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March 8, 2011

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Re: People v Sammie Ray Bailey, Jr.
Supreme Court No. 141739
Court of Appeals No. 278411
Circuit Court No. 06-06768-FC

Dear Clerk:

Enclosed please find the original and twenty-four (24) copies of the Defendant-Appellee's Brief on Appeal, and Proof of Service for filing in your Court.

Thank you for your cooperation.

Sincerely,

Michael L. Mittlestat
Assistant Defender

MLM/JEA
Enclosures

cc: Kent County Prosecutor (2 copies)
Attorney General of Michigan
Sammie Ray Bailey Jr.

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
-v-
SAMMIE RAY BAILEY,
Defendant-Appellant.

Supreme Court No. 141739

Court of Appeals No. 278411

Circuit Court No. 06-6768 FC

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF INGHAM)

Jessica Applin, being first sworn, says that on March 8, 2011, she mailed one copy of the following: DEFENDANT-APPELLEE'S BRIEF ON APPEAL/PROOF OF SERVICE, to the ATTORNEY GENERAL, and two copies to the KENT COUNTY PROSECTOR:

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Jessica Applin
Subscribed and sworn to before me
March 8, 2011.

Jean M. Downey
Notary Public, Ingham County, Michigan
My commission expires: 11/1/2014

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals,
Peter D. O'Connell, P.J., and Richard A. Bandstra and Elizabeth L. Gleicher, J.J.
Reversing the Circuit Court for the County of Kent, Dennis C. Kolenda, J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-v-

SAMMIE RAY BAILEY, JR.,

Defendant-Appellee
_____/

Supreme Court No. 141739

Court of Appeals No. 278411

Circuit Court No. 06-06768-FC

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

STATE APPELLATE DEFENDER OFFICE

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Trial Court answered "No".

Court of Appeals answered "Yes".

Defendant-Appellee answers "Yes".

II. THE TRIAL COURT MUST CLEARLY INSTRUCT THE JURY THAT THE PROSECUTION HAS THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT A HOMICIDE IS NOT JUSTIFIED. DID THE TRIAL COURT FAIL TO ADEQUATELY INSTRUCT MR. BAILEY'S JURY ON THAT BURDEN?

Trial Court answered "No".

Court of Appeals answered "Yes".

Defendant-Appellee answers "Yes".

COUNTERSTATEMENT OF FACTS

Sammie Ray Bailey Jr. was convicted of second-degree murder and felony firearm following a jury trial before Kent County Circuit Court Judge Dennis Kolenda from March 13-29, 2006. The prosecution alleged that Mr. Bailey and his half-brother, Terrill Lambeth, shot and killed Keith Hoffman in retaliation for Hoffman's previous robberies of Lambeth. Bailey argued self-defense and defense of his brother.

Defendants were tried jointly before separate juries. At trial, witness testimony was presented that Hoffman was a well-known drug dealer and thug in the neighborhood near Prince and Dallas Streets on Grand Rapids' southeast side. He was thought to be affiliated with two gangs known as the "Get-em Boyz" and the "K-zoo Boyz". 95a, 105a. His nickname was "Killer Keith", and he was known for carrying guns and committing several armed robberies and violent assaults. 35a, 95a, 112a-114a.

Terrill Lambeth and Sammie Bailey were close and protective of their mother, Sandra Harmon, who lived with Bailey near the Prince/Dallas neighborhood. 92a. Before May of 2006, Lambeth had several run-ins with Killer Keith Hoffman. One day during the summer of 2005, he was parking his car near his mother's house when Hoffman approached and robbed him at gunpoint. 92a-93a. Before leaving, Hoffman warned that he knew where Lambeth's family lived and worked, and threatened to hurt them if the robbery was reported. *Id.* In a second incident in 2006, Lambeth was at a store with a friend buying drinks to watch the Super Bowl. 93a. While they were in the parking lot, Hoffman jumped into their car and again robbed them at gunpoint. 94a-95a, 109a. This incident was especially painful, as Hoffman stole a family-keepsake ring that had been passed down from Lambeth's great-grandfather. *Id.* Hoffman

repeated his threats to Lambeth's family, which Lambeth heeded because of Hoffman's reputation. *Id.*

The afternoon of May 3, 2006, Lambeth drew his brother into his problems with Hoffman in a disastrous way. He was on his way to his mother's house when he spotted Hoffman standing on the corner of Prince and Dallas, his usual hangout. 95a-97a. Lambeth decided to ask Hoffman for his family ring back, even if he had to buy it. *Id.* Although he had seen Hoffman around since the two robberies, he reasoned that it was safest to approach him then, in broad daylight and out in the open where everyone could see. 95a, 97a. When Lambeth got to his mother's house, his brother was unexpectedly home as he had gotten off work early that day. Lambeth told Bailey of his intent and asked him to go along to watch his back. Although Lambeth hoped to avoid trouble, he was afraid because of his prior experience, and because Prince and Dallas was Hoffman's neighborhood, where many of his "home boys" hung out. 95a. Lambeth took his gun for protection but he did not see Bailey with one. 95a, 105a.

Lambeth and Bailey then walked to the corner of Prince and Dallas and approached Hoffman. 95a. As his brother stood a few feet behind him, Lambeth asked Hoffman for his ring, offering him money for it. 96a. At one point, Hoffman angrily responded "Fu** you bitch! I'll rob you right now!" while drawing a gun. 96a, 105a, 107a. Fearing for his life and with no time to reflect, Lambeth drew his own gun and fired one or two shots in defense. 96a, 107a. When his gun jammed, Lambeth panicked and fled the scene leaving his brother to fend for himself. 96a, 100a-101a, 107a. Hoffman was still standing when Lambeth ran, and he did not see what happened after that, although he heard additional gunshots. 100a-101a, 107a.

Lambeth made it clear at trial that any problems were between Hoffman and him, as Bailey had not been personally involved with any of the prior run-ins with Hoffman. 103a, 105a.

He believed any shots fired by his brother would have been defensive, as Bailey was in a position to see and hear Hoffman. 106a. Lambeth stressed his belief that his brother would never have used unjustified force – Sammie was a "good law abiding citizen . . . a good man" who had never been in trouble. 193a, 106a.

Police responding to the scene found Hoffman dead near the corner of Prince and Dallas. 13a, 18a. He was lying on his side, with a small group of 7-10 people standing near his body. A second crowd of about 50-100 people gathered in the vicinity, but a bit farther away. 12a-13a, 19a, 63a. Many in the crowd were angry over the shooting and yelling at the officers; some threatened to rush and take the body with force; fights broke out among the onlookers. 13a, 19a, 21a. As the investigation was proceeding, individuals approached and gave officers false names for Hoffman. 57a. Additional officers were called in, in an effort to keep order and maintain the scene's integrity. 13a, 19a, 21a.

Officers found bags of crack cocaine and marijuana on the ground next to Hoffman's body. 14a, 16a-17a. A cell phone was neatly stacked on a package of cigars a few feet away, as if someone had placed them there. 15a, 61a, 64a. Police found a jacket lying nearby with a medication bottle and a plastic bag containing a white powder residue in its pocket. 60a-61a, 63a, 66a. Four 9-millimeter shell casings and an unfired .40-caliber cartridge were found on the ground. 20a, 60a. While no gun was recovered, officers could not say whether someone from the crowd had removed one from Hoffman before they arrived. 17a.

A tracking dog led police to Ms. Harmon's house, where they arrested Bailey as a suspect in the shooting. Hours later, after denying Bailey access to an attorney his family had retained for him, officers brought Harmon and a second person into the police interrogation room and then secretly taped a conversation between mother and son. 75a. In that conversation, Bailey

took responsibility for the shooting, but indicated several times that his mother should contact his brother for the story. 115a-116a. This prompted his mother to repeatedly accuse him of lying to her and about his role. 115a-118a. When asked by an unknown person whether he acted in self-defense, Bailey responded with the partially-audible statement: "Just, I mean, it made me do it cause I rolled over to see if he was dead cuz when we got there he, he was thrown' his arms up and stuff like that. You know, he basically (?) – and I just blacked out, (/) --- [*sic*]." 120a (punctuation marks and parenthesis in original).

Witnesses from the Prince/Dallas neighborhood testified for the prosecution, including Charlie Long, Fred Reed, Amonte McDonald, Kevin Strickland, and Marion Kilgore. Messrs. Long, Reed, and Strickland testified that they saw two black men approach Hoffman and the man resembling Bailey shoot Hoffman several times. 28a-29a, 38a-39a, 49a. Some of these witnesses heard yelling or arguing immediately beforehand. 38a, 41a-42a. Reed indicated that both men shot Hoffman, while Long and Reed saw one or both men fire additional shots after Hoffman fell to the ground. 24a, 39a. McDonald, Long's nephew, was standing near Hoffman when the shooting occurred, but claimed he did not see anything, as he was looking in the other direction. 44a-45a. Kilgore, Long's sister, was on their mother's porch and did not see the shooting. 22a-24a. She testified that Long was inside the house when the shooting occurred. 22a, 25a. After the shooting, she saw McDonald turn Hoffman over and touch him. 27a.

Witnesses gave varying estimates of the police response time to the shooting, with one person estimating that it took 20 minutes or more for officers to arrive at the scene. 32a. Although witnesses denied seeing Hoffman with a gun, McDonald, who was the first to approach Hoffman, was seen trying to take drugs from him and hide them before police arrived. 24a, 27a,

29a-30a, 32a. McDonald was friends with Hoffman and they were seen shaking hands and hugging shortly before the shooting. 22a-23a, 28a, 44a.

A pathologist testified that Hoffman's body had seven bullet wounds, but due to uncertainty over which were entry, exit, or reentry holes, there may have been as few as four shots that hit him. 79a, 87a. The wounds came from a large caliber gun or guns, possibly a 9-millimeter or a .40 caliber. *Id.* A single 9-millimeter slug was recovered from Hoffman's right forearm – no other slugs were found in or around the body. 79a-80a, 82a. A defect in that slug was consistent with it striking a hard object, such as a bone or another gun before entering the body. 70a, 87a. The pathologist could not say precisely how Hoffman was positioned when shot. 88a. While all but one shots exited the body, there was no indication of ricochet marks or divots on the sidewalk near the shooting to corroborate witness claims that Hoffman had been shot after he fell. 88a. Tests revealed the presence of cocaine, codeine, and marijuana in Hoffman's system, while rocks of crack cocaine were found hidden in his buttocks. 85a-86a.

While gunshot residue analysis is commonly performed on deceased shooting victims, investigators did not perform one on Hoffman to determine whether he had fired a gun the day of his death. 68a, 89a.

After deliberating for nearly two days and submitting numerous questions, the jury found Bailey guilty of the lesser offense of second-degree murder and felony firearm. 154a-157a. Lambeth was found guilty of first-degree murder and felony firearm.

Following this, Bailey appealed, arguing, *inter alia,* that the jury instructions had erroneously defined the term aggressor and provocation *vis-à-vis* self-defense and defense-of-another, and had failed to adequately convey the prosecution's burden of proof and reasonable doubt standard on justification. The matter proceeded in the Court of Appeals and in this Court

as described by Appellant. Appellant's Brief on Appeal, 7-8. Notably, when Bailey sought leave to appeal from the Court of Appeals' May 21, 2009 decision, the prosecution neither cross-appealed nor filed a response to challenge that court's holding that there were preserved instructional errors. Then on remand from this Court to reconsider its harmless error analysis, the Court of Appeals held that the instructional errors were not harmless beyond a reasonable doubt on July 20, 2010. 173a-186a. After that point, Appellant sought leave to appeal, challenging the Court of Appeals' prior decision on preservation and the two instructional errors for the first time in this Court.

On November 29, 2010, this Court granted leave to appeal and ordered briefing on: "(1) whether it is proper to instructed the jury that, if the prosecutor proves beyond a reasonable doubt that the defendant confronted the person that he killed, intending by his presence to provoke that person to use deadly force, then he forfeits his claim of self-defense, and (2) whether the reasonable doubt standard is sufficiently expressed when the court instructs the jury that, if there was a realistic or reasonable possibility that the defendant acted in self-defense, he is not guilty." 187a. Bailey timely moved for reconsideration or clarification of the leave grant and briefing order. On February 3, 2011, this Court granted reconsideration and amended its order to require the parties to address "(1) whether the court erroneously instructed the jury as to the effect of provocation on a claim of self-defense, and (2) whether the reasonable doubt standard is sufficiently expressed when the court instructs the jury that, if there was a realistic or reasonable possibility that the defendant acted in self-defense, he is not guilty." Attachment A.

ARGUMENT

I. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT MR. BAILEY WAS AN AGGRESSOR WHO FORFEITED ALL RIGHT TO SELF-DEFENSE AND DEFENSE-OF-ANOTHER BY APPROACHING THE DECEASED, INTENDING BY HIS "MERE PRESENCE" TO PROVOKE THE DECEASED INTO "DOING SOMETHING"

Issue Preservation/Standard of Review

Appellant inaccurately claims there was an inadequate objection to the aggressor and forfeiture instructions. Brief of Appellant 8-9. To the contrary, the judge instructed the juries jointly on all issues, including self-defense and defense-of-another. 129-148a. Afterward, Lambeth's attorney objected to the court's aggressor definition, contending that it incorrectly required forfeiture even if Hoffman overacted with deadly force to a lawful approach or request to return property by defendants. 149a. While "mere presence" was not specifically uttered, the comments alerted the judge that he defined aggressor too broadly to include conduct, including mere presence, that resulted in the unintended, disproportionate use of deadly force. The judge had the chance to fix the error by narrowing the aggressor definition that applied to both defendants, but unequivocally refused to do so in a ruling on the instructions pertaining to both defendants. 150-151a.

Given this, any further objection to that instruction by Bailey would be redundant and futile. *See United States v Baker,* 458 F3d 513, 517-518 (CA 6, 2006). "It [is] hardly necessary for one counsel to repeat the objections made by the other when sufficient objections were interposed to direct the trial judge's attention to [the] situation." *People v Logie,* 321 Mich 303, 307; 32 NW 2d 458 (1948); *see also People v Griffin,* 235 Mich App 27, 41 n 4; 597 NW 2d 176 (1999), *overruled in part on other grounds by, People v Thompson,* 477 Mich 146 (2007);

People v Bradford, 69 Mich App 583, 586; 245 NW 2d 137 (1976); *People v Brown,* 38 Mich App 69; 195 NW 2d 806 (1972); *Baker, supra.* Accordingly, the Court of Appeals correctly reviewed this issue for preserved constitutional error. *People v Carines,* 480 Mich 750, 767; 597 NW 2d 130 (1999).

This Court reviews the legal accuracy of jury instructions as well as constitutional questions *de novo. People v Gillis,* 474 Mich 105, 113; 712 NW 2d 419 (2006).

Argument

A defendant has a Fifth and Sixth Amendment right to a properly-instructed jury on the elements of the crime and any defenses. US Const, amends V, VI, XIV; *United States v Gaudin,* 515 US 506, 510-11; 115 S Ct 2310; 132 L Ed 2d 444 (1994); *People v Mills,* 450 Mich 61, 537 NW 2d 909 (1995). Instructions that distort or eliminate elements, or that deny the defendant an accurate jury determination on self-defense, violate those constitutional protections. *Gaudin, supra* at 510-11; *People v Kurr,* 253 Mich App 317, 326-327; 654 NW 2d 651 (2002); *Barker v Yukins,* 199 F3d 867, 875 (CA 6, 1999).

"[T]he killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin,* 434 Mich 482, 502; 456 NW 2d 10 (1990); *People v Riddle,* 467 Mich 116, 119; 649 NW 2d 30 (2002). The right to self-defense also includes the right to defend another under similar circumstances. *People v Curtis,* 52 Mich 616, 622; 18 NW 385 (1884). Once raised the absence of self-defense and defense-of-another become essential elements that the prosecution must prove beyond a reasonable doubt. *People v Dupree,* 486 Mich 693, 709-10; 788 NW 2d 399 (2010); CJI2d 7.21.

An act committed in self-defense but in which defendant was the "initial aggressor" does not meet the elements of lawful self-defense. *Heflin, supra* at 509. This Court asks whether the jury was erroneously instructed on the effect of provocation on a self-defense claim.[1] Judge Kolenda defined for the jury the concepts of "aggressor" and "provocation" as follows:

> You've also got to remember that a person forfeits self-defense, even if they'd otherwise have it, have the right to it, if they were the first to use deadly force, that's the ultimate bootstrapping. You can't use deadly force, and then have someone respond to deadly force and say, Now I can use deadly force to defend myself. You just can't do that.
>
> *Nor* can a person claim self-defense *if they provoked the other person into using deadly force. They deliberately provoke them into using deadly force*, and then say, Well, now that they are, I can respond to it.
>
> *Nor can a person claim self-defense if what they do is confront someone, intending, by their mere presence, to provoke that person into doing something, and then take advantage of it.* That is all making the person who is claiming self-defense the aggressor. You have to be without fault. *Without fault means that you can't be the first one to use, and you can't provoke the other person into doing it, and you can't set up a situation where what you mean for them to do is to take the first step so that you are then claiming to take the second step.*
>
> * * *
>
> . . . And the defendant, to have the benefit of the defense, cannot have been the aggressor, which means the first to use deadly force, a person who provoked it, or one who did something to set up a situation where deadly force ends up getting used, and they then in turn get to respond to it and bootstrap into a claim of defense. (Emphasis supplied) 143a.

The third paragraph above misstated the subjective and objective aspects of the aggressor definition. By requiring forfeiture where a person intends to provoke another into "doing something," the court incorrectly deemed Bailey the aggressor even if he did not intend to kill or provoke deadly force. Additionally, by equating mere presence with an act of aggression, the judge erroneously required forfeiture based on otherwise lawful conduct that is not legally

[1] Mr. Bailey argued both self-defense and defense of his brother. Because the standards are substantially the same, references to "self-defense" herein will include by implication defense of another.

provocative and would not justify the use of deadly force. Finally, the instructions incorrectly defined the effect of any provocation on self-defense by requiring absolute forfeiture if Bailey was in any way at fault. Instead, Michigan law permits even one who shares some fault or invites trouble to defend himself or another from the unintended, unjustified, or disproportionate use of deadly force.

A. The instructions incorrectly deemed Bailey to have forfeited the right of self-defense even if he acted without the intent to kill or to provoke the use of deadly force.

Mr. Bailey agrees that, as with the elements of any crime, intent is relevant to the issue of self-defense and to whether one is the aggressor in a deadly affray. *See Wallace v United States,* 162 US 466; 16 S Ct 859; 40 L Ed 1039 (1896). It is necessary, however, to appreciate the scope of the provocation/aggressor jury instructions here.

Appellant asserts the aggressor definition was limited to mere presence coupled with the intent to provoke the use of deadly force as a pretext for killing. Appellant's Brief on Appeal p. 10, 19. But the third of the above-quoted aggressor definitions goes beyond that by specifying that defendants also forfeited self defense if they intended to provoke another into "doing something." 143a. Provoking "something" connotes a far broader range of reactions than just the use of deadly force, as that "something" could include many things, including an argument, the return of property, a fistfight, *or* deadly force. And while that third paragraph later references provoking the "first step" so that the "second step" can follow, the judge did not specify what the first or second step were beyond the previous "something." Thus, Judge Kolenda did not limit forfeiture to a defendant who harbors the initial intent to kill and then intentionally provokes deadly force as a pretext for killing.

Nor did, as has been suggested, Judge Kolenda accurately narrow the aggressor definition when he later summarized the concept as "one who did something to set up a situation where deadly force ends up getting used..." 143a. This only reinforces the prior, overly broad aggressor definition. The idiom "ends up getting used" implies that while there may be a potential for something to occur, one's acts could lead to that occurrence without intending it. The judge did not link how defendants intended the situation to "end up" with how it actually did "end up." Under the instruction, one could "set up a situation" intending only to get property back, or to start an argument or fistfight. The other person could escalate the situation and "end up" using deadly force despite the defendant's initial intent. Yet under this instruction, he would forfeit self-defense since he set in motion a chain of events that led to deadly force. The instruction expanded forfeiture beyond just the intent to provoke deadly force.

As Appellant apparently agrees, acts taken without the initial intent to kill or to provoke the use of deadly force do not make one an aggressor, since the defendant would lack the *mens rea* required for murder. Appellant's Brief on Appeal, p. 12-14; *see also Wallace, supra* at 466. Yet that is precisely what the third aggressor definition the court gave allowed the jury to find by requiring forfeiture if Bailey intended to provoke only "something." Indeed the instructions would actually require forfeiture in the second hypothetical Appellant posits in pages 13-14 of its Brief on Appeal, where person C approaches D without intending to kill but nonetheless with the knowledge of D's violent character and of the likelihood that he might provoke D into reacting with violence. The jury could have found from the evidence that Bailey fit into the category of that hypothetical person "C"; that he went with Lambeth to confront Hoffman knowing that Hoffman might be provoked, but not intending for deadly force to result. Based on the

expansive aggressor definition, the jury was misled into rejecting self-defense since he intended or knew he would or could be provoking "something."

B. Contrary to the instructions, "mere presence" does not make one a deadly aggressor or forfeit self-defense.

Not only did Judge Kolenda distort the intent requirement of provocation, but he also misstated the objective aspect of the aggressor definition by equating "mere presence" in public place with an act of aggression that forfeited self-defense. As the Court of Appeals held, no Michigan authority supports that one becomes an aggressor merely by presenting himself to a person in a public street, even if he does so while armed. 164a. Additional acts are required.

In analyzing this aspect of the instructions, it is important to remember the "basic premise of Anglo-American criminal law" that "no crime can be committed by bad thoughts alone. Something in the way of an act, or of an omission to act where there is a legal duty to act, is required too." 1 Wayne R Lafave, Subst Crim Law, § 6.1(b)(2d ed 2010). In that vein, it is well settled that mere presence by itself generally does not establish criminality even if the person knows a crime will be committed. *People v Burrel,* 253 Mich 321; 235 NW 170 (1931); *People v Wolfe,* 440 Mich 508, 521; 489 NW 2d 748 (1992).

Converging with this principle is the requirement of causation and proportionality between acts and responses in the self-defense context. A deadly aggressor is "one who first does acts of such nature as would *ordinarily* lead to a deadly combat or as would put the other person involved in fear of death or serious bodily injury." (emphasis added) 1 Wharton's Criminal Law & Procedure (Anderson ed), § 229, p 501; *People v Van Horn,* 64 Mich App 112, 116; 235 NW 2d 80 (1975); *People v Smith,* 67 Mich App 145; 240 NW 2d 475 (1976). As this

Court has held, one "may only be held legally accountable as an aggressor for responsive conduct by another that is reasonably attributable to [defendant's] own conduct." *People v Townes,* 391 Mich 578, 592; 218 NW 2d 136 (1974). A person does not become an aggressor if his initial acts do not "relate to the assault in resistance to which the assailant was killed." *Id.* at 593. If deadly force is a reaction that is independent in character to the defendant's conduct, even if it somehow wrongful, the defendant may still act in self-defense "unless indeed, his act *is of such a character as to justify the assault.*" *Id.* at 593 (emphasis added) (internal quotations omitted).

Thus, the "exercise of a legal right in a lawful manner" is not an act of provocation that forfeits self-defense, even if the actor knows that it will put her in a position to be attacked and arms herself for protection. 40 CJS Homicide § 187 (2010). Moreover, as the Court of Appeals noted, one may confront another to seek a settlement of a claim or discuss a disagreement without forfeiting self-defense, even if she is armed and displays less than a "friendly spirit." 164a; *see also* 40 Am Jur 2d Homicide § 146. Additionally,

> . . . A defendant does not become an aggressor merely because he provides an opportunity for conflict, as distinguished from causing it. Nor does a defendant become an aggressor by an act of preparation, such as arming himself, with the intent to cause a conflict with the deceased; he becomes an aggressor only after he performs an act manifesting such intent. (internal footnotes and citations omitted) 2 Wharton's Criminal Law § 137 (15th ed).

By itself, Bailey's mere presence in a public place is a legal, non-threatening act, and such presence did not make him an aggressor because the use of deadly force is not a "reasonably attributable" or a "legally justified response" to such presence. *Townes, supra* at 592. While presenting oneself to another can provide an *opportunity* for a conflict, it does not in itself cause one. 2 Wharton's Criminal Law *supra* at 137.

Requiring symmetry between the defendant's actions and the reactions to them in this context lies at the root of the self-defense doctrine. As a leading treatise explains, the reason an aggressor cannot claim self-defense is because "the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense." 2 Wayne R LaFave, Subs Crim L §10.4(e) (2d ed., 2010). If conduct that is not objectively life threatening or provocative of deadly force justified a "victim" in responding with deadly force so as to preclude self-defense, the principles of self-defense would be distorted. The right of self-defense would be rendered essentially meaningless since even if the "victim" overreacts unreasonably and unjustifiably to something as innocuous as mere presence, the defendant could not defend himself against that unlawful assault, and would instead be forced to choose between death and criminal conviction.

Michigan decisions are in accord. For instance, in *People v Curtis, supra* at 623, this Court held that mere insulting remarks do not forfeit self-defense since insults would not justify the use of deadly force by the listener. Instructing the jury otherwise would be the "equivalent legally to saying that while words will not justify a dangerous assault they will preclude a person from resisting it, and in that respect [such a] charge [is] altogether inconsistent." *Id.*

Similarly, this Court in *Townes* rejected the notion that a defendant who trespassed in a store and started an argument with an employee forfeited his right to defend himself against the threatened use of deadly force by the store manager who intervened. *Townes, supra* at 592. While the defendant may have been in the wrong for trespassing and fighting in the store, he was not the deadly aggressor because the store manager's act of producing a gun and threatening him with it was not "a legally reasonable response to [defendant's] conduct." *Id.*

In reaching that conclusion, *Townes* specifically relied on *Cartwright v State*, 14 Tex App 486, 498-99, 502; 1883 WL 8943 (1883). *Townes, supra* at 592. In *Cartwright,* the Texas court rejected the argument that one becomes an aggressor merely by "[g]oing to the place where another is, with a deadly weapon, for the purpose of provoking a difficulty, or with the intent of having an affray." 1883 WL 8943, at 11. Instead, the evidence must show that the defendant also "knowingly and willingly used language, or did acts which might reasonably lead to an affray or a deadly conflict" beyond merely approaching a person with a provocative intent. *Id.* at 12.

Other authorities affirm that mere presence by itself is insufficient to forfeit self-defense since deadly force is not a proportionate or reasonably legal response. *See* CJI2d 7.18 (equating a "deadly aggressor" with "a person who started an assault on someone else [with deadly force/with a dangerous or deadly weapon]."); *see also Van Horn, supra* at 115 (defendant's refusal to leave apartment building when ordered did not make him the aggressor since his actions were not of a nature that would lead to a deadly combat or put the other person involved in fear of death or serious bodily injury.); *Smith, supra* at 154 (defendant not deadly aggressor by arguing with gas station manager over price and refusing to pay); *see also State v Bristol,* 53 Wyo 304; 84 P 2d 757 (Wyo 1938) (defendant not an aggressor despite getting a gun after deceased threatened him, after which he entered a tavern where deceased was known to be and "glared" in deceased's direction); *State v Livesay,* 71 Idaho 442, 448; 233 P 2d 432 (Idaho, 1951) (error in instructing that defendant was aggressor if she put herself in a position where she knew she might have to invoke self-defense, because "[b]are intent and purpose to provoke a difficulty does not deprive one of the right of self-defense. He must do some act or something at the time of the difficulty that does provoke the same."); *Thompson v United States,* 155 US 271; 15 S Ct

73; 39 L Ed 2d 146 (1894) (defendant did not become aggressor by arming himself after being threatened and then walking on road in front of deceased's house); *State v Starks,* 627 P 2d 88, 91 (Utah, 1981) ("that defendant. . . armed himself and went to a location where he knew he would find the deceased does not of itself deprive himself of his right to self-defense.") The common law of this state and elsewhere requires something more than mere presence to make one an aggressor. Some additional act that would justify or reasonably lead to the use of deadly force is required.

It is true that one scholar has submitted a person "forfeits the privilege if he goes into the vicinity of the other on a mere pretext, knowing and intending that his mere presence will cause the attack." Perkins & Boyce, Criminal Law (3d ed., 1982), p. 1131. But as discussed above, this does not necessarily reflect the majority rule or the rule in Michigan. Nor should it be read to endorse the extremely broad aggressor definition given here that required forfeiture even without an intent to provoke deadly force.

Furthermore, such a statement must be considered within the context of the specific facts presented. Consider *People v Neeley,* 20 Iowa 108; 1866 WL 125 (1865), one case cited to support this broader view of forfeiture. Perkins & Boyce, *supra* at 1131, n 7. In *Neeley,* not only did the defendant approach the victim intending to start something, but that approach was preceded by a series of hostile and threatening acts in the hours and moments before the killing, including; shooting the victim's dog, angrily fighting with victim's wife and daughter, chasing the victim's sister and children while armed, and then rapidly approaching the victim and his wife with a gun while exchanging angry words immediately before the shooting. 1866 WL 125 at 1-2; *see also Cartwright,* 1883 WL 8943 at 12.

Burton v State, 254 Ark 673; 495 SW 2d 841 (1973), the primary case cited by Appellant, provides a similar factual context. In *Burton,* the defendant's approach of the victim was preceded by a series of threats by the victim and hostile, menacing stares and a private conversation between the two men that one could infer was an exchange of additional threats or challenging statements. Later, when the defendant entered a tavern where the victim was, the victim retrieved his gun and stated that defendant was "loaded for bear" and that "'I think it's fixin' [sic] to come down," after which the defendant made provocative statements within earshot of the victim and his friend. *Id.* at 674-676. More than mere presence with a provocative intent existed, as there were acts that placed the victims in fear of death or evinced an intent to engage in mutual deadly combat.

Here, the aggressor instructions required forfeiture even without any additional acts or words that would reasonably lead to or justify the use of deadly force. Instead, they required forfeiture based on otherwise lawful "mere presence" coupled with some subjective provocative intent even if that intent was not to kill or provoke deadly force. Thus, the instructions wrongfully stated both the subjective and objective aspects of the aggressor definition.

C. The instructions wrongfully precluded Bailey from self-defense if he was in any way "at fault" for Hoffman's use of deadly force, without consideration of the reasonableness or proportionality of the reaction, or the possibility of retreat.

Even if Bailey was at "fault" for approaching Hoffman, the instructions wrongfully deemed him to have forfeited all right to self-defense in absolute terms, regardless of whether Hoffman's reaction was unintended, unreasonable, or disproportionate. Contrary to the instructions, Michigan has no such "in-for-a-penny-in-for-a-pound" rule of forfeiture. "One who provokes a difficulty may defend oneself against violence on the part of the one provoked if the

violence be disproportionate to the seriousness of the provocation or greater in degree than the law recognizes as justifiable under the circumstances." 40 CJS, *Homicide,* § 186 (2010). In Michigan, even one who "invites trouble" or provokes a difficulty is not entirely foreclosed from defending himself if the other person escalates the encounter by using deadly force. *Pond v People,* 8 Mich 150, 175 (1860)*; Riddle, supra* at 132-33; CJI2d 7.19. Rather, in such cases, the self-defense right is qualified by a duty to retreat that one who is free from fault would not have:

> One who was the aggressor in a chance medley (an ordinary fistfight, or other nondeadly encounter), or who culpably entered into such an engagement, finds that his adversary has suddenly and unexpectedly changed the nature of the contest and is resorting to deadly force. *This . . . is the only type of situation which requires "retreat to the wall."* Such a defender, not being entirely free from fault, must not resort to deadly force if there is any other reasonable method of saving himself. Hence if a reasonable avenue of escape is available to him he must take it *unless he is in his "castle" at the time. Id.* (emphasis in original), *quoting* Perkins & Boyce, *Criminal Law* (3d ed.), p. 1121.

Under *Riddle,* "[w]here a defendant 'invites trouble' or meets nonimminent force with deadly force, his failure to pursue an available, safe avenue of escape might properly be brought to the attention of the factfinder as a factor in determining whether the defendant acted in reasonable self-defense." *Id.* at 127; *Pond, supra* at 175*; see also* CJI2d 7.19 (jury instruction providing that non-deadly aggressor "does not lose all right to self defense" provided that the defendant retreats from a deadly attack "if safe to do so").

Accordingly, as the Court of Appeals held, "mere presence" does not eliminate one's potential opportunity to invoke self-defense even if that presence in some way "caused" a fight. Rather, Bailey's presence, intent, and the possibility of a reasonable retreat, were factors to be considered by the jury in determining whether he acted reasonably in self-defense. 165a; *see also Riddle, supra.* Contrary to this, the instructions deemed him to have forfeited the defense entirely, by his undisputed mere presence coupled with some provocative intent.

In challenging the Court of Appeals' decision, Appellant asserts that the court focused too narrowly on the instructions' "mere presence" language without considering it in the proper context of the other instructions that, according to Appellant, limited the aggressor definition to its proper scope. Appellant's Brief on Appeal 19. To the contrary, a review of the aggressor instructions as a whole only reinforces the conclusion that they were misleading. Of the instructions' three paragraphs that spelled out the ways to forfeit self-defense, the second and third are prefaced by the word "nor", denoting separate and alternative components of the list. 143a; Miriam Webster's Online Dictionary, Definition of "Nor", http://www.merriam-webster.com/dictionary/nor.[2] Only the first two paragraphs mention "deadly force" – the first references actually using deadly force while the second references deliberately provoking such force. The third paragraph does not specify deadly force, but references only an intent to provoke "something." 143a. Reading that paragraph to also mean deliberately provoking deadly force would make it redundant with the preceding paragraph and would disregard the word "nor". It is thus readily apparent that Judge Kolenda presented three separate ways one forfeits self-defense: (1) by being the first to use deadly force, (2) by deliberately provoking another into using deadly force, and (3) by confronting someone, intending, by his mere presence to provoke another into "doing something." Therefore, the Court of Appeals properly held that the instructions as a whole, erroneously defined the concept of aggressor and provocation, and their effect on self-defense.

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[2] Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/nor, defines the term "nor" as:

> 1—used as a function word to introduce the second or last member or the second and each following member of a series of items each of which is negated <neither here nor there> <not done by you nor me nor anyone>
>
> 2—used as a function word to introduce and negate a following clause or phrase.

D. The constitutional error requires reversal.

Since this instructional error misstated the essential elements of justification and denied Bailey the right to argue and present self-defense, the constitutional harmless error test applies. *Neder v United States,* 527 US 1, 15; 119 S Ct 1827; 144 L Ed 2d 35 (1999). Reversal is required unless the prosecution proves beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the verdict. *Chapman v California,* 386 US 18, 23-24; 87 S Ct 824; 17 L Ed 2d 705 (1967); *Sullivan v Louisiana,* 508 US 275, 279; 113 S Ct 2078; 124 L Ed 2d 182 (1993).

In *Neder, supra* at 17, the Supreme Court explained that where, as here, instructional error distorts or removes an element of a crime, the error is harmless where that element was "uncontested and supported by overwhelming evidence." *Accord, People v Harper*, 479 Mich 599, 639-41; 739 NW 2d 523 (2007). Conversely, "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding [the reviewing court] should not find the error harmless." *Neder, supra* at 19.

A straightforward application of *Neder* and *Chapman* reveals the soundness of the Court of Appeals' decision to reverse. Self-defense was contested and supported by evidence, directly in the form of Lambeth's testimony describing his history with Hoffman and the events leading to the shooting. 8a-10a, 92a-108a. Additionally, as the Court of Appeals found, circumstantial evidence supported the defense theory despite the failure to recover Hoffman's gun. *See Wolfe, supra* at 526 ("circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence.") Such evidence includes: (1) testimony describing Hoffman's gang membership, acts of gun violence, and habitual gun possession; (2) direct and circumstantial evidence that some of Hoffman's other belongings, such as his drugs, phone, cigars, and jacket, had been

removed from him after he was shot; and, 3) the failure to conduct gunshot residue testing on Hoffman to determine whether he fired a gun. 184a, 35a, 92a-95a, 105a, 112a-114a. These factors, combined with an unstable atmosphere at a scene surrounded by a hostile crowd, support the inference that someone had removed a gun from Hoffman during the nearly 20 minutes that some witnesses estimated that it took for the police to arrive. 12a-13a, 19a, 21a, 57a, 63a.

Moreover, there were reasons to doubt key eyewitnesses' reliability. They all lived in Killer Keith Hoffman's neighborhood, and at least one expressed fear of reprisal over how he testified. 33a, 95a The jury could infer that witnesses had slanted their testimony in Hoffman's favor out of fear or loyalty. Indeed, Charlie Long's trial testimony was inconsistent with his own prior statements and testimony where he had denied seeing anything at all, and contradicted by his own sister's testimony that placed him *inside* the house when the shooting occurred. 23a, 25a, 33a-36. Cross-examination raised questions over the quality of a second witness' vision. 39a, 41a. While a third witness denied being high at the precise time of the shooting, he admitted using drugs throughout that day and had been one of Hoffman's drug customers. 51a-53a. Furthermore, cross-examination raised questions over whether one or more of the witnesses' views of the shooting could have been blocked or obscured. 76a.

Even Bailey's recorded statement is far from the "smoking gun" Appellant wishes it was, as several comments supported the theory that he was merely covering for his brother by taking the "fall" for him. Indeed, his mother accused him of lying because it was entirely out of character for him to do something like that. 115a-118a. Notably, when asked about self-defense, Bailey alluded to threatening conduct by Hoffman, and to "blacking out," which could be interpreted as a garbled explanation that Hoffman was the first to use deadly force. 120a.

That the jury was struggling with issues of guilt is revealed in its decision not to convict on premeditated murder and in its multiple questions about the evidence and law. One question suggested that the jury might be close to hanging, while another asked, "what if there was no proof that Mr. Bailey knew the reason he was going down there?" 154a-155a. This further belies Appellant's assertion that the jury was so overwhelmed by evidence of guilt that the errors did not matter.

Any rational, properly instructed jury could harbor a reasonable doubt on justification. *Neder, supra* at 19. As the Court of Appeals found, there were conflicting claims on both sides of the issue, and it is not the proper role of any reviewing court to weigh the evidence and determine credibility in the place of a jury that did not have the proper standards for deciding guilt. 185a; *Barker, supra* at 874; *see also Wolfe, supra* at 514-15 (weighing evidence and deciding credibility is exclusive function of jury, not appellate court). Indeed, accepting Appellant's contention that the error is harmless would "necessarily mean[] that the court believed some evidence but discredited other evidence. This, however, it cannot do and remain in compliance with our constitutional guarantees [of the right to a jury trial]." *Barker, supra at* 874.

It must also be remembered that the jury was given three separate aggressor definitions and this Court must presume that it followed the incorrect one even if the other two were correct. *People v Clark,* 340 Mich 411, 418; 65 NW 2d 717 (1954). As the Court of Appeals held, the jury presumptively rejected self-defense based on Bailey's mere presence, without even considering the core elements of self-defense or whether the prosecution proved Lambeth was not telling the truth. 185a-186a. Thus, there is far more than a reasonable possibility that the error contributed to the verdict. *Chapman, supra* at 23.

Even if this Court found there was not an adequate objection to the aggressor instruction, reversal would still be required under the plain error standard of review. *Carines, supra* at 763. Unpreserved instructional error requires reversal where: (1) error occurred, (2) that was clear or obvious, (3) that affected a substantial right of the defendant and was prejudicial. *Id.* Furthermore, the error must result in the conviction of an actually innocent person or seriously affect the fairness, integrity or public reputation of the trial. *Id.*

Each of these requirements exists. The trial court clearly misinformed the jury on the aggressor definition and the effect of provocation, which affected Bailey's substantial right to a properly instructed jury on the essential element of self-defense. And as noted above, the jury presumptively followed the separate incorrect aggressor instruction and mistakenly rejected self-defense out of hand. Thus, unlike cases where an omission from one part of the instructions was filled-in by other surrounding instructions so as to ensure an accurate jury finding on all essential elements, *compare, Carines, supra,* at 771-73, there was no such filling-of-the-gap here. This, combined with the evidence supporting a rational jury finding on self-defense, compels the conclusion that the error was both highly prejudicial and it seriously affected the fairness, integrity and public reputation of this trial. *See People v Mass,* 464 Mich 615, 640-641; 628 NW 2d 540 (2001) (plain error not harmless where instructions revealed the jury could have convicted of conspiracy to deliver more than 225 grams of cocaine without considering the proper amount of drugs involved); *Compare, Johnson v United States,* 520 US 461; 469-70; 117 S Ct 1544; 137 L Ed 2d 718 (1997) (unpreserved failure to instruct on element harmless where evidence on missing element was overwhelming and uncontroverted). Reversal is therefore required under either standard of review.

II. THE TRIAL COURT FAILED TO ADEQUATELY INSTRUCT THE JURY ON THE PROSECUTION'S BURDEN OF PROVING UNJUSTIFIED HOMICIDE BEYOND A REASONABLE DOUBT.

Issue Preservation/Standard of Review

Appellant states the correct standard of review, as this issue was preserved by an objection. 151a; Appellant's Brief on Appeal, p. 26.

Argument

As noted above, the absence of self-defense and defense-of-another are elements of murder that the prosecution must prove beyond a reasonable doubt, and the jury must be clearly instructed on that burden. *Dupree, supra* at 710. Mr. Bailey acknowledges the Constitution does not require particular phraseology to convey the burden of proof or reasonable doubt standards. *See Victor v Nebraska,* 511 US 1; 114 S Ct 1239; 127 L Ed 2d 583 (1994). Rather, "taken as a whole, the instructions [must] correctly conve[y]" those concepts to the jury. *Id* (internal quotations omitted). The trial court "must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." *Id.* To pass scrutiny, the instructions must leave "no doubt in the mind of the reviewing court" that the jury understood the prosecution bore the burden of proving all elements beyond a reasonable doubt. *People v Hubbard,* 217 Mich App 459, 487; 552 NW 2d 493 (1996).

This Court asks whether a trial court distorts the prosecution's burden of proof if it instructs that "if there was a realistic or reasonable possibility that the defendant acted in self-defense, he is not guilty." 178a. A reading of this aspect of the instructions in context reveals

that it was only one component of a series of instructions that inadequately conveyed the burden of proof and reasonable doubt standard.

As with other instructions here, the burden of proof instructions on self-defense were inartful and confusing. The judge initially attempted to articulate that burden by stating, "the lack of justification has to be proven here. The defendant doesn't have to prove justification. The evidence has to establish the lack of justification." 141a. The judge did not specify that the prosecution bore the burden of proof; he laid it instead on the "evidence". *Id;* 166a, 185a. The judge then continued with the confusing statement, "now that's an awkward way of saying things. It is talking about proving a negative, which is technically correct, but hard to talk about." 141a.

As the Court of Appeals noted, "during the trial court's ensuing effort to clarify the law, [it] entirely neglected to inform the jurors that the prosecutor bore the burden to disprove Bailey's and Lambeth's self-defense claims." 166a. Instead, the surrounding statements reveal a repeated undermining of that burden. The judge repeatedly stressed that self-defense applied only "under very limited circumstances"; that it was a "limited" and "very limited" defense; that the circumstances allowing justification were "few", or "very few"; and that it was a "narrow" defense." 141a-143a. He went on to explain the level of certainty the jury should have to acquit:

> Since it has got to be proven beyond a reasonable doubt, just like you contributed to the murder, that a person did not kill with justification, I'm going to state it this way: If there is a realistic possibility, based upon the evidence presented here, that one or both of the defendants acted in either self-defense or defense of another person, then we don't have murder, if there was a realistic possibility. If, on the other hand, it's not a realistic possibility, no possibility at all, *or even just a mere possibility, just a possibility,* not a realistic possibility, then murder is back on the table, because then the thing which would eliminate it, justification, doesn't exist. 141a (emphasis added).

The judge continued:

> . . . the law, not surprisingly, deems protecting life to be very important. Therefore, because the defense of justification, in reality, forgives taking a life, the circumstances under which that defense can be utilized are *very few*. If they weren't very few and very strictly applied, what we'd be saying is that the law makes it easy to kill somebody. That would, of course, cheapen all life. So the law says that this defense, while it exists – and, if it exists, a defendant is entitled to the benefit of it – has to be narrow, which means it applies only in limited circumstances. . . . (emphasis added) 141a-142a.

This series of statements clouded and undermined the burden of proof on self-defense. There is no authority in Michigan for Judge Kolenda's repeated statements about the "limited" extremely "narrow" nature of self-defense, nor is there a basis for the judge's claim that the law frowns on citizens protecting themselves or others from violent attacks. Rather, if a rational view of the evidence supports self-defense, then the prosecution must prove its absence beyond a reasonable doubt. *Dupree, supra* at 710. Indeed, a person is not guilty of a crime – a killing is justified – if he honestly and reasonable believes it is necessary to do so to prevent imminent death or great bodily harm and takes reasonable steps in defense. *Id.* at 707.

Adding to these repeated limiting comments was the judge's statement that the jury should convict if there was only a "mere possibility, just a possibility" that Bailey acted in self-defense. 141a. One can "possibly" be guilty of a crime, yet the constitution bars conviction unless the prosecution proves that possibility beyond a reasonable doubt. Likewise, one cannot be convicted of murder where she "possibly" acted in self-defense unless the prosecution eliminates that possibility by proof beyond a reasonable doubt. Within the context of the other statements, this further frayed confidence in the jury's ability to understand the burden of proof and reasonable doubt standard.

As the Court of Appeals noted, simply using the standard jury instructions would have adequately explained the proper standards. 166a; *see also* CJI 2d 7.20. Instead, these ad-libbed

instructed left significant doubt that the jury understood them. *Hubbard, supra* at 487. Notably, the judge used the words "limited" or "very limited" five times, "few" or "very few" twice, "narrow" or "very narrow" twice, and said it should be "strictly applied" once, for total of 10 editorial statements on the limited value of self-defense in this case. 141a-143a. In contrast to these ubiquitous statements was that after his single passing reference to the issue, not once did the judge clearly and directly state that the prosecution bore the burden of proof. 166a. By short-shrifting the burden and presenting self-defense in this way, the judge did not adequately convey the proper burden or reasonable doubt standard.

For the reasons discussed in the previous section, the Court of Appeals correctly held that this preserved instructional error was not harmless beyond a reasonable doubt, as the evidence on justification was contested and any rational, properly instructed jury could find for the defense on that element. *Neder, supra,* at 19; *see* Issue I-D; 185a. As the Court of Appeals explained,

> A juror who believed that the victim fired the first shot or appeared to have reached for a gun may nevertheless have rejected self-defense on the basis of the mistaken belief that Bailey failed to prove this claim beyond a reasonable doubt. Stated differently, if the jury concluded that Lambeth was probably telling the truth about the victim's actions immediately before the shooting, it may have nevertheless convicted because of the misapprehension that Bailey had to prove Lambeth's truthfulness beyond a reasonable doubt. 185a.

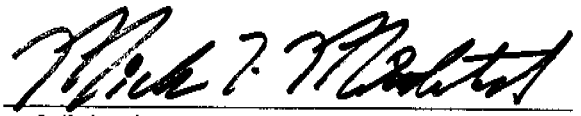
Reversal is therefore required.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellee asks that this Honorable Court affirm the Court of Appeals' decision reversing his convictions, and remand for a new trial.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

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Dated: March 8, 2011

ATTACHMENT A

People v Bailey, Order from the Court of Appeals,
Decided February 3, 2011 (Docket No. 278411)

Order

Michigan Supreme Court
Lansing, Michigan

February 3, 2011

141739(93)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 141739
COA: 278411
Kent CC: 06-006768-FC

SAMMIE RAY BAILEY, JR.,
Defendant-Appellee.

/

On order of the Court, the motion for reconsideration or clarification of this Court's November 24, 2010 order is considered, and it is GRANTED. On reconsideration, the November 24, 2010 order is amended to read as follows:

On order of the Court, the application for leave to appeal the July 20, 2010 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall address: (1) whether the court erroneously instructed the jury as to the effect of provocation on a claim of self-defense, and (2) whether the reasonable doubt standard is sufficiently expressed when the court instructs the jury that, if there was a realistic or reasonable possibility that the defendant acted in self-defense, he is not guilty.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 3, 2011

Corbin R. Davis
Clerk

d0201