71518-6

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NO. 71518-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN KAYSER,

Appellant.

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

The Honorable Deborra Garrett, Judge

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

STEVEN KAYSER
Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by concluding it had no discretion to reduce the sentence below the 36-month sentence enhancement.

2. The mandatory sentencing enhancement of 36 months for a firearm violates the separation of powers doctrine.

3. The court erred and violated appellant's right to a jury trial by instructing the jury it had a "duty to return a verdict of guilty."

B. STATEMENT OF THE CASE

Appellant adopts and incorporates the Statement of the Case from the Brief of Appellant.

C. ARGUMENT

1. THE MANDATORY THREE-YEAR SENTENCE "ENHANCEMENT" IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

a. *Constitutional Punishment Must Permit the Court to Consider an Offender's Age and the Attendant Characteristics and Circumstances.*

> The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." ... That right, we have explained, "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned'" to both the offender and the offense.

Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 2463, 183 L. Ed. 2d 407 (2012).

> "An offender's age ... is relevant to the Eighth Amendment," and so "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."

Id. at 2464. Thus in *Miller*, the Supreme Court overturned mandatory sentences for offenders under age 18. It held the Constitution requires a court have discretion to consider the offender's age and the many qualities inherent in that age. It held the mandatory sentencing scheme was flawed

> because it gave no significance to "the character and record of the individual offender or the circumstances" of the offense and "exclud[ed] from consideration ... the possibility of compassionate or mitigating factors."

Miller, 132 S. Ct. at 2467. Mandatory penalties, it held,

> by their nature preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it.

Miller, 132 at 2467. It thus held the Eighth Amendment forbids mandatory sentences of life in prison without parole for juveniles. "[S]uch a scheme poses too great a risk of disproportionate punishment." *Id.* at 2469.

b. *The SRA Unconstitutionally Removes From the Court's Discretion Consideration of the Specific Qualities of the Person Before It.*

The Sentencing Reform Act of 1981, RCW Ch. 9.94A, removed the court's ability to consider the qualities of the individual before it for sentencing. The statute's purposes omit an individual's personal characteristics:

> **9.94A.010. Purpose**
> The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentencing, and to:
> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
> (2) Promote respect for the law by providing punishment which is just;
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
> (4) Protect the public;
> (5) Offer the offender an opportunity to improve himself or herself;
> (6) Make frugal use of the state's and local governments' resources; and
> (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

> The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purposes of this chapter, that there are

> substantial and compelling reasons justifying an exceptional sentence. ...
>
> ...
>
> (1) Mitigating Circumstances--Court to Consider
>
> The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

RCW 9.94A.535.

> The sentencing guidelines and prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant.

RCW 9.94A.340.

While this limitation by its terms applies to the guidelines, the Supreme Court has interpreted it also to prohibit personal characteristics as the basis for exceptional sentences downward.[1]

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[1] *See, e.g., State v. Law*, 154 Wn.2d 85, 89, 110 P.3d 717 (2005) (parenting responsibilities and post-conviction rehabilitation won't support exceptional sentence for theft); *State v. Freitag*, 127 Wn.2d 141, 896 P.3d 1254 (1995) (complete lack of prior police contacts and history of extraordinary concern for others not a valid basis for a departure for vehicular assault); *State v. Fowler*, 145 Wn.2d 400, 38 P.3d 335 (2002) (individual's low risk to re-offend does not support departure); *State v. Ha'mim*, 132 Wn.2d 834, 940 P.2d 633 (1997) (age alone at time of offense (18) not valid basis for departure on robbery).

Criticizing the majority, Justice Madsen pointed out:

> It is the majority of this court, not the SRA, that has closed the door on exercise of trial court discretion. It is this court which has consistently disregarded personal factors justifying departures downward despite the SRA's clear intent to the contrary ... .

Freitag, 127 Wn.2d at 145 (Madsen, J., dissenting).

> (3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm ...:
>
> ...
>
> (b) Three years for any felony defined under any law as a class B felony ... .
>
> (e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions ... .

RCW 9.94A.533(3).

Under these provisions, a sentencing court must consider an offender's "criminal history," but may not consider the person's good works over a long life. The court is to provide "punishment which is just," and "make frugal use of the state's ... resources." Yet if the court concludes the person before it is not a risk to the public, does not need incarceration to improve himself, is no

risk of reoffending, and if the court believes the punishment is disproportionate to the "seriousness of the offense," yet the law requires it to sentence a man in his 70s to serve three years in prison for the firearm enhancement on a standard range that otherwise is 3-9 months.[2]

The courts have concluded the SRA permits courts to reduce sentences for multiple offenses, even serious violent offenses, by running them concurrently if it finds the SRA ranges are "clearly excessive," and a lower sentence will serve the purposes of RCW 9.94A.010. RCW 9.94A.589(1)(b), 9.94A.535.[3] A crime victim can be considered "vulnerable" because of age and circumstances to permit an exceptional sentence above the range. When an equally senior citizen, living out in the country with a more vulnerable

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[2] RCW 9.94A.515 (seriousness level IV); RCW 9.94A.510 (range 3-9 for 0 offender score). A jail sentence of 3-9 months could be served on work release or other partial confinement. RCW 9.94A.680.

[3] *See: In re PRP of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007) (six counts of assault 1° and drive-by shooting); *State v. Miller*, 181 Wn. App. 201, 324 P.3d 791 (2014) (two counts of attempted murder 1°); *State v. Graham*, ___ Wn. App. ___, 337 P.3d 319 (2014) (defendant fired AK-47 at six police officers).

wife, who spent much of his professional life assisting law enforcement, has a single incident that he believed was justified where no one was harmed, the law must permit the court to consider equivalent factors and impose a sentence that is just.

Such a sentencing scheme poses too great a risk of disproportionate punishment. This Court should hold the trial court has the discretion to sentence below this mandatory enhancement.

c. *Removing Judicial Discretion to Consider a Person's Age and Attendant Qualities Violates the Separation of Powers Doctrine.*

While the courts repeatedly have held the Legislature may set the laws regarding sentencing, yet at some point those sentencing laws remove so much discretion from the courts to do justice in individual cases that they trench upon the power of the judiciary.

> [O]ne of the cardinal and fundamental principles of the American constitutional system, both state and federal [is] the separation of powers doctrine. "It has been declared that the division of governmental powers into executive, legislative, and judicial represents probably the most important principle of government declaring and guaranteeing the liberties of the people, and preventing the exercise of autocratic power, and

> that it is a matter of fundamental necessity, and is essential to the maintenance of a republican form of government."

Washington State Motorcycle Dealers Ass'n v. State, 111 Wn.2d 667, 674-75, 763 P.2d 442 (1988).

> Washington's constitution, Const. art. 4, § 1 vests the judicial power of the State in a separate branch of the government -- the judiciary.

Washington State Bar Ass'n v. State, 125 Wn.2d 901, 906, 890 P.2d 1047 (1995).

> In furtherance of this principle of separation of powers, this court has refused to interfere with the executive and legislative branches of government while at the same time insisting that those branches of government not usurp the functions of the judicial branch of government.

Id. at 907.

A traditional role for the judiciary is to apply the law to the particular individuals before it for sentencing.

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. **This, too, must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to**

> **consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.**[4]

The American Bar Association Standards instruct sentencing courts to consider personal characteristics of an individual when determining whether mitigating circumstances justify a downward departure from guidelines.

> Standard 18-63. Using presumptive sentences: mitigating and aggravating factors and personal characteristics of individual offenders; criminal history
>
> (a) In determining the sentence of an offender, a sentencing court should consider first the level of severity and the types of sanctions that are consistent with the presumptive sentence. The court should then consider any modification indicated by factors aggravating or mitigating the gravity of the offense or the degree of the offender's culpability, by personal characteristics of an individual offender that may be taken into account, or by the offender's criminal history.

ABA CRIMINAL JUSTICE SECTION STANDARDS ON CRIMINAL JUSTICE, STANDARD ON SENTENCING, Std. 18-6.3 (1994).

Indeed, Washington's fourth estate and the public believe this is the duty of the judiciary.

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[4] *Koon v. United States*, 518 U.S. 81, 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) (emphasis added) (affirming exceptionally low sentences for police officers who violated civil rights).

> The role of a judge is to carry out the law, but also to employ discretion in the courtroom on how offenses are punished. Often, personal qualities such as fairness, compassion and open-mindedness play a major role.

Editorial: Votingforjudges.org makes it easier to size up judicial candidates, SEATTLE TIMES (10/15/2014).

The Washington Supreme Court upheld the Sentencing Reform Act of 1981, RCW Chapter 9.94A, against constitutional challenge because it "structures, but does not eliminate" judicial discretion from sentencing. RCW 9.94A.010; *State v. Ammons*, 105 Wn.2d 175, 181, 713 P.2d 719 (1986). The SRA provided standard ranges for felony sentences, but also permitted courts the discretion in specific cases to go above or below that standard range based on the facts of the case. A statutory basis for going below the standard range includes:

> (a) To a significant degree, the victim was an initiator, ... aggressor, or provoker of the incident;
>
> ...
>
> (c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

RCW 9.94A.535(1). Thus a failed self-defense case such as here explicitly provides the court a basis for going below the standard range.[5]

The Legislature has amended the SRA hundreds of times since it originally enacted it. Increasingly these amendments, such as the mandatory firearm enhancement, completely remove judicial discretion in sentencing individuals.

> The doctrine of stare decisis 'requires a clear showing that an established rule is incorrect and harmful before it is abandoned.'

State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). To the extent the courts have upheld the mandatory nature of firearm enhancements, *Miller v. Alabama* demonstrates those holdings are wrong. The unjust result in this case demonstrates they are harmful.

The need for individualized sentencing is as compelling for our senior citizens who have led an exemplary life as for juveniles who have not yet had the opportunity to mature. This charge essentially arises from an honest misunderstanding:

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[5] *State v. Flett*, 98 Wn. App. 799, 807, 992 P.2d 1028, *review denied*, 141 Wn.2d 1002 (2000); *State v. Jeannotte*, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997).

the Kaysers did not perceive Mr. Adams as a process server, in part because he did not act as most process servers act. The genuine fear that he needed to protect his wife, himself, or his property reduced Mr. Kayser's culpability. He has no need for rehabilitation; he has led a crime-free life for longer than many of us have been alive. Not only was he crime-free, but he had served his nation both militarily and by assisting law enforcement.

This increased punishment is even more reprehensible given that the firearm is the element that makes this crime a felony in the first place. No person was injured. No property was damaged. The Legislature initially concluded assault "with a deadly weapon" warranted a standard range sentence of 3-9 months. The State believed twelve months of probation was a sufficient penalty for Mr. Kayser had he chosen not to go to trial. But because he truly believed he had a right to protect his wife, himself, and his property, he would not concede guilt of any crime. CP 197-98.

This statute usurped the power of the judiciary and gave it to the prosecutor, who had

the discretion to remove the firearm enhancement, but did not when Mr. Kayser would not plead guilty.

This is precisely the reason we have courts and judges -- to recognize when a particular case is compellingly different from the "usual" assault with a deadly weapon, when an individual's culpability is greatly reduced from the norm. The judiciary must have the power to consider the individuals before them to impose a sentence that is "just." A statute cannot utterly remove that discretion.

d. *Prejudice*

Prejudice is established if a different sentence might have been imposed had the trial court applied the law correctly.

> While no defendant is entitled to an exceptional sentence . . ., every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.[6]

Here Judge Garrett expressed her concern that the statutory law may require a sentence different from what she would choose; and that this Court may decide the law differently. She said she would be

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[6] *Mulholland, supra*, 161 Wn.2d at 334, quoting *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). *Accord: Miller, Graham, supra.*

watching. Appellant urges this Court to hold that the judge had the authority to impose a sentence less than 36 months.

2. IT WAS ERROR TO INSTRUCT THE JURY IT HAD A "DUTY TO RETURN A VERDICT OF GUILTY."

"We thought that this issue was resolved."[7] The Court of Appeals has rejected this issue.[8] Yet the Washington Supreme Court and the United States Supreme Court have not addressed it. *Meggyesy*, 90 Wn. App. at 698.[9]

Here the court instructed the jury that if it found each element of the charge proved beyond a

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[7] *State v. Moore*, 179 Wn. App. 464, 465, 318 P.3d 296, *review denied*, 180 Wn.2d 1019 (2014); *State v. Nicholas*, Court of Appeals No. 31218-6-III (Slip Op. 12/30/2014) at 1.

[8] Decisions by the Court of Appeals, Division One: *Moore; State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319, *review denied*, 136 Wn.2d 1028 (1998), *abrogated on other grounds by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005). Division Two: *State v. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999); *State v. Brown*, 130 Wn. App. 767, 124 P.3d 663 (2005). Division Three: *State v. Wilson*, 176 Wn. App. 147, 307 P.3d 823 (2013), *review denied*, 179 Wn.2d 1012 (2014); *Nicholas*.

[9] Consider: *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963), holding Constitution guaranteed state defendant a right to counsel, overturning state courts and overruling its own prior opinion in *Betts v. Brady*, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942).

reasonable doubt, "it will be your duty to return a verdict of guilty." CP 29.

Appellant does not suggest that the jury may disregard or determine for itself "the law."[10] The jurors must follow the law as given by the court. But the court may only instruct accurately on the law. And the law never imposes a "duty to return a verdict of guilty" on the jury.

The essence of the right to a jury trial is the general verdict. This institution, protected throughout the ages, embodies the right of the jury to acquit. The Constitution protects this general verdict.[11] The law protects the jury's power to acquit in the Constitutional right to a jury

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[10] *Moore* and *Nicholas* in particular argue that the jury is required, and takes an oath, to follow the law. This circular reasoning begs the questions: Does the law ever require the jury to return a verdict of guilty? Appellant agrees the jury may not determine the law for itself without regard to the court's instructions. Nonetheless, it may always acquit. The law does not and cannot prohibit that verdict.

[11] *Sparf v. United States*, 156 U.S. 51, 15 S. Ct. 173, 39 L. Ed. 343 (1895); *Sofie v. Fibreboard Corp.*, 112 W.2d 636, 771 P.3d 711 (1989).

trial.[12] It is error for the court to tell the jury the law is otherwise.

The concluding instruction for a penalty enhancement special verdict requires precisely the same burden of proof--beyond a reasonable doubt--as the charge. Yet the pattern instructions propose proper language:

> **In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.** If you unanimously agree that the answer to the question is "no," or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no".

WPIC 160.00. *See* Instruction No. 21, CP 46. This language accurately tells the jury the law's constitutional threshold requirement for finding the enhancement, but in no way requires the jury to answer a certain way. This language is a proper statement of the law. It in no way tells the jury of any right of "jury nullification." Indeed, there has been no concern that this instruction has triggered a flood of jury special verdicts rejecting these enhancements.

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[12] U.S. Const., amends. 6, 14; Const., art. I, §§ 21, 22.

Applying this principle to the elements instruction, the equivalent language would be:

> In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proved beyond a reasonable doubt.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

a. *The Law Never Imposes a "Duty to Convict."*

> We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence ... If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.[13]

The history of the jury's right of acquittal to temper the power of the executive and legislature is well discussed in *Jones v. United States*, 526 U.S. 227, 244-48, 119 S. Ct. 1215, 143

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[13] *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969). *See also Horning v. District of Columbia*, 254 U.S. 135, 138, 41 S. Ct. 53, 65 L. Ed. 185 (1920) ("[T]he jury has the power to bring in a verdict in the teeth of both law and facts.").

L. Ed. 2d 311 (1999). Despite "countervailing measures to diminish the juries' power,"

> the denouement of the restrictive efforts left the juries in control ... over the ultimate verdict, applying law to fact .... That this history had to be in the minds of the Framers is beyond cavil. ... Americans of the period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion.

Id., 526 U.S. at 246-48. The Sixth Amendment incorporates this understanding in the right to a jury trial. *Id.* If a court improperly withdraws even a particular issue from the consideration of the jury, it denies the defendant the right to jury trial.[14]

Our courts similarly have recognized that a jury always has the option to acquit. A judge cannot direct a verdict for the State because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power."[15]

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[14] *United States v. Gaudin*, 515 U.S. 506, 510-11, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration).

[15] *State v. Primrose*, 32 Wn. App. 1, 4, 645 P.2d 716 (1982). *See also State v. Salazar*, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as

This State's Constitution guarantees an even greater protection of the right to a jury trial than the United States Constitution. The founders of our state constitution not only granted the right to a jury trial, Const., art. I, § 22; they expressly declared it "shall remain inviolate." Const. art. I, § 21.

> The term "inviolate" connotes deserving of the highest protection. ... Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assault to its essential guarantees.

Sofie v. Fibreboard Corp., 112 Wn.2d at 656. The Constitution, article 1, section 21 "preserves the right [to jury trial] as it existed in the territory at the time of its adoption." *Pasco v. Mace*, 98 Wn.2d 87, 94-95, 653 P.2d 618 (1982); *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910).

If the law gives the jury the unreviewable power to acquit, it is inaccurate for the court to tell the jury it has a duty to convict. An

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basis for upholding admission of evidence).

instruction that says it has such a duty directs a verdict. *Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993).

A "duty to return a verdict of guilty" further limits the jury's consideration to those "elements" listed in the "to convict" instruction. It prohibits the jury from considering any separate considerations in other instructions. In this case, it prevented the jury from considering the right to defend oneself, another, or one's property because those elements were not included in Instruction No. 5 -- even though the court included a paragraph describing defense of self or others in Instruction No. 13. CP 29, 37.

The effect of this language was evident in the State's closing argument: Referring the jury to Instruction No. 5, the prosecutor argued it contained two elements. RP 1061. That argument accurately conveyed the court's instructions. Yet it was an incorrect statement of the law.

The problem also was reflected in a jury venire member's comments during voir dire. The juror had served on an earlier prosecution for

> a small gambling case, a couple of persons in a bar betting and were

> arrested and we on the juror [sic] said "hey, we have all done that", but by law he was guilty and we had to vote him guilty.

The juror noted it was "not fair," but what the law required. RP 171. Yet the jury's power provides a check and balance on the prosecutor's discretion.

It was reversible error for the court to instruct the jury it had a duty to return a verdict of guilty.

b. *Recent Decisions Do Not Resolve This Issue.*

In *Nicholas*, the court cited *Sparf v. United States*, *supra*, to hold that the jury must follow the law. In *Sparf*, the United States Supreme Court decided 5-4 that the court could preclude a jury from considering a lesser included offense when the law did not permit it. The analysis turned on whether the jury had the right to determine the law as well as the facts; and the majority held the court must determine the law. Nonetheless, the Court never suggested the jury could not return a verdict of not guilty. Although the trial court could determine there was no evidence to support a conviction of manslaughter on a charge of murder,

yet it could not remove from the jury's general verdict its option of acquittal.[16]

Rather than preserve the jury's power "inviolate," and contrary to the warning of *Jones, supra*, *Nicholas* suggests our history justifies erosion of that power. *Nicholas* at 11-12.

Nicholas cites regrettable examples of acquittals--the Emmett Till and Medgar Evers murders--and the controversy over O.J. Simpson's acquittal. Yet these outcomes may reflect our society's racist history and divide more than a general lawlessness.[17]

Prosecutorial discretion and mandatory sentences have imprisoned and disenfranchised

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[16] "[A] general verdict of guilty or not guilty, of necessity, decided every question before them which involved a joint consideration of law and fact; not that the jury could ignore the directions of the court, and take the law into their own hands." *Id.*, 156 U.S. at 69.

[17] After the 14th Amendment, most juries in the South remained all-white. Abramson, Jeffrey, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 109 (1994); Bond, James E., NO EASY WALK TO FREEDOM, RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 241 (1997) (finding deep racism in Georgia and describing historical news accounts that predicted Whites would rather avoid jury cases that would be decided by a mixed jury); Schmidt, Benno C., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401 (1983).

minorities in vastly disproportionate numbers.[18] The prosecutions of Dr. Jack Kevorkian, who assisted dozens of terminally ill people to end their lives, did not "engender anarchy." *Nicholas*, Slip Op. at 14. Rather they conveyed the jury's belief, representing the community, that in those individual cases, the prosecutions were unjust.

The ability to elect judges and prosecutors does not dispense with the right to a jury trial or the need for the general verdict. *Nicholas*, Slip Op. at 12. The right to a jury trial empowers the jury on a case-by-case basis to decide whether its government is functioning in a just manner. One erroneous prosecution may not require ouster at election time. The jury is an integral part of the justice system. It has the responsibility, and the power, to do justice, one case at a time. It is not merely a rubber stamp to verify a prosecutor's goals, or the judge's perceptions.

The local community may not approve of a prosecutor choosing to send an elderly man to prison for three years for believing he had the

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[18] Alexander, Michelle, THE NEW JIM CROW (2010).

right to defend himself, his wife, and his property far from city resources. The jury is the community's representative in this system.

The trial court's use of this instruction, particularly without including the absence of self-defense, defense of others, defense of property, and general criminal intent, requires reversal of this conviction.

D. CONCLUSION

Appellant respectfully asks this Court to reverse his conviction and remand his case for a new trial because of the improper jury instruction. He asks that it remand for a new sentencing hearing at which the sentencing court is permitted to consider whether his age and other personal characteristics support an exceptional sentence below the 36 months imposed for the firearm enhancement.

DATED this 7th day of February, 2015.

Respectfully submitted,

STEVEN KAYSER
Appellant

ALEXANDRA FAST declares:

On this date I caused a copy of this document to be served on the following entities by depositing them in the United State Mail Service, postage prepaid, address as follows:

Kimberly Anne Thulin
Whatcom County Superior Court
311 Grand Avenue, Suite 201
Bellingham, WA 98225

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

2-23-2015-SEATTLE, WA
Date and Place

Alex Fast
ALEXANDRA FAST