

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

STATE OF WISCONSIN,
Plaintiff,

v. Case No. _____

(NAME CLIENT),
Defendant.

NOTICE OF MOTION AND DEFENDANT'S MOTION FOR SUPPLEMENTAL JURY
INSTRUCTION ON SELF DEFENSE

TO: ASSISTANT DISTRICT ATTORNEYS
MILWAUKEE COUNTY

PLEASE TAKE NOTICE that Mr. (Name Client) , appearing specially by attorneys _____, will appear in that Branch of the Circuit Court presided over by the Honorable _____ in his courtroom on _____ at 8:30 AM or as soon thereafter as counsel may be heard and will move the court for an order that the jury be instructed on the law of self defense pursuant to WIS JI CRIMINAL 805 (see attached) and that the instruction be supplemented to include language that the jury should consider the age of the defendant in determining whether the actions of the defendant were objectively reasonable.

The parties have previously advised the court that self defense is likely to be an issue of importance during the trial of this case. Evidence will be received that the defendant at age 15 caused the death of (name deceased). Both parties are likely to offer evidence that (name client) told police that he defended himself against the physical advances and attack of deceased and that he believed he was going to be physically and sexually assaulted. At the conclusion of the

testimony there will be sufficient evidence to instruct the jury on the law of self defense, regardless of whether the defendant testifies.

The law of self defense in Wisconsin provides that a person is privileged to use force which is intended or likely to cause death or great bodily harm if the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself. Sec. 939.48(1), Wis. Stats. This privilege has a subjective component and an objective component. The actor must have an actual belief that such force is necessary to prevent imminent death or great bodily harm to himself. The actor's belief must also be reasonable.

Whether a person's belief is reasonable is determined is defined in WIS JI CRIMINAL 805 as follows:

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

The jury instruction is not adequate in this case and should be supplemented because the age of the defendant is a critically important fact of the case. The importance of age is magnified by the fact that at the time of trial the defendant will be ___ years of age. When children are involved the reasonableness standard relates to a person of like age, intelligence and experience. *Maichle v. Jonovic*, 69 Wis. 2d 622, 626 (1975). The United States Supreme Court has repeatedly stated in recent decisions that children are different from adults in the eyes of the law. *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 180 L.Ed 2d 310, 2011 U.S. LEXIS 4557 (2011). *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d 1 (2005). The Eighth

Amendment prohibits the imposition of the death penalty on juvenile offenders under 18. *Graham v. Florida*, 130 S.Ct. 2011, 176 L.Ed. 2d 825, 2010 U.S. LEXIS 3881 (2010). The Eight Amendment prohibits the imposition of a sentence of life without parole on a juvenile offender who committed a non-homicide crime.

Even though the U.S. Supreme Court called the conclusions about children “self-evident”, *J.D.B. Supra.*, it was not until the advent of brain-imaging research that the Court gave recognition to the now well documented differences between children and adults. *Roper, Supra.*

In order to fully instruct the jury concerning the law relating to self defense the Defendant requests that the Court supplement WIS JI CRIMINAL 805 as follows:

In determining the (name client)’s position under the circumstances that existed at the time of the alleged offense you should consider all the circumstances that relate to the (name client)’s situation, including his age at the time. The standard involving children relates to a reasonable person of like age, intelligence and experience. You can draw upon your common knowledge and experience as well as the testimony received during the trial, in determining whether the beliefs of (name client) were reasonable for a person of his age at the time of the alleged offense.