COA NO. 71518-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

92836-3

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Steven Kayser, defendant below, petitions the Court to review the issues listed below.

B. COURT OF APPEALS OPINION

Mr. Kayser seeks review of the unpublished opinion in *State v. Kayser*, COA No. 71518-6-I (Slip Op., Dec. 21, 2015). App. A. The Court of Appeals denied Mr. Kayser's motion for reconsideration (Feb. 22, 2016). App. B.

C. ISSUES PRESENTED FOR REVIEW

1. Does defense of property require proof that a trespasser acted with actual malice, or merely that the person defending his property reasonably perceived the trespass was malicious?

2. Did the incorrect standard for defense of property erroneously lead the Court of Appeals to deny the claim of ineffective assistance of counsel?

3. Does the Eighth Amendment or the separation of powers doctrine grant the sentencing court discretion to consider an offender's advanced age and meritorious life to reduce a three-year firearm sentence enhancement?

D. STATEMENT OF THE CASE

Steven Kayser is an inventor. Now 71 years old, he worked full-time from age nine. He served in the Air Force. He holds degrees in accounting, business and taxation. As a forensic accountant he was a cooperating witness with the FBI and United States Attorney on criminal fraud matters. His work resulted in death threats. RP 814-21.

Mr. Kayser owns many patents, trademarks, copyrights and trade secrets. Some of his products have been counterfeited, resulting in litigation. RP 818-20, 822.

In 2006 Mr. Kayser moved to Whatcom County. His home has a barn, which he uses as an office and warehouse for his inventions. The property has a large gate with prominent no-trespassing signs. Exs. 71-77. The barn contains trade secrets and inventions. It is locked at all times. Plywood covers windows and doors so people cannot see in. His office is marked at the end nearest the house. RP 819-20. In 2007, Mr. Kayser married Gloria Young. RP 744-49.

In late 2009-early 2010, Mr. Kayser referred a fraud matter to the federal government. He anticipated retaliation. RP 821-22.

On February 18, 2010, Ms. Young saw a strange car parked on their property near the road. It hadn't pulled up to the front of the warehouse or the house, as most people did. RP 781-91, 753-55, 308, 323; Exs. 6, 11, 14, 22, 32. A burly man with long hair and unkempt clothes went up to the warehouse. He looked into a boarded window. He tried the handle on a locked door. Then he walked around the building and out of sight, to an area where there was only a propane tank. RP 753-55, 781-85, 308-09, 327, 355, 364.

Ms. Young quickly locked the door and phoned Mr. Kayser in his office. She told him there was a large man snooping around, looking into boarded windows, trying to jimmy a locked door. Ms. Young was very scared. RP 757-58, 771-72, 792-98.

Ms. Young saw the man walk towards Mr. Kayser's office. She stepped outside and walked slowly toward him to distract him. She was much

smaller than he was. RP 308-09.[1] She was scared of him, but shouted, "Who are you, what do you want?" RP 759. The man didn't answer. RP 332.

The man walked toward her, calling, "Are you Mrs. Kayser?" She said yes, her name was Gloria Young. He handed her papers. Without her glasses, she couldn't read them. She asked what they were. She saw he had something shiny in his hand. RP 760-61, 799-801, 248-62, 307, 337-39. The man, later identified as process server Mark Adams, agreed his behavior could have scared a 75-year-old woman. RP 332-34.

Mr. Kayser came out of his office, walked toward the house, and was shocked to see Ms. Young outside. About two feet from her was a big man who looked like a biker, hair blowing in the breeze. Mr. Kayser didn't understand why this man was so close to his wife. RP 824-25.

Mr. Kayser called out, "Can I help you?" The man did not respond. RP 340-41. The man asked if he was Steven Kayser. Mr. Kayser responded, "Yes, Steven Kayser. Can I help you?" The man handed

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[1] Gloria Young was 5' tall and 75 years old. Mr. Kayser was 5'5". RP 235.

him papers. Mr. Kayser, sensing something was wrong, grabbed the papers, never taking his eyes off the man. RP 825-28, 262-66, 341-42.

The man took several steps back toward Ms. Young. As he reached into a metal container, Mr. Kayser immediately thought, "Gun, gun, gun." RP 763-64. He said loudly, "You've got five seconds to get off the property." RP 828, 267-68, 334-35, 342, 738. The man didn't move. Mr. Kayser repeated his warning. The man still did not move or say anything. RP 828-29, 763-65.

Mr. Kayser quickly ran into his office and got his shotgun. He ran back up the steps to where the man still stood. Mr. Kayser again said he had five seconds to get off the property, and started counting. RP 829.

Mr. Kayser was very frightened. He saw Ms. Young; he thought of her high blood pressure. Mr. Kayser counted again. When the man did nothing, he shot the gun up into the air. RP 271.

Mr. Kayser repeated his warning and counted again. After five, he shot in the air again. Now the man moved: he walked slowly on the gravel. RP 765-67, 808-09. At his car near the road, the man

looked back. Mr. Kayser said again, "I'm counting to five." The man got into the car and made a motion toward the windshield with something in his hand. Again, Mr. Kayser was afraid he had a gun. RP 832-35.

Mr. Kayser fired a third shot into the air. RP 835-36. Mr. Kayser wanted the man off his property and away from his wife. RP 870, 888, 894-95. He believed the man was trespassing and threatening them. RP 875. The man drove off. Mr. Kayser closed the gate to his property. RP 858-59.

1. SELF-DEFENSE AND DEFENSE OF PROPERTY

The defense theory was that Mr. Kayser acted in defense of his wife, himself, and his property. Defense counsel described Mr. Kayser's fears and his goal for Mr. Adams to "leave my property" in opening statement. RP 239. Mr. Adams did not identify himself or his purpose when he went on the property. RP 260-61. Deputy King admitted he would be alarmed if a stranger came onto his property, was snooping around, and didn't come to the door. RP 485-86. The defense established if a process server remains without permission after completing service, it is a trespass. RP 490.

2. JURY INSTRUCTIONS AND VERDICT

The defense proposed a lawful use of force instruction that included self-defense, defense of others, and defense of property, and instructions defining trespasser. CP 100, 105-06. When the State requested a separate instruction defining "malicious," defense counsel withdrew the proposed paragraph on defense of property. The jury was then left with only self-defense and defense of another. The State argued Mr. Kayser had no reasonable fear of injury. Defense counsel again referred to defense of property in closing. RP 1100-01.

After deliberating roughly one full day the jury found Mr. Kayser guilty of second degree assault while armed with a firearm. CP 70-71, 5-6.

3. SENTENCING

Mr. Kayser has lived his life crime-free. RP 1129. In addition to assisting law enforcement much of his life, he has proven himself generous, often helping others in need. He is extremely devoted to his wife. CP 117-90, 194-205. Even the

State recommended a sentence at the bottom of the standard range. RP 1134; CP 206-08.[2]

The defense moved for an exceptional sentence below the mandatory 36-month firearm enhancement. It argued the Constitution required the court to consider the characteristics of the person before it for sentencing, including his age, his good character, and his genuine belief that he needed to protect himself, his wife and his property against an unidentified trespasser. RP 1133-34; CP 194-205. The Court noted its frustration with the mandatory sentence that "may not be what the Court would have chose to do," but concluded it was bound. The judge commented she would watch the Court of Appeals decision with interest. RP 1138-40. She imposed a sentence at the bottom of the standard range, three months, plus the enhancement for a total of 39 months in prison, CP 10-19 and released Mr. Kayser pending appeal. CP 191.

4. COURT OF APPEALS OPINION

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[2] Pretrial, the State offered to dismiss the firearm enhancement and reduce the charge to three misdemeanors of reckless endangerment with 12 months probation and an anger management class. Mr. Kayser declined to plead to any crime. CP 198.

The Court of Appeals reversed Mr. Kayser's conviction for the erroneous admission of evidence under ER 404(b). It continued to address remaining issues, however, that might arise on retrial.

The Court rejected appellant's claim of ineffective assistance of counsel, U.S. Const., amends. 6, 14, for withdrawing the defense of property theory when the State proposed an additional instruction defining "malicious."

"The defense of property is available to justify the use of force only if the trespass is "malicious'" ... . Slip Op. at 9-10, citing RCW 9A.16.020. The Court of Appeals concluded:

> ... It was a legitimate tactical decision for counsel to decide against pursuing **a defense that would require the jury to find that Adams acted with malice. There was little or no evidence that Adams came on Kayser's property with a wish to annoy or injure anyone.** ...
>
> Instead, counsel argued self-defense and defense of another. **That defense theory did not depend on Adams' actual intent, but instead focused on what Kayser reasonably believed.** It was more consistent with Kayser's testimony that Adams' conduct made him afraid for himself and more particularly for his wife.

Slip Op. at 10 (emphases added).

The Court of Appeals also affirmed appellant's sentence, concluding the Constitution only allowed

a juvenile to overcome mandatory sentences. Statement of Add'l Grounds at 1-14; Slip Op. at 12.

E. ARGUMENT

1. THE COURT OF APPEALS ERRONEOUSLY HELD THAT "MALICIOUS TRESPASS" FOR PURPOSES OF DEFENSE OF PROPERTY WAS TO BE JUDGED OBJECTIVELY AND THEREFORE INCORRECTLY HELD THAT DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL, VIOLATING MR. KAYSER'S DUE PROCESS RIGHTS AND CREATING INCORRECT LAW OF THE CASE FOR RETRIAL. RAP 13.4(b)(1), (2), (3).

The lawful use of force -- to defend oneself, another, or one's property -- is defined in the same paragraph of the same statute.

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> ...
>
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or **a malicious trespass, or other malicious interference with real or personal property** lawfully in his or her possession, in case the force is not more than is necessary; ....

RCW 9A.16.020 (emphasis added).

a. *Malicious Trespass, for Purposes of Defense of Property, Turns on the Defendant's Reasonable Belief, Not A Trespasser's Actual Intent.*

This Court recognized that "malice" for defense of property is based on the defendant's reasonable belief.

> Here, the trial court correctly instructed the jury that O'Hara's actions were justified if he was acting in self-defense of his person or his property. In particular, the court instructed the jury that **if O'Hara reasonably believed Loree was maliciously trespassing or maliciously interfering with O'Hara's property, he was justified in using reasonable force.**

State v. O'Hara, 167 Wn.2d 91, 106, 217 P.3d 756 (2009) (emphasis added). For all cases of self-defense or defense of others, the same standard is applied: **whether the defendant reasonably believed** he needed to use force.[3]

> To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable. ... Evidence of self-defense is viewed "from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees."

State v. Graves, 97 Wn. App. 55, 62, 982 P.2d 627 (1999), quoting *State v. Janes*, 121 Wn.2d 220, 238,

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[3] Defense of property, unlike self-defense, does not require a showing that the defendant believes he is about to be injured. *State v. Bland*, 128 Wn. App. 511, 514, 116 P.3d 428 (2005).

850 P.2d 495, 22 A.L.R.5th 921 (1993).[4] The same standard applies to defense of others:

> An individual who acts in defense of another person, reasonably believing him to be the innocent party and in danger, is justified in using force necessary to protect that person even if, in fact, the party whom he is defending was the aggressor. If properly requested by the defense, a "defense of others" instruction must be given whenever there is evidence from which the jury could conclude that, under the circumstances, the actor's apprehension of danger and use of force were reasonable.

State v. Bernardy, 25 Wn. app. 146, 168, 605 P.2d 791 (1980), *citing State v. Penn*, 89 Wn.2d 63, 568 P.2d 797 (1977); *State v. Fischer*, 23 Wn. App. 756, 598 P.2d 642 (1979).

Nothing about the malicious trespass provision suggests it should be interpreted differently.

b. *The Facts of the Case Support a Defense of Property Instruction.*

i. *Mr. Adams trespassed by remaining on the property.*

> A person "enters or remains unlawfully" in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

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[4] *Accord*: *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977); *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984).

RCW 9A.52.010(5). Although a process server may be licensed to enter onto property to serve process,[5] the law does not permit him to remain after he has completed service and been ordered off the property. *State v. Redwine*, 72 Wn. App. 625, 865 P.2d 552, *review denied*, 124 Wn.2d 1012 (1994). Mr. Kayser was entitled to defend against trespass when Mr. Adams did not leave his property as ordered. Once he was told to leave and did not leave, Mr. Adams was trespassing.

ii. *The Defense presented evidence of malice.*

As in *Redwine*, Mr. Adams's refusal to leave after being told to go warranted an instruction on defense of property. *Redwine*, 72 Wn. App. at 631.

> (12) "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty; ... .

RCW 9A.04.110(12).

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[5] RCW 9A.52.090(4) provides serving legal process is a legal **defense** to a criminal **prosecution** for criminal trespass; it does not specifically license every process server to enter property. App. D. This case did not involve a prosecution of Mr. Adams.

Mr. Adams came on the property without driving up where visitors come to the office or residence. He looked into windows, tried locked doors, and went behind buildings. Even when confronted and asked who he was, he did not identify himself by name or by purpose. Even before he was ordered to leave, his conduct was inappropriate.

As in *Redwine*, Mr. Kayser believed Mr. Adams was reaching into his case for a gun. Mr. Kayser also believed Mr. Adams was standing too near his wife and frightening her. Slip Op. at 2. Thus, if "malice" is separately required to defend against trespass, Mr. Adams' furtive conduct, and Mr. Kayser's belief that Mr. Adams was frightening his wife and reaching for a gun was evidence that his failure to leave was malicious.

iii. *The defense presented evidence of subjective belief in Mr. Adams' malice.*

The facts of *State v. Redwine*, *supra*, nearly mirror this case. Hines came onto Redwine's property to serve process. Redwine ordered him off the property. Hines claimed Redwine kicked him as he went to his car. Hines sat in his car on the property, making notes. Redwine saw Hines reach

into a case which appeared to contain a pistol. Redwine got his shotgun. Hines then left.

Redwine was convicted of assault in the fourth degree for kicking, and assault in the second degree for the shotgun. The trial court instructed on self-defense and defense of property. The State argued on appeal that Redwine had not presented sufficient evidence to warrant self-defense or defense of property instructions. The Court of Appeals rejected this argument.[6]

> As to the fourth degree assault, **Mr. Redwine produced evidence Mr. Hines remained on the property, refusing to leave after serving the papers.** As to the second degree assault, Mr. Redwine presented evidence that he believed Mr. Hines was reaching for a pistol. **We agree this evidence is sufficient to require an instruction on lawful use of force on both charges.**

Id. at 631 (emphases added).

Here the Court of Appeals erroneously applied an objective standard for defense of property. This error led it to mistakenly deny Mr. Kayser's claim for ineffective assistance of counsel.[7] The

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[6] The Court of Appeals reversed on other grounds.

[7] U.S. Const., amends. 6, 14; Const., art. I, § 22. *See* App. D.

subjective standard required less evidence than self-defense, and so it was not a reasonable strategy to abandon defense of property in favor of self-defense.

The Court of Appeals opinion conflicts with the cited decisions of this Court and the Court of Appeals and presents a significant constitutional question this Court should decide. RAP 13.4(b)(1)-(3).

2. THE MANDATORY THREE-YEAR SENTENCE "ENHANCEMENT" AS APPLIED IN THIS CASE VIOLATES THE EIGHTH AMENDMENT AND PRESENTS A SIGNIFICANT QUESTION OF PUBLIC IMPORTANCE. RAP 13.4(b)(3), (4).

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) (emphasis added).

> "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 life sentences for offenders under age 18. It held the Constitution guarantees a court 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.[8]

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[8] *See also*: *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 259 (2015) (sentencing court may give exceptional sentence below the range based on reduced culpability because of age and accompanying circumstances); *State v. Ronquillo*, 190 Wn. App. 765, 775, 361 P.3d 779 (2015) (under *Miller*, a

b. *The SRA Unconstitutionally Removes the Court's Discretion to Consider 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 Act removes an individual's personal characteristics from consideration, RCW 9.94A.010, RCW 9.94A.340; even for mitigating purposes, RCW 9.94A.535.

This Court[9] has interpreted the SRA to prohibit using personal characteristics for exceptional sentences downward. Criticizing the majority, Justice Madsen pointed out:

> It is the majority of this court, not the SRA, that has closed the door on exercise

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sentencer must consider offender's age and attendant characteristics before imposing a de facto life sentence -- to age 68).

[9] *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); *State v. Freitag*, 127 Wn.2d 141, 896 P.3d 1254 (1995) (lack of prior police contacts and history of concern for others not a valid basis for a departure); *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 (18) not valid basis for departure); *but see O'Dell, supra* (age and attendant characteristics may reduce culpability for crime).

> 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).

Mr. Kayser's sentence included a mandatory three-year "enhancement" for a firearm. RCW 9.94A.533(3). Under this provision, a sentencing court must consider an offender's "criminal history," but not the lack thereof, nor his deeds over a long life. The court is to provide "punishment which is just," and "make frugal use of the state's ... resources," RCW 9.94A.010, but in doing so, cannot consider risk of reoffending, risk to the public, or other factors relating to a just sentence.[10] It is duty-bound to impose absurd sentences, such as sending an elderly man to prison for three years for a firearm.

Paradoxically, the personal circumstances of a *victim*, such as vulnerability due to advanced

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[10] 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.

age,[11] may be considered to determine a sentence, but not the defendant's analogous circumstances. Furthermore, sentencing a man in his 70s to more than three years in prison is a de facto life sentence. It requires this Court's consideration under *Ronquillo, supra*.

This SRA sentencing scheme poses too great a risk of disproportionate punishment for the Eighth Amendment. *Miller v. Alabama, supra*. This Court should review whether the trial court has 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.*

The Legislature may enact sentencing statutes, but when they remove discretion from the courts to do justice in individual cases, 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,

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[11] *State v. Clinton*, 48 Wn. App. 671, 676, 741 P.2d 52 (1987) (67-year-old victim particularly vulnerable due to age).

> 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.
>
> ...
>
> 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.

Washington State Bar Ass'n v. State, 125 Wn.2d 901, 906, 907, 890 P.2d 1047 (1995). A traditional role for the judiciary is to apply the law to the particular individuals before it for sentencing. Although guidelines may eliminate unfair sentencing disparities,

> 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.[12]

The ABA Standards instruct sentencing courts to consider an individual's personal characteristics when determining whether mitigating circumstances justify a lower sentence.

> 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(a) (1994).

This Court upheld the SRA 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). But the hundreds of amendments since that decision, such as the

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[12] *Koon v. United States*, 518 U.S. 81, 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) (affirming exceptionally low sentences).

mandatory firearm enhancement, completely remove judicial discretion in sentencing individuals.

The need for individualized sentencing is as compelling for senior citizens who have led an exemplary life as for juveniles who have not yet had the opportunity to mature. This charge arises from an honest misunderstanding: the Kaysers did not perceive Mr. Adams as a process server, in part because he did not act as most process servers act. Mr. Kayser's genuine fear to protect his wife, himself, or his property reduced his culpability. RCW 9.94A.535(1)(c). 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.

The SRA now usurps the judiciary's power and gives it to the executive, who had the discretion to seek the firearm enhancement.

This is precisely the reason we have courts -- to recognize compelling distinctions among cases, especially ones involving dramatically less culpability. The judiciary must retain the

discretion to consider the individuals before them to impose a sentence that is "just."

This issue is a significant issue of constitutional law and public importance that this Court should decide. RAP 13.4(b)(3), (4).

F. CONCLUSION

This Court should grant review, clarify the legal standard for defense of property, and consider whether the Eighth Amendment permits a sentencing court to consider an offender's advanced age and attendant circumstances before imposing a mandatory sentence.

DATED this 29th day of February, 2016.

LENELL NUSSBAUM, WSBA No. 11140
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APPENDIX A

COURT OF APPEALS SLIP OPINION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. STEVEN LEO KAYSER, Appellant.	)	No. 71518-6-I DIVISION ONE UNPUBLISHED OPINION FILED: December 21, 2015

BECKER, J. — Steven Kayser appeals his conviction for assaulting a process server. An erroneous ruling admitting character evidence was sufficiently prejudicial to require a new trial.

FACTS

Steven Kayser, a man in his late sixties at the time of the incident in question, became an inventor after working much of his life as an accountant. Kayser protects his inventions as trade secrets. He has occasionally been involved in litigation concerning them.

Kayser moved to rural Whatcom County in 2006. A driveway marked by a large "no trespassing" sign leads into his property. The first building encountered is a long warehouse where Kayser maintains his office and stores documents. Kayser keeps the windows of this building covered. Kayser's residence is at the end of the driveway.

In February 2010, process server Mark Adams arrived at the Kayser property with a civil summons and complaint to serve on Kayser and his wife. It was about 4:00 p.m. Adams parked his car and walked up to the warehouse. He knocked on one of the doors and tried to look through a window. A phone in Adams' car rang, so he returned to the car momentarily. He then went back to the warehouse and started knocking on a different door.

Kayser's wife, Gloria Young, saw Adams from a window and thought he was "snooping." Young telephoned Kayser in the warehouse to alert him. She then went outside and was approached by Adams. In response to questions, Young told Adams that she lived there and that she was Kayser's wife. Adams handed her some papers from a metal box. Kayser came out of the warehouse and said, "Can I help you?" Adams responded by asking him if he was Steven Kayser. Kayser answered "yes." Adams did not identify himself. He handed documents to Kayser and asked if he would sign for them.

Kayser testified that he perceived Adams as a trespasser. He felt Adams, a large man with long hair, was frightening Young, who is some years older than Kayser, small and a little frail. Kayser also said that when he saw Adams reaching into the metal box, he feared it might contain a gun. In an angry voice, Kayser told Adams he had five seconds to get off the property. Kayser threatened to get a gun.

Adams testified that he immediately began to walk back to his car. Kayser, on the other hand, testified that Adams stayed where he was. Kayser hurried back to his office, came out with a shotgun, and fired a shot. Kayser kept

counting to five and fired two more shots—one after Adams reached his car and one as Adams backed out of the driveway.

Three years later, Kayser was tried and convicted of assault in the second degree while armed with a deadly weapon. The jury answered "yes" to the allegation that the assault occurred with a firearm. Kayser was sentenced to three months for the assault and three years for the firearm enhancement. Kayser appeals.

SUFFICIENCY OF THE EVIDENCE

Kayser first challenges the sufficiency of the evidence to prove the crime charged. When a conviction must be reversed for insufficiency of the evidence, the case must be dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). We therefore address this issue first.

In considering the sufficiency of the evidence, this court reviews the record in the light most favorable to the State to determine whether a rational jury could have found the essential elements of the charge beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

At trial, Adams testified that all the shots were fired into the air, although the second shot was at a lower angle than the others. Kayser argues that Adams' trial testimony supports, at most, the misdemeanor charge of unlawful display of a firearm.

In a statement to police officers right after the incident, Adams said he thought the second shot was fired toward him and he was surprised it did not hit him or his car. The jury could have believed that what Adams told police at the

time of the incident was more credible than his memory three years later. And in any event, the State was not required to prove that Kayser shot directly at Adams. The question presented to the jury was whether Kayser used unlawful force with the intent of putting Adams in imminent fear of bodily injury. The element of intent for the felony as charged is in the definition of assault, stated as follows in instruction 7:

INSTRUCTION NO. 7

> An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict harm.

Adams testified that Kayser threatened to shoot him if he was not off the property by the count of five. He recalled that after the first shot, he ran to his car and ducked under the dashboard while fumbling with his keys. He was surprised that the second shot did not hit either him or his car. This evidence was sufficient to prove that Kayser intended his shots to create in Adams apprehension and fear of bodily injury and that Adams did in fact have a reasonable apprehension and imminent fear of bodily injury.

Kayser defended on the basis that the force he used was lawful because he was acting in defense of himself and his wife. Where self-defense or defense of another is claimed, the absence of self-defense becomes another element the State must prove beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983). Kayser contends the State did not present sufficient evidence to show the absence of self-defense.

Adams testified that he handed papers to Kayser to sign and asked Kayser for his signature. According to Adams, Kayser responded by proclaiming that Adams would be shot if he were not off the property in five seconds. Adams testified that he immediately began to walk back towards his car. A reasonable jury could conclude from this testimony that Adams posed no threat to Kayser or Young. This was sufficient evidence to carry the State's burden to prove absence of self-defense.

We reject Kayser's challenge to the sufficiency of the evidence.

ER 404(b) – EVIDENCE OF INTENT

We next address the alleged error in admitting evidence under ER 404(b).

During a search of Kayser's office, the police photographed a pencil sketch of what looked like a stop sign. The sketch was found taped to an interior window shutter, facing inward. Below the stop sign diagram were handwritten sentences indicating entry was forbidden without the owner's permission. "This is a very dangerous place" was clearly written on the bottom. On a sticky note attached to the sketch, the phrase "Armed Response" was penciled in.

The State offered the photograph as an exhibit. Kayser objected on ER 404(b) grounds.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). Evidence of a prior act may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). Such evidence must be relevant to

a material issue, and its probative value must outweigh its prejudicial effect. State v. Everybodytalksabout, 145 Wn.2d 456, 465-66, 39 P.3d 294 (2002).

To determine whether evidence is admissible under ER 404(b), trial courts must engage in a three-part analysis. First, the court must identify the purpose for which the evidence will be admitted. Second, the evidence must be materially relevant. Third, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the jury. In doubtful cases, the scale should be tipped in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999).

The trial court admitted the exhibit as probative of Kayser's intent and found that it was not unduly prejudicial. After a deputy testified and described the sketch, Kayser moved for a mistrial. The motion was denied.

On appeal, Kayser argues the admission of the evidence violated ER 404(b). This court reviews decisions under ER 404(b) for an abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

The State initially suggests that ER 404(b) does not apply because the challenged exhibit "does not constitute misconduct or a bad act." The idea that the rule applies only to prior bad acts or misconduct is a misconception. Everybodytalksabout, 145 Wn.2d at 466. The rule prohibits the use of any kind of "other" act as propensity evidence.

"If the State offers evidence of a prior act to demonstrate intent, there must be a logical theory, *other than propensity*, demonstrating how the prior act

connects to the intent required to commit the charged offense." Wade, 98 Wn. App. at 334. Here, to convict Kayser of the charged offense, the State had to prove that he fired the shots with the intent to create in Adams apprehension and fear of bodily injury. The State theorizes that the presence of the sketch inside Kayser's office "was an indication from Kayser that he intended to deal with uninvited trespassers with an armed response." This theory does not logically connect the sketch with Kayser's intent when he fired the shots on the day in question. There was no evidence that Kayser himself made the sketch, what its purpose was, or how long it had been hanging in his office.

"Use of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant. To use prior acts for a nonpropensity based theory, there must be some similarity among the facts of the acts themselves." Wade, 98 Wn. App. at 335. The State did not identify for the trial court any similarity between Kayser's act of firing shots outside the office and his "other" act of keeping the sketch inside the office. When the issue first arose, the prosecutor said, "I think the jury can make of it what they will." What the jury was then allowed to "make of it" was that Kayser had a propensity to use arms to scare off strangers. We conclude the trial court abused its discretion by admitting the sketch.

Errors under ER 404(b) require reversal only if the error, within reasonable probability, materially affected the outcome. The error is harmless "if the evidence is of minor significance compared to the overall evidence as a whole." Everybodytalksabout, 145 Wn.2d at 468-69.

The State argued that Kayser fired the shots because he was angry about being served papers. Kayser argued that he fired the shots with justification because he perceived Adams to be a trespasser who was menacing his wife and did not leave when asked. The exhibit enabled the State to argue that an "Armed Response" was Kayser's preplanned response to unwelcome visitors in general. Thus, the exhibit cast doubt on Kayser's claim that his use of force in this incident was lawful.

The trial court reasoned that the note was not "all that prejudicial" to Kayser because it simply reflected that he was a careful and private man, concerned about the confidentiality of his trade secrets and the safety of himself and his wife. The sketch was more than that. It included the statement "This is a very dangerous place" and the note "Armed Response." This material was prejudicial. It suggested that Kayser was a dangerous individual inclined to resort to firearms without legitimate reason.

Because Kayser's defense depended on the reasonableness of his claim of self-defense and defense of another, we cannot say with confidence that the challenged evidence had no material effect on the outcome of the trial. Kayser is entitled to a new trial.

We next address other issues raised by Kayser that may arise again on retrial.

DEFENSE OF PROPERTY

Defense counsel initially proposed an instruction on lawful force that included use of force to defend one's property. Just before the case went to the

jury, counsel withdrew that portion of the instruction. Kayser contends counsel's withdrawing the instruction on defense of property was deficient performance.

To establish ineffective assistance of counsel, Kayser must show that (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We presume counsel is effective, and the defendant must show there was no legitimate strategic or tactical reason for counsel's action. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Claims of ineffective assistance of counsel are reviewed on appeal de novo. Sutherby, 165 Wn.2d at 883.

Kayser contends there was no legitimate reason for trial counsel to abandon the defense of property instruction. He argues that if instructed on the defense of property, the jurors might have reasonably believed that he, a man in his late sixties and of small build, used reasonable force to eject a large stranger who he believed to be a trespasser.

Kayser correctly argues that a person who uses force to expel a trespasser will not necessarily incur criminal liability so long as the use of force is reasonable. RCW 9A.16.020. It is not necessary for the defendant in such a case to show that he feared for his own personal safety. State v. Bland, 128 Wn. App. 511, 516, 116 P.3d 428 (2005). "Although the use of deadly force is not justified to expel a mere nonviolent trespasser, under certain circumstances necessary force may include putting a trespasser in fear of physical harm."

Bland, 128 Wn. App. at 517. But defense of property is available to justify the use of force only if the trespass is "malicious":

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> . . . .
>
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, *or a malicious trespass*, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.020 (emphasis added).

Defense counsel withdrew the defense of property instruction when it became clear that an instruction would also be needed to define the word "malicious." The State proposed an instruction, modeled after RCW 9A.04.110(12), defining "malicious" in terms of "an evil intent, wish, or design to vex, annoy, or injure another person." It was a legitimate tactical decision for counsel to decide against pursuing a defense that would require the jury to find that Adams acted with malice. There was little or no evidence that Adams came on Kayser's property with a wish to annoy or injure anyone. Cf. Bland, 128 Wn. App. at 516 (trespasser was cursing and acting vexatiously).

Instead, counsel argued self-defense and defense of another. That defense theory did not depend on Adams' actual intent, but instead focused on what Kayser reasonably believed. It was more consistent with Kayser's testimony that Adams' conduct made him afraid for himself and more particularly for his wife.

We conclude Kayser has not shown that defense counsel's performance was deficient.

ADEQUACY OF JURY INSTRUCTIONS

Because the jury has the right to regard the to-convict instruction as a complete statement of the law, it should state all elements the State is required to prove. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Kayser contends that under this rule, the State's burden to prove the absence of self-defense belongs in the to-convict instruction.

A trial court does not commit reversible error when a to-convict instruction does not refer to the State's burden to prove the absence of self-defense, so long as that burden is made clear through a separate instruction. State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991); State v. Acosta, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984). That is what happened here. Instruction 5, the to-convict instruction, did not include the absence of self-defense as an element, but the State's burden to prove it was stated in instruction 13.

Kayser also contends the to-convict instruction should have instructed the jury to find that Kayser "intentionally" assaulted another "with the objective or purpose to accomplish a result that constitutes a crime." This language was set forth verbatim in a separate instruction, instruction 11. Kayser does not persuasively explain why it was constitutionally necessary to include the same language in the to-convict instruction, nor does he cite authority that would support such a holding.

DETECTIVE AT COUNSEL TABLE

At trial, the prosecutor sat at counsel table with Detective John Allgire. Allgire was expected to testify. Kayser moved to exclude Allgire from the

courtroom until the time of his testimony. The court denied the motion. Kayser assigns error to this ruling. The relevant rule of evidence is ER 615. The rule expressly permits a party such as the State, which is "not a natural person," to designate a representative to sit in the courtroom and hear the testimony of other witnesses:

> At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

ER 615. The trial court properly applied the rule.

STATEMENT OF ADDITIONAL GROUNDS

Kayser filed a statement of additional grounds for review under RAP 10.10(a).

Because Kayser had no criminal history, the standard range for his offense was three to nine months. By statute, a mandatory three-year term must be added when there has been a conviction for assault with a firearm. RCW 9.94A.533(3)(b). The trial court imposed a base sentence of three months and then added three years for the enhancement. Kayser contends a court has discretion to impose a shorter sentence in consideration of a person's age. He relies on Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). But the holding of Miller pertains to juveniles. Kayser is not a juvenile. This argument does not provide an additional ground for review.

Instruction 5 informed the jury that it had a "duty" to convict Kayser if it believed the State had proved all elements of second degree assault. This court has previously rejected the argument that such an instruction is erroneous. State v. Meggyesy, 90 Wn. App. 693, 697-705, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 162 n.1, 110 P.3d 188 (2005). We see no basis for reviewing it again.

Reversed.

Becker, J.

WE CONCUR:

Leach, J.

Cox, J.

APPENDIX B

ORDER DENYING RECONSIDERATION

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

STATE OF WASHINGTON, Respondent, v. STEVEN LEO KAYSER, Appellant.	No. 71518-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Steven Kayser, has filed a motion for reconsideration of the opinion filed on December 21, 2015. Respondent, State of Washington, has filed an answer to appellant's motion. The court has determined that appellant's motion for reconsideration is denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 11th day of February, 2016.

FOR THE COURT:

Becker, J.

Judge

APPENDIX C

JURY INSTRUCTIONS

INSTRUCTION NO. 13

It is a defense to a charge of Assault in the Second Degree that the force used or attempted was lawful as defined in this instruction.

The use of or the attempt to use 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, or by someone lawfully aiding a person who he reasonably believes is about to be injured, in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 20-21, 37-38, amended by Supp. CP [Subno. 180].

The use of or the attempt to use force upon or toward the person of another is also lawful when used in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

CP 100 (paragraph removed from Instruction No. 13).

INSTRUCTION NO. 12

The law permits a person to enter upon private property in order to serve legal process (which includes any document required or allowed to be served upon persons or property), if the entry is reasonable and necessary for the service of process.

CP 36.

No. 17

A trespasser is a person that remains unlawfully in or upon premises of another.

CP 42.

No. 18

A person remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so remain.

CP 43.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and to have the Assistance of Counsel for his defence.

U.S. Const., amend. 6.

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend. 8.

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const., amend. 14.

No person shall be deprived of life, liberty, or property, without due process of law.

Const., art. 1, § 3.

In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, ... to have a speedy public trial by an impartial jury ... .

Const., art. 1, § 22.

RCW 9A.52.090. Criminal trespass -- Defenses.

In any prosecution under RCW 9A.52.070 [criminal trespass 1°] and 9A.52.080 [criminal trespass 2°], it is a defense that:

...

(4) The actor was attempting to serve legal process which includes any document required or allowed to be served upon persons or property, by any statute, rule, ordinance, regulation, or court order, excluding delivery by the mails of the United States. This defense applies only if the actor did not enter into a private residence or other building not open to the public and the entry onto the premises was reasonable and necessary for service of the legal process.

RCW 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.533. Adjustments to standard sentences

...

(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.535. Departures from the guidelines

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.

(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.340. Equal application

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.

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, as well as via email, address as follows:

Ms. Kimberly Anne Thulin
Whatcom County Prosecutor's Office
311 Grand Avenue, Suite 201
Bellingham, WA 98225

kthulin@co.whatcom.wa.us

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.

2·29·2016 - SEATTLE, WA
Date and Place

Alex Fast
ALEXANDRA FAST

LENELL NUSSBAUM
ATTORNEY AT LAW
2125 WESTERN AVENUE, SUITE 330
SEATTLE, WASHINGTON 98121
(206)728-0996

OFFICE RECEPTIONIST, CLERK

To: Alexandra Fast; Kimberly Thulin
Subject: RE: Kayser, Steven - COA No. 71518-6-I - Petition for Review

Received 2-29-16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Alexandra Fast [mailto:ahfast2@gmail.com]
Sent: Monday, February 29, 2016 11:32 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; Kimberly Thulin <kthulin@co.whatcom.wa.us>
Subject: Kayser, Steven - COA No. 71518-6-I - Petition for Review

Please accept for filing the attached "Petitioner's Motion to File Overlength Petition for Review" and "Petition for Review". A certificate of service is attached to both pleadings.

Alexandra Fast
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