

FILED
Court of Appeals
Division II
State of Washington
3/23/2020 10:40 AM

No. 54288-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Miller,

Appellant.

Pierce County Superior Court Cause No. 18-1-03704-4

The Honorable Judge Jerry T. Costello

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

ISSUES AND ASSIGNMENTS OF ERROR..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 4

ARGUMENT..... 12

I. The trial court’s erroneous self-defense instructions violated Mr. Miller’s Fourteenth Amendment right to due process..... 12

A. Mr. Miller was entitled to use force to defend himself if he reasonably believed he was “about to be injured.”... 12

B. The trial court erroneously instructed jurors that Mr. Miller could not act in self defense unless he feared “great personal injury.”..... 13

C. The court erroneously required jurors to apply the standards applicable in homicide cases..... 15

II. The trial court infringed Mr. Miller’s unqualified statutory right to instructions on a lesser-included offense..... 17

A. An accused person has the unqualified right to have jurors instructed on a lesser included offense. 17

B.	As charged in this case, unlawful display of a firearm is legally included within first-degree assault, and the “place of abode” exception does not apply.....	18
C.	This court should not follow the <i>Haley</i> court’s interpretation of the “place of abode” exception. Furthermore, even if correct, <i>Haley’s</i> interpretation of the statute does not apply to Mr. Miller’s porch.....	21
D.	Under <i>Workman’s</i> factual prong, unlawful display of a weapon is a lesser included offense of the crimes charged in this case.....	23
E.	The Court of Appeals should review this error <i>de novo</i>	24
III.	The trial judge violated Mr. Miller’s due process right to instructions on a lesser-included offense.	26
A.	The Supreme Court explicitly left open whether there is a due process right to instruction on a lesser included offense in noncapital cases.....	26
B.	<i>Mathews</i> provides the proper test for Washington courts to evaluate procedural due process claims in Washington criminal cases.	29
C.	Under <i>Mathews</i> , courts are constitutionally required to instruct on applicable lesser-included offenses.....	31
D.	Even under <i>Patterson</i> , courts are constitutionally required to instruct on applicable lesser-included offenses.	35
E.	The Court of Appeals should review <i>de novo</i> this manifest error affecting Mr. Miller’s Fourteenth Amendment right to due process.	36
IV.	The trial court violated Mr. Miller’s right to counsel by failing to adequately inquire into his conflict with his attorney.	37

CONCLUSION	39
-------------------------	-----------

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Addington v. Texas</i> , 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)	31
<i>Ake v. Oklahoma</i> , 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) ...	31
<i>Beck v. Alabama</i> , 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)26, 32, 33, 34, 35, 36	
<i>Benitez v. United States</i> , 521 F.3d 625 (6th Cir. 2008)	38
<i>DeBerry v. Wolff</i> , 513 F.2d 1336 (8th Cir. 1975)	28
<i>Dockins v. Hines</i> , 374 F.3d 935 (10th Cir. 2004)	29
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004).....	31
<i>In re Winship</i> , 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	12
<i>Jones v. Hoffman</i> , 86 F.3d 46 (2d Cir. 1996) (<i>Jones II</i>)	28
<i>Keeble v. United States</i> , 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973).....	27, 32
<i>Leary v. Garraghty</i> , 155 F.Supp.2d 568 (E.D. Va. 2001)	28
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)29, 30, 31, 33, 34	
<i>Medina v. California</i> , 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).....	30, 35
<i>Patterson v. New York</i> , 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).....	30
<i>Perry v. Smith</i> , 810 F.2d 1078 (11th Cir. 1987)	29

<i>Robertson v. Hanks</i> , 140 F.3d 707 (7th Cir. 1998).....	28
<i>Sansone v. United States</i> , 380 U.S. 343, 85 S. Ct. 1004, 13 L. Ed. 2d 882 (1965).....	27
<i>Scott v. Elo</i> , 302 F.3d 598 (6th Cir. 2002)	28
<i>Solis v. Garcia</i> , 219 F.3d 922 (9th Cir. 2000).....	28
<i>State v. Haley</i> , 35 Wn.App. 96, 665 P.2d 1375 (1983).....	21, 22
<i>Stevenson v. United States</i> , 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896).....	32
<i>Stewart v. Warden of Lieber Corr. Inst.</i> , 701 F.Supp.2d 785 (D.S.C. 2010)	28
<i>Tata v. Carver</i> , 917 F.2d 670 (1st Cir. 1990)	28
<i>Teague v. Lane</i> , 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)	28
<i>Trujillo v. Sullivan</i> , 815 F.2d 597 (10th Cir. 1987)	28
<i>Turner v. Rogers</i> , 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011).....	31
<i>United States v. Adelzo-Gonzalez</i> , 268 F.3d 772 (9th Cir. 2001).....	38
<i>Valles v. Lynaugh</i> , 835 F.2d 126 (5th Cir. 1988).....	29
<i>Vujosevic v. Rafferty</i> , 844 F.2d 1023 (1988)	28, 33, 35

WASHINGTON STATE CASES

<i>Black v. Cent. Puget Sound Reg'l Transit Auth.</i> , --- Wn.2d. ---, 457 P.3d 453 (2020).....	25, 36, 37
<i>In re Det. of Morgan</i> , 180 Wn.2d 312, 330 P.3d 774 (2014)	29
<i>In re Pers. Restraint of Stenson</i> , 142 Wn.2d 710, 16 P.3d 1 (2001).....	37
<i>State v. Beaver</i> , 184 Wn.2d 321, 358 P.3d 385 (2015).....	29, 31
<i>State v. Berlin</i> , 133 Wn.2d 541, 947 P.2d 700 (1997)	17

<i>State v. Coley</i> , 180 Wn.2d 543, 326 P.3d 702 (2014) <i>cert. denied</i> , 135 S.Ct. 1444, 191 L.Ed.2d 399 (2015).....	30
<i>State v. Condon</i> , 182 Wn.2d 307, 343 P.3d 357 (2015)	17, 24
<i>State v. Corey</i> , 181 Wn.App. 272, 325 P.3d 250 <i>review denied</i> , 181 Wn.2d 1008, 335 P.3d 941 (2014).....	24, 25
<i>State v. Cross</i> , 156 Wn.2d 580, 132 P.3d 80 (2006).....	37, 38, 39
<i>State v. Downey</i> , 9 Wn.App. 852, 447 P.3d 588 (2019), <i>review denied</i> , 194 Wn.2d 1015, 452 P.3d 1224 (2019).....	25
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	17, 23, 25, 26
<i>State v. Gave</i> , 77 Wn.App. 333, 890 P.2d 1088 (1995).....	20
<i>State v. Jones</i> , 183 Wn.2d 327, 352 P.3d 776 (2015) (Jones I)	25
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	14
<i>State v. Lamar</i> , 180 Wn.2d 576, 327 P.3d 46 (2014)	36
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010)	37
<i>State v. Parker</i> , 102 Wn.2d 161, 683 P.2d 189 (1984).....	17, 18, 23, 24, 26
<i>State v. Prado</i> , 144 Wn.App. 227, 181 P.3d 901 (2008)	19
<i>State v. Smith</i> , 118 Wn.App. 480, 93 P.3d 877 (2003).....	19, 20, 21, 22, 29
<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	25
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	33
<i>State v. Woods</i> , 138 Wn.App. 191, 156 P.3d 309 (2007)	12, 14, 16
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978)...	11, 17, 18, 19, 23

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI 2, 3, 37, 39, 40
U.S. Const. Amend. XIV 1, 2, 3, 12, 16, 26, 29, 36, 39, 40

WASHINGTON STATE STATUTES

RCW 10.61.003 17
RCW 10.61.010 17
RCW 9.41.270 3, 18, 20, 21, 23, 24
RCW 9A.16.020..... 13
RCW 9A.16.050..... 16
RCW 9A.36.011..... 23

OTHER AUTHORITIES

RAP 2.5..... 36
WPIC 16.02..... 16
WPIC 16.07..... 16
WPIC 17.02..... 13, 15

ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Miller's conviction infringed his Fourteenth Amendment right to due process.
2. The court's instructions relieved the State of its burden to prove the absence of self-defense.
3. The court's instructions magnified the degree of injury Mr. Miller was required to fear in order to use force in self-defense.
4. The court erroneously instructed jurors that Mr. Miller could not defend himself unless he feared great personal injury.
5. The court erred by giving Instruction No. 23.
6. The court erred by giving Instruction No. 26.
7. The court erred by giving Instruction No. 27.

ISSUE 1: Due process requires the State to prove every element of a charged crime beyond a reasonable doubt. Did the trial judge violate Mr. Miller's right to due process by instructing the jury in a manner that relieved the State of its burden to prove the absence of self-defense?

ISSUE 2: A person may lawfully use force in self-defense when he reasonably believes he is about to be injured. Did the trial court erroneously instruct jurors that Mr. Miller could use force only if he feared great personal injury, defined as "severe pain and suffering"?

8. The trial judge erred by refusing to instruct the jury on the lesser included offense of unlawful display of a weapon.
9. Mr. Miller's conviction was entered in violation of his statutory right to have the jury consider applicable lesser offenses.
10. The trial judge violated Mr. Miller's Fourteenth Amendment right to due process by refusing to instruct on an applicable lesser included offense.

ISSUE 3: An accused person has an unqualified statutory right to instructions on applicable lesser-included offenses. Did the court improperly refuse to instruct jurors on the lesser included offense of unlawful display of a weapon?

ISSUE 4: Due process requires the court to instruct on applicable lesser-included offenses upon request. Did the court violate Mr. Miller's Fourteenth Amendment right to due process by refusing to instruct on unlawful display of a weapon?

11. The trial court violated Mr. Miller's Sixth and Fourteenth Amendment right to counsel.
12. The trial court erred by failing to adequately inquire into the conflict between Mr. Miller and his appointed attorney.
13. The trial court erred by refusing to appoint new counsel to represent Mr. Miller prior to sentencing.

ISSUE 5: An indigent person accused of a crime has a constitutional right to the appointment of counsel. Did the court's failure to adequately inquire into the breakdown of the attorney-client relationship violate Mr. Miller's Sixth and Fourteenth Amendment right to counsel?

INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court found that Mr. Miller was entitled to instructions on self-defense. Instead of telling jurors that Mr. Miller could defend himself if he reasonably believed he was “about to be injured,” the court’s instructions required a fear of “great personal injury.” These instructions relieved the State of its burden to prove the absence of self-defense beyond a reasonable doubt. Mr. Miller’s convictions violated his Fourteenth Amendment right to due process and must be reversed.

Mr. Miller asked the court to instruct on the lesser included offense of unlawfully displaying a weapon. The court agreed that Mr. Miller had met the legal and factual prongs of the test for giving such an instruction. However, the court declined to give the proposed instructions, relying on a misinterpretation of RCW 9.41.270. This infringed Mr. Miller’s unqualified statutory right to instruction on a lesser included offense. It also violated his Fourteenth Amendment right to due process. His convictions must be reversed.

Mr. Miller asked the trial court several times to appoint new counsel. The court did not meaningfully inquire into his dissatisfaction with his court-appointed lawyer. This violated his Sixth and Fourteenth Amendment right to counsel. His convictions must be reversed, and the case remanded for appointment of new counsel.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Michael Miller has lived in the Wagon Wheel mobile home park many years, his trailer was in space 18. RP (10/10/19) 102. Mr. Miller was 64 in the fall of 2018. RP (10/17/19) 676-677. His back was broken in 1993, his mobility remains limited, and his right hand is numb. RP (10/17/19) 677-680. Others described Mr. Miller as frail, and he often drank beer to help with his ongoing pain. RP (10/15/19) 226; RP (10/17/19) 709.

At the front door of Mr. Miller's trailer was a wooden porch with steps. RP (10/15/19) 108, 128, 296. It was open and visible from the street and further. RP (10/15/19) 199.

In September 14, 2018, Mr. Miller saw Jessica Aitchison go into the trailer next to Mr. Miller's. RP (10/15/19) 321. Her father, Steven Aitchison is the president of the homeowner's association of the mobile home park. RP (10/15/19) 191; RP (10/16/19) 379-382.

The occupant of that trailer had died, and the trailer was empty while waiting for a family member or representative to claim the former occupant's property. RP (10/15/19) 321; RP (10/16/19) 385-386; RP (10/17/19) 707-708. Jessica Aitchison wanted to live in the trailer, and she had obtained permission from her father to clean it out and get it ready for her to move in. RP (10/15/19) 319-321; RP (10/16/19) 384-385.

But Mr. Miller didn't know that. When he saw Jessica Aitchison go into the trailer, he was concerned she was trespassing. RP (10/16/19) 363. He and another occupant of the park went over to find out what was going on, and Jessica Aitchison poked her head out a window to talk to them. RP (10/15/19) 322-324. She told them her father had given her permission to be there, but that failed to allay Mr. Miller's concerns. RP (10/17/19) 708.

Mr. Miller commented that he didn't think the requisite time had passed for the trailer to be considered abandoned. RP (10/15/19) 324, 327. Jessica Aitchison found Mr. Miller abrasive.¹ RP (10/15/19) 324. Jessica Aitchison and the other park occupant spoke a bit more, more cleaning was done, and then Jessica Aitchison left the trailer. RP (10/15/19) 324-328.

Jessica Aitchison went to her father's trailer, where she found him with friend Vernon Frye, who was also a member of the homeowner association board. RP (10/15/19) 266, 286; RP (10/16/19) 383. She told her father that Mr. Miller had spoken to her about her ability to do things inside the trailer. RP (10/15/19) 287; RP (10/16/19) 386.

¹ Mr. Miller was in pain that day and had been drinking beer throughout the day. RP (10/17/19) 709.

Steven Aitchison drove his truck with Vernon Frye and parked in front of Mr. Miller's trailer. RP (10/15/19) 199; RP (10/16/19) 354, 388. Both men got out of the truck, and Frye stood at the truck while Aitchison went up to the door, standing on the porch. RP (10/15/19) 205, 288.

Nextdoor neighbor Jourdan Brown was outside and saw Aitchison and Frye pull up and get out of the truck. RP (10/15/19) 199. Aitchison went up onto the porch and knocked loudly. RP (10/17/19) 71.3 Mr. Miller opened the door and immediately told Aitchison to get off the porch. RP (10/15/19) 292, 295; RP (10/16/19) 390-391; RP (10/17/19) 747. Mr. Miller was concerned and felt surrounded given where each man stood, and he tried to escort Aitchison off the porch. RP (10/17/19) 716-719.

Aitchison did not get off the porch. RP (10/15/19) 295. Aitchison said that Mr. Miller reached for his neck but did not make contact. RP (10/16/19) 391; RP (10/17/19) 561. Aitchison was quickly on top of Mr. Miller who'd fallen through the porch. RP (10/15/19) 293-294, 338; RP (10/16/19) 391; RP (10/17/19) 720, 747.

Brown heard the porch break and looked over and saw Aitchison on top of Mr. Miller. RP (10/15/19) 203. Brown heard the two exchange words, and heard Aitchison tell Mr. Miller to "knock it off" or he would not let him up. RP (10/15/19) 204. Brown was concerned for Mr. Miller's

safety and yelled to Aitchison to let Mr. Miller up, to not hurt Mr. Miller, and to just call police. RP (10/15/19) 204, 229, 259, 338. It looked to Brown like Aitchison was choking Mr. Miller.² RP (10/15/19) 218, 228.

Aitchison was over six feet tall and weighed 360 pounds at the time.³ RP (10/15/19) 293; RP (10/16/19) 391, 413. Frye said it looked like after Mr. Miller opened the door, Aitchison “hip checked” him and took Mr. Miller to the ground.⁴ RP (10/15/19) 293-294. He saw Aitchison’s hands at Mr. Miller’s upper chest. RP (10/15/19) 294.

After threatening to have Mr. Miller evicted, Aitchison did let Mr. Miller up, and Mr. Miller went inside. RP (10/16/19) 390-392, 439; RP (10/17/19) 721. Mr. Miller had been hurt: his shoulder was injured, he was in pain, and his movement was limited. RP (10/17/19) 557, 562, 720-725, 748. Neither Aitchison nor Frye had left. RP (10/15/19) 231; RP (10/17/19) 721-725. Mr. Miller found his gun and went back out. RP (10/17/19) 722, 755.

Aitchison had a concealed firearm carry permit, and it was common knowledge in the park that he was usually armed. RP (10/16/19)

² Brown testified at trial that Mr. Miller would be no match for Aitchison in a fight. RP (10/15/19) 260.

³ Aitchison was 55 years old. RP (10/16/19) 377.

⁴ Aitchison claimed that upon opening the door, Mr. Miller immediately tried to grab him. RP (10/16/19) 423.

416-417. Mr. Miller knew that Aitchison was usually armed. RP (10/17/19) 701.

Mr. Miller went out with his gun and fired 4 shots.⁵ He said that he wanted to run Aitchison and Frye off because he was afraid. RP (10/16/19) 536; RP (10/17/19) 726, 751. He said he was not trying to hurt anyone, but that he was afraid. RP (10/17/19) 726-27. But Brown, Frye and Aitchison all claimed Mr. Miller shot at them. RP (10/15/19) 210-212, 253, 297; RP (10/16/19) 397, 435. Jessica Aitchison would later testify that it didn't look to her like Mr. Miller was aiming the gun. RP (10/16/19) 355; RP (10/16/19) 373.

Police arrived and surrounded the trailer. RP (10/10/19) 102-109. The Lakewood Police Chief called inside, and Mr. Miller said he'd shot four times into the air. RP (10/10/19) 107. Eventually Mr. Miller came out and was arrested. RP (10/10/19) 102-111; RP (10/16/19) 485.

The state charged Mr. Miller with three counts of Assault in the First Degree, all with firearm enhancements. CP 1-2.

By January of 2019, the case had still not moved forward, and Mr. Miller's attorney Mark Quigley asked for additional time to investigate the case. RP (1/15/19) 3-5. The continuance was granted, only to be followed

⁵ Police only located one strike, on Aitchison's truck. RP (10/15/19); RP (10/17/19) 575-579. One of these four shots was a misfire. RP (10/17/19) 597-598.

by more continuances for various reasons. RP (1/15/19) 5; RP (5/3/19) 10-13; RP (6/13/19) 20-26; RP (7/12/19) 29-31.

At the May 3, 2019 readiness hearing, Mr. Miller told the court he objected to the continuance and requested a new attorney. RP (5/3/19) 12-14. Mr. Miller told the court that his attorney has “tried to force me” into plea deals, argued with him, and told him that he has 35 or 36 other clients “ahead of you.” RP (5/3/19) 14. The judge told Mr. Miller that most attorneys probably have that many clients and that a new attorney would delay the case. RP (5/3/19) 14. Mr. Miller told the court that he had requested a new attorney through the Office of Assigned Counsel (OAC), but that the director did not speak to him or visit him in jail. RP (5/3/19) 14-15. Without asking defense attorney Quigley for any input, the court explained that OAC likely found no conflict and took no action. RP (5/3/19) 15-16.

The case was called for trial on September 9, 2019, and Mr. Miller told the court he still wanted a new attorney. RP (9/9/19) 35-37. The judge told him that the issue was not noted for consideration that day, and continued the trial. RP (9/9/19) 35-37. On September 20, 2019, Mr. Miller again asked for a new attorney. He told the court that he has experienced nothing but conflict with his attorney, and he noted that his attorney still did not have complete discovery. RP (9/20/19) 42.

The court asked attorney Mark Quigley if he wanted to respond, and without asking for an order, Quigley discussed his relationship with his client. RP (9/20/19) 42-43. Quigley told the judge that contrary to his client's statements, he has documented his many contacts with his client, and that he has been documenting that he reviewed all the discovery with his client. RP (9/20/19) 43-44. He told the court that he had told his client that he would live the rest of his life in prison if convicted,⁶ and that he had recommended that Mr. Miller plead guilty. RP (9/20/19) 44. The judge denied Mr. Miller's request for a new attorney and told him that having worked with Quigley for years, he knew that Quigley would tell the court if there was a conflict. RP (9/20/19) 44-46.

Quigley appeared in court twice more with Mr. Miller for the trial to be reset, and trial began on October 9, 2019. RP (10/3/19) 50-52; RP (10/8/19) 59; RP (10/9/19) 4-29.

At trial, Brown, Frye and Aitchison all claimed that Mr. Miller shot at them. RP (10/15/19) 206, 275; Mr. Miller testified and claimed self-defense. RP (10/17/19) 676-731.

⁶ The offer from the State was to plead guilty to 3 counts of assault 2 with one firearm enhancement. The jury ultimately only found Mr. Miller guilty of two counts of assault 2, though with two firearm enhancements. RP (10/9/19) 59-60; CP 65-73.

The trial judge found that Mr. Miller was entitled to have the jury instructed on self-defense. CP 52-58. In the general self-defense instruction, the court told the jury that

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to suffer great personal injury in preventing or attempting to prevent an offense against the person, and when the force is not more than necessary.
CP 52.

The court's "act on appearances" instruction similarly required a good faith and reasonable ground to believe the person is in "actual danger of great personal injury". CP 55. The court went on to define great personal injury as "an injury that the person reasonably believed... would produce severe pain and suffering if it were inflicted upon the person." CP 56. The defense objected to the use of "great personal injury." RP (10/21/19) 774-777.

The defense also offered an instruction allowing the jury to find Mr. Miller guilty of the lesser charge of unlawful display of a weapon. CP 23-26. The court found that both the legal and factual prongs of the *Workman* test were met.⁷ RP (10/21/19) 775. But the court declined to instruct the jury on the lesser, because the deck was attached to the front door of Mr. Miller's home. RP (10/21/19) 775.

⁷ *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

The jury acquitted Mr. Miller on all three of the assault 1 charges. RP (10/23/19) 836-840. They also acquitted on one of the assault in the second degree charges, finding Mr. Miller guilty of only two counts of assault two, with two firearm enhancements. CP 65-73.

Mr. Miller had no prior criminal history, and the court sentenced him within his standard range to 84 months. CP 77-89. Mr. Miller timely appealed. CP 90.

ARGUMENT

I. THE TRIAL COURT’S ERRONEOUS SELF-DEFENSE INSTRUCTIONS VIOLATED MR. MILLER’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Mr. Miller was entitled to use force to defend himself if he reasonably believed he was about to be injured. The trial instructed jurors that he was not entitled to use force unless he reasonably believed he was about to suffer great personal injury. This violated his Fourteenth Amendment right to due process.

A. Mr. Miller was entitled to use force to defend himself if he reasonably believed he was “about to be injured.”

Due process requires the State to prove the elements of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *State v. Woods*, 138 Wn.App. 191, 198, 156 P.3d 309 (2007); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In self-defense cases, “the absence

of self-defense becomes another element of the offense, which the State must prove beyond a reasonable doubt.” *Woods*, 138 Wn.App. at 198.

By statute, “[t]he use, attempt, or offer to use force upon or toward the person of another is not unlawful...[w]hen used by a party about to be injured.” RCW 9A.16.020(3). This standard is reflected in the pattern instruction: “The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.02 (4th Ed) (certain bracketed material omitted).

In this case, the trial court found that Mr. Miller was entitled to instructions on self-defense. CP 52-58. The court should have instructed jurors that Mr. Miller could defend himself if he reasonably feared he was “about to be injured.” RCW 9A.16.020(3); WPIC 17.02.

The court’s instructions misstated the relevant standard, and the defense did object. CP 52, 55, 56; RP (10/21/19) 774-777.

This requires reversal of Mr. Miller’s convictions. *Id.*

B. The trial court erroneously instructed jurors that Mr. Miller could not act in self defense unless he feared “great personal injury.”

Instead of instructing jurors on the correct standard, the trial court improperly instructed jurors that Mr. Miller could not use force in self defense unless he feared “great personal injury.” CP 52. The court’s “act

on appearances” instruction also required a danger of “great personal injury.” CP 55. The court defined “great personal injury” to require proof that Mr. Miller reasonably believed he’d suffer an injury that “would produce severe pain and suffering.” CP 56.

Self-defense instructions violate due process if they magnify the harm a person must fear to justify the use of force. *Id.*; see also *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009) (“A jury instruction on self-defense that misstates the harm that the person must apprehend is erroneous”). Here, the court’s instructions did just that, requiring fear of “great personal injury” instead of mere “injury.” CP 52, 55, 56.

This case is controlled by *Woods*. In that case, the defendant stabbed another person. His attorney proposed an “act on appearances” instruction allowing force if the defendant reasonably believed that he was “in actual danger of *great bodily harm*.” *Woods*, 138 Wn.App. at 200 (emphasis in original). The court reversed, noting that “the use of force is justified if the defendant reasonably believed he was *about to be injured*.” *Id.*, at 201 (emphasis added).

As in *Woods*, the instructions here magnified the harm Mr. Miller was required to apprehend to use force in self-defense. *Id.* Instead of a reasonable belief that he was “about to be injured,” the instructions required fear that he was in danger of “great personal injury.” CP 52.

The error is compounded by the erroneous “act on appearances” instruction and the instruction defining “great personal injury.” CP 55, 56. Under the trio of instructions given by the court over Mr. Miller’s objection, Mr. Miller could only use force or act on appearances if he believed he was at risk of a great personal injury, producing severe pain and suffering. CP 52, 55, 56; RP (10/21/19) 774-777.

The court should have used an instruction based on WPIC 17.02, which correctly incorporates the “about to be injured” language.⁸ That instruction is to be used “for any charge other than homicide or attempted homicide.” WPIC 17.02, Note on Use.

The trial court’s error relieved the State of its burden of proving the absence of self-defense. *Id.*; *Winship*, 397 U.S. at 361. Mr. Miller’s convictions must be reversed, and the case remanded for a new trial with proper instructions. *Woods*, 138 Wn.App. at 198-200.

C. The court erroneously required jurors to apply the standards applicable in homicide cases.

The “great personal injury” language used by the court only applies in homicide cases. By statute, homicide is justifiable “[i]n the lawful defense of the slayer... when there is reasonable ground to

⁸ Similarly, the court’s “act on appearances” instruction should have been modeled on WPIC 17.04. That instruction refers to “injury” rather than “great personal injury.” WPIC 17.04. It is to be used with WPIC 17.02. WPIC 17.04, Note on Use.

apprehend on the part of the person slain... to do some *great personal injury* to the slayer.” RCW 9A.16.050(1).

This standard is also reflected in the homicide jury instructions. Homicide is justifiable when “the slayer reasonably believed that the person slain intended to inflict death or *great personal injury*.”⁹ WPIC 16.02 (certain bracketed material omitted) (emphasis added). This instruction is to be used in cases involving homicide. WPIC 16.02, Note on Use.

The trial court erroneously applied the homicide standard to Mr. Miller’s case. CP 52, 55, 56. This magnified the harm he was required to apprehend in order to defend himself and relieved the State of its burden to prove the absence of self-defense. *Woods*, 138 Wn.App. at 198.

The court’s instructions violated Mr. Miller’s Fourteenth Amendment right to due process. *Id.* His convictions must be reversed, and the case remanded for a new trial with proper instructions. *Id.*

⁹ Similarly, the “act on appearances” instruction for homicide cases requires a reasonable fear of “great personal injury.” WPIC 16.07.

II. THE TRIAL COURT INFRINGED MR. MILLER’S UNQUALIFIED STATUTORY RIGHT TO INSTRUCTIONS ON A LESSER-INCLUDED OFFENSE.

- A. An accused person has the unqualified right to have jurors instructed on a lesser included offense.

An accused person has an “unqualified” statutory right to instructions on an applicable lesser-included offense. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984); RCW 10.61.003; RCW 10.61.010. The right attaches where two conditions are met. *Workman*, 90 Wn.2d at 448.

First, the lesser offense must “consist[] solely of elements that are necessary to conviction of the greater, charged offense.” *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015). Under this first prong, the court examines the greater offense “as charged and prosecuted, rather than... [as it] broadly appear[s] in statute.” *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

Second, the evidence must “support[] an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense.” *Condon*, 182 Wn.2d at 316 (emphasis in original).

The evidence is viewed in a light most favorable to the instruction’s proponent. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). The court may not weigh the evidence. *Id.*, at 461. The instruction must be given if “even the slightest evidence” suggests

that the person may have committed only the lesser offense. *Parker*, 102 Wn.2d at 163-164.

Here, the proposed instructions satisfied both prongs of the *Workman* test. Indeed, the trial court found “that the legal and factual prongs of *Workman* are satisfied by the evidence in this case.” RP (10/21/19) 775; CP 23-26. The court refused to instruct the jury based on the “place of abode” exception to the unlawful display charge. RP (10/21/19) 775-776. Because this stemmed from an erroneous reading of the law, the trial court violated Mr. Miller’s unqualified statutory right to instructions on the lesser included offense. *Parker*, 102 Wn.2d 163-164.

B. As charged in this case, unlawful display of a firearm is legally included within first-degree assault, and the “place of abode” exception does not apply.

A person may be convicted of unlawfully displaying a weapon if he “carr[ies], exhibit[s], display[s], or draw[s] any firearm... in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.” RCW 9.41.270(1). The offense does not apply to “[a]ny act committed by a person while *in* his or her place of abode.” RCW 9.41.270(3)(a) (emphasis added).

Under *Workman*’s legal prong, unlawful display of a weapon is a lesser included offense of first-degree assault. *See State v. Prado*, 144

Wn.App. 227, 243, 181 P.3d 901 (2008). Each element of the lesser offense is a necessary element of the greater offense. The legal test supports Mr. Miller’s request for instructions on unlawful display of a weapon. *Id.*

Here, the trial court found that the lesser offense qualified under both prongs of *Workman* but refused to give the instruction because of the “place of abode” exception to unlawful display of a weapon.¹⁰ RP (10/21/19) 775-776. The trial court’s understanding of the “abode” exception was flawed. *Smith*, 118 Wn.App. at 484.

Contrary to the trial court’s conclusion, the exception did not apply to Mr. Miller as he stood on his front porch with a firearm. Under the facts of this case, he could have been charged with and convicted of unlawful display of a weapon. *Id.* Accordingly, the exception was not a bar to Mr. Miller’s request for instructions on the lesser included offense. *Id.*

In *Smith*, the defendant displayed a firearm while in his backyard. *Id.* The *Smith* court concluded that “[a] backyard does not satisfy the place of abode exception.” *Id.*, at 485.

Examining the plain language of the statute, the court determined that “[t]he word ‘in’ clearly implies inside, not one’s backyard.” *Id.*, at

¹⁰ The scope of the exception is a question of statutory interpretation, reviewed de novo. *State v. Smith*, 118 Wn.App. 480, 483, 93 P.3d 877 (2003).

484. Had the legislature “wanted to enact a broader exception, it could have used ‘at’ rather than ‘in.’” *Id.*

Under *Smith*, the exception does not include “behavior that occurs in an area exposed to the public.” *Id.* In reaching this conclusion, the *Smith* court contrasted a person’s “legitimate privacy right in his or her home” with the absence of any expectation of privacy in areas of curtilage impliedly open to the public. *Id.*

The court found this limitation on the place of abode exception consistent with the legislature’s purpose—promoting public safety by protecting people against those who carry weapons in a threatening manner. *Id.*

Here, as in *Smith*, Mr. Miller was outside his home, in an area impliedly open to the public. RP (10/15/19) 268-269, 296; RP (10/16/19) 400; *see State v. Gave*, 77 Wn.App. 333, 337, 890 P.2d 1088 (1995) (“Areas of curtilage impliedly open to the public include a driveway, walkway, or access route leading to the residence or to the porch of the residence.”) Furthermore, his behavior “was not contained to an audience on his property.” *Smith*, 118 Wn.App. at 485 n. 8. While standing on his front porch with a firearm, he was in a position to “intimidate” or “alarm” members of the public. *See* RCW 9.41.270(1).

As in *Smith*, the “place of abode” exception did not apply to Mr. Miller. He could have been charged with and convicted of unlawful display of a weapon under RCW 9.41.270(1). Because of this, the trial court should have instructed jurors on the lesser included offense.

C. This court should not follow the *Haley* court’s interpretation of the “place of abode” exception. Furthermore, even if correct, *Haley*’s interpretation of the statute does not apply to Mr. Miller’s porch.

The *Smith* court criticized and distinguished a 1983 decision from Division III. *Smith*, 118 Wn.App. at 485 n. 8 (citing *State v. Haley*, 35 Wn.App. 96, 665 P.2d 1375 (1983)). The court “questioned [*Haley*’s] holding.” *Smith*, 118 Wn.App. at 485 n. 8.

The *Haley* court’s analysis of the statutory language is suspect. The court examined the word “abode,” but failed to discuss the statute’s use of the word “in” to describe the exception. *Haley*, 35 Wn.App. at 98.

The *Smith* court, by contrast, analyzed the entire phrase used by the statute. *Smith*, 118 Wn.App. at 484. It examined not only the definition of “abode,” but also the meaning of the word “in.” *Id.* The interpretation adopted by the *Smith* court is correct.

In addition, the *Smith* court noted features of the *Smith* defendant’s property that differed from the property at issue in *Haley*. The distinguishing features remarked on by the *Smith* court are present here.

Id. Because of this, the interpretation of the “abode” exception adopted by the *Haley* court does not encompass Mr. Miller’s porch.

In *Haley*, the charged conduct occurred on a private deck behind the defendant’s home. The court described the property as follows:

The deck, which is attached to the home, is surrounded by a railing about 3 feet high on two sides and a privacy rail approximately 11 feet high on the remaining side. There is a swimming pool in the middle of the deck. The deck is accessible from the living and dining room areas, an overhead balcony attached to the home, as well as the back yard. The deck overlooks the Spokane River. Below the deck is a steep wooded hill with a tram down to the river.

Haley, 35 Wn.App. at 97.

Mr. Miller’s porch, by contrast, was on the front of his home, facing the public street. It was not shielded from view; instead it was visible to all and impliedly open to the public. There were no barriers (such as the railings and steep wooded hill in *Haley*) restricting access. The porch did not have a swimming pool or other private facility on it. It could not be accessed from other parts of Mr. Miller’s home, and thus was not an integral part of his home. RP (10/15/19) 268-269, 296; RP (10/16/19) 400; *cf.* *Haley*, 35 Wn.App. at 97.

Mr. Miller’s porch is unlike the deck described in *Haley*. It was not “an extension of his dwelling and therefore a part of his abode.” *Smith*,

118 Wn.App. at 485 n. 8. The *Haley* court’s interpretation of the “place of abode” exception does not apply to Mr. Miller’s porch. *Id.*

D. Under *Workman*’s factual prong, unlawful display of a weapon is a lesser included offense of the crimes charged in this case.

The trial court found that Mr. Miller’s case satisfied the factual test outlined in *Workman*. RP (10/21/19) 775-776. The factual prong requires courts to view the evidence “in the light most favorable to the party that requested the instruction.” *Fernandez-Medina*, 141 Wn.2d at 456. The court may not weigh the evidence. *Id.*, at 461. The instruction must be given if “even the slightest evidence” suggests that the person may have committed only the lesser offense. *Parker*, 102 Wn.2d at 163-164.

Unlawful display of a weapon requires proof that the accused person acted in a manner that “either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.” RCW 9A.41.270(1). By contrast, first-degree assault requires proof that the accused person act “with intent to inflict great bodily harm.” RCW 9A.36.011(1).

In this case, there is evidence that Mr. Miller acted in a manner manifesting intent to intimidate or warranting alarm for the safety of others. RCW 9A.41.270(1). There is also evidence that he did not act with intent to inflict great bodily harm. RCW 9A.36.011(1).

First, Mr. Miller denied any intent to inflict great bodily harm. RP (10/17/19) 725-726, 756, 759. Instead, he testified that his intent was to defend himself, and to persuade the others to leave his property. RP (10/17/19) 759-760. Second, by shooting from his porch with a firearm, he acted in way that “either manifest[ed] an intent to intimidate [others] or that warrant[ed] alarm for the safety of other persons.” RCW 9.41.270(1).

When taken in a light most favorable to Mr. Miller, as proponent of the instructions, there is at least “the slightest evidence” that he committed unlawful display of a weapon “to the exclusion of the greater, charged offense.” *Condon*, 182 Wn.2d at 316.

This evidence was sufficient to require instructions on the lesser-included offense. Because there was at least the “slightest evidence” that Mr. Miller committed only unlawful display of a weapon, the trial court erred by refusing to instruct on that charge. *Parker*, 102 Wn.2d at 163-164. Mr. Miller’s convictions must be reversed, and the case remanded for a new trial with proper instructions. *Id.*

E. The Court of Appeals should review this error *de novo*.

A trial court’s refusal to instruct on a lesser offense is reviewed *de novo*. *State v. Corey*, 181 Wn.App. 272, 276, 325 P.3d 250 review denied, 181 Wn.2d 1008, 335 P.3d 941 (2014). This is so because the legal sufficiency of the evidence supporting an instruction involves the

application of law to facts. *Corey*, 181 Wn.App. at 276. A court’s application of law to facts is reviewed *de novo*. See, e.g., *State v. Jones*, 183 Wn.2d 327, 338, 352 P.3d 776 (2015) (Jones I).

Some courts have erroneously applied an abuse-of-discretion standard when the refusal is based on the factual prong of the *Workman* test. See, e.g., *State v. Downey*, 9 Wn.App. 852, 856-857, 447 P.3d 588 (2019), *review denied*, 194 Wn.2d 1015, 452 P.3d 1224 (2019) (“This court reviews the trial court’s determination of the legal prong *de novo* and the factual prong for an abuse of discretion”) (citing *State v. Walker*, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998)).

The dispute is not implicated in this case, because the trial judge agreed that Mr. Miller met both of *Workman*’s prongs. RP (10/21/19) 775-776. The court’s error stems from a misreading of the “place of abode” exception, and thus involves a question of statutory interpretation. RP (10/21/19) 775-776. Statutory interpretation is an issue of law, reviewed *de novo*. *Black v. Cent. Puget Sound Reg’l Transit Auth.*, --- Wn.2d. ---, ___, 457 P.3d 453 (2020).

Furthermore, the error requires reversal under any standard of review. There are no disputed facts, because the trial court may not weigh the evidence. *Fernandez-Medina*, 141 Wn.2d at 461. Instead, the court must take the evidence in a light most favorable to Mr. Miller. *Id.*, at 456.

The instructions must be given if supported by even slight evidence.

Parker, 102 Wn.2d at 163-164.

Taking the evidence in a light most favorable to Mr. Miller (instead of weighing the evidence), there is at least slight evidence that he committed only the lesser offense. *Id.*; *Fernandez-Medina*, 141 Wn.2d at 456, 461.

Applying the law to these facts, Mr. Miller was entitled to have the jury instructed on the lesser included offense of unlawful display of a weapon. His convictions must be reversed, and the case remanded for a new trial with proper instructions. *Parker*, 102 Wn.2d at 163-164.

III. THE TRIAL JUDGE VIOLATED MR. MILLER'S DUE PROCESS RIGHT TO INSTRUCTIONS ON A LESSER-INCLUDED OFFENSE.

Due process requires courts to instruct on applicable lesser-included offenses requested by the defense. The court failed to do so here. This violated Mr. Miller's Fourteenth Amendment right to due process.

A. The Supreme Court explicitly left open whether there is a due process right to instruction on a lesser included offense in noncapital cases.

In all capital proceedings, due process requires instruction on applicable lesser-included offenses. U.S. Const. Amend. XIV; *Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). This

stems from the risk of error that flows from denial of such instructions. *Id.*, at 633-638.

The Supreme Court has not determined if the rule applies to noncapital cases. Indeed, the *Beck* court explicitly reserved ruling on the question: “We need not and do not decide whether the Due Process Clause would require the giving of such instructions in a noncapital case.” *Id.*, at 638 n. 14. The Supreme Court has noted that a rule precluding instruction on a lesser included offense “would raise difficult constitutional questions,” even outside the capital context. *Keeble v. United States*, 412 U.S. 205, 213, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973).

The constitutional issue does not arise in federal criminal prosecutions, where the right to instruction on a lesser included instruction is “beyond dispute” under the federal rules of criminal procedure. *Id.*, at 208 (citing FRCP 31(c)); *see also Sansone v. United States*, 380 U.S. 343, 349, 85 S. Ct. 1004, 13 L. Ed. 2d 882 (1965). Since the right to such instructions is beyond dispute, there is no need to address constitutional arguments in federal criminal cases.

Federal court review of state criminal convictions is limited and deferential. Despite this, some federal courts have concluded that refusal to instruct on a lesser-included offense may violate due process even in noncapital cases prosecuted in state court.

The third circuit has unequivocally extended *Beck* to noncapital cases. *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988). Four circuits will address the issue on *habeas* review if the refusal to instruct threatens a fundamental miscarriage of justice. Courts adopting this approach include the first, sixth, seventh, and eighth circuits. *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990); *Scott v. Elo*, 302 F.3d 598, 606 (6th Cir. 2002)); *Robertson v. Hanks*, 140 F.3d 707, 711 (7th Cir. 1998); *DeBerry v. Wolff*, 513 F.2d 1336, 1339 (8th Cir. 1975).

Six federal circuit courts have refused to address the issue on procedural grounds under rules governing *habeas corpus* proceedings.¹¹ Three of these have concluded that review “is foreclosed because it would require the announcement of a new rule in contravention of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).” *Jones v. Hoffman*, 86 F.3d 46, 47 (2d Cir. 1996) (*Jones II*); *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000); *Stewart v. Warden of Lieber Corr. Inst.*, 701 F.Supp.2d 785, 793 (D.S.C. 2010) (citing unpublished Fourth Circuit case); *see also Leary v. Garraghty*, 155 F.Supp.2d 568, 574 (E.D. Va. 2001). Another three adhere to a general rule of “automatic nonreviewability” in *habeas* proceedings. *Trujillo v. Sullivan*, 815 F.2d 597, 603 (10th Cir. 1987); *see also Valles v. Lynaugh*, 835 F.2d 126, 127

¹¹ Apparently, the D.C. Circuit Court of Appeals has not addressed the issue.

(5th Cir. 1988); *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004); *Perry v. Smith*, 810 F.2d 1078, 1080 (11th Cir. 1987).

Because Washington courts are not constrained by rules limiting federal *habeas corpus* review, this court should address Mr. Miller's due process argument. The court should find that the refusal to instruct on an applicable lesser-included offense violates procedural due process.

B. *Mathews***Error! Bookmark not defined.** provides the proper test for Washington courts to evaluate procedural due process claims in Washington criminal cases.

Courts balance three factors when evaluating procedural due process claims under the Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). These factors include (1) the private interest at stake, (2) the risk of error under current procedure and the probable value of additional procedures, and (3) the government's interest in maintaining the existing procedure. *Id.*

Washington courts apply *Mathews* balancing to procedural due process challenges in civil cases. *See, e.g., In re Det. of Morgan*, 180 Wn.2d 312, 320, 330 P.3d 774 (2014). However, the Washington Supreme Court has been inconsistent in its evaluation of procedural due process challenges in criminal cases. *Compare State v. Beaver*, 184 Wn.2d 321, 336, 358 P.3d 385 (2015) (applying *Mathews*); *with State v. Coley*, 180 Wn.2d 543, 558, 326 P.3d 702 (2014) *cert. denied*, 135 S.Ct. 1444, 191

L.Ed.2d 399 (2015) (rejecting *Mathews*). Such inconsistency need not persist.

Mathews should apply when Washington courts evaluate Washington criminal procedure. There is no basis to deny criminal defendants the same test applied to protect the due process rights of civil litigants.

Federalism concerns justify a deferential standard when *federal* courts evaluate *state* criminal procedures. See *Medina v. California*, 505 U.S. 437, 445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) . However, these federalism concerns are not applicable when Washington courts address issues of state criminal procedure.

The *Medina* decision applies only to federal review of state court proceedings. *Id.*, at 444-445 (citing *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)). Federal courts are loathe to “construe the Constitution so as to intrude upon the administration of justice by the individual States.” *Patterson*, 432 U.S. at 201; see also *Medina*, 505 U.S. at 445 (quoting *Patterson*).

Washington should not adopt the *Patterson* standard when reviewing its own state criminal procedures. Washington courts should apply *Mathews*, despite the U.S. Supreme Court’s adoption of the *Patterson* standard in federal court. Because *Medina* and *Patterson* deviate

from *Mathews* only as a result of federalism, this court must apply *Mathews* balancing to Mr. Miller's procedural due process claim. *Beaver*, 184 Wn.2d at 336.

- C. Under *Mathews*, courts are constitutionally required to instruct on applicable lesser-included offenses.

Under *Mathews*, courts must instruct on applicable lesser-included offenses. The magnitude of the private interest at stake, the risk of error when jurors do not have the chance to consider a lesser-included offense, and the absence of any real countervailing government interest all weigh in favor of this result.

The private interest at stake. A proceeding that may result in confinement involves the “most elemental of liberty interests,” one described as “almost uniquely compelling.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 530, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); *Ake v. Oklahoma*, 470 U.S. 68, 78, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). *Mathews* balancing requires significant procedural safeguards when a person faces even brief confinement in a civil proceeding. *Turner v. Rogers*, 546 U.S. 431, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011); *Addington v. Texas*, 441 U.S. 418, 433, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Thus, the private interest here weighs heavily in favor of requiring instruction on a lesser-included offense as a matter of due process.

The risk of error. In federal court, an accused person has the right to instructions on a lesser-included offense. *Stevenson v. United States*, 162 U.S. 313, 322-323, 16 S.Ct. 839, 40 L.Ed. 980 (1896). The federal rule is “beyond dispute.” *Keeble*, 412 U.S. at 208. In capital proceedings—including those conducted in state court—due process requires instruction on applicable lesser-included offenses. *Beck*, 447 U.S. at 634.

Failing to instruct on applicable lesser-included offenses increases the risk of error at trial. Such a failure “diminish[es] the reliability of the guilt determination,” and “enhances the risk of an unwarranted conviction.” *Id.*, at 638. Providing jurors with three options—guilty, not guilty, or guilty of a lesser charge— “ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard.” *Id.*, at 634.

Without instruction on a lesser-included offense, the accused person is

exposed to the substantial risk that the jury’s practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction...

Keeble, 412 U.S. at 212-213.

In other words, failure to instruct on a lesser-included offense creates a risk of conviction even in the absence of proof beyond a

reasonable doubt, “simply because the jury wishes to avoid setting [the defendant] free.” *Vujosevic*, 844 F.2d at 1027. The risk of error may increase when conviction does not carry the death penalty: in such cases jurors might find themselves *more* willing to convict despite the absence of proof on one element, since erroneous conviction will not result in execution of the innocent.

Absent instruction on an applicable lesser included offense, the risk of error is great. The second *Mathews* factor weighs in favor of requiring appropriate instruction on lesser-included offenses.

The government’s interests. The third *Mathews* factor requires examination of the public interest, including “the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335. Appropriate instructions on lesser-included offenses benefit the state, and impose no fiscal or administrative burdens. The public interest therefore weighs in favor of a rule requiring such instruction.

First, prosecutors have a duty to act in the interest of justice. *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). No prosecutor should seek what the *Beck* court described as an “unwarranted conviction.” *Beck*, 447 U.S. at 638.

Second, proper instruction on an included offense allows jurors to convict of a lesser charge when they might otherwise acquit the defendant of the charged crime.¹² Juries will convict defendants of the appropriate offense when the state cannot prove the charged offense.

Third, unwarranted conviction on a greater charge wastes resources by incarcerating people for longer periods than necessary or appropriate. Instruction on applicable lesser-included offense reduces the possibility that offenders will receive longer sentences than warranted by their behavior.

As these three considerations show, the government's interest favors appropriate instruction on lesser-included offenses. The third *Mathews* factor thus supports such instruction.

All three *Mathews* factors weigh in favor of instructing jurors on applicable lesser-included offenses. *Mathews*, 424 U.S. at 333. The significant private interest, the likely benefits of additional procedural protections, and the benefit flowing to the state all favor such instruction. *Id.*

Due process requires Washington courts to adopt the *Beck* court's reasoning. *Id.* Failure to instruct on a lesser-included offense violates due

¹² As the *Beck* court noted, this rationale underlies the common law origin of the practice. *Beck*, 447 U.S. at 633.

process when the evidence supports such an instruction and the accused person requests it. *Beck*, 447 U.S. at 634.

Here, the court’s instructions forced jurors to either acquit or convict Mr. Miller of felony assault. They did not have “the ‘third option’ of convicting on a lesser included offense...” *Id.*

The trial court’s refusal to instruct the jury on unlawful display of a weapon violated Mr. Miller’s due process right to a fair trial. *Id.*; *Vujosevic*, 844 F.2d at 1027. The court must reverse his conviction and remand the case to the superior court. *Vujosevic*, 844 F.2d at 1027. Upon retrial, the court must instruct jurors on any applicable lesser-included offenses. *Id.*

D. Even under *Patterson*, courts are constitutionally required to instruct on applicable lesser-included offenses.

When federal courts analyze state criminal procedures, their review is more deferential than that outlined in *Mathews*. Instead of balancing the relevant interests, federal courts find a due process violation if a practice “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Medina*, 505 U.S. at 446 (quoting *Patterson*) (internal quotation marks omitted).

Even though applicable only to federal courts reviewing state criminal procedures, that standard is met here. The right to a lesser

included instruction is a principal of justice so rooted in tradition and conscience as to be ranked as fundamental. *See Beck*, 447 U.S. at 633-638. As the *Beck* court noted, the practice is rooted in the common law, is beyond dispute in the federal system, and has been unanimously affirmed by those state courts addressing the issue. *Id.*, at 635-636.

Thus, even under the *Patterson* standard, an accused person has a due process right to instruction on a lesser-included offense. In this case, the trial court's refusal to instruct on unlawful display of a weapon violated Mr. Miller's Fourteenth Amendment right to due process. *Id.*

E. The Court of Appeals should review *de novo* this manifest error affecting Mr. Miller's Fourteenth Amendment right to due process.

Constitutional issues are reviewed *de novo*. *Black* --- Wn.2d. at _____. The error here is preserved, because Mr. Miller proposed instructions on unlawful display of a weapon. CP 23-26. The trial court rejected the proposed instructions. RP (10/21/19) 775-776.

Even if the constitutional error were not preserved, it would be reviewable as a manifest error affecting a constitutional right. RAP 2.5(a)(3). To raise a manifest error, an appellant need only make "a plausible showing that the error... had practical and identifiable consequences in the trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

The showing required under RAP 2.5(a)(3) "should not be confused

with the requirements for establishing an actual violation of a constitutional right.” *Id.* An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Here the error had practical and identifiable consequences. The trial court knew that Mr. Miller was proposing instructions on a lesser-included offense. CP 23-26. Given what the trial court knew at the time, the court could have corrected the error, which prohibited jurors from considering an applicable lesser-included offense. *Id.*

The Court of Appeals should review this manifest error *de novo*. *Id.*; *Black* --- Wn.2d. at ____.

IV. THE TRIAL COURT VIOLATED MR. MILLER’S RIGHT TO COUNSEL BY FAILING TO ADEQUATELY INQUIRE INTO HIS CONFLICT WITH HIS ATTORNEY.

When the “relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel,” even if no actual prejudice is shown. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001); *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80 (2006).

When a defendant requests the appointment of new counsel, the trial court must inquire into the reason for the request. *Cross*, 156 Wn.2d at 607-610; *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008). An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Cross*, 156 Wn.2d at 610.

The court “must conduct ‘such necessary inquiry as might ease the defendant’s dissatisfaction, distrust, and concern.’... The inquiry must also provide a ‘sufficient basis for reaching an informed decision.’” *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777 (9th Cir. 2001) (citation omitted). Furthermore, “in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” *Id.*, at 776-77. The focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *Id.*

Here, the trial court did not sufficiently inquire into the conflict. RP (5/3/19) 14-16, 29; RP (9/9/19) 36-37; RP (9/20/19) 42-46. The judge allowed Mr. Miller to speak but did not ask specific and targeted questions aimed at determining whether defense counsel could continue to represent his client. RP (5/3/19) 14-16, 29; RP (9/9/19) 36-37; RP (9/20/19) 42-46. Nor did the judge ask defense counsel whether he believed he could

continue to represent Mr. Miller. RP (5/3/19) 14-16, 29; RP (9/9/19) 36-37; RP (9/20/19) 42-46.

The court's limited inquiry was inadequate. *Cross*, 156 Wn.2d at 607-610. The court's failure to inquire and its refusal to appoint new counsel violated Mr. Miller's Sixth Amendment right to the effective assistance of counsel. *Id.* His sentence must be vacated, and the case remanded for the appointment of counsel. *Id.* Upon remand, counsel may pursue a motion for a new trial prior to sentencing.

CONCLUSION

The trial court should have properly instructed jurors on the law of self-defense. Mr. Miller was entitled to use force if he reasonably believed he was "about to be injured." The court erroneously told jurors he must apprehend "great personal injury" before defending himself. This relieved the State of its burden to prove the absence of self-defense and violated Mr. Miller's Fourteenth Amendment right to due process.

The court should also have instructed on the lesser-included offense of unlawful display of a weapon. The court found that Mr. Miller would be entitled to the instruction but for the "place of abode" exception to the unlawful display statute. The "place of abode" exception does not apply. Mr. Miller was not inside his home and was not in a private area

that was an integral part of the residence. He could have been charged and convicted of unlawfully displaying a weapon because he stood on his porch, facing the public, and fired his gun. He was therefore entitled to the instruction.

The court's error violated Mr. Miller's unqualified statutory right to instructions on the lesser-included offense. It also violated his Fourteenth Amendment right to due process.

When Mr. Miller repeatedly expressed dissatisfaction with his attorney, the court should have inquired into the problem. The court's failure to do so violated Mr. Miller's Sixth and Fourteenth Amendment right to counsel.

Respectfully submitted on March 23, 2020,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Michael Miller, DOC #420364
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 23, 2020.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

March 23, 2020 - 10:40 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54288-9
Appellate Court Case Title: State of Washington, Respondent v. Michael Miller, Appellant
Superior Court Case Number: 18-1-03704-4

The following documents have been uploaded:

- 542889_Briefs_20200323103925D2400190_8468.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 54288-9 State v. Michael Miller Opening Brief.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- kristie.barham@piercecountywa.gov

Comments:

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com

Address:

PO BOX 6490

OLYMPIA, WA, 98507-6490

Phone: 360-339-4870

Note: The Filing Id is 20200323103925D2400190