

62926-3

62926-3

NO. 62926-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

SAMUEL RYAN,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

When Samuel Ryan tried to rob money from a store, he possessed one gun. Because he restrained four people present in the store by displaying his gun, he was convicted of one count of first degree robbery and three counts of first degree kidnapping based on the intent to commit first degree robbery. His display of the gun elevated the degree of the four charges for which he was convicted and also was the basis for four consecutive 60-month firearm enhancements. This sentence violated Ryan's right to be free from double jeopardy and his convictions for kidnapping when incidental to robbery must be dismissed for insufficient evidence of an independent offense.

Furthermore, even though there were several recognized grounds for seeking a sentence below the standard range, defense counsel told the court its hands were "tied" and it could not impose a sentence less than the standard range. The court then increased Ryan's sentence based on its own factual determination that the closely related kidnapping offenses were "separate and distinct," in violation of Ryan's right to due process of law and fair trial by jury.

B. ASSIGNMENTS OF ERROR.

1. Ryan's convictions for first degree robbery and kidnapping predicated on the commission of first degree robbery violate the double jeopardy prohibitions of the state and federal constitutions.

2. Ryan's convictions for first degree kidnapping based on conduct incidental to a robbery must be dismissed for insufficient evidence as required by the Fourteenth Amendment and Article I, section 3 of the Washington Constitution.

3. The court's imposition of multiple consecutive firearm enhancements for possession of a single firearm in a single incident violates double jeopardy and was predicated on an incorrect unit of prosecution.

4. Ryan was denied his right to effective assistance of counsel at sentencing by his attorney's failure to inform the court of the available grounds for an exceptional sentence.

5. The court violated Ryan's rights to due process of law and trial by jury by increasing his sentence based upon factual determinations that his convictions constituted "separate and distinct conduct" absent jury findings or proof beyond a reasonable

doubt, contrary to the Sixth and Fourteenth Amendments and Article I, sections 3 and 22 of the Washington Constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Double jeopardy prohibits multiple punishments for the same legal elements and factual circumstances based on the offenses as specifically charged and proven. Here, Ryan was convicted of first degree robbery and first degree kidnapping based on the single incident of using a gun while restraining people for the purpose of stealing property. Do these convictions violate double jeopardy under the particular facts of this case?

2. A robbery necessarily involves restraining a person to take or retain property, and in such circumstances, a kidnapping may be incidental to the robbery and may not stand as a separate offense. In the case at bar, Ryan's kidnapping convictions rest on acts inherent in and incidental to the robbery. Should the kidnapping convictions be dismissed based on the lack of sufficient, separate evidence establishing the kidnapping offenses?

3. The unit of prosecution defines the legislative intent for punishing certain acts for double jeopardy purposes. When Ryan was convicted of possessing a single firearm on one occasion used for a single purpose of committing a robbery, does the unit of

prosecution mandate a single punishment for possession of the firearm rather than four consecutive five-year terms, or 240 months, as punishment?

4. Based on the Supreme Court's grant of review in several cases, should this Court reconsider its ruling that double jeopardy does not bar multiple punishments for the same act of possessing a single firearm on a single occasion used to accomplish a single objective?

5. A criminal defendant receives ineffective assistance of counsel at sentencing when a reasonable attorney would know of established grounds for seeking a sentence less than the standard range and does not inform the court that it has the discretion to impose a lesser sentence. Ryan's attorney told the court its hands were tied and it could not impose a lower sentence. Did Ryan receive ineffective assistance of counsel when there were several available grounds for seeking an exceptional sentence below the standard range?

6. The Sixth and Fourteenth Amendments require that any factual determination used to increase an offender's sentence must be charged and proven to a jury beyond a reasonable doubt. Was Ryan denied his constitutional rights to due process and trial by jury

when the court made the factual determination that the kidnapping offenses amounted to “separate and distinct” criminal conduct and imposed an enhanced sentence on that basis?

D. STATEMENT OF THE CASE.

In 2003, Samuel Ryan was convicted following a stipulated bench trial of one count of first degree robbery and three counts of first degree kidnapping. CP 24. The charges stemmed from an incident where he robbed an auto parts store at gunpoint and used duct tape to restrain the people present during the robbery. CP 1-9, 24.

Ryan successfully appealed from the initially imposed “three-strike” sentence of life without the possibility of parole. CP 27. On remand in 2005, the trial court found the kidnapping convictions were incidental to the robbery and they merged into the robbery under double jeopardy. CP 29; CP 39. The prosecution successfully appealed the merger of offenses at sentencing and this Court ordered a new sentencing hearing. CP 41.

In 2009, the sentencing court imposed mid-range standard range terms for all offenses of conviction, as well as four consecutive firearm enhancements. 1/23/09RP 12-13. The court counted the three first degree kidnapping convictions as separate

and distinct serious violent offenses and imposed consecutive terms, for a total of 447 months, or 37.25 years, incarceration. Id.

Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. RYAN'S CONVICTIONS FOR ROBBERY AND KIDNAPPING VIOLATE DOUBLE JEOPARDY

The state and federal double jeopardy clauses reject the imposition of multiple punishments from the same offense. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995); U.S. Const. amend. 5; Wash. Const. art. I, § 9. Double jeopardy is a constitutional issue that may be raised for the first time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000). Review is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Double jeopardy analysis requires looking at offenses not in the abstract, but as charged. United States v. Arlt, 252 F.3d 1032, 1038 (9<sup>th</sup> Cir. 2001) (citing Blockberger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). Because statutes routinely outline alternative routes to a violation, an as-charged

approach is vital in assessing offenses for federal double jeopardy purposes.

In Arlt, the defendant was charged under a general conspiracy statute. The court ruled that the “specific substantive offense” designated in the indictment was central to determining the elements to analyze for double jeopardy purposes. 252 F.3d at 1038. Similarly, a felony murder offense predicated on “killing in the course of a rape” must focus on those specific elements when reviewed under a double jeopardy claim. Whalen v. United States, 445 U.S. 684, 694-95, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Thus, it is not the statutory elements in abstract that dictate a double jeopardy claim, but the statutory elements at issue in a particular case.

Here, Ryan was charged with violating the first degree robbery and kidnapping statutes. CP 10-12. While it is certainly possible that a person could commit these offenses separately, double jeopardy analysis must be tethered to and focused upon the offenses as charged and proven. Absent a clear indication of contrary legislative intent, courts do not engage in contrived efforts to divine legislative intent when none is clearly established. Whalen, 445 U.S. at 692.

In the prosecution's earlier appeal from the trial court's sentence that merged the kidnapping offenses into the robbery, this Court summarily ruled that a kidnapping, even when incidental to a robbery, may never merge because kidnapping does not require a taking. CP 40-41 (citing State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005)). Ryan urges this Court to revisit that cursory analysis, which arose in the context of a State sentencing appeal and not as part of a broader double jeopardy challenge, because it rests on an incorrect understanding of double jeopardy analysis as dictated by the federal courts.

Ryan's first degree robbery conviction rested on his display and threatened use of a firearm. CP 10; CP 39. Likewise, his kidnapping convictions rested on his intent to facilitate the commission of first degree robbery. CP 11-12. The use of a firearm elevated both offenses: the robbery would not be a first degree robbery without it and the kidnapping would not be a first degree kidnapping without the intent to commit first degree robbery. CP 10-12. The "force" used to accomplish both was the same in fact and law. To restrain for purposes of kidnapping is to restrict movement "by physical force [or] intimidation." RCW 9A.40.010(a). The same legal and factual principle governs the

first degree robbery charged here, because the prosecution had to prove that force or fear was used to obtain property or prevent resistance to the taking and the same facts underlie the elements of both offenses. RCW 9A.56.190; RCW 9A.56.200. As charged and proven, the robbery and kidnapping offenses require intentional restraint, and necessitate the same proof.

In State v. Korum, 120 Wn.App. 686, 703, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614 (2006), the court dismissed kidnapping offenses on the grounds they were incidental to robbery. In re Pers. Restraint of Bybee, 142 Wn.App. 260, 266, 175 P.3d 589 (2007) (discussing holding in Korum). The court found that as a matter of law, there was "insufficient evidence to prove kidnappings independent of and with a different purpose than the robberies." Bybee, 142 Wn.App. at 266; Korum, 120 Wn.App. at 707.<sup>1</sup> When the duration of the restraint does not exceed the robbery and its purpose is to commit the robbery, the kidnapping is incidental. Korum thus demonstrates the interrelated nature of a kidnapping and robbery when based on the same set of

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<sup>1</sup> The Supreme Court affirmed this portion of the Court of Appeals decision without comment because the prosecution did not challenge this part of the Court of Appeals ruling. Korum, 157 Wn.2d at 623-25.

acts and shows that notwithstanding multiple convictions, the evidence may not establish separate offenses.

If two different criminal statutory provisions punish the same offense, then the conviction under both statutes is presumed to violate legislative intent. United States v. Davenport, 519 F.3d 940, 943 (9<sup>th</sup> Cir. 2008). Here, first-degree robbery as charged necessarily proved the kidnapping and first degree kidnapping necessarily proved the robbery. Whatever alternative possibilities could occur in other cases, in the case at bar, Ryan's conduct as charged and proven demonstrates that convictions for robbery and kidnapping violates double jeopardy. See Arlt, 252 F.3d at 1038.

2. WHERE RYAN'S CONVICTION FOR KIDNAPPING IS INCIDENTAL TO HIS CONVICTION FOR ROBBERY, THERE IS INSUFFICIENT EVIDENCE OF KIDNAPPING AND SEPARATE CONVICTIONS VIOLATE HIS RIGHT TO DUE PROCESS OF LAW.

a. The prosecution must prove each and every element of the crime beyond a reasonable doubt. "The due process clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Jackson v. Virginia, 443 U.S. 307, 311,

99 S.Ct. 2781, 61 L.Ed.2d 560 (1970) (quoting In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970)); U.S. Const. amend. 14; Wash. Const. art. I, § 3.

Evidence is sufficient to support a conviction only if, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find each of the elements of the crime beyond a reasonable doubt. Jackson, 443 U.S. at 311; State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

As charged in the case at bar, the essential elements of first degree kidnapping are intentional abduction “with the intent to facilitate the commission of the felony of robbery in the first degree.” CP 11-12; RCW 9A.40.020(1). “Abduct” is defined as, “to restrain a person by using or threatening to use deadly force.” RCW 9A.40.010(2).

“Restrain” means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty. Restraint is “without consent” if it is

accomplished by physical force, intimidation, or deception.

RCW 9A.40.010(1).

The substantial interference with a person's liberty required to prove restraint must be a "real or material interference," as contrasted with a slight inconvenience or petty annoyance. State v. Robinson, 20 Wn.App. 882, 884, 582 P.2d 580 (1978), aff'd on other grounds, 92 Wn.2d 307, 597 P.2d 892 (1979). By placing the word "substantial" in the statutory definition of restraint, the legislature demonstrated that the statute is intended to reach significant conduct restricting a person's freedom of movement in "important" and "essential" ways. Id. at 885.

Furthermore, this substantial interference with a person's freedom of movement must not be incidental to the commission of another crime. Green, 94 Wn.2d at 227; Korum, 120 Wn.App. at 707. Kidnapping is a serious offense, contemplating serious conduct as its cause, and requires more than interference with a person. Robinson, 20 Wn.App. at 884-85.

Even when kidnapping and robbery convictions do not violate double jeopardy, there may be insufficient evidence to prove a separate kidnapping offense. Bybee, 142 Wn.App. at 265-67. In

the instant case, the kidnapping in the first degree was incidental to the robbery and no separate conviction may be imposed and enforced.

b. Kidnapping involves more than merely moving or holding a person incidental to the commission of another crime.

Offenses that involve moving or holding another person may include conduct that technically falls under the legal definition of kidnapping but does not meet the legal requirements for true kidnapping. Green, 94 Wn.2d at 227. Interference with a person's freedom of movement must have a significance that is independent of the other offense being committed. Id. Otherwise, the restraint does not amount to the commission of the separate crime of kidnapping. Id.

For example, in Green, the defendant picked up his victim, stabbed her, and carried her to another part of an apartment building. Id. at 226. The court ruled that, "the mere incidental restraint and movement of a victim which might occur during the course of a [crime] are not standing alone, indicia of a true kidnapping." Id. at 227. Although Green "lifted and moved the victim to the apartment's exterior holding area, it is clear these events were actually an integral part of and not independent of the

underlying homicide.” Id. at 226-27. Moving a person’s body against that person’s will is considered an incidental restraint if it was done solely as a means of committing another crime. Id.

Even more similarly to the case at bar, in Korum, the defendants committed several robberies, inside people’s homes, and restrained the victims. In two robberies, the victims were restrained with duct tape, at gunpoint. 120 Wn.App. at 690-91 (Smith robbery, Fox/Campbell robbery). In another robbery, the defendants tied up seven people with wrist restraints and duct tape at gunpoint. Id. at 691 (Beatty/Molina robbery).

The Korum Court found the restraint, abduction, and use of force “incidental” to the robberies. Id. at 707. The purpose of the restraint was to complete the robbery and prevent the victims’ interference with the thefts; the secretion of the victims was not extreme, remote, or far longer than it took to complete the robberies; and the restraint did not raise a separate and distinct injury. For example, the five minutes it took one victim to free himself from the duct tape restraints showed he was not restrained to a degree so significant as to establish a separate offense. Id.

Likewise, in Ryan’s case, the purpose and extent of the restraint was to accomplish the robbery. Although restrained, the

victims were not so unduly restricted in movement, as shown by one victim who used a hidden cell phone and called the police even though he had been duct taped. CP 4-5. The duct tape used to restrain them, and secreting the victims in a bathroom, did not establish a separate offense of kidnapping for each person restrained.

As recognized in Korum and Green, kidnapping may readily hew close to the line of being subsumed by another offense when that offense, like robbery, necessarily involves some detention against the victim's will. Green, at 306; Korum, 120 Wn.App. at 705. While "a literal reading" of statutes might suggest every robbery could be a kidnapping, this overlap should not be interpreted as intentional. Id. Ryan's kidnapping convictions are incidental to the robbery, as the trial court found when it merged the offenses under a double jeopardy theory. CP 39-40. Where kidnapping is incidental to robbery, the kidnapping must be dismissed. Korum, 120 Wn.App. at 707.

3. RYAN'S SENTENCE IMPOSING FOUR  
FIREARM ENHANCEMENTS BASED ON USE  
OF A SINGLE GUN DURING ONE INCIDENT  
VIOLATES HIS RIGHT TO BE FREE FROM  
DOUBLE JEOPARDY

a. The constitutional bar on double jeopardy prohibits

multiple firearm enhancements for the same offense. While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct.

Freeman, 153 Wn.2d at 770-71; North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

“Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently.” State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

The double jeopardy provisions of the United States and Washington Constitutions provide that a person may not be convicted more than one time under the same criminal statute if he or she has committed only one “unit” of the crime. State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006). The unit of prosecution is designed to protect the accused from overzealous prosecution. State v. Turner, 102 Wn.App. 202, 210, 6 P.3d 1226 (2000).

The unit of prosecution may be an act or a course of conduct. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). The unit of prosecution is determined by examining the statute's plain language. Leyda, 157 Wn.2d at 342. If the legislature has not specified the unit of prosecution, or if legislative intent is unclear, this Court resolves any ambiguity in favor of the accused. Tvedt, 153 Wn.2d at 711.

b. Unit of prosecution analysis bars imposing multiple firearm enhancements for the same incident and same weapon. A defendant cannot be punished multiple times for possession of marijuana simply because the drug was stored in two different places. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). The Adel Court ruled that the prosecution's attempt to divide possession based on its location rested "on a slippery slope of prosecutorial discretion to multiply charges." *Id.* at 636.

Likewise, in State v. Varnell, 162 Wn.2d 165, 107 P.3d 24 (2008), the defendant was charged with four counts of solicitation because he asked one person to kill four individuals. The court ruled that because Varnell asked an undercover detective to commit four murders in one conversation, "at the same time, in the

same place, and for the same motive,” his acts “constitute a single unit of prosecution.” Id. at 171.

In State v. DeSantiago, 149 Wn.2d 402, 419, 68 P.3d 1065 (2003), the court found that the firearm enhancement statute’s use of the words “a firearm” means that a defendant may be punished separately for each firearm involved. Here, unlike DeSantiago, the single incident involved a single firearm, and yet this one firearm resulted in four additional prison terms.

c. Ryan’s possession of a single weapon cannot be punished multiple times for the same acts. Ryan received four consecutive firearm enhancements, totaling 240 months of additional incarceration, for possessing a single firearm on a single occasion during a single incident. This additional incarceration more than doubled the standard range sentences imposed for the offenses themselves, piling 240 months on top of the 207 months he received in consecutive sentences for the substantive offenses – and each those offenses were enhanced in degree because of the firearm. CP 87.

Current RCW 9.94A.533(3), formerly RCW 9.94A.510(5), provides,

if an offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement.

The same statute also states:

(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, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

RCW 9.94A.533(3)(e).

This statute directs the procedure for serving any firearm sentencing enhancements but does not speak to whether such enhancement should be imposed for offenses that involve the same conduct and same firearm, used with the same general purpose. Because of the intertwined nature of the offenses and the single firearm used on a single occasion, Ryan should receive a single firearm enhancement for the incident, rather than four enhancements despite the single use of a firearm.

4. BECAUSE THE FIREARM ENHANCEMENTS ARE BOTH ELEMENTS OF THE ROBBERY AND KIDNAPPING OFFENSES AND ELEVATED THE SAME OFFENSES TO MORE SERIOUS CRIMES, THE IMPOSITION OF ADDITIONAL PUNISHMENT VIOLATED DOUBLE JEOPARDY

Ryan was convicted and sentenced for one count of first degree robbery and three counts of first degree kidnapping. Each offense was elevated in degree, and consequent punishment, because they were committed while Ryan used a firearm. CP 10-12. Additionally, the prosecution further charged Ryan with committing each offense while in possession of a firearm, and thus requested another 60 months of prison based on this added allegation. Because double jeopardy principles prohibit this stacking of punishments based on the same allegations, Ryan's sentence must be reduced.

In the past, this Court has rejected double jeopardy challenges to charging both a substantive crime involving use of a deadly weapon as an element, as well as a deadly weapon enhancement. See State v. Caldwell, 47 Wn.App. 317, 320, 734 P.2d 542, rev. denied, 108 Wn.2d 1018 (1987) (robbery); State v. Pentland, 43 Wn.App. 808, 811, 719 P.2d 605, rev. denied, 106 Wn.2d 1016 (1986) (rape). In Ryan's prior appeal, he raised a

similar argument, although it pertained to the single count of first degree robbery for which the court had imposed sentence and not the other offenses that the trial court had merged. This Court denied Ryan relief based on its ruling in State v. Nguyen, 134 Wn.App. 863, 142 P.3d 1117 (2006), for which review was later denied, 163 Wn.2d 1053 (2008). CP 42.

But recently, the Supreme Court granted review of two cases raising this very issue, State v. Aguirre<sup>2</sup> and State v. Kelley.<sup>3</sup> Accordingly, an authoritative decision addressing this claim should occur in the near future and any such ruling would apply to Ryan. See State v. Worl, 129 Wn.2d 416, 425, 918 P.2d 905 (1996). Because Ryan's case is still pending on direct review and not yet

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<sup>2</sup> The Court of Appeals decision in Aguirre was unpublished, but the Supreme Court website lists the issue for which review was granted as, Whether double jeopardy principles were violated in a second degree assault prosecution when the defendant's use of a weapon was both an element of the charge and the basis for imposing a deadly weapon sentence enhancement.

State v. Aguirre, COA No. 36186-8-II, rev. granted, 165 Wash.2d 1036 (2009), issue statement available at:

[http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme\\_issues.display&fileID=notyetset#P424\\_23402](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=notyetset#P424_23402).

<sup>3</sup> State v. Kelley, 146 Wn.App. 370, 189 P.3d 853 (2008), rev. granted, 165 Wash.2d 1027 (2009). The Supreme Court website lists the issue for which review was granted as,

Whether double jeopardy principles were violated in a second degree assault prosecution when the defendant's use of a firearm was both an element of the charge and the basis for imposing a firearm sentence enhancement.

Available at:

[http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme\\_issues.display&fileID=notyetset#P424\\_23402](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=notyetset#P424_23402)

final, he would be entitled to receive the benefit from a favorable decision substantially reducing his sentence. See State v. Evans, 154 Wn.2d 438, 443, 114 P.3d 627 (2005).

It is now well-established that any fact increasing the maximum penalty that may be imposed upon a criminal defendant is akin to an element of an offense. Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 494 n.194, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).<sup>4</sup> The aggravating factor is the functional equivalent of an element and must be charged in the information and proven beyond a reasonable doubt. Recuenco, 163 Wn.2d at 434.

Rcw 9.94A.533 increased the maximum sentence over and above the Blakely statutory maximum, i.e., the standard range under the sentencing guidelines, for the crime. Thus, following Blakely, Apprendi, and Recuenco, the enhancement statute is the functional equivalent of an element of the crime. The prior decisions holding that there is no double jeopardy problem

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<sup>4</sup> See also Ring v. Arizona, 536 U.S. 584, 604-05, 122 S.Ct. 2428, 153 L.Ed.2d 18 (2002).

because there is no duplication of elements between the underlying crime and the weapon enhancement no longer hold sway, and the reasoning of Nguyen is no longer dispositive because the Supreme Court has accepted review of cases speaking to the same issue. Thus, Ryan seeks relief for the double jeopardy violation that occurs from the stacking of punishments for the same factual elements.

There is no question that Ryan's first degree robbery and first degree kidnapping convictions are the same in fact and in law as the accompanying firearm enhancements. First, each involves the same criminal act. Had Ryan not displayed a handgun in the course of trying to rob the store, he could not have been convicted of first degree robbery and the kidnapping was elevated to the first degree by virtue of the first degree robbery conviction. The kidnapping charges expressly predicated the elevation to first degree on the grounds they were committed "with the intent to facilitate commission of the felony Robbery in the First Degree." CP 11-12. Each count involves the use of a gun in the course of a robbery, and is the same in fact as in law. RCW 9A.56.200; RCW 9A.40.020; see also RCW 9A.40.030 (defining second degree

kidnapping as kidnapping occurring “under circumstances not amounting to kidnapping in the first degree.”).

Ryan’s use of one gun both elevated the degree of the crimes charged and resulted in the imposition of firearm enhancements, which increased his standard range sentence as well as the length of the enhancement itself. Ryan was given an additional 240 months, or 20 years in prison for the firearm enhancements. He was essentially sentenced for using a firearm while armed with a firearm, and he was thus convicted and punished twice for the use of a weapon. The addition of a firearm enhancement to Ryan’s four convictions placed him twice in jeopardy for the use of a gun and violated the state and federal constitutions. Because the multiple punishments are based upon the same facts and law, they violate the double jeopardy provisions of the federal and state constitutions. The firearm enhancements must be vacated and his case remanded for resentencing. State v. Gohl, 109 Wn.App. 817, 824, 37 P.3d 293 (2001), rev. denied, 146 Wn.2d 1012 (2002).

5. BY FAILING TO SEEK A SENTENCE BELOW THE STANDARD RANGE BASED ON VALID AND COMMONLY RECOGNIZED GROUNDS, DEFENSE COUNSEL DID NOT PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL

a. Ryan has a constitutional right to effective

assistance of counsel at sentencing. A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. 6; <sup>5</sup> Wash. Const. art. I, § 22.

The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.

Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)).

An accused's right to be represented by counsel is a fundamental component of our criminal justice system.

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<sup>5</sup> The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Lawyers in criminal cases “are necessities, not luxuries.” Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be “of little avail,” as this Court has recognized repeatedly. “Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”

Cronic, 466 U.S. at 653-54 (footnotes omitted.).

To prevail in a claim of ineffective assistance of counsel, a defendant must show, “First, [that] counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” Strickland, 466 U.S. at 687. If there is a reasonable probability that but for counsel’s inadequate performance, the result of the trial would have been different, prejudice is established and reversal is required. Hendrickson, 129 Wn.2d at 78.

An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 123 S.Ct.

2527, 2535, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms," quoting Strickland, 466 U.S. at 688).

While an attorney's decisions are treated with deference, his or her actions must be reasonable based on all circumstances. Wiggins, 123 S.Ct. at 2541; State v. Tilton, 149 Wn.2d 775, 72 P.2d 735 (2003). To show prejudice, the defense must demonstrate grounds to conclude a reasonable probability exists of a different outcome, but need not show the attorney's conduct altered the result of the case. Tilton, 149 Wn.2d at 784.

b. Ryan's attorney unreasonably failed to ask for a sentence below the standard range. The failure to request a sentence below the standard range may constitute ineffective assistance of counsel. State v. McGill, 112 Wn.App. 95, 98, 47 P.3d 173 (2002).

In McGill, the defendant was convicted of several drug offenses for multiple police-arranged drug sales during an eight-day period. 112 Wn.App. at 97-98. The same police informant arranged the drug sales at the behest of investigating police officers. Id. At sentencing, McGill's attorney did not ask for an

exceptional sentence or alert the court it had the authority to consider such a sentence. Id. at 98-99, 102. This Court found the attorney did not provide constitutionally adequate assistance of counsel. Id. at 102.

The McGill Court reasoned that courts had held on several occasions that multiple police-orchestrated drug sales within a short period of time present a valid basis for imposing a sentence below the standard sentencing range based on the operation of the multiple offense policy. Id. at 100 (citing State v. Sanchez, 69 Wn.App. 255, 256-57, 261, 848 P.2d 208, rev. denied, 122 Wn.2d 1007 (1993) (three drug buys within eight days initiated by police with same buyer and seller results in excessive sentence and justifies sentence below standard range)); State v. Hortman, 76 Wn.App. 454, 458, 886 P.2d 234 (1994), rev. denied, 126 Wn.2d 1025 (1995) (grounds for sentence below standard range where police solicited two drug sales in same location within 13 days).

In light of the clear authority justifying a sentence below the standard range based on the same factual scenario, the McGill court found it unreasonable and deficient for counsel to fail to ask for an exceptional sentence in such circumstances. 112 Wn.App. at 102. McGill rejected the reasoning of a Division Three case,

State v. Hernandez-Hernandez, 104 Wn.App. 263, 15 P.3d 719, rev. denied, 143 Wn.2d 1024 (2001), which refused to find ineffective assistance of counsel for failing to seek a sentence below the standard range because the trial court would have been free to reject such a sentence. Id. The court in McGill ruled that because the trial court cannot make an informed decision without being informed of the parameters of its decision-making authority, it constitutes ineffective assistance when counsel does not explain to the sentencing court that there is a valid legal basis for an exceptional sentence below the standard range. Id.

Here, assisting or cooperating with law enforcement is a recognized mitigating factor justifying a lesser sentence. State v. Nelson, 108 Wn.2d 491, 499, 740 P.2d 835 (1987). In some circumstances, a confession to a crime may be a mitigating circumstance. State v. Armstrong, 106 Wn.2d 547, 551, 723 P.3d 1111 (1986). Additionally, when a defendant is convicted of multiple offenses, the cumulative effects of the subsequent acts are trivial, and the resulting sentence is unduly harsh, the multiple offense policy justifies an exceptional sentence. RCW

9.94A.535(1)(g).<sup>6</sup> The statutory list of mitigating factors is illustrative and non-exclusive, and therefore, does not limit an attorney from seeking an exceptional sentence in various scenarios. State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993).

But not only did Ryan's attorney neglect to inform the court that it could impose an exceptional sentence, counsel told the court it lacked such authority. 1/23/09RP 11. He said, "I think the court's hands are somewhat tied in the sense of what [sentence] it can impose." Id. Counsel pointed out that Ryan had always taken responsibility for his actions, and Ryan had never wanted to subject the prosecution to the expense and effort required for a trial. Id. Counsel further claimed the standard range sentence was unfair, disproportionate, and unjust. Id. He asked for a low end sentence.

The sentencing judge had previously imposed a lesser sentence upon Ryan for this offense. The same judge had ruled that the kidnappings were an integral part of and incidental to the robbery and merged all three kidnappings into the robbery in its

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<sup>6</sup> RCW 9.94A.535 (1)(g) permits the court to impose a sentence below the standard range when, "The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010."

2005 sentence. 2/11/2005RP 9-11; CP 29 (2005 Judgment and Sentence); Supp. CP \_\_, sub. no. 110 (State's motion to reconsider).

Upon his arrest immediately following the offense, Ryan had confessed to the police and assisted the police in their investigation of a cohort. CP 6-8. He provided evidence used against his co-defendant. He entered into a stipulated bench trial based on agreed evidence rather than request a jury trial or cross-examine the witnesses against him. Supp. CP \_\_, sub. no. 66 (Stipulation to Facts).

He stipulated to the evidence despite the likelihood he would receive a three-strike sentence of life without the possibility of parole. At his 2009 sentencing hearing, he reminded the court "I know what I did was wrong" and he had said so before. 1/23/09RP 11.

Ryan's cooperation throughout the prosecution, going as far as stipulating to the evidence against him that would bring him a sentence of life without the possibility of parole, would be a valid basis for seeking an exceptional sentence below the standard range. Nelson, 108 Wn.2d at 499. Additionally, the court had already found the harm caused by the kidnappings were incidental

to and a function of the robbery. Yet defense counsel told the court its hands were “tied” and it had no basis for considering a lesser sentence. See McGill, 112 Wn.App. at 102 (finding counsel ineffective for failing to inform court of permissible authority for exceptional sentence below standard range).

Accordingly, the court should have considered whether to impose a sentence below the standard sentencing range. Defense counsel did not ask for any such consideration or inform the court of its authority to impose a sentence less than the standard range. Counsel did not let the sentencing court know that in cases with remarkably similar facts, courts have the authority to impose a sentence less than the standard range. McGill, 112 Wn.App. at 102.

c. Ryan was prejudiced by the ineffective assistance of counsel and reversal is required. The sentencing court imposed a mid-range 447-month standard range sentence. Defense counsel never informed the court that it had the authority, and indeed case law supported, a sentence below the standard range based on similar facts. 1/23/09RP 10. Counsel's failure to make the court aware of the court's sentencing authority requires reversal of the sentence and reconsideration of the appropriate sentencing

term. Consequently, Ryan's sentence must be remanded in order for the court to consider a sentence below the standard range.

McGill, 112 Wn.App. at 102.

6. RYAN'S SENTENCE WAS IMPERMISSIBLY  
ELEVATED BASED ON JUDICIAL FACT-FINDING  
WITHOUT PROOF TO A JURY BEYOND A  
REASONABLE DOUBT

Ryan received an enhanced sentence based upon the trial court's factual determination that the three counts of first degree kidnapping were "separate and distinct" serious violent offenses as defined in RCW 9.94A.030. 1/23/09RP 12-13; RCW 9.94A.589 (requiring consecutive sentences for "separate and distinct" criminal conduct). Any time the State increases authorized punishment based on a factual determination, those facts must be proved to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 490; U.S. Const. amends 6, 14; Wash. Const. art. I, §§ 3, 22.

Washington law presumes that current offenses are sentenced concurrently. In re Pers. Restraint of Van Delft, 158 Wn.2d 731, 738-39, 147 P.3d 573 (2006). Ryan respectfully requests this court reconsider the decision in State v. Cubias, 155 Wn.2d 549, 120 P.3d 129 (2005), and find that the court violated Ryan's Sixth and Fourteenth Amendment rights by increasing his

sentence based on the factual determination of separate and distinct criminal conduct.

F. CONCLUSION.

For the reasons stated above, Samuel Ryan respectfully asks this Court to dismiss the kidnapping convictions as incidental to the robbery and contrary to the prohibition against double jeopardy, which also applies to the four consecutive firearm enhancements. Ryan further contends his sentence was erroneously imposed without proper consideration of an available basis for an exceptional sentence and predicated on impermissible judicial fact-finding. Finally, Ryan also asks that no costs be awarded in the event that does not substantially prevail on appeal.

DATED this 28<sup>th</sup> day of July 2009.

Respectfully submitted,



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Washington Appellate Project (91052)  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 62926-3-I
v.	)	
	)	
SAMUEL RYAN,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
<input checked="" type="checkbox"/> SAMUEL RYAN	(X)	U.S. MAIL
860930	( )	HAND DELIVERY
MCNEIL ISLAND CORRECTIONS CENTER	( )	_____
PO BOX 881000		
STEILACOOM, WA 98388		

2009 JUL 28 PM 4:52

FILED  
COURT OF APPEALS - DIVISION ONE  
STATE OF WASHINGTON

**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF JULY, 2009.

X \_\_\_\_\_ 

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