brown therefore failed to establish some evidence that he attempted to RETREAT at the

CONCURRING/DISSENTING OPINION

earliest practicable time as a matter of law and, in my view, forfeited any right to claim SELF-DEFENSE. ▌See Bangs v. State, 608 P.2d 1 (Alaska 1980); ▌State v. Millett, 273 A.2d 504, 510 (Me.1971). For this reason, I would not follow ▌State v. Jackson, 382 P.2d 229 (Ariz.1963), and other cases which, in my view, encourage violence by authorizing the kind of conduct that Brown engaged in this case. Brown had a right to lead his life unobstructed by Miller. The fact that he knew Miller was armed and could be dangerous did not require Brown to hide in his room. If Brown feared Miller, Brown certainly could arm himself in order to go about his normal business so long as he did not intentionally seek Brown out. In my view, public policy precludes us from holding that Brown may arm himself with a rifle and seek out someone he has substantial reason to fear will shoot him in order to continue a confrontation.

I am not insensitive to Brown's predicament. Miller's threat to kill him no doubt hurt Brown's pride and may even have enraged him. To this extent, Brown's response was understandable. But on reflection, we should not give our approval to Brown's subsequent actions because to do so encourages extremely dangerous confrontations. Brown's testimony establishes that he went to the party house knowing that a violent confrontation was likely. His actions endangered every person present. It is fortunate that more people were not injured. I would hold that the statutory duty to retreat precludes a finding

Steve R. GARCIA, Appellant (Defendant),

v.

The STATE of Wyoming, Appellee (Plaintiff).

No. 83-21.

Supreme Court of Wyoming.

Aug. 11, 1983.

Defendant was convicted in the District Court, Laramie County, Joseph F. Maier, J., of second-degree murder, and he appealed. The Supreme Court, Thomas, J., held that: (1) self-defense instruction emphasizing duty to retreat was proper, in light of defendant's obvious opportunity to retreat prior to resorting to deadly force, and (2) trial court did not err in refusing to allow defendant's subpoenaed witnesses to testify at the preliminary hearing.

Affirmed.

Bartlett, 170 Mo. 658, 71 S.W. 148 (1902); ▌State v. Sunday, Mont., 609 P.2d 1188 (1980); State v. Grimmett, 33 Nev. 531, 112 P. 273 (1910); ▌State v. Abbott, 36 N.J. 63, 174 A.2d 881 (1961); Foster v. State, 8 Okl.Cr. 139, 126 P. 835 (1912); and Fowler v. State, 8 Okl.Cr. 130, 126 P. 831 (1912).

In his brief the appellant quotes from Mischke, Criminal LAW--HOMICIDE--SELF-DEFENSE--DUTY to *1152 RETREAT, 48 Tenn.L.Rev. 1000 (1981). We are impressed with the fact that this theory seems to depend upon a person being without fault in bringing on an assault and may, according to some authorities, be restricted to his HOME or curtilage. While some courts have extended to other places the area within which the defendant can claim the benefit of the rule, we do not perceive the circumstances of this case as those in which the appellant can claim to be without fault.

▌[2] The appellant participated fully in the prior quarreling and conflict with Connelly. When he went into the kitchen to obtain the knife he had the option of walking on out the door and going peacefully to his own home. There is nothing to indicate that his life was in imminent jeopardy at that time except his claim that it was. Instead he chose to take a knife from a kitchen drawer, return to the living room, and fatally stab Connelly. While the appellant may want to believe that those circumstances constitute self-defense, the law should not justify him in this aberrant style of thinking.

This court previously has considered the defense of self-defens[illegible] homicide

The PEOPLE, Plaintiff and Respondent,
v.
William Harris KING, Defendant and Appellant.
Cr. 20380.
Supreme Court of California, In Bank.
Aug. 29, 1978.

Defendant was convicted before the Superior Court, Santa Clara County, William J. Fernandez, J., of possession, following felony conviction, of a firearm capable of being concealed on the person, and he appealed. The Supreme Court, Manuel, J., held that: (1) use of a concealable firearm in defense of self or others in emergency situations is a defense to charge of violating statute making it an offense for a felon or drug addict to have in his possession, etc., a firearm capable of being concealed on the person, and (2) it was reversible error to refuse to give self-defense instruction in view of evidence that defendant was located in apartment from which no safe egress was possible, that group of intruders were attempting to violently force entry into the apartment, that defendant and occupants were afraid, that one occupant gave defendant a pistol and that defendant shot only to frighten the intruders.

Reversed.

reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent."

CALJIC No. 5.42 (1974 Revision): "A person may defend his HOME or habitation against anyone who manifestly intends or endeavors in a violent or riotous manner, to enter that HOME or habitation and who appears to intend violence to any person in that HOME. The amount of force which the person may use in resisting such trespass is limited by what would appear to a reasonable person, in the same or similar circumstances, necessary to resist the violent or unlawful entry. He is not bound to retreat even though a retreat might safely be made. He may resist force with force, increasing it in proportion to the intruder's persistence and violence if the circumstances which are apparent to the homeowner are such as would excite similar fears and a similar belief in a reasonable person."

CALJIC No. 5.30: "It is lawful for a person who is being assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so he may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent."

CALJIC No. 5.51: "Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an honest conviction and fear that he is about to suffer death or great bodily harm, and if a reasonable man in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if the person so confronted acts in self-defense upon such appearances and from such fear and honest convictions, his right of self-defense is the same whether the danger is real or merely apparent."

CALJIC No. 5.50: "A person who is threatened with an attack that justifies the exercise of the right of SELF-DEFENSE, need not RETREAT. In the exercise of his right of self-defense, he may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and he may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene."

FN4. The requested instruction stated: "If you find that William Harris King acted in self-defense, or in defense of another, then in order to find

STATE of Oregon, Respondent,
v.
Jimm Bob LOCKE, Appellant.
Court of Appeals of Oregon, Department 1.
Argued and Submitted Sept. 24, 1971.
Decided Oct. 19, 1971.
Rehearing Denied Dec. 9, 1971. See ▌491 P.2d 214.

Murder prosecution. The Circuit Court, Lane County, Edwin E. Allen, J., rendered judgment and defendant appealed. The Court of Appeals, Langtry, J., held that instruction on duty to RETREAT as related to SELF-DEFENSE, without taking into conderation fact that defendant was in his HOME when victim physically assaulted him, was improper, even though defendant's own version of altercation might justify inference that violence was over and victim no longer a threat, where defendant testified that victim had, within seconds of shooting, repeatedly threatened to kill defendant and that defendant feared that victim would take pistol from third person and carry out his threat.
Reversed and remanded.

State v. Locke
▌[1]
▌203 HOMICIDE
▌203VIII Trial
▌203VIII(C) Instructions
▌203k300 Self-Defense

▌203k300(7) k. Applicability to issues and evidence in general.
Or.App. 1971.
Murder prosecution instruction on duty to RETREAT as related to SELF-DEFENSE, without taking into consideration fact that defendant was in his HOME when victim physically assaulted him, was improper, even though defendant's own version of altercation might justify inference that violence was over and victim no longer a threat, where defendant testified that victim had, within seconds of shooting, repeatedly threatened to kill defendant and that defendant feared that victim would take pistol from third person and carry out his threat.

*367 **991 William Frye, Eugene, argued the cause for appellant. With him on the brief was Robert D. Woods, Eugene.

Walter L. Barrie, Asst. Atty. Gen., Salem, argued the cause for respondent. With him on the brief were Lee Johnson, Atty. Gen., and John W. Osburn, Sol. Gen., Salem.

Before SCHWAB, C.J., and LANGTRY and THORNTON, JJ.

LANGTRY, Judge.

Defendant appeals from conviction of second degree murder. He was charged with first degree murder.

The only assignment of error concerns the following jury instruction:

'I instruct you that, if you believe from the evidence and beyond a reasonable **992 doubt, that the defendant could have avoided any conflict between himself and decedent, without increasing the danger to himself, it was his duty to avoid such conflict, and RETREAT, and so to render a resort to the law of SELF-DEFENSE unnecessary.'

This instruction, which states the general rule of self-defense with reference to the duty to avoid conflict, was given twice--the second time when the jury requested additional instruction. Defendant excepted to it on both occasions because it placed an 'absolute duty' upon the defendant to retreat; thus, it

did not take into consideration the fact that the defendant was in his HOME when the deceased physically attacked him and he feared that the deceased would carry out threats he made to kill the defendant.

*368 The only part of the transcript we have is the direct and cross-examination of the defendant, which, by itself, presents the defendant's version of the facts. This version apparently varies much from that of other witnesses. In his testimony defendant said that he and the deceased, who was a man of American Indian ancestry, whose grandfather was in the 'Battle of Bull Run, or something, or Big Horn, or something * * *,' and a third person, whose name was Summers, had been drinking liquor extensively together--first at taverns and on the road and finally in defendant's home. He said that the deceased, without prior warning, slapped defendant from a chair in which he was sitting, and said:

'* * * 'You stole my country. I'm going to kill you white son-of-bitches."

Defendant said that deceased kneeled or bent over him and

'* * * Every time I tried to get up, he hit me, or slapped me.

'* * *

'He didn't say anything, except, 'I'm going to kill you white sons-of-bitches.' That's last ten things he said.'

Defendant, from the floor, requested Summers to get a pistol from a bedroom, where Summers knew it was, and stop the altercation. Summers got the pistol and

Wayne Albert ROADS, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF SISKIYOU, Respondent;

The PEOPLE of the State of California, Jane Skanderup, District Attorney for the County of Siskiyou, and Thomas C. Lynch, Attorney General of the State of California, Real Parties in Interest.

Civ. 12284.

Court of Appeal, Third District.

Aug. 14, 1969.

Hearing Denied Oct. 9, 1969.

Proceeding for writ of prohibition, after petitioner's motion to set aside indictment on charges of murder, possession of narcotics, and possession of narcotics paraphernalia had been denied by the Superior Court, Siskiyou County, which nevertheless granted motion severing further proceedings on homicide charge from those on narcotics charges. The Court of Appeal, Janes, J., held that there was not sufficient probable cause to support charge of murder.

Writ issued.

[3]
203 HOMICIDE
203V Excusable or Justifiable Homicide
203k108 SELF-DEFENSE
203k118 Duty to RETREAT

203k118(3) k. When attack is on one's own premises.

Cal.App. 1969.

One may stand his ground and resort to use of deadly force to repel an intruder in his HOME when it reasonably appears that such intruder intends to inflict serious bodily harm.

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Phillip Anthony GARCIA, Defendant and Appellant.
Cr. 16110.
Court of Appeal, Second District,
Division 1.
Aug. 8, 1969.

Defendant was convicted in the Superior Court, Los Angeles County, Paul G. Breckenridge, J., of assault with a deadly weapon and he appealed. The Court of Appeal, Lillie, J., held that bow and arrow held in firing position with arrow pointed at victim in manner such that it could be fired in an instant constituted deadly weapon, that aside from manner in which defendant held bow and arrow for use, he committed an assault with deadly weapon when he actually shot victim with arrow, as defendant's claim of SELF-DEFENSE was question of fact foreclosed on appeal, and that victim of assault was under no duty to RETREAT from in front of his RESIDENCE, when defendant approached him with bow and arrow, but could exercise his right of SELF-DEFENSE and fight by use of all force and means apparently necessary.

Judgment affirmed.

[4]
37 ASSAULT AND BATTERY
37II Criminal Responsibility
37II(A) Offenses
37k62 Defenses

37k67 k. Self-defense.

Cal.App. 1969.

Victim of assault with deadly weapon was under no duty to RETREAT but could exercise his right of SELF-DEFENSE and stand his ground and defend himself by use of all force and means apparently necessary where defendant approached victim in front of victim's RESIDENCE carrying loaded bow with arrow pointed at victim. West's Ann.Pen.Code, s 245.

take it away from him. * * * I hit him with my left. I kicked him real quick because I wanted to get rid of the weapon. Then I was shot *522 and I went and got a stick and took it (bow and arrow) away from him.' The evidence clearly points to the conclusion that the arrow was indeed 'pointed at' Godiness; that the bow and arrow had to be held in a firing position for the arrow to have been shot into Godiness' arm in the instant Godiness tried to disarm him; and **836 that only the pressure of a 'loaded' bow could cause the arrow to go 'clean through' Godiness' arm--in one side of his body and out the other--which indicates far more force than under the circumstances could be exerted to thrust the arrow by hand into Godiness' shoulder.

[3][4][5][6] In any event, defendant committed an assault with a deadly weapon when he actually shot Godiness with the arrow. On the record before us appellant's claim of self-defense was a question of fact which is foreclosed on appeal. (People v. Davis, 63 Cal.2d 648, 654, 47 Cal.Rptr. 801, 408 P.2d 129.) The trial judge was not required to, and did not accept defendant's version of what occurred (People v. Zilbauer, 44 Cal.2d 43, 48--49, 279 P.2d 534; People v. Eggers, 30 Cal.2d 676, 686, 185 P.2d 1); he was unimpressed with the verity of his testimony and rejected defendant's assertion that around 4 a.m. he returned to Godiness' RESIDENCE because he wanted to sell him the bow and arrows, and when attacked by Godiness, in self-defense thrust the arrow by hand into his shoulder. The evidence shows that defendant carried the loaded

bow with the arrow pointed at Godiness. Because of the earlier challenge and the fact that defendant was 'coming like that' with the bow and arrow, Godiness was justified in his fear of imminent danger and his belief that it was necessary to disarm him to protect himself. The record points to defendant as either an actual or apparent aggressor. Justification does not depend upon the existence of actual danger but on appearances. In order that a person may avail himself of the right of self-defense it is sufficient that the appearance of his assailant be such as to arouse in his mind, as a reasonable man, a belief that his assailant was about to commit great bodily injury on him. (People v. Jackson, 233 Cal.App.2d 639, 641, 43 Cal.Rptr. 817; People v. Collins, 189 Cal.App.2d 575, 588, 11 Cal.Rptr. 504.) Godiness was under no duty to RETREAT; in the exercise of his right of SELF-DEFENSE he could stand his ground and defend himself by the use of all force and means apparently necessary. (People v. Collins, 189 Cal.App.2d 575, 588, 11 Cal.Rptr. 504; People v. Dawson, 88 Cal.App.2d 85, 95, 198 P.2d 338; see also People v. Holt, 25 Cal.2d 59, 63, 153 P.2d *523 21.) Under the circumstances here defendant could not justify his shooting Godiness as self-defense unless he 'really and in good faith (had) endeavored to decline any further struggle' before the assault. (s 197(3), Pen.Code.) To do this he must have removed the necessity, actual or apparent, for Godiness to defend himself against his conduct. A man has not the right to provoke a quarrel, go to it armed, take

STATE of Arizona, Appellee,
v.
Alvord JACKSON, Appellant.
No. 1263.
Supreme Court of Arizona, En Banc.
May 29, 1963.

Defendant was convicted of seconddegree murder. The Superior Court of Apache County, J. Smith Gibbons, J., entered judgment, and the defendant appealed. The Supreme Court, Struckmeyer, J., held that the Superior Court erred in rejecting evidence of the defendant that the deceased carried a gun in his coat, that he had made threats to use it, and that defendant had been informed of such facts a week before the shooting of the deceased, and that it was error to refuse to give defendant's requested instruction that a person is not required to retreat before he may act lawfully in self-defense.

Judgment reversed.

STATE v. JACKSON

▌[5]
▌203 HOMICIDE
▌203V Excusable or Justifiable Homicide
▌203k108 SELF-DEFENSE
▌203k118 Duty to RETREAT

▌203k118(1) k. In general.

Ariz. 1963

Defendant, who was charged with murder, did not waive right of self-defense by returning to place of altercation with deceased after having gone HOME to place of safety. A.R.S. s 13-462.

STATE
v.
TUTTLE.
No. 907.
Supreme Court of Arizona.
Oct. 15, 1941.

L. C. Tuttle was convicted of murder in the first degree, and he appeals. Affirmed.

pocket or attempt to use it. When defendant struck him with the knife, deceased knocked defendant down with his fists. The razor was later found on the floor of the tent.

No exception is taken to the court's instructions and there could be none. They **90 were full and fair. The court defined all the degrees of homicide and submitted forms of verdict for each degree, with proper directions. It defined the law of SELF-DEFENSE, by one on his own premises, as follows: '* * * you are instructed that when a person is assaulted in his own HOME by a person armed with a deadly weapon, and believes himself in danger of great bodily harm or believes that his life is in danger, he need not RETREAT, but may take human life to prevent such felonious attack, and the taking of human life under such circumstances is justifiable * * * and you must acquit defendant.' Those who see and hear the witnesses testify are in a much better position to weigh their testimony than we, and in passing on questions of fact are more apt to be correct than we. The jurors had an opportunity to observe the manner and conduct of the witnesses and by their verdict have said there was no necessity *120 for the defendant to take the deceased's life to protect his own, under the facts and circumstances submitted to them. And, as said in the forepart of this opinion, we cannot say the evidence was insufficient to support their verdict and the judgment.

[3][4] Counsel in their argument under (1) and (2) make the complaint that

STATE
v.
PHILLIPS.
Supreme Court of Washington.
July 1, 1910.

Department 1. Appeal from Superior Court, Okanogan County; E. W. Taylor, Judge.

Charles Phillips was convicted of murder in the second degree, and he appeals. Reversed.

1. HOMICIDE (s 137*)--INDICTMENT--SUFFICIENCY.

An indictment charging that defendant killed deceased is not insufficient for failing to allege that deceased died within a year and a day from the infliction of the wound.

[Ed. Note.--For other cases, see Homicide, Cent. Dig. ss 228-230; Dec. Dig. s 137.*]

* For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

complained of imports anything mere than this. While the second instruction complained of may be a correct statement of the law in the abstract, it had no application to the facts before the court in this case. It was no doubt the established rule of the common law that a person assaulted must RETREAT to the wall or warn his adversary to desist before taking his life in SELF-DEFENSE, provided always there was time and opportunity for making such RETREAT or giving such warning, in safety. But it was likewise an established rule of the common law that: 'A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence and surprise to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to RETREAT, but may pursue his adversary until he has secured himself from all danger; and, if he kill him in so doing, it is called justifiable SELF-DEFENSE.' State v. Marfaudille, ▌48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346, and authorities cited. In other words the duty to retreat or warn has no application to one against whom a felonious assult is committed with a deadly weapon. It is idle to say that a person assaulted by a highwayman in the street, or by a burglar in his HOME, must RETREAT or give warning before he can lawfully *256 resort to the right of SELF-DEFENSE. Without attempting to pass upon conflicting testimony or the credibility of witnesses, the rule as thus stated holds good in this case.

Legislative Affairs Agency
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Testimony on HB 293

Date Sent: 2/9/96 *No. of Pages Including Cover Sheet:* 3

Thank You,

Tammy R. Hall
Information Assistant

STATE of ALASKA

Delta Junction Legislative Information Office

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February 9, 1996

TO: House Judiciary

Please accept the enclosed originals of written testimony for the House Judiciary Committee hearing that was scheduled on 2/9/96.

Copies of this testimony were transmitted by fax on 2/9/96.

Thank you,

Tammy Renee' Hall
Information Assistant

Enclosures: 3

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary committee name committee on HB 293 bill/ subject, dated Feburary 9, 1996.

I don't agree with legislative actions trying to take away rights already given to the people under the united States Constitution and making it a privledge.

Are you not aware that a Force Officer could be construed as a Criminal and a person reacting to it would be within their rights to protect themselves and their property – it would be self-defense.

Do you not understand united States Constitution is the Supreme Law of the land.

How many of you Legislators have read the Constitution of the united States of America (for the Republic) not a Democracy and the Alaska State Constitution and do you understand it?

I don't believe these laws you keep making to take control of peoples lives are in the We the PEOPLE's best intrest. The State is still working hand in hand with U.N. Tactics being played out.

Signed: Jeanne Marie Phipps
Testifier

Concerned Sovereigns Constitutional Citizens
Representing (Optional)

Fourth Judicial District % P.O. Box 544
Address

Delta Junction Alaska Republic
Phone No. 907-895-4805

Alaska State Legislature

Please enter into the record my testimony to the House Judiciary committee name committee on HB 293 bill/ subject, dated 2-9-96.

As A Sovern Citizen I cannot go along with this bill or any like them. This bill takes away My Rights under the Constitutions and replaces My Rights with A privledge.

I Shall not now or anytime in the future give up any of My Rights in the Constitution or The Bill of Rights

Its time our so called legistators Stand up for We The People and not just for the funds available

Gene Ottenstroer

Signed: Gene Ottenstroer

Concerned Sovern Citizen
Testifier

Fourth Judicial District
Representing (Optional)

C/O PO Box 1059
Address Junction Alaska Republic

Phone No. 895 4805

Alaska State Legislature

Please enter into the record my testimony to the JUDICIARY committee name

committee on HB 293 bill/ subject, dated 2-9-96.

I ASK THAT YOU SUPPORT AND PASS HB 293

THANK YOU

Ray C Rourke

Signed: Ray C Rourke
Testifier

SCTF
Representing (Optional)

P.O. Box 2 DELTA JUNCTION, AK 99737
Address

907-895-4448
Phone No.

Alaska State Legislature

House of Representatives

Official Business

State Capitol
Juneau, Alaska 99801-1182
(907) 465-3718

House Majority Leader

SPONSOR STATEMENT

HB-293, "An Act relating to the use of force in defense of persons or property", provides that citizens may use force including deadly force to protect themselves in their homes.

Court cases throughout other jurisdictions affirm the principle that in his or her own home, a person does not have to retreat from a real or imagined threat to their safety.

In the realm of a self-defense plea of "Crime Prevention" to justify the use of force and deadly force the Court of Appeals of the State of Arizona has written;

In 162 ARIZ. 363, 783 P.2D 809, State of Arizona v Larry Vernon, The court of appeals, Brooks, J,. held that "crime prevention" defense is available only when home, its contents, or residents therein are being protected by use or threatened use of physical force or deadly physical force against another.

In 22 CAL.3D 12, *20, 582 P.2D 1000, **1004, 148 CAL.RPTR. 409, ***413, CALJIC No. 551 the court said.. "Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an honest conviction and fear that he is about to suffer death or great bodily harm, and if a reasonable man in a like situation seeing and knowing the same facts, would be justified in believing himself in like danger, and if the person so confronted acts in self-defense upon such appearances and from such fear and honest convictions, his right of self-defense is the same whether the danger is real or merely apparent."

In CALJIC No. 5.50" " A person who is threatened with an attack that justifies the exercise of the right of SELF-DEFENSE, need not RETREAT. In the exercise of his right of self-defense, he may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and he may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.

The precedents are clear, a person may use deadly force in defense of their home

The Alaska Supreme Court requires the trial judge to instruct on self-defense even when the evidence supporting the defendant's self-defense claim was weak or implausible. Houston v. State. 602 P.2d 1124, 1126 n.6 (Alaska 1978). See, e.g., Willett v. State. 836 P.2d 955, 958 (Alaska App. 1992); Carson v. State. 736 P.2d 356,359 (Alaska App. 1987)

On the surface, the present statutes seem to allow this defense at this time.

Alaska Statute 11.81.335(2)(b) states " A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety to others, the person can avoid the necessity of using deadly force by retreating, except their is no duty to retreat if the person is

(1) on premises which the person owns or leases and the person is not the initial aggressor.

Contrary to these decisions and in accord with AS 11. 81.330 and AS 11.81.900(b)(23) the Court of Appeals of the State of Alaska in Van Ha v. State of Alaska No. A-4818, opinion No. 1400 - March 31, 1995, stated that .."a defendant claiming self-defense as justification for the use of force must prove that he or she acted to avoid what he or she reasonably perceived to be a threat of imminent harm. A defendant's reasonable belief that harm will come at some future time is not sufficient to support a claim of self-defense or defense of others." To continue.." The defendant's use of force against his enemy is authorized only when the defendant actually and reasonably believes that the enemy's threatened attack is imminent." AS 11.81.900(b)(23); Paul v. State. 655 at 777, 778 n.8.

In this decision, the court furthers elaborates upon how the determination of reasonableness is defined.

"[T]he determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation"[.] Such terms encompass more than the physical movements of the potential assailant. ... [T]hese terms include any relevant knowledge the defendant had about the person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure [or commit a crime upon] him or that the use of deadly force was necessary under the circumstances."

This bill is intended to clarify the intent of the legislature, that a person has a right to be secure in their person and property, in their own home.

FISCAL NOTE

STATE OF ALASKA B. NO: HB 293

1995 LEGISLATIVE SESSION

Revision Date: _____ Dept. Affected: Public Safety

Title: Use of force defending person or property Alaska State Troopers

Component: Detachments

Sponsor: Representative Al Vezey

Requestor: (H) Judiciary COMPONENT SERIAL NO. 0799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL EXPENDITURES	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ( ) Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 95) impact: $ -0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)
Insufficient statistical and other information is available to adequately project the impact of this legislation. If its implementation significantly effects Alaska State Troopers operations, future budget requests will address this need.

Prepared By: Francis C. Allan Phone: 269-5691

Division: Alaska State Troopers Date: 04/14/95

Approved by Commissioner: Del Smith Date: 4/17/95

Agency: Ronald L. Otte, Dept. of Public Safety

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