

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

GARLAND HAMPTON,

Petitioner,

Case No. 98-C-0355

vs.

Honorable _____

DANIEL BERTRAND, Superintendent
Green Bay Correctional Institution,

Respondent.

**MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS**

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STATEMENT OF ISSUES PRESENTED

1. Was it error to uphold the trial court's decision to exclude the petitioner from testifying regarding state of mind evidence relevant to the petitioner's self-defense claim?

The appellate courts of Wisconsin and the United States Supreme Court affirmed the trial court's decision.

2. Was it error when the appellate courts of Wisconsin and the United States Supreme Court affirmed the trial court's decision to deny the petitioner's Motion to Dismiss as the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars retrial when the prosecutor intentionally provoked the defense into moving for a mistrial?

The Wisconsin appellate courts and the United States Supreme Court upheld the trial court's decision to deny the Motion to Dismiss.

STATEMENT OF CRITERIA WARRANTING ISSUANCE OF THE WRIT

Pursuant to 28 U.S.C. § 2254 (b) (1) (A), the petitioner has exhausted the remedies available in the courts of the state of Wisconsin as his conviction was affirmed in District 1 of the Wisconsin Court of Appeals and his petition for review was denied by the Wisconsin Supreme Court. His Petition for Certiorari to the United States Supreme Court was denied.

The petitioner's conviction "resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The decision also "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

The Court of Appeals for the Seventh Circuit in an en banc decision in *Lindh v. James P. Murphy*, 96 F.3d 856 (7th Cir. 1996) rev'd and rem'd as to retroactive applicability of statute, 138 L.Ed.2d 481 (1997), held that "for current purposes it is enough to say that when the constitutional question is a matter of degree, rather than of concrete entitlement[], a 'reasonable' decision by the state court must be honored." *Id.* at 14. The decision of the trial court to wholly exclude testimony regarding the defendant's reasonable belief that he was acting in self-defense was not reasonable as necessitated by *Lindh*. The petitioner's case differs significantly from *Lindh*. This case raises the specter of a complete denial of due process and compulsory process in violation of *Chambers v. Mississippi*, 410 U.S. 284 (1973), *Washington v. Texas*, 388 U.S. 14 (1967), and *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). Under the due process clause of the 14th Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). The petitioner was denied the right to present testimony regarding the numerous acts of violence of which he was both a witness and a victim to show that his belief he was in imminent danger of death or great bodily harm was reasonable. He was also precluded from testifying fully regarding his fear of the victim Donnell Storks on the night he was killed.

Additionally, the trial court denied the defendant's motion to dismiss the charge against the defendant. The prosecutor, in her cross-examination of the defendant, asked a question about his background and violence. The answer to the question would have required the defendant to testify about the same evidence which the court had previously ruled was inadmissible. The

prosecutor intentionally forced the defense to move for a mistrial. Her intentional conduct bars retrial under the double jeopardy clause of the United States Constitution.

Thus this court must grant the petition for writ of habeas corpus as the Wisconsin trial court excluded the testimony of the defendant and others to show that his belief that he acted in self-defense was reasonable and the court denied the motion to dismiss. These decisions violated the petitioner's rights to due process of law in violation of the 5th and 14th Amendments to the United States Constitution.

STATEMENT OF THE CASE

Procedural Status Of The Case

Garland Hampton was charged with first-degree intentional homicide. (R. 43) . He was 15 years old when charged and was subsequently waived into adult court. (R. 53:115). Mr. Hampton was first tried before the Honorable Maxine A. White on February 6, 1995. (R. 43) . The defense filed several motions, most significantly, a Motion to Admit Psycho-Social History Testimony and Memorandum of Law. (R. 57, App. 126) . This Motion outlined many acts of violence to which Garland Hampton was both a victim and a witness. (R. 57 , App. 126) . These instances were offered to show the effect they had on Garland Hampton's state of mind on the night of the homicide and why he was afraid of, Donnell Storks. (R. 57, App. 126).

The court ruled that evidence regarding Garland Hampton's relationship with Donnell Storks was admissible to show his "mind-set " on June 10th and 11th, 1994. (R.45:126). The court determined that the other acts of violence -- not related to Donnell Storks -- were inadmissible to show Garland Hampton's state of mind. (R. 43:126).

The defense also filed an Offer of Proof as to Specific Instances when Garland Hampton Thought He Would be Killed as it Relates to the Reasonableness of his Fear on the Night of June

10, 1994. (R. 19 , App. 122) . This motion lists four specific instances when Garland Hampton felt he was going to die. (R. 19, App. 122) . The court, after reviewing this Offer of Proof, held that as to the second and third instances, when Garland was shot at in front of his grandmother's house and when a car drove up next to him and shots were fired at him, were admissible. (R. 45:135). However, the court excluded the defense from presenting evidence that about a month before the shooting of Donnell Storks, Garland Hampton's grandmother pointed a shot gun at him and said that she was going to "blow his brains out" and when Garland was 9 years old, he saw his mother kill his stepfather in the kitchen of their apartment. (R. 19, 43:135, App. 122). Specifically, the court held that if Garland Hampton were asked on direct "did you think you were going to die" and he were to answer "yes" , then he could not explain that he had felt that way before unless it related to the specific instances the court admitted. (R. 45:136) . In short, the court ruled that Garland Hampton was being asked to "lie by omission". (See R. 45:136).

The first trial lasted four days and ended in a mistrial. (R. 48). The mistrial was granted because the Assistant District Attorney asked the defendant, on cross-examination, a question which would have elicited testimony which the court had held was inadmissible. (R. 48: 130-131). The Assistant District Attorney asked Garland Hampton: "Shooting and killing somebody that you know is just one of those things that happens for you, isn't it?" (R. 48:93). Garland Hampton responded "Yes". (R.48:93). The court held that this question would have elicited the prohibited social-history testimony from the defendant that the court had excluded earlier. (R.48:129). The court granted a mistrial. (R. 48:131).

The defense subsequently filed a Motion to Dismiss based on double jeopardy. (R. 27). The defense asserted that the prosecutorial conduct which was the basis of the mistrial was

intended to provoke the defendant into moving for a mistrial. (R. 27). The court denied the defendant's motion to dismiss. (R.49:19-21).

On May 1, 1995, the defense filed a Memorandum of Law in Support of Previously Filed Motion to Admit State of Mind Evidence of the Juvenile Defendant. (R. 29, App. 173) . This memorandum set out a number of incidents which were not connected to the victim, Donnell Storks, but were relevant to Garland Hampton's reasonable belief that he was in imminent danger of death or great bodily harm. (R. 29:3, App. 175) . Included in this memorandum was an offer of proof in the form of questions which the defense would ask Garland Hampton and answers that he would give. (R. 29:14-15, App. 186-187). The defense argued that the court's previous ruling would prohibit the defendant from truthfully answering the following questions:

- Q. Did you shoot Donnell Storks?
- A. Yes.
- Q. Why?
- A. Because I was afraid.
- Q. Afraid of what?
- A. Afraid I was going to die.
- Q. Why?
- A. Because I felt that same fear before.
- Q. When?
- A. When Grandma Gauge threatened to kill me.
- Q. She didn't?
- A. I thought she was going to.
- Q. Why?
- A. Because she's killed before.
- Q. How many times have you believed you were going to be killed?
- A. Many.
- Q. What does it feel like?
- A. I start sweating, I breathe faster and I start Seeing the sisters and brothers in my head that I will never see again.
- Q. Did you feel those things on the night you shot Donnell Storks?
- A. Yes.
- Q. Have you felt this way at other times?
- A. When I saw my mother shoot Charles Cheirs.
- Q. Did you think that you were going to be killed?
- A. Yes. (R. 29:14-15, App. 186-189).

The court denied the motion to reconsider. (R. 49:15).

Garland Hampton was tried a second time before the Honorable Maxine A. White. (R. 49:2). He was convicted of first-degree intentional homicide. (R. 54: 94). On July 7, 1995, Garland Hampton was sentenced to life. (R. 55:81). He will be eligible for parole in 20 years. (R. 55:81).

Garland Hampton appealed the decisions of the trial court. The Wisconsin appellate courts and the United States Supreme Court affirmed the trial court's rulings. (App. 101, 101(a), 101 (b)).

Statement Of The Facts

On June 10, 1994, Garland Hampton got up around 10:30 a.m. (R. 53:116). He ate breakfast, took a shower and got dressed. (R. 53:117). When he got dressed, he put money, drugs and a gun in his pocket. (R. 53:118-119). He went to the store, and then hung out at 3rd and Keefe with his friends, Georgie Brown and Donnell Storcks for the rest of the day. (R. 53:120-121). When Garland got to 3rd and Keefe, he was told by his friends that some Gangster Disciple gang members had done a drive-by shooting earlier and everyone, including Georgie, Donnell and Garland was armed. (R. 53:123-124). Garland knew that Donnell was armed because he saw Donnell with his gun. (R. 53:124).

Donnell was known to carry a .380 caliber gun. (R. 50:77). It was known in the neighborhood that this gun had a defect. (R. 50:77). The safety did not work and the trigger would go off. (R. 50:77, 53:125). Garland knew about the broken safety because the gun had gone off and Donnell had shot himself in the buttocks about a month before he died. (R. 50:77, 53:125). Donnell had also pointed that gun at Garland. (R. 53:125). It happened on 3rd and

Keefe, Donnell pointed the gun at Garland's feet. (R. 53:125). Garland was afraid that the gun might go off accidentally, so he asked Donnell to move the gun. (R. 53:125). Donnell responded by pointing the gun at Garland's chest and saying "[I]f I want to shoot you, I would have shot you." (R. 53:125). Garland testified that when the gun was pointed at him, he was sweaty and shaky. (R. 53:126).

On the evening of June 10th, 1994, Garland Hampton, Kenyatte Helm, and Donnell Storks were outside of Ruben Drinkwater's house. (R. 50:68). Mr. Drinkwater was a thirty-year old friend of Donnell Storks. (R. 50:68, 76). Donnell and Mr. Drinkwater were gambling with some other people. (R. 50:68, 53:127). Garland was sitting on the steps of Mr. Drinkwater's house, counting his money. (R. 53:135). Donnell and Kenyatte came up to him and Kenyatte said "here they come!" (R. 53:135). Garland thought they meant the Gangster Disciples who had been shooting in the neighborhood earlier in the day. (R. 53:135, 137). Garland jumped up and ran to the back of the house. (R. 53:137). As the car came down the street, Garland saw Kenyatte and Donnell step to the side of the porch with their guns in their hands. (R. 53:138). Garland testified that he was scared and had his gun out as well. (R. 53:139). As the car came down the street, Garland heard Donnell and Kenyatte say: "that ain't them", meaning that the people in the car were not Gangster Disciples. (R. 53:139). Garland went back to the steps where he had been counting his money, and noticed that his money was missing. (R. 53:139). He returned to the back of the house to see if he had dropped the money back there, but it was not there. (R. 53:139). Garland continued to look for the money, but did not find it. (R. 53:139). Garland confronted Donnell and Kenyatte about the money. (R. 50:69). Garland asked Kenyatte and Donnell if they had seen his money. (R. 53:128). Donnell and Kenyatte told Garland that they did not have the money. (R. 50:69). Garland testified that Donnell got very

angry. (R. 53:128). Donnell told Garland "I ain't got your damn money." (R. 53:142).

Garland and Kenyatte left again. (R. 50:70). Kenyatte came back to tell Donnell that something was happening on first street. (R. 50:71). Kenyatte asked Donnell to go with him to first street because some Gangster Disciple gang members were there again. (R. 50:72). Donnell was a member of the Vice Lords, rivals of the Gangster Disciples. (R. 50:72-73). After Kenyatte asked Donnell to go with him, Donnell got up off the steps and leaned toward the bushes near the house. (R. 50:73). At that point, Donnell said something about "getting strapped". (R. 50:73). "Getting strapped," means getting a pistol. R. 50:74).

Kenyatte, Donnell and Garland then walked toward Jessie's Tavern. (R. 53:128). They had to go through a yard to get there. (R. 53:128). Donnell was still arguing with Garland about the money. (R. 53:129). Garland noticed that Donnell had his gun in his hand as he was walking through the yard. (R. 53:129). Garland testified that he got scared when he saw Donnell with his gun. (R. 53:129). Donnell continued to argue with Garland. (R. 53:129). Donnell still had the gun in his hand and he was moving his hand. (R. 53:129, 174). Garland was afraid, pulled his gun out and shot Donnell twice. (R. 53:129).

ARGUMENT

I. THE PETITIONER' S CONSTITUTIONAL RIGHT TO DUE PROCESS AND RIGHT TO PRESENT A DEFENSE UNDER THE 5TH, 6th, AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE WISCONSIN COURTS EXCLUSION OF THE TESTIMONY OF THE DEFENDANT REGARDING RELEVANT STATE OF MIND TESTIMONY.

The Wisconsin Court of Appeals, the Wisconsin Supreme Court and the United States Supreme Court affirmed the trial court's decision to exclude relevant state of mind testimony of the defendant and others to support his assertion that he acted in self-defense. This court should

grant review of this issue as it presents an important federal Question and the petitioner's constitutional due process rights under the 5th and 14th Amendments to the United States Constitution and his right to present a defense under the 6th Amendment to the United States Constitution have been violated. The decision of the state court was contrary to the clearly established principles of *Chambers v. Mississippi*, 410 U.S. 284 (1973).

A. Introduction.

From the first motions filed in advance of the first trial to the closing arguments in the second trial, the only theory of defense was self-defense. A 15-year-old boy was on trial for killing another 15-year-old boy. The testimony showed that each child had a gun and that each child was afraid of the other child. Garland, a young "man-child", testified he was afraid of the victim and that he thought he was going to die. The court prohibited Garland from honestly answering the Question, "Why did you think you were going to die?" The ruling of the Wisconsin courts denying the admissibility of the relevant state of mind testimony forced Garland Hampton to lie by omission. Garland Demetrius Montrel Hampton would have testified, had he been allowed, that he watched, terrified, as his mother shot his stepfather, that his grandmother threatened to kill him and backed up that threat by reminding him that she had killed and wasn't afraid to kill again. Garland Hampton lived his life with a greater and more urgent fear of death than any who will read this brief. He had a right to tell that jury why he was afraid that night, what that fear felt like and that he had experienced that fear in the past. These experiences made up the tragic fiber of Garland Hampton's state of mind the night he killed Donnell Storks. For the few with Garland's life experiences, the fact that he has witnessed lethal force makes it more reasonable to shoot instead of wait. In Garland's world if you wait, you die. (R. 45:106). Merely because the testimony would make one weep with anguish, is not a reason

to rule it irrelevant. The jury instruction mandates that they must consider whether or not his fear was reasonable at the time of the offense from a person in his position at the time. What was prohibited from being admitted was testimony regarding Garland Hampton's position at the time. The jury was prohibited from hearing about the frightening experiences this young man witnessed in his young life and also of which he was a victim. This was error and this petitioner must be granted.

B. Other States Have Admitted Evidence Of The Defendant's Individual Circumstances As It Relates To State Of Mind In Self-Defense Cases.

There are three standards of self-defense utilized in American Jurisprudence: the objective standard, the subjective standard and the hybrid, which is a mixture of both the objective and subjective standards.¹ The following constitute a group of cases from other jurisdictions which articulate the proposition that a jury is entitled to look at a defendant's individual circumstances when evaluating whether a person was privileged to use self-defense. As different states have different standards regarding the relationship between the objective and subjective prongs of self-defense, the holding of the Wisconsin courts violated the defendants right to due process and right to present a defense under the 5th, 6th and 14th Amendments to the United States Constitution.

In a highly publicized case, the New York courts have struggled back and forth between the utilization of an objective standard and a subjective standard. Like Wisconsin, they

¹ Wisconsin, as well as Alaska, Colorado, Connecticut, Minnesota, and North Carolina have adopted the hybrid standard with both a subjective and objective. Delaware, the District of Columbia, Hawaii, Illinois, Maryland, New York, North Dakota, Ohio, Virginia, Washington, and Wyoming have adopted the subjective standard of self-defense. Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and West Virginia have adopted the objective standard of self-defense.

ultimately utilized a similar hybrid standard. The trial court in *People v. Goetz*, 502 N.Y.S.2d 577 (Sup. 1986) (App. 248) held that the self-defense standard looks at the "defendant's own state of mind and to whether the defendant believes that another person is about to commit a robbery and that it is necessary for him to use deadly physical force in order to defend himself." This decision upheld the subjective standard. *Id.* The Appellate Division of New York addressed this same issue in *People v. Goetz*, 501 N.Y.S.2d 326 (A.D. 1 Dept. 1986) (App. 254). The court found that applying the objective standard "improperly shifts the focus of attention from the subjective states of mind of this defendant, necessary to determine his mental state in terms of culpability, substitutes the criterion of a fictitious, hypothetical person -- the reasonable man -- thereby using civil negligence concepts, in sharp contrast to the Penal Law definition of this defense." *Id.* at 327. Finally, the Court of Appeals of New York in *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986) (App. 264), determined there should be both a subjective and objective element to the standard of self-defense. *Id.* at 52. The court determined that by adding an objective threshold, it did, not mean that the background and other relevant characteristics of a particular actor must be ignored. *Id.* "To the contrary, we have frequently noted that a determination of reasonableness must be based on the 'circumstances facing a defendant or his 'situation.'" *Id.* This brings in the physical attributes of the defendant and "any prior experiences [the defendant] had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary 'under the circumstances.'" *Id.* The court stated that the jury should consider these experiences in weighing the defendant's actions. *Id.* This case goes to the heart of Garland Hampton's argument. Goetz had experienced prior acts of violence with persons other than the four victims and was allowed to produce that evidence at trial. Should it be admissible for a white man, who arguably, is

afraid of persons with different backgrounds, but not admissible for a black child who is afraid of someone with the same background? Under the same reasoning as *Goetz*, Garland Hampton should have been allowed to produce evidence of prior violent acts committed by persons who were not the victim but who influenced his state of mind.

The standard of self-defense in Colorado is similar to that of Wisconsin -- a mixture of objective and subjective. *People v. Jones*, 675 P.2d 9 (Colo. 1984) (App. 203). In *Jones*, the defendant, a police officer, was confronted by three men during an argument over a car. *Id.* at 11. A fight ensued and the defendant's eyeglasses were knocked from his face. *Id.* The Supreme Court of Colorado ordered a new trial because the jury was not properly instructed on self-defense. "[T]he totality of circumstances, including the number of persons reasonably appearing to be threatening the accused, must be considered by the trier of fact in evaluating the reasonableness of the accused's belief in the necessity of defensive actions and the reasonableness of force used by him to repel the apparent danger." *Id.* at 14. The totality of the circumstances for Garland Hampton included his constant exposure to violence in which he could not defend himself from his family.

The Minnesota Supreme Court also has adopted a hybrid standard of self-defense. *State v. Housley*, 322 N.W.2d 746 (Minn. 1982) (App. 210). In *Housley*, the defendant testified that he "was a high school graduate and a construction worker. He stood 6'3" tall, weighed 165 pounds and was extremely nearsighted." *Id.* at 748. Six months before the incident, the defendant had been beaten and robbed at gunpoint in his house. *Id.* at 751. On the night of the incident, Housley was awakened by the sound of a thud and then heard someone walking on glass in his kitchen. *Id.* The defendant could not find his glasses but located his gun. *Id.* Seconds later he was confronted by the silhouette of an unknown man who appeared to have a

gun in his left hand. *Id.* Housley fired at the intruder who turned out to be a police officer executing a search warrant. *Id.* The jury convicted Housley, but the Supreme Court of Minnesota reversed finding that the prosecution failed to prove that Housley's concern for his safety was unreasonable. *Id.* The court admitted evidence that the defendant had been robbed in his house six months prior to the incident. There was no allegation that the earlier robbery was committed by the victim. This is the same type of evidence Garland Hampton sought to admit at trial -- evidence that did not involve the victim, but had a bearing on the defendant's reasonable belief of imminent danger.

The State of Kansas has battled back and forth from a subjective standard to an objective standard and has settled on a mixture of the two, similar to Wisconsin's standard. In *State v. Simon*, 646 P.2d 1119 (Kan. 1982) (App. 214) the Supreme Court of Kansas first changed the standard of self-defense from the previous subjective standard to an objective standard. In *Simon*, the jury was allowed to hear the following testimony as it related to the defendant's reasonable belief. *Id.* at 1120. The defendant was an elderly homeowner in Wichita. *Id.* at 1121. The victim, Steffen Wong, of Asian descent, had rented the duplex next door to the defendant. *Id.* Because Mr. Wong was Asian, the defendant assumed he knew martial arts, which made the defendant afraid of Mr. Wong. *Id.* The defense offered the testimony of a psychologist who stated that the defendant was a "psychological invalid" who was very tense and fearful and that this mental condition permitted him to "misjudge reality" and believe he was under attack. *Id.* This evidence was offered to support the reasonableness of the defendant's belief that he was in imminent danger. Garland Hampton, like the defendant in this case, reacted more quickly because he had seen first-hand the impact of lethal gun violence. He had been in situations where he could not do anything to protect those he loved. The jury should have been

allowed to hear this testimony and to determine if the defendant acted reasonably.

In light of the ruling on the standard of self-defense in *Simon*, the Supreme Court of Kansas decided it did not want to adopt a strictly objective standard and ruled that the standard would be a hybrid, like Wisconsin's standard. *State v. Wiggins*, 808 P.2d 1383 (Kan. 1991) (App. 217). In *Wiggins*, the defendant was convicted of second-degree murder of a fellow prisoner at the state penitentiary. *Id.* Wiggins asserted that he acted in self-defense and was allowed to present evidence of the "fears and unique circumstances of life within a prison environment." *Id.* at 1386. At trial, Wiggins presented the testimony of a psychologist who provided the jury "with a description of the prison environment and the subculture and values of persons - living within that environment." *Id.* The psychologist stated, "**the code of behavior within a culture of fear was much different than the Code of behavior accepted by others.**" *Id.* (emphasis added). This evidence was relevant to the defendant's reasonable belief. Garland Hampton lived in a culture of fear.² There were numerous instances when he feared he would be killed by his mother, grandmother, aunt or any other family member or friend. His testimony regarding these events was relevant to his reasonable belief that he was going to die on the night of June 10, 1994.

In contrast to the Wisconsin standard, Arkansas has adopted an objective standard of self-defense, which is stricter than the Wisconsin hybrid standard. *Turner v. State*, 527 S.W.2d 580 (Ark. 1975) (App. 220). In *Turner*, the Supreme Court of Arkansas analyzed whether or not the issue of the defendant's intoxication was relevant to the defense of self-defense. *Id.* at 586. The

² As Garland Hampton told Don Terry of the New York Times, "I guess I been scared all my life," said Garland, a stocky boy with a hint of a 70's style afro, who cried as he talked about his life. "For me, living has been the same as running through hell with a gasoline suit on." Don Terry, One Family's Curse Heirloom: Homicide, N.Y. TIMES, Dec. 12, 1994, at A1.

court held that "[a] critical issue was the reasonableness of his [the defendant's] apprehension that he was in danger of losing his life or receiving great bodily injury." *Id.* "In order to justify the assault, it must have appeared that the circumstances were such as to excite the fears of a reasonable person." *Id.* "Clearly, the inquiry as to Turner's state of intoxication was relevant for the jury's consideration of these issues." *Id.* (internal citations omitted). Similarly, all of the violence that Garland Hampton has witnessed, including that committed by his family members, is relevant to the issue of the juvenile defendant's reasonable belief of imminent danger.

The State of Washington has adopted a subjective standard of self-defense and has interpreted it by stating that "the justification of self-defense is to be evaluated in light of all the facts and circumstances known to the defendant, including those known substantially before the killing." *State v. Wanrow*, 559 P.2d 548, 555 (Wash. 1977) (App. 226). The court found that circumstances predating the killing by weeks and months were deemed entirely proper and in fact essential, to a proper disposition of the claim of self-defense. *Id.* at 556. Similarly, in *State v. Janes*, 850 P.2d 495 (Wash. 1993) (App. 234), the Supreme Court of Washington again adopted the subjective standard and stated that evidence of prior violence between the victim and the defendant was admissible. *Id.* The trial court held that some of the proffered evidence of the Hampton family violence was too remote. As the offer of proof illustrated, Garland Hampton did witness violence by his family which predated the death of Donnell Storcks that was not remote and should be admissible. (*See* R. 19, App. 122).

The Illinois courts also follow the subjective standard of self-defense and have recently held that "a defendant's perception of danger and knowledge of specific facts bearing thereon are material and relevant to the jury's assessment of his belief that deadly force was necessary." *People v. Moleterno*, 556 N.E.2d 703 (Ill. App. I Dist. 1990) (App. 241). Similarly, in *People v.*

Infelise, 336 N.E.2d 559 (Ill. 1975) (App. 245), the court held that "[t]he test is not what the court thinks a reasonable man would believe but rather what the defendant, as a reasonable man, believed." *Id.* at 562. Infelise was charged and convicted of aggravated assault of a police officer. *Id.* at 559. The jury was allowed to hear evidence that the defendant was a 17-year-old immigrant who did not speak English well and that the officers were in plain clothes and an unmarked squad car. The court reversed because it found there was not enough evidence to convict the defendant.

More recently, in *People v. Wesley*, 563 N.E.2d 21 (N.Y. 1990) (App. 272), the Court of Appeals of New York elaborated further on the self-defense standard and held that "[t]he critical focus must be placed on the particular defendant and the circumstances actually confronting him at the time of the incident, and what a reasonable person in those circumstances and having [the] **defendant's background and experiences** would conclude." *Id.* at 23-24 (emphasis added). The court held that this subjective element of the self-defense standard was imperative. *Id.* The second threshold of the Wisconsin self-defense standard is based on the same subjective standard. Hence, the introduction of the juvenile defendant's **experiences** should include evidence of acts of violence that would affect the defendant's reasonable belief of imminent danger -- even if they do not relate to the victim. This is the exact evidence which Garland Hampton sought to admit.

The above cases show the national trend to admit evidence which is specific to a defendant such as the offered state of mind testimony as it relates to the defendant's reasonable belief that he was in imminent danger at the time of the offense.

C. The Wisconsin Courts And The United States Supreme Court Erred When They Affirmed The Trial Court's Exclusion Of The Defendant's Testimony Regarding The Specific Acts Of Violence Which He Witnessed And Of Which He Was A Victim As This Testimony Was Relevant To His State Of Mind And Reasonable Belief That. He Acted In Self-Defense.

The trial court prohibited the defendant from testifying why he was afraid of the victim Donnell Storks on June 10, 1994 and the Court of Appeals upheld that decision. In short, the court of appeals held that the "state of mind" testimony of the defendant was "not relevant to Hampton's self-defense arguments, nor was it relevant to any other issue at trial." (App. 110). This state of mind testimony was admissible to show what constituted Garland Hampton's reasonable belief on the night of Donnell Stork's death. A person's state of mind develops as their life experiences develop. The fact that Garland Hampton's state of mind was developed by what can only be characterized as tragic experiences does not render it irrelevant. The exclusion of this evidence violated the petitioner's due process rights and his right to present a defense.

1. The exclusion of the defendant's state of mind testimony violated the principles articulated in *State v. Felicia Morgan*.

In January of 1994 this office filed an appeal in *State v. Felicia Morgan*, 195 Wis. 2d 388, 536 N.W.2d 425 (Ct. App. 1995). The case was submitted to the Court of Appeals on July 7, 1994. The *Morgan* case was decided on June 20, 1995 -- two weeks after the conviction of Garland Hampton and 5 months after the court first held that the law wasn't there yet. (R.45:125). The Court of Appeals held that the decision in *Morgan* was "not very relevant to the issue he raises in this case." (App. 112). The court of appeals stated:

[W]ith respect to the specific issue raised by Hampton in this case, Morgan only states the obvious: In order for any "psycho-social"

history evidence to be admissible it must have "legal significance!" to some issue at trial. *Id.* at 431, 536 N.W.2d at 441; *see also* RULE 904.02, STATS. (App. 113).

The proffered evidence was legally significant to Garland Hampton's assertion that he acted in self-defense.

One of the issues in the *Morgan* case was whether a defendant's social history could be introduced to show that she suffered from Post-Traumatic Stress Disorder and as a result of flashbacks did not intend to commit the crime charged. The court of appeals in *Morgan* held:

The issue of whether Morgan suffered from post-traumatic stress disorder at the time of the homicide was not relevant in the guilt phase of her trial. **Nor do we conclude that. Morgan has demonstrated any other 'legal significance' of the psycho-social history evidence to the guilt phase of her trial. . . .** While we acknowledge that the proffered *testimony*, if accurate, portrays a horrific life fraught with ceaseless violence and senseless bloodshed -- a life that we would earnestly hope no person should have to endure - we are unable to attach or locate any **legal significance** of this testimony to the issue of Felicia Morgan's guilt or innocence in Brenda Adams's homicide. Tragedy does not beget legal relevance. *Morgan* at 431, 536 N.W.2d at 441. (Emphasis added).

The defense in Garland Hampton's case was self-defense, a well-known, garden variety, commonly used, legally significant defense. Counsel was not seeking to show that there were flash-backs which caused the defendant not to intend to commit his crime, or that the defendant was crazy, but merely that he was afraid. Garland Hampton's fear on the night of the homicide and what was going on in his mind at the time of the homicide is relevant to a legally recognized, legally significant defense. This testimony would have shown that Garland Hampton's fear was reasonable from his position at the time and in light of his own experiences.

The fact that Garland Hampton's experiences may cause the empathic among us to label

it as tragic is just another sign of the desperate times in which we live. The question which lurks behind all who would have evaluated this evidence, had they been permitted to do so, is why didn't Garland wait to see what Donnell was going to do with the gun that he was waving at his side? The proffered testimony would have shown that in Garland's childhood experiences **if you wait, you die or you may die.** (R. 45:106). Had the jury heard the testimony as to why Garland Hampton didn't wait, he would not have been convicted of first degree intentional homicide, but rather second degree intentional homicide, the use of excessive force in self-defense or he might have been completely exonerated. See Wis. JI-Criminal 1014 (App. 192).

The Wisconsin Supreme Court has held that:

Once a defendant passes this first hurdle, he is entitled to a conviction of imperfect self-defense manslaughter, if: (1) he had an actual, but unreasonable, belief that the force was necessary because the unlawful interference resulted in an imminent danger of death or great bodily harm or (2) he possessed a reasonable belief that force was necessary because the unlawful interference resulted in an imminent danger of death or great bodily harm but his belief regarding the amount of force necessary was unreasonable." *State v. Camacho*, 176 Wis. 2d 860, 881-883, 501 N.W.2d 380, 388-389 (1993).

The Wisconsin court of appeals, in its analysis of the law of self-defense and the defendant's argument states:

Hampton essentially is arguing that in order to determine the reasonableness of a defendant's belief "from the standpoint of the defendant" a jury must know the individual defendant's personal background and "psycho-social" history. (App. 114-115).

The Wisconsin court of appeals states that this would change the standard so that "a reasonable person would mean a reasonable person who is, in fact, identical to the actual defendant in terms of personal background and life experience." (App. 115). The court also argues that this would "eviscerate the objective, reasonable person requirement." (App. 115). The court of appeals

analysis is incorrect. Under the law of self-defense, the jury must determine if the defendant's belief was reasonable looking at the "position of the defendant under the circumstances existing at the time of the alleged offense." See Wis. JI-Criminal 1014 (1994) (App. 192). If specific experiences in the defendant's background affected his state of mind at the time of the incident, then the defendant should be allowed to explain to the jury what those experiences were and how they affected his state of mind. This does not eviscerate the objective prong of the self-defense standard. The jury has the ultimate ability to determine if the defendant's belief that he was in imminent danger of death or great bodily harm was reasonable.

In furtherance of the self-defense claim and as a way to preserve the record for appellate review, the defense offered four pretrial documents which detailed the state of mind of the defendant. These were entitled:

1. Offer of Proof as to Specific Instances when Garland Hampton Thought He would be Killed as it Relates to the Reasonableness of His Fear on the Night of June 10, 1994 (R. 19 , App . 122) .
2. Motion-in-limine Number 6 (R. 21, App. 124).
3. Notice of Motion and Motion to Admit Psycho-social History Testimony and Memorandum of Law (R. 57, App. 126).
4. Memorandum of Law in Support of Previously filed Motion to Admit State of Mind Evidence of the Juvenile Defendant (R. 29, App. 173).

In their own unique way, each of these documents says, "Garland isn't like you and me, he is different." He learned to be afraid earlier than most and learned that violence is a tool of those you love. Garland testified that he and Donnell were friends, were in the same gang and had the same friends. (R. 53:120). In Garland's world people you love die first and frequently at the hands of people they love. He would have testified, if given a chance to do so, that he would have shot the person who killed his step-father Charles Cheirs – his mother -- if he had a gun. He was so afraid of his own grandmother that he would have shot her too -- if he had a gun. He

knew each of those two people had shot before and were not afraid to kill again. Similarly, he knew Donnell Storks had shot before and that Donnell was prepared to shoot Garland and others on the night of the homicide. That Garland didn't wait until he knew for sure if Donnell was going to kill him may be a crime in the state of Wisconsin, but it is not first degree intentional homicide. The jury was entitled to know why Garland Hampton didn't wait. The testimony as to why Garland Hampton didn't wait is relevant to a recognized defense and had tremendous legal significance with respect to whether his belief was reasonable from his position at the time of his acts.

The Wisconsin court of appeals has held that:

A distinction exists between: (1) using post-traumatic stress disorder state-of-mind evidence to specifically cast doubt on the existence of the necessary specific intent of a charged offense, as in the case of [*State v.*] *Coogan*, [154 Wis. 2d 387, 453 N.W.2d 186 (Ct. App. 1990)] or to **support a recognized privilege to that offense**, as in the case of [*State v.*] *Richardson*, [189 Wis. 2d 418, 525 N.W.2d 378 (Ct. App. 1994)]; and (2) using a diagnosis of post-traumatic stress disorder, in a general sense, as a defense. *Morgan* at 426-427, 536 N.W.2d at 439 (emphasis added) .

In Garland Hampton's case the state of mind testimony proffered in the four documents cited above supported the recognized privilege of self-defense. **In this case, a syndrome defense was not offered.** The prior experiences of a child as they related to self-defense or in the alternative, the excessive use of force in self-defense, was offered.

The Wisconsin Supreme Court has held:

The past conduct of a person markedly affects what others may reasonably expect from him in the future. When the accused maintains self-defense, he should be permitted to show he knew of specific prior instances of violence on the part of the victim." *McMorris v. State*, 58 Wis. 2d 144, 151, 205 N.W.2d 559, 562-563 (1973).

The trial court permitted testimony regarding the victim's character for violence but excluded the proffered social-history testimony. The trial court held that the social-history testimony did not fit within the *McMorris* type exception. The trial court did not have the benefit of the holding in *State v. Felicia Morgan*, 195 Wis. 2d 388, 536 N.W.2d 425 (Ct. App. 1995), where the Wisconsin Supreme Court held that relevance of social history testimony turns on its legal significance to a recognized privilege, such as self-defense. The Wisconsin court of appeals erroneously held that *Morgan* was not "very" relevant to this case and the Wisconsin Supreme Court and the United States Supreme Court upheld that decision. Therefore, this Court should grant review of this issue.

- 2. Under Wisconsin law, the reasonable person standard of self-defense has both an objective Component and a subjective component. Garland Hampton was prohibited from eliciting testimony regarding the subjective component of self-defense.**

Most practitioners who have put a defendant on the stand, have succeeded in presenting background testimony of the defendant as a result of a court's ruling that the defendant is entitled to his proper day in court. *State v. Hoppe*, 74 Wis. 2d 107, 246 N.W.2d 122 (1976). Garland Hampton was denied his proper day in court because he could not tell the jury about those experiences which formed the subjective prong of the self-defense standard.

In the state of Wisconsin, when the issue of self-defense is raised by the defendant, the jury must determine three issues: (1) whether or not the defendant's belief that he was preventing or terminating an unlawful interference with his person was reasonable, (2) whether or not the defendant's belief that the force or threat of force was necessary to prevent or terminate the interference was reasonable and (3) whether or not the defendant's belief that the actual

amount of force used was necessary to prevent or terminate the interference was reasonable. *State v. Camacho*, 176 Wis. 2d 860, 869, 501 N.W.2d 380, 383 (1993). "The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now." Wis. JI-Criminal 1014 (1994) (App. 192). The background and experiences of the defendant form the subjective component.

The Wisconsin Supreme Court has articulated a different standard for determining if the beliefs of children are reasonable. The Court held that "in the case of children, beliefs, instincts and impulses are judged in relation to those of a reasonable person of like age, intelligence and experiences." *Maichle v. Jonovic*, 69 Wis. 2d 622, 627-628, 230 N.W.2d 789, 793 (1975). The Wisconsin court of appeals in its decision, does not address whether or not the proffered evidence should have been admitted as it was relevant to the state of mind of a "child" -- a 15-year-old boy. The proffered evidence would have allowed the jury to determine if Garland Hampton's actions were reasonable for a person of like age, intelligence and experience.

The Wisconsin courts have held that the defendant's reasonable belief may be based on prior bad acts of the victim. However, the Wisconsin courts have not yet addressed the issue of whether other factors which would influence the defendant's state of mind in self-defense are admissible.

3. Exclusion of the proffered state of mind testimony violated Garland Hampton's Constitutional rights to due process and his right to present a defense.

The exclusion of the evidence by the Wisconsin appellate courts, the United States Supreme Court and the trial court constituted a denial of the defendant's right to a fair trial and a denial of his Due Process rights pursuant to the Fifth and Fourteenth Amendments to the United

States Constitution as well as a denial of the defendant's right to present a relevant and legally recognized defense under the 6th Amendment to the United States Constitution.

The right to present a defense is a question of constitutional proportion which involves "constitutional facts" that the court may review de novo. *In The Interest of Michael R.B. v. State of Wisconsin*, 175 Wis. 2d 713, 720, 499 N.W.2d 641, 644 (1993). The constitutional right to present evidence is in the confrontation and compulsory process clauses of Article 1, Section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution. *State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325, 330 (1990). "The two rights have been appropriately described as opposite sides of the same coin and together, they grant defendants a constitutional right to present evidence." *Id.* at 330. The rights granted by the confrontation and compulsory process clauses are fundamental and essential to achieving the constitutional objective of a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973).

The evidence the trial court excluded was relevant and legally significant as it related to the defendant's theory that he acted in self-defense. Garland Hampton was denied a fair trial. He was not able to tell his story. He was not able to have his proper day in court. Had the decision in *State v. Felicia Morgan* come down 30 days earlier, Garland Hampton would not have been denied his right to present a relevant defense. The trial court in excluding the evidence held that the "law was not there yet." (R. 45: 125).

It is now.

- 4. Exclusion of the proffered state of mind testimony violated Garland Hampton's Constitutional rights to due process and his right to present a defense.**

The Wisconsin Courts stated that the proffered state of mind testimony should not

be admitted because to do so would mean that "the privilege of perfect self-defense would vary depending on the background or personal history of the person attempting to exercise the privilege." (App. 115). "A person exposed to a lifetime of violence would have greater latitude to exercise the privilege of self-defense than a person raised in a life free from strife." (App. 115).

The idea that someone who has experienced more violence in their life may react quicker than someone who has never experienced violence has been espoused by the courts. The dissent in *State v. Camacho*, 176 Wis. 2d 860, 877, 501 N.W.2d 380, 390 (1993) supported this assertion:

A person who has previously been the victim of a violent crime who later panics and under an unreasonable but actual belief takes the life of another because he or she actually believes that his or her person is in danger is not a culpable as one who kills in cold-blood for no reason other than to murder another. The two people should not be treated the same. *Id.*

The Wisconsin court of appeals in this case states that the majority in *Camacho* "rejected this argument in creating the objective standard of reasonableness." (App. 115, fn 6).

The law of self-defense in the state of Wisconsin has both a subjective and objective prong. The Wisconsin court of appeals has failed to understand that the proffered testimony falls within the subjective prong of the standard of self-defense. The objective prong is not "eviscerated". The jury, after hearing all the evidence has the ultimate ability to determine whether or not the defendant's belief was reasonable.

Therefore, the Wisconsin court's decision to affirm the trial court's exclusion of the state of mind evidence was erroneous and violated the defendant's 5th, 6th and 14th Amendment rights to due process and right to present a defense.

II. THE WISCONSIN APPELLATE COURTS AND THE UNITED STATES SUPREME COURT ERRED WHEN THEY AFFIRMED THE TRIAL COURT'S DECISION TO DENY THE DEFENDANT'S MOTION TO DISMISS BASED ON DOUBLE JEOPARDY.

A. The Wisconsin Courts And The United States Supreme Court Erroneously Affirmed The Trial Court's Decision To Deny The Defendant' S Motion To Dismiss.

The Wisconsin appellate courts found that there was no evidence to support the defendant's motion to dismiss. (App. 119). Both the defense and prosecution regularly elicit "social history" testimony for the purposes of impeachment. However, the extensive pre-trial motions litigated in this case limited the scope of that testimony. The testimony which was excluded, is the kind of defendant bashing which occurs on a daily basis in the criminal courts. In other words, when the court denied the defendant's motion to admit social "history as it related to the state of mind of the defendant, it also held what's "good for the goose is good for the gander". Therefore the prosecutor was on notice when she asked the questions that she would be violating the courts ruling causing the defendant to move for a mistrial.

The United States Supreme Court has held that where a defendant in a criminal trial successfully moves for a mistrial, he may invoke the bar of double jeopardy in a second effort to try him if the conduct giving rise to the successful motion for a mistrial was prosecutorial conduct intended to provoke the defendant into moving for a mistrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982). A retrial is barred "where the error that prompted the mistrial is intended to provoke a mistrial or is 'motivated by bad faith or undertaken to harass or prejudice' the defendant." *Id.* at 670 citing *United States v. Dinitz*, 424 U.S. 600, 611 (1976).

Prior to the first trial of Garland Hampton, the issue of the admissibility of Mr. Hampton's history of exposure to violence was extensively litigated in pre-trial motions and

hearings. (R. 19, 21,45: 105-137, 57, App. 122, 126, 173). The court admitted evidence of the past experiences between Garland Hampton and the victim, Donnell Storks. (R. 45: 126). The court excluded evidence of violence to which Garland Hampton was both a victim and a witness which involved his various relatives. (R. 45:126). This evidence was offered to show that Garland Hampton's vast exposure to violence caused him to be fearful of Donnell Storks on the night of June 10th, 1994 and to respond as he had seen others respond in the past. (R. 19, 21, 27, 57, App. 122,124,126,173). These issues were clearly litigated, before the trial and the court made a specific ruling.

Mr. Hampton testified on the fourth day of his first trial. (R. 48:27-93). The Assistant District Attorney asked Mr. Hampton: "**Shooting and killing somebody that. you know is just one of those things that happens for you?"** (R.48:93). Garland Hampton answered "**yes**" (R. 48:93). This was the last question on cross-examination. (R. 48:93). The defense moved for a mistrial and the motion was granted. (R. 48:131). The court granted the motion for a mistrial and held that the question asked by the prosecutor and the response by the defendant opened the door to the previously prohibited testimony. (R. 48:128). "If his answer was . . . yes, because he was reflecting on his past history, then a proper answer to the question on redirect would be to allow him to explain shooting and killings that cause him to conclude as he did in this case. " (R. 48:129). This would open the door to the evidence the court had previously excluded.

The Assistant District Attorney intentionally asked the defendant that question in an effort to abort the trial. She knew that by asking that question, she would illicit a response that would open the door to the evidence proffered by the defense, but precluded by the court. The question was intended to provoke a mistrial.

The court of appeals held that because the prosecutor objected to the defendant's motion

for mistrial there was no evidence of intentional conduct. (App. 119). This assumption was erroneous. In the second trial, the testimony against Mr. Hampton was bolstered by an incredible "jail house confession". This "confession" was not available at the first trial and was used to significantly strengthen the state's case. Because the Assistant District Attorney's conduct was intended to provoke the defense to move for a mistrial, the court should have granted the defendant's Motion to Dismiss. The retrial of Mr. Hampton violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

By the time Garland Hampton was charged with first degree intentional homicide, he had witnessed his mother kill his step-father and had heard the nightly bragging of his grandmother - that she had killed two people. The juvenile court decided that Garland should be tried as an adult. But the testimony sought to be introduced was the testimony of a frightened child. Just because he is labeled an "adult" does not mean that he has the wisdom and judgment of someone his senior. Children frighten more easily than adults. Adults don't check under the bed for monsters. Adults don't ask to sleep with the light on. Adults aren't afraid of thunder. Garland's fears were not comprised of monsters or thunder, but of people being shot to death before his very eyes. Garland Hampton's fears were real -- at least to him. The law requires that the jury look at him.

To uphold the exclusion of this testimony, is to push Garland's fear far from jurors so they are not exposed to the same feelings of terror that he experienced. To allow that is to deny Garland Hampton a fair trial while denying jurors their own capacity for empathy. The jury instruction says one cannot base a verdict on sympathy or fear to return a verdict of guilt, but the self-defense instruction says that the juror must put themselves in the position of the defendant at

the time. Wis. JI-Criminal 140, 1014 (App. 171).

Therefore, is respectfully requested that this Court grant review of these issues.

Dated at Milwaukee, Wisconsin this 15th day of April, 1998.

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