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NO. 35331-8-II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JACOB MELVIN KORUM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Stephanie A. Arend, Judge

OPENING BRIEF OF APPELLANT

MONTE E. HESTER
RITA J. GRIFFITH
Attorneys for Appellant

1008 Yakima Avenue, Suite 302
Tacoma, WA 98495-4859

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in increasing Jacob Korum's sentences after his successful appeal.

2. The trial court erred in imposing a 60-month firearm enhancement rather than a 24-month deadly weapon enhancement.

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Where the trial court could not identify any conduct which occurred after Jacob Korum's prior sentencing which would justify more severe sentences after a successful appeal, did the trial court violate Jacob Korum's state and federal constitutional rights to due process of law by increasing his sentence on remand? (Assignment of Error 1)

2. Where the trial court (a) stated that the court could not consider Mr. Korum's rehabilitative efforts and acceptance of responsibility; (b) focused on an erroneous belief that Mr. Korum's family and friends believed he had made a "stupid mistake"; and (c) compared Mr. Korum's sentence with that of his co-defendants in an incomplete and uninformed manner, did the trial court's reasons for

increasing Mr. Korum's sentence on remand after a successful appeal establish the court's bias at resentencing and constitute an abuse of discretion?¹
(Assignment of Error 1)

2. Did the trial court err in relying on State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003), where Tili did not involve a remand for dismissal of concurrent counts or resentencing solely on counts which were upheld as correct on appeal? (Assignment of Error 1)

3. Did the trial court err in relying on Tili, to excuse the need for finding reasons, based on objective conduct by Mr. Korum, for increasing his sentence on remand? (Assignment of Error 1)

¹ As set out below in the Statement of the Case, Mr. Korum's family and friends focused their comments on the changes he had made in recent years and positive things about him. No one who spoke or wrote to the court on behalf of Mr. Korum referred to his criminal conduct as being only a "stupid mistake" or youthful indiscretion. The only person who spoke of a "stupid mistake" was the prosecutor, who made an unsupported claim at sentencing that this was what Mr. Korum and his supporters believed. RP 8.

The court's cursory comparison of Mr. Korum's sentences to the sentences of his co-defendants' was incomplete. The court made no attempt to consider the bases of the length of the co-defendant's sentences.

4. Did the trial court go beyond the mandate issued by the Washington Supreme Court in increasing Mr. Korum's sentences? (Assignment of Error 1)

5. Was the trial court collaterally estopped from increasing Mr. Korum's sentences? (Assignment of Error 1)

6. Did the trial court err in imposing a 60-month firearm enhancement, rather than a 24-month deadly weapon enhancement, where a trial court has no authority to make the firearm finding and doing so violated Mr. Korum's Sixth Amendment right to a jury trial? (Assignment of Error 2)

7. Did the trial court err in imposing a 60-month firearm enhancement, rather than a 24-month deadly weapon enhancement, where the legislature never enacted a procedure for submitting the firearm finding to a jury? (Assignment of Error 2)

8. Did the trial court err in imposing a 60-month firearm enhancement, rather than a 24-month deadly weapon enhancement, where the error in not submitting the finding to a jury to be determined by a beyond a reasonable doubt standard cannot not be harmless under Washington law? (Assignment of Error

2)

C. STATEMENT OF THE CASE

1. Procedural History

This is an appeal of the trial court's increasing Jacob Korum's sentences for each of his burglary, assault and robbery convictions after his kidnapping convictions and the firearm enhancements for the kidnapping counts were dismissed on appeal. The procedural and factual history of this case is outlined by the Supreme Court in State v. Korum, _____ Wn.2d _____, 141 P.3d 13 (2006), as follows:

The charges against Jacob Korum arose from four incidents, which took place on three days during the summer of 1997. Mr. Korum and four co-defendants entered or attempted to enter the homes of drug dealers in order to rob them.

The state initially charged Jacob Korum with 16 counts of burglary, robbery, kidnapping and assault arising from robberies at a house and a trailer located on the same property (the Beaty/Molina robbery); Mr. Korum was the driver during these incidents. On July 31, 1998, Mr. Korum entered guilty pleas to first degree kidnapping while armed

with a firearm and one count of second degree possession of a firearm; the trial court imposed a total sentence of 135 months of confinement following the entry of the pleas. The state's recommendation, at that time, was 72 months for the kidnapping count, 60 months for the firearm enhancement and a 12-month concurrent term for the firearm possession count for a total of 132 months.

After Mr. Korum withdrew his plea, the prosecutor amended the information to add 15 new counts for a total of 32 counts. The jury acquitted him of two counts and convicted him of the remaining charges. At the sentencing hearing after trial, the state recommended consecutive standard range sentences at the high end of the 608 to 810 month standard range for the kidnapping convictions, which, with the 600 months for the firearm enhancements, totalled 1,208 to 1,410 months. The state also recommended exceptional sentences of 1,200 months for each of the four burglary convictions and for the two robbery convictions, to run concurrently with the kidnapping convictions and enhancements. The court imposed a sentence of 1,208

months for the kidnapping convictions and enhancements, and sentences at the low end of the standard range for all remaining counts. The prosecutor and court engaged in the following colloquy:

THE COURT: Okay. Is there anything in addition to your brief that you wanted to argue regarding your request for an exceptional on the requested exceptional on the burglary and robbery; is that right?

MR. McCANN [the prosecutor]: No, Your Honor. I don't have anything in addition to my brief.

THE COURT: Okay. Those would run concurrent to the kidnapping?

MR. McCANN: That's correct.

THE COURT: To run concurrently?

MR. McCANN: It wouldn't increase the sentence.

THE COURT: So what is the practical reason for making that request?

MR. McCANN: Well, Your Honor, obviously the case goes on after this point. The purpose of the sentencing guidelines are to ensure punishment accounting for all the crimes that he's committed.

As I have indicated in my brief, there are bases for an exceptional sentence, and I'm just asking that the Court sentence him to that for those bases. I can't anticipate what happens after this leaves this courtroom, and I think the sentence is

appropriate.

RP (6/8/01) 64-65.

In response to the state's requests for exceptional sentences or sentences at the top of the standard range the court ruled:

THE COURT: I do not find that there are any substantial and compelling reasons to sentence Jacob Korum outside the presumptive ranges. The State has requested that I impose the high end of the standard range. I am not willing to do that either

THE PROSECUTOR: Your Honor, with regard to the sentences on the crimes other than the kidnappings, did the Court wish to follow similar low end with those concurrent?

THE COURT: Yes

RP (6/8/01) 96.

The court imposed a sentence of 1,208 months for the kidnapping convictions and enhancements, and sentences at the low end of the standard ranges for all remaining counts. CP 282.

On appeal, this Court reversed and dismissed the 10 kidnapping counts as incident to the robberies. State v. Korum, 120 Wn.App. 686, 705-707, 86 P.3d 166 (2004). On review, the Washington Supreme Court upheld the burglary, robbery and

assault convictions, affirmed dismissal of the ten kidnapping counts and remanded for re-sentencing. Korum 141 P.3d at 33-34.

2. The sentencing hearing after appeal

At the sentencing hearing, Jacob Korum addressed the court and took full responsibility for his actions and expressed his regret for the pain and heartache he had created:

From my love affair with guns, drugs, and alcohol I became the monster that had only been in my mind all these years. My monster had been created by me and only me, but it was no longer just my monster. I had become the real-life monster that destroyed people's lives through fear and intimidation and taking the feeling of security and safety away. For this I am truly sorry. I would do anything to take back the three summer nights of July 14th, August 2nd and August 30th of 1997. . . . I don't want anyone to live a single day of heartache or fear as a result of my past actions.

RP 50. Mr. Korum admitted that he had not accepted responsibility for his actions until after he had received a long prison sentence: "Going to prison with a hundred-year sentence has forever changed my life. Only then was I able to come to terms with the life I had led. . . . I no longer wanted to be the person that had led me to prison." RP 47-48.

He assured the court that he would never commit another crime:

I have worked very hard in the past five years to make the very best effort I can to become the very best person. It is my promise to every victim in this case I will never commit a single crime against another person as long as I shall live. I am committed to the victims of my actions, the Court, my family, and the community for which I live to be the very best, productive person I can be.

RP 50.

A number of friends and family addressed the court, focusing on the changes and progress Mr. Korum had made while in prison and his positive outlook for the future. RP 37-47.

Mr. Korum's accomplishments, as documented in his sentencing memorandum, were uncontested at the sentencing hearing. CP 297-306. Mr. Korum had participated in every program which was available to a person with his sentence structure. While in prison, Mr. Korum was infraction-free during his nearly 100 months of incarceration; he earned a certificate in Information Technology from Pierce College and lacked only electives for his associate's degree. CP 298. At the time of the sentencing he was working full-time in the Pierce

College computer lab helping others. CP 298.

Additionally, Mr. Korum had earned the right to participate in the extended family visiting program and had been granted a family furlough to attend his grandfather's funeral. The furlough was granted after a Department of Corrections risk assessment. CP 298.

While conceding that the cases "[talked] about things such as a person's behavior since the time of the original sentencing," the trial court ignored the positive changes and Mr. Korum's acceptance of responsibility. RP 57. In increasing the sentences previously imposed, the court announced that its only discretion was determining where within the standard range the sentence should be. RP 53-54.

Citing State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003), the court ruled that the context was currently different from the sentencing after trial where "his minimum of the standard range sentencing range was 608 to 810 months," and that then "the Court determined it made no difference whatsoever as a practical matter whether on the robbery count Mr. Korum was sentenced to 129 months or 171 months or

anywhere in between that." RP 55-56. The court also ruled that it was not actually increasing the sentence at all because Mr. Korum would receive a sentence "significantly less than 608 months." RP 56.

Before pronouncing sentence, the court addressed the members of the audience who had spoken on Mr. Korum's behalf and indicated: (1) that people needed to be punished as well as rehabilitated; (2) that the fact that Mr. Korum "behaves in prison" was "not something that the Court has any control over"; (3) that whether the community was safer or not while Mr. Korum was in prison was not "before the Court today"; and (4) that whether or not he had gained everything he could gain in prison was not an issue. RP 58-59. The court noted that people who wrote letters characterized Mr. Korum's actions as "stupid mistakes or someone making a youthful indiscretion," and that "[t]his is not something that was a stupid mistake." RP 59. The prosecutor claimed that Mr. Korum's supporters characterized his crimes as a "stupid mistake," but Mr. Korum's family and friends simply did not minimize his

conduct. They focused on the changes they had seen in him in recent years and the positive things about him, without trying to excuse his actions. RP 8-9.

The court noted that there were separate and discrete robberies and children were involved in some and that the number of convictions exceeded the number of convictions of his co-defendants. RP 60. The court noted that it "understood that some of the co-defendants had been sentenced to as much as 22 years . . . and they were not convicted of 20 separate felonies." RP 60-61.

The court ruled that the error in not submitting the firearm enhancement to the jury was harmless. RP 63-64.

D. ARGUMENT

1. THE COURT SHOULD REVERSE MR. KORUM'S SENTENCES AND REMAND FOR RESENTENCING TO THE LOW END OF THE STANDARD RANGE.

- a. The increased sentences on remand after a successful appeal constituted judicial vindictiveness.

It was un rebutted at sentencing that Jacob Korum has led an exemplary life in prison, has recognized the impact of his crimes on the victims, has accepted full responsibility for his actions and

has made a firm commitment to being a model and productive citizen when released from custody. Neither the state nor the court could identify one thing about Mr. Korum's conduct since his last sentencing hearing that would justify increasing his sentence, nor any new information about the crimes which would justify increasing his sentence. Instead the court discounted his impressive record by saying that neither his rehabilitation, his good behavior in prison, nor the safety of the community was relevant to the sentencing decision. RP 59.

What the court apparently *did* consider relevant was the court's sense that Mr. Korum's supporters downplayed the seriousness of his actions, which *he* unambiguously did not; the fact that there were some children involved and the fact that some of Mr. Korum's co-defendants, she "understood," got longer sentences. RP 60-61. None of this was new information; the information about Mr. Korum's co-defendants was inaccurate and not new. None of the speakers claimed that Mr. Korum made a "stupid mistake." They each focused on the positive changes they had witnessed. Of the six letters written to

the court, none referred to the crime as a "stupid mistake."² Like the speakers, the writers focused on the positive changes in Mr. Korum's life. CP 307-25; 334-42. The judge was obviously looking for something negative and refusing to consider anything positive.

A presumption of vindictiveness arises where the same judge imposed harsher sentences after a successful appeal. The presumption should be deemed un rebutted because the judge here had no reason, based on conduct after the original sentencing, to justify increased sentences. All new information was positive. The judge ignored important considerations which should be relevant to sentencing, such as the safety of the community, and contrived one negative thing to say about Mr. Korum's supporters. RP 58-59.

Safety of the community is relevant to sentencing. One of the express goals of the SRA is

² Mr. Korum's 85-year-old grandmother wrote that "he did get into trouble with the law as a teenager and he did deserve to spend some time in prison because of that. But he got such an unfair sentence of over 100 years and it almost broke his heart and our families' hearts." CP 315. This was the closest thing to minimizing the crimes.

to "protect the public." RCW 9.94A.010(4); see also, e.g., State v. Schimelpfenig, 128 Wn.App. 224, 115 P.3d 338 (2005) (safety of others is a factor which should be considered in determining whether a condition excluding a person from a geographical location should be imposed); RCW 9.95.009(2), (3) (the ISRB must make public safety considerations the highest priority when making discretionary decisions on release from confinement). Moreover, the judge ignored the differences between Mr. Korum and his co-defendants and ignored the fact that two of his co-defendants received shorter sentences and had been released from prison.³

³ Two of Mr. Korum's co-defendants received shorter sentences than he did. Mellick pled guilty to 1 count of robbery 1, 1 count of kidnapping 2, 1 count of assault 2 and 1 count of burglary 2; he was sentenced to 96 months without a gun or weapon enhancement. Phillips pled guilty to 2 counts of kidnapping 2, 1 count of robbery 2, and 3 counts of assault 2, with the deadly weapon enhancements; he was sentenced to 120 months. Durden pled guilty to 1 count of kidnapping 1, 2 counts of burglary 1 (one of which involved a burglary only he and Bybee were accused of) and one count of unlawful possession of a firearm 1; with a ten-year consecutive deadly weapon enhancement, he was sentenced to 269 months. Bybee pled guilty to 1 count of kidnapping 1, 1 count of robbery 1, 2 counts of burglary 1, and 1 count of unlawful possession of a firearm 1; with the deadly weapon enhancements and a consecutive kidnapping

Based on this record, an un rebutted presumption of vindictiveness arises.

The United States Supreme Court held in North Carolina v. Pearce, 395 U.S. 711, 722-723, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), that because a person is denied his constitutional right to due process of law if judicial vindictiveness plays any part in sentencing, a presumption of vindictiveness arises where the court imposes a higher sentence after a successful appeal. For this reason, the justification for the higher sentence "must affirmatively appear in the record and must objectively be based on objective information concerning the defendant's identifiable conduct after the original proceeding." Pearce, 395 U.S. at 723-726. In Wasman v. United States, 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984), the Supreme Court held that Pearce created a rebuttable presumption and reiterated that an increased sentence after retrial and conviction following a successful appeal should be justified "by

conviction, he was sentenced to 240 months. Only Mr. Korum and Phillips had a zero offender scores.

identifying relevant conduct or events that occurred subsequent to the original proceeding."⁴ Consistent with this precedent, the Supreme Court in Texas v. McCullough, 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986), affirmed a longer sentence after a new trial was granted where the original sentence was

⁴ The Supreme Court has also limited the Pearce presumption of vindictiveness in circumstances not applicable here. See, e.g., Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) (presumption does not arise where the defendant is sentenced by a jury at both trials and the second jury is not informed of the prior sentence); Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) (presumption does not arise where the defendant elects a trial de novo and is aware of the risk of a greater sentence if convicted again); (United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982) (no presumption of vindictiveness where a charge is added after the defendant decides not to enter a guilty plea).

Similarly, in Washington, reviewing courts have held, in circumstances which are not applicable here, that the presumption of vindictiveness does not arise after a harsher sentence is imposed. See, e.g., State v. Parmelee, 121 Wn.App. 707, 90 P.3d 1092 (2004) (presumption does not arise where different judge imposes harsher sentence and gives specific, nonvindictive reasons for imposing sentence); State v. Havens, 70 Wn.App. 251, 852 P.2d 1120 (1993) (different judge imposes sentence after retrial and did not know of the former sentence); State v. H.J., 111 Wash.App. 298, 44 P.3d 874 (2002) (constitutional to impose the same treatment requirement as an exceptional sentence where the court mistakenly believed it could be part of a standard range sentence at the initial sentencing).

imposed by a jury and where there were additional witnesses at the second trial which shed new light on the defendant's conduct.

Then, in Alabama v. Smith, 490 U.S. 794, 798-803, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), the Supreme Court held that a longer sentence may be justified based on evidence that became available at trial which the judge was unaware of at the time of the initial sentencing after a plea that was later withdrawn. The Court construed the Pearce presumption as arising where there is a "reasonable likelihood" that an unexplained increase in sentence is a product of vindictiveness. Smith, 490 U.S. at 798-800. The Smith court noted, in particular, that concerns about judicial vindictiveness arise where the same judge considers a sentence and then after a successful appeal changes the sentence without an adequate explanation. Smith, 490 U.S. at 802.

Circuit courts which have addressed the issue have found that the presumption of vindictiveness is not rebutted in situations similar to that presented here. For example, in United States v. Resendez-Mendez, 251 F.3d 514 (5th Cir. 2001), the Court of

Appeals held that the trial court's proffered reasons for increasing the defendant's sentence did not rebut the presumption of vindictiveness. Those reasons were that the court had more time to review the matter and that the court was not convinced that the defendant was truly sorry. 251 F.3d at 518. The court noted that cases in which longer sentences had been upheld involved subsequent criminal activity. Resendez-Mendez, 251 F.3d at 518 (citations omitted). The court reasoned:

No similar newly discovered facts, changed circumstances, or post-sentencing occurrences emerged regarding Resendez or his criminal behavior following his original sentencing. . . . It is as though the court was requiring the defendant's allocution to justify not increasing the original sentence, a purpose opposite from allocution's opportunity to seek a lesser sentence.

Id. at 518. This discrediting of the allocution in Resendez-Mendez is remarkably similar to the refusal to consider Mr. Korum's allocution and unfair discrediting of the statements of his supporters in this case.

Similarly, in United States v. Rapal, 146 F.3d 661 (9th Cir. 1998), the Ninth Circuit held that the presumption of vindictiveness arising from an

increase in sentence was not rebutted where the "the only relevant event occurring after the initial sentence was Rapal's appeal." Rapal, 146 F.3d at 664. The court held that:

the record must show more than that the judge simply articulated some reason for imposing a more severe sentence. The reason must have at least something to do with conduct or an event, other than the appeal, attributable in some way to the defendant. If the timing of resentencing sufficed, appeal would inevitably be chilled because taking the appeal itself is the only thing over which the defendant has any control. As taking an appeal is clearly protected, winning the appeal and with it, the timing of resentencing, cannot alone justify the imposition of a harsher sentence on remand.

Rapal, at 664.

Similarly, Washington courts have upheld increased sentences if the increased sentences were justified by conduct which occurred after the initial sentencing. See, State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) (sentence increased after the defendant's fraud in obtaining an erroneous sentence was discovered); State v. White, 123 Wn.App. 106, 97 P.3d 34 (2004) (DOSA not given on resentencing because of the defendant's drug use and infraction record in prison). Where the record

did not provide a justification for an increased sentence after a successful appeal, however, this court has held that the presumption of vindictiveness was not rebutted. State v. Ameline, 118 Wn.App. 128, 75 P.3d 589 (2003).

Here, the same judge imposed longer sentences on each count after a successful appeal and provided no justification for doing so. The judge, in fact, could not point to any conduct which occurred after the prior sentencing which might justify an increase. Moreover, the judge refused to consider any of the positive evidence of Mr. Korum's conduct since the prior sentencing hearing and made an unfair and cursory comparison between Mr. Korum and his co-defendants. This Court should reverse Mr. Korum's sentences and remand for imposition of sentences at the low end of the standard ranges, the same sentences which were previously imposed and which were upheld on appeal, before a different judge.

- b. The court erred in relying on State v. Tili; and even if the context of sentencing changed because of the dismissal of the kidnapping counts, there was still no justification for increasing Mr. Korum's sentences.

In Washington, the Sentencing Reform Act (SRA) determines the interrelationship among multiple convictions. This happens in two basic ways. First, other current convictions contribute to the offender score and the resulting standard range. RCW 9.94A.525. Thus, a person who is sentenced for more than one conviction, as a general rule, gets a sentence which reflects his other convictions through the calculation of his offender score. RCW 9.94A.525. Second, the SRA determines whether sentences for multiple convictions will be concurrent or consecutive. RCW 9.94A.589.

In the first instance, once the offender score is calculated, the fact of the other convictions is not relevant to a determination of the length of a standard range sentence. In the second instance, the multiple convictions may be relevant to the overall length of sentence, if the sentences are imposed consecutively.

In State v. Tili, 148 Wn.2d 350, 60 P.3d 1192

(2003), this Court considered a case in which a trial judge declined to impose an exceptional sentence at a first sentencing hearing because of the court's mistaken belief that the sentences would run consecutively as a matter of law. On remand, after learning that the sentences should run concurrently, the trial judge imposed an exceptional sentence, and this Court upheld the sentence because of the significant change of context between the first sentencing and the second. In doing so, this Court noted that the reason why the judge declined to impose an exceptional sentence originally was because the sentence was much longer at that time, when the terms were imposed consecutively.

Tili is distinguishable from this case, where the counts which were upheld by the Supreme Court were imposed concurrently, not consecutively, with the dismissed kidnapping counts. The only reason the case was remanded for resentencing was to dismiss the kidnapping counts; the remaining counts were upheld. Had the kidnapping counts not been dismissed, obviously there would have been no reason to remand the case for resentencing. The remaining

counts, which were upheld on appeal, remained concurrent and were never consecutive to the kidnapping counts.

In some cases, if not here, dismissal of charges will lower the standard range for the remaining counts. But a lower standard range should never be a reason for imposing a longer sentence; it should be a reason for imposing a shorter sentence. Tili does not support increasing a sentence where a concurrent term was vacated. The change in "context" here was not comparable to the change in context in Tili.

Most importantly, even if Tili *did* support an inference that the context had changed sufficiently to justify reconsidering the sentence originally imposed, the trial court in this case still failed to articulate any reasons to increase Mr. Korum's sentences. Bono v. Benoy, 197 F.3d 409, 420 (9th Cir. 1999) (the presumption of vindictiveness is overcome only if there is conduct or an event, other than the appeal, attributable to the defendant). As set out above, the court failed to cite any reason based on Mr. Korum's post-sentencing conduct which

would justify the increase.

The court said that at the prior sentencing it did not matter where in the standard range the sentences were imposed because the sentences were running concurrently with the longer kidnapping sentences. RP 55-56. The prosecutor, however, argued for exceptional sentences or sentences at the top of the standard range at the prior hearing. The prosecutor gave two reasons: (1) exceptional sentences would be proper sentence for the criminal conduct; and (2) exceptional sentences should be imposed because the appeal might change the posture of the case. RP(6/8/01) 64-65. The court considered both arguments and rejected them both, finding that the low end of the standard ranges were the appropriate sentences. RP(6/8/01) 96. The dismissal of the kidnapping charges does not rebut the presumption of vindictiveness under these circumstances. See United States v. Peyton, 353 F.3d 1080 (9th Cir. 2003) (the record does not rebut the presumption of vindictiveness where the judge applied a sentence enhancement which was rejected at the initial sentencing); United States v. Jackson,

181 F.3d 740 (6th Cir. 1999) (holding that the court's reasons for going from the low to the high end of the guideline range on resentencing, although objective reasons, were inadequate to explain the need to increase the defendant's sentence).

This case is the precise opposite of the trial court's consideration in Tili that it would give an exceptional sentence but for the consecutive sentences. Most importantly, however, in this case the court failed to articulate any reason why the low end of the standard range was not appropriate or why it would have given a longer sentence initially but for the kidnapping convictions. A bare statement that the court had no incentive to go beyond the low end at an earlier time is no justification; neither did it have any incentive not to impose the *high* end of the standard range. Where, as here, all of the information presented at sentencing supported the low end of the standard range and where the trial court failed to articulate any valid reasons for refusing to consider the information, the presumption of vindictiveness is not rebutted. The court's refusal to consider valid

positive sentencing factors and focus on negative things which were not actually reflected in the record support the inference of vindictiveness.

The absence of reasons and presence of untenable reasons also support a finding of an abuse of discretion. It was "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). As in Pers. Restraint of Dyer, 157 Wn.2d 358, 367-368, 139 P.3d 320 (2006), where the decision-maker ignores affirmative evidence in the record and relies on speculation and generalizations which are not supported by the record, the decision maker abuses its discretion.

Mr. Korum's sentences should be reversed and remanded for imposition of sentences at the low end of the standard range, as previously imposed.

- c. The trial court's consideration of sentences imposed on Mr. Korum's co-defendants was faulty and based on inadequate information.

The trial court's consideration of the sentences imposed on Mr. Korum's co-defendants made reference only to the longer sentences imposed. RP

60-61. In fact, two of Mr. Korum's four co-defendants received much shorter sentences of eight years and ten years and both have been released from prison. The co-defendant that the court referred to as receiving a longer sentence, Mr. Durden, was not sentenced to the high end of the standard range, as the court indicated, but rather to the low end of the sentencing range of first degree kidnapping of 149 months. Mr. Durden also had a previous weapon enhancement which doubled the length of his firearm enhancement for the kidnapping conviction to 120 months, for a total of 269 months. Mr. Durden and Mr. Bybee, the other co-defendant who received a longer sentence, also pled guilty to a burglary charge arising from an incident that did not involve the other co-defendants.

To punish Mr. Korum for a double gun enhancement, a first degree kidnapping conviction and a burglary conviction that he was not charged with or convicted of furthers the conclusion that there was judicial vindictiveness in this case.

The court's comparison was based on a very narrow and incorrect view of the sentences imposed

on the other four co-defendants. Most importantly, the court's comparison reflected the negative manner in which the court sentenced Mr. Korum. The court ignored the fact that two of the co-defendants received shorter sentences and the fact that the two longer sentences imposed reflected convictions and gun enhancements which did not apply to Mr. Korum. The increase in sentences upheld on appeal was not supported by a fair comparison of his sentence to his co-defendants' sentences and was indicative of vindictive sentencing.

d. The increase in sentences went beyond the scope of the mandate.

RAP 12.2 sets forth a broad statement of the authority and binding power of the appellate decisions. As noted in Allyn v. Asher, 132 Wn.App. 371, 378, 131 P.3d 339 (2006), the trial court's authority to take actions not in strict conformance with the appellate decision is severely limited.

The Washington Supreme Court also addressed this issue in the context of sentencing in Tili, supra, and State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992). In Collicott, the trial court was reversed after considering and rejecting an

exceptional sentence at the initial sentencing. The court, after the successful appeal, considered the same factors it had previously considered and sentenced the defendant to an exceptional sentence. In reversing, the Supreme Court noted:

Having declared in the original sentencing that an exceptional sentence was not warranted, and operating at the re-sentencing under the mandate to "re-determine the offender score," the trial court could not, at re-sentencing, impose an exceptional sentence based on aggravating factors which were considered in the prior sentencing and rejected as a basis for an exceptional sentence.

Collicott, 118 Wn.2d at 272. The court reiterated that RAP 12.2 restricts the authority of the trial court and when the mandate directs the trial court to conduct "further proceedings in accordance with . . . the opinion," it does not have the authority to go outside the mandate.

Distinguishing Collicott, the Tili court allowed for re-sentencing where the opinion held that the defendant's "sentence . . . [was] statutorily required to be served concurrently unless an exceptional sentence [was] imposed." Consequently, Tili allowed for re-sentencing including the imposition of an exceptional sentence.

Conversely, the Supreme Court here remanded for re-sentencing to reflect the dismissal of the kidnapping counts. The opinion states:

We decline to review the Court of Appeals holding that the kidnapping charges were incidental to the robbery charges because the State failed to properly raise the issue in this court.

....

As a result, we affirm the Court of Appeals dismissal of counts 2, 3, 8-12, 18, 19 and 25 because the State did not properly raise the issue in this court and reverse its dismissal of counts 17-22 and 24-32 for prosecutorial vindictiveness. Therefore, as indicated by the attached Appendix A, which we incorporate by reference, we uphold Korum's convictions on counts 1, 4-7, 13-17, 20-24, 26-27 and 30-32.

Thus, we affirm the Court of Appeals in part, reverse in part, and remand for resentencing consistent with this opinion.

Korum, 141 P.3d at 33-34.

Given that the Supreme Court did not make any decision invalidating any other conviction, the court was without the authority to re-sentence Mr. Korum to anything but the original sentence on those counts. Re-sentencing was only for purposes of reducing the offender score to reflect the dismissal of the kidnapping convictions. Again, this court

should remand for re-sentencing before a different court.

- e. The trial court was collaterally estopped from re-sentencing Mr Korum to a higher sentence than imposed initially.

As stated in Collicott, supra, the Doctrine of Collateral Estoppel applies in criminal cases and prevents re-litigation of issues that have been actually adjudicated previously. Collicott, at 660 (citing State v. Peele, 75 Wn.2d 28, 30, 448 P.2d 923 (1968).) In determining whether collateral estoppel applies in a criminal context, the court determines whether the issue was raised and resolved by the former judgment and then whether the issue being raised in the subsequent proceeding is identical to that sought to be barred. Collicott, at 661.

In Collicott, the court found that collateral estoppel did apply because the judge had previously determined that he would not impose an exceptional sentence, and, subsequently, could not change his mind based on the same arguments that were presented in the first judgment.

Likewise, collateral estoppel applies in this

situation. Every argument presented in the first sentencing was used as a basis for the sentencing in the second hearing. Notwithstanding those arguments, the court previously declined to give anything other than the low end of the sentencing range. Given that scenario, the court was estopped from changing its mind simply because Mr. Korum was successful in having counts reversed on appeal. For this reason, Mr. Korum's judgment and sentence should be reversed and his case remanded for re-sentencing.

2. THE TRIAL COURT ERRED IN IMPOSING A 60-MONTH FIREARM SENTENCE ENHANCEMENT RATHER THAN A 24-MONTH DEADLY WEAPON ENHANCEMENT.

In State v. Recuenco, 154 Wn.2d 156, 162, 110 P.3d 188 (2005), the Washington Supreme Court held that under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the trial court had no authority to impose a firearm enhancement where, as here, a jury found only that the defendant was armed with a deadly weapon. Although the United States Supreme Court accepted certiorari in Recuenco, and reversed the judgment of the Washington Supreme Court, the U.S. Supreme Court

reviewed only the issue of whether the Blakely error in the case could ever be harmless. The U.S. Supreme Court did not alter the basic holding in Recuenco, that a sentencing judge has no authority under the Sixth Amendment to make the firearm determination instead of the jury. Moreover, the U.S. Supreme Court remanded to the Washington Supreme Court to consider whether the Recuenco state court decision rested on independent state grounds.⁵ Recuenco v. Washington, 548 U.S. _____, 126 S.Ct. 478, 163 L.Ed.2d 362 (2006).

For a number of reasons, the decision of the Washington Supreme Court should be controlling on Mr. Korum's case.

- a. The trial court had no authority to make the firearm determination.

Nothing in Recuenco v. Washington authorizes a trial court to go beyond a jury's deadly-weapon finding and make a firearm enhancement finding at sentencing. A judicial determination that a deadly weapon is a firearm violates the Sixth and

⁵ Oral argument is set for winter term on this issue. Supreme Court number 74964-7. The court will also consider whether the issue has become moot in Mr. Recuenco's case.

Fourteenth Amendments to the United States Constitution. Recuenco, 154 Wn.2d at 162-163. Here the question was not submitted to the jury and there has never been a finding beyond a reasonable doubt. The issue is not one of harmless error, but of the trial court's authority at sentencing or resentencing to make a finding instead of having the jury make the finding. The trial court erred in imposing a firearm enhancement where the jury was never asked to find that Mr. Korum was armed with a firearm, only a deadly weapon.

- b. There is no procedure for submitting a firearm special verdict to a jury.

RCW 9.94A.602 provides:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused . . . was armed with a deadly weapon at the time of the commission of the crime . . . the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant . . . was armed with a deadly weapon at the time of the commission of the crime.

. . . The following instruments are included in the term deadly weapon . . . pistol, revolver, or any other firearm. .

Thus, RCW 9.94A.602 establishes a procedure by which a deadly weapon enhancement can be pled and proven

to a jury. RCW 9.94A.602 protects a defendant's Sixth Amendment right to a jury trial.

RCW 9.94A.533(4) provides that additional time shall be added to the standard sentence if the offender was armed with a deadly weapon other than a firearm during the offense--two years for a class A felony, one year for a class B felony, and six months for a class C felony.⁶ RCW 9.94A.533(3) purports to establish the additional punishment to be imposed where an offender was armed with a firearm as defined in RCW 9.41.010--five years for a class A felony, three years for a class B felony, and eighteen months for a class C felony. Where the defendant has a previous deadly weapon sentence, the enhancements are doubled. RCW 9.94A.533(3)(d), 4(d).

Unlike the statutory procedure for a deadly weapon enhancement, there is no corresponding statutory procedure for a firearm enhancement.

The firearm enhancement was adopted in 1995 as part of Initiative 159, the "Hard Time for Armed Crime" initiative, intended to increase sentences

⁶ RCW 9.94A.533 has replaced former RCW 9.94A.510, but the pertinent terms remain the same.

for armed crime. State v. Brown, 139 Wn.2d 20, 25, 983 P.2d 608 (1999); Washington Sentencing Guidelines Commission, Adult Sentencing Guidelines Manual, comment at II-67. This law sought to increase the punishment for armed crime and to differentiate crimes committed with a firearm from crimes committed with some other deadly weapon. In re Charles, 135 Wn.2d 239, 246, 955 P.2d 798 (1998).

While the purpose of 159 was to increase punishment for armed crimes, the Legislature's failure to create a statutory procedure by which a jury could find a firearm special verdict precludes the imposition of the firearm enhancement. RCW 9.94A.533 (3), which purports to add time if the defendant is armed with a firearm, is not rooted in a statutory procedure authorizing a jury to enter a special verdict form, such as that authorized by RCW 9.94A.602.

After the decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), holding that any fact which authorized a sentence longer than the top of the standard range had to be submitted to a jury and proven beyond a

reasonable doubt, the Washington Supreme Court held that Blakely undermined Washington's exceptional sentencing provisions.

Where the legislature has not created a procedure for juries to find aggravating facts and has, instead, explicitly provided for judges to do so, we refuse to imply such a procedure on remand.

. . . .

To create such a procedure out of whole cloth would be to usurp the power of the legislature.

State v. Hughes, 154 Wn.2d 118, 151, 110 P.3d 192 (2005). The Court recognized Washington precedent which

"has consistently held that the fixing of legal punishments for criminal offenses is a legislative function." State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 781 P.2d 796 (1986). "[I]t is the function of the legislature and not of the judiciary to alter the sentencing process." State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d at 416 (1975).

Hughes, 154 Wn.2d at 149. The Washington Supreme Court echoed this in Recuenco, decided the same day as Hughes. The Recuenco court reversed Mr. Recuenco's firearm enhancement because the jury verdict addressed only the deadly weapon enhancement. Recuenco, 154 Wn.2d at 162. But rather

than simply remand to allow the question to be submitted to the jury, the Court further found that the question could never, under current statutes, be submitted to the jury:

Because we held in Hughes that we would not imply a procedure by which a jury can find sentencing enhancements on remand, we remand for resentencing based solely on the deadly weapon enhancement which is supported by the jury's special verdict.

Recuenco, 154 Wn.2d at 164. In concluding that the options on remand were limited solely to the lesser enhancement, the court recognized that, unlike the lesser deadly weapon enhancement, there was no statutory authority to submit a firearm enhancement to a jury. If there were statutory authority, there would be no need to infer one and no need to cite Hughes in declining to do so. The decision in Recuenco was consistent with prior decisions holding that RCW 9.94A.602 and RCW 9.94A.533(3) reserved to the trial judge, not the jury, the right to determine whether the deadly weapon was a firearm. State v. Meggysey, 90 Wn.App. 693, 958 P.2d 319, review denied, 136 Wash.2d 1028 (1998); State v. Rai, 97 Wn.App. 307, 983 P.2d 712 (1999). The holdings that the trial judge could make the

determination, of course, was overruled in Recuenco.

RCW 9.94A.602 was enacted well before the enactment of the firearm enhancement; the firearm enhancement could not have been contemplated at the time of enactment.

The only authority that has ever existed is to impose the lesser deadly weapon enhancement. Mr. Korum's enhancement should, for this reason, be reduced to a deadly weapon enhancement.⁷

c. The error in imposing a firearm enhancement cannot be harmless under Washington law.

In Recuenco v. Washington, the United States Supreme Court remanded the case back to the Washington Supreme Court to determine whether, under state law, the error in not submitting the firearm verdict to the jury could ever be harmless error. The answer to this question should be "no," because the Washington constitution is more protective of

⁷ The United States Supreme Court, in Washington v. Recuenco, expressly refused to reach the question of whether under Washington law any procedure existed to permit the submission of the firearm question to the jury. Thus, the harmless error analysis in that case does not control the issue raised here.

the right to a jury trial than is the United States Constitution. Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618 (1982).

In Pasco v. Mace, the Washington Supreme Court held that imposition of a determinate jail sentence constitutes sentencing for a crime; and under Const. Art. 1, § 21, no crime is too petty to warrant denial of a jury trial.

In reliance on Pasco v. Mace, the court in State v. Browet, Inc., 103 Wn.2d 215, 691 P.2d 571 (1984), held that a contempt proceeding under RCW 7.48.080, for violation of an injunction against maintaining a moral nuisance, was unconstitutional as applied because the contemnor was denied a jury trial. The court in Browet held that where a determinate sentence is imposed with no opportunity to purge the contempt, the sentence is a criminal punishment and the contemnor cannot be denied a jury trial. Because the contemnor was denied a jury trial in that case, the statute was unconstitutional as applied. Browet, at 219.

The Washington Supreme Court has analyzed Article I, §§ 21 and 22, under the factors set out

in State v. Gunwall, 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986), and concluded that the right to a jury trial may be broader under these provisions than under the federal constitution. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003). A review of relevant Gunwall factors demonstrates that broader protections include a right to a jury trial on the firearm enhancement which cannot be subject to a harmless error analysis.

(i) Textual language:

Article I, § 21 provides that the right to a jury trial shall remain inviolate. "The term 'inviolate' connotes deserving of the highest protection." Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

(ii) Textual difference:

Unlike the United States Constitution, the Washington Constitution contains two provisions regarding the right to a jury trial: "The right of trial by jury shall remain inviolate" In addition, Article 1, § 22 provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an

'impartial jury.'" Article 1, § 21 has no federal equivalent. State v. Schaaf, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987). The fact that the Washington Constitution mentions the right to a jury trial in the strongest terms and in two provisions indicates the importance of the right under the Washington constitution. State v. Smith, supra.

(iii) Constitutional history or preexisting law:

In State v. Thorne, 129 Wn.2d 736, 789, 921 P.2d 514 (1996), the court held that criminal history is a factor that has traditionally been considered by sentencing courts, and therefore the legislature was within its discretion in defining past crimes as sentencing factors rather than as elements of the crime. By contrast, as held by the United States Supreme Court in Recuenco v. Washington, the firearm finding is, at the least, equivalent to an element of the crime.

Moreover, as held in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), and State v. Recuenco, the complete absence of a jury verdict on the firearm enhancement is a more significant error than the omission of one element of a crime; this is because

there is no verdict to uphold other than the weapon enhancement verdict. The Hughes court set forth its reasoning in detail on this point. The court relied on the analysis in Sullivan v. Louisiana, 508 U.S. 275, 279-80, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), which equated constitutionally-deficient reasonable-doubt instructions with a lack of a jury verdict of guilt beyond a reasonable doubt.

Consistent with the jury-trial guarantee, the question [Chapman v. California, 386 U.S. 18 (1967)] instructs the reviewing court to consider not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely attributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury-trial guarantee.

Sullivan, 508 U.S. at 279-280.

The Hughes court concluded:

In each case at hand, there was no jury finding beyond a reasonable doubt of aggravating factors warranting an enhanced sentence. It would be illogical to perform harmless error analysis on the absence of those findings. There is no

object upon which to apply harmless error analysis. Instead of asking whether but for the error the findings *would have been the same*, the court would be asking whether but for the error the findings *would have been different*. Such an analysis is the equivalent of speculating on the jury's verdict, which the Supreme Court has held is never allowed.

Hughes, 154 Wash.2d at 145 (emphasis in original).

The Hughes court expressly considered and rejected the argument that judicial fact-finding by a preponderance of the evidence is equivalent to the omission of an element of an offense in jury instructions, which the court held to be subject to harmless error analysis in Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999): "The Court there [in Neder] held that conclusion was consistent with Sullivan, distinguishing the situation where all of the jury's findings were 'vitiating' by the improper reasonable doubt instruction from that where the jury simply did not explicitly find on one element." Hughes, 154 Wn.2d at 148 (citing Neder, 547 U.S. at 10-15) (emphasis in original).

The Washington Supreme Court concluded again that in Blakely exceptional sentencing violations,

it is not a matter of a missing element, it is a matter of having no jury verdict or jury finding to uphold:

The situation arising in Blakely Sixth Amendment violations is readily distinguishable from the scenario in Neder. Although Neder involved the situation where a jury did not find facts supporting every element of the crime, it still returned a guilty verdict. Like traditional harmless error analysis cases, the reviewing court could ask whether but for the omission in the jury instruction, the jury would have returned the same verdict. Where Blakely violations are at issue, however, the jury necessarily did not return a special verdict or explicit findings on aggravating factors supporting an exceptional sentence. The reviewing court asks whether but for the error, the jury would have made *different or new* findings. This situation is analogous to Sullivan -- there is no basis upon which to conduct a harmless error analysis. Instead, proponents of harmless error ask this court to speculate on what juries would have done if they had been asked to find different facts. This speculation is not permitted. Harmless error analysis cannot be conducted on Blakely Sixth Amendment violations.

Hughes, 154 Wash.2d at 148.

The Washington Supreme Court followed the Hughes analysis in Recuenco.

Here, there is simply no jury verdict to uphold because the jury was never asked to return a firearm verdict. There is no jury verdict to uphold, and,

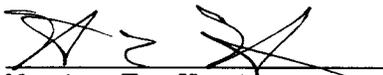
under the Washington Constitution, Mr. Korum was absolutely entitled to have a jury verdict on the issue. Absent a verdict to uphold, the error cannot be harmless.

E. CONCLUSION

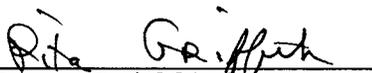
Appellant respectfully submits that his judgment and sentences should be reversed and his case remanded for resentencing before a different judge.

RESPECTFULLY SUBMITTED this 15th day of November, 2006.

LAW OFFICES OF MONTE E.
HESTER, INC. P.S.
Attorneys for Appellant

By: 
Monte E. Hester
WSB #121

LAW OFFICE OF
RITA GRIFFITH
Attorney for Appellant

By: 
Rita Griffith
WSB #14360

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Pamela Loginsky
Special Deputy Prosecuting Attorney
Washington Assn. of Prosecuting Attorneys
206 10th Avenue SE
Olympia, WA 98501

Paul Weisser
Office of the Attorney General
P. O. Box 40116
Olympia, WA 98504-0116

Jacob Korum
#786524
McNeil Island Corrections Center
PO Box 881000
House # D221 Bed 2
Steilacoom, WA 98388

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Signed at Tacoma, Washington this 15th day of November, 2006.


Lee Ann Mathews

KORUM'S CHARGES AND THEIR DISPOSITIONS			
Count No.:	Charge:	Verdict:	Disposition:
Count 1	Burglary in the first degree	Guilty	Uphold
Special Verdict, Count 1	Armed with a deadly weapon	Yes	Uphold
Count 2	Kidnapping in the first degree	Guilty	Merged
Special Verdict, Count 2	Armed with a deadly weapon	Yes	Merged
Count 3	Kidnapping in the first degree	Guilty	Merged
Special Verdict , Count 3	Armed with a deadly weapon	Yes	Merged
Count 4	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 4	Armed with a deadly weapon	Yes	Uphold
Count 5	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 5	Armed with a deadly weapon	Yes	Uphold
Count 6	Robbery in the first degree	Guilty	Uphold
Special Verdict, Count 6	Armed with a deadly weapon	Yes	Uphold
Count 7	Burglary in the first degree	Guilty	Uphold
Special Verdict, Count 7	Armed with a deadly weapon	Yes	Uphold
Count 8	Kidnapping in the first degree	Guilty	Merged
Special Verdict, Count 8	Armed with a deadly weapon	Yes	Merged
Count 9	Kidnapping in the first degree	Guilty	Merged
Special Verdict, Count 9	Armed with a deadly weapon	Yes	Merged
Count 10	Kidnapping in the first degree	Guilty	Merged
Special Verdict, Count 10	Armed with a deadly weapon	Yes	Merged
Count 11	Kidnapping in the first degree	Guilty	Merged
Special Verdict, Count 11	Armed with a deadly weapon	Yes	Merged
Count 12	Kidnapping in the first degree	Guilty	Merged
Special Verdict, Count 12	Armed with a deadly weapon	Yes	Merged
Count 13	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 13	Armed with a deadly weapon	Yes	Uphold
Count 14	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 14	Armed with a deadly weapon	Yes	Uphold

KORUM'S CHARGES AND THEIR DISPOSITIONS			
Count 15	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 15	Armed with a deadly weapon	Yes	Uphold
Count 16	Attempted robbery, 1st degree	Guilty	Uphold
Special Verdict, Count 16	Armed with a deadly weapon	Yes	Uphold
Count 17	Burglary in the first degree	Guilty	Uphold
Special Verdict, Count 17	Armed with a deadly weapon	Yes	Uphold
Count 18	Kidnapping in the first degree	Guilty	Merged
Special Verdict, Count 18	Armed with a deadly weapon	Yes	Merged
Count 19	Kidnapping in the first degree	Guilty	Merged
Special Verdict, Count 19	Armed with a deadly weapon	Yes	Merged
Count 20	Robbery in the first degree	Guilty	Uphold
Special Verdict, Count 20	Armed with a deadly weapon	Yes	Uphold
Count 21	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 21	Armed with a deadly weapon	Yes	Uphold
Count 22	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 22	Armed with a deadly weapon	Yes	Uphold
Count 23	Unlawful possession firearm, 2d degree	Guilty	Not appealed
Special Verdict, Count 23	None	N/A	N/A
Count 24	Burglary in the first degree	Guilty	Uphold
Special Verdict, Count 24	Armed with a deadly weapon	Yes	Uphold
Count 25	Kidnapping in the first degree	Guilty	Merged
Special Verdict, Count 25	Armed with a deadly weapon	Yes	Merged
Count 26	Assault in the second degree	Guilty	Uphold
Special Verdict, Count 26	Armed with a deadly weapon	Yes	Uphold
Count 27	Attempted robbery, 1st degree	Guilty	Uphold
Special Verdict, Count 27	Armed with a deadly weapon	Yes	Uphold
Count 28	Attempted burglary, 1st degree	Not guilty	Not guilty
Special Verdict, Count 28	Armed with a deadly weapon	N/A	N/A

KORUM'S CHARGES AND THEIR DISPOSITIONS			
Count 29	Attempted robbery, 1st degree	Not guilty	Not guilty
Special Verdict, Count 29	Armed with a deadly weapon	N/A	N/A
Count 30	Attempted assault, 2d degree	Guilty	Uphold
Special Verdict, Count 30	Armed with a deadly weapon	Yes	Uphold
Count 31	Attempted burglary, 1st degree.	Guilty	Uphold
Special Verdict, Count 31	Armed with a deadly weapon	Yes	Uphold
Count 32	Attempted robbery, 1st degree	Guilty	Uphold
Special Verdict, Count 32	Armed with a deadly weapon	Yes	Uphold