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DIVISION II  
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STATE OF WASHINGTON  
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No. 41994-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**David Lander,**

Appellant.

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Thurston County Superior Court  
Cause Nos. 09-1-341-0, 09-1-00342-8  
The Honorable Judge Gary Tabor

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
FAX: (866) 499-7475

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### **ASSIGNMENTS OF ERROR**

1. The sentencing court erred by imposing firearm enhancements.
2. The firearm enhancements were imposed in violation of Mr. Lander's right to notice of the charges against him under the Sixth and Fourteenth Amendments, and under Wash. Const. Article I, Section 22.
3. The firearm enhancements were imposed in violation of Mr. Lander's Fourteenth Amendment right to due process.
4. The firearm enhancements were imposed in violation of Mr. Lander's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22.
5. The sentence imposed exceeded that authorized by the jury's verdicts.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An accused person may not be convicted of or sentenced for an uncharged enhancement. In this case, Mr. Lander was alleged to have committed two offenses while armed with a deadly weapon. Did the imposition of two consecutive firearm enhancements violate his right to due process and to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?
2. An accused person is guaranteed a jury determination of any fact necessary to increase punishment above the statutory maximum. In this case, the jury was asked to determine whether or not Mr. Lander was armed with a deadly weapon during the commission of two charged crimes. Did the imposition of two consecutive firearm enhancements violate his right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22?

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

David Lander was charged with Theft of a Firearm, Theft in the Second Degree, Trafficking in Stolen Property in the First Degree, and Unlawful Possession of a Firearm in the Second Degree. Information, Supp. CP.<sup>1</sup> The prosecution also alleged that he “was armed with a deadly weapon, to wit: a firearm” during the commission of Counts II (theft) and III (trafficking). Information, Supp. CP. The charges stemmed from an incident in which he stole a rifle (and other items) from a truck and gave the rifle to his mother for Christmas. Certification for Probable Cause, Supp. CP.

His case proceeded to trial, and the court gave the following instructions relating to the deadly weapon allegation:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crimes in Counts II and III. A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the

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<sup>1</sup> Additional charges relating to another vehicle prowl were filed under Cause No. 09-1-342-8, and consolidated with these charges for trial. Those charges are not addressed here. All references are to the clerk’s papers (abbreviated CP) from Cause No. 09-1-341-0.

nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime. A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

Instruction No. 31, Court's Instructions to the Jury, Supp. CP.

The jury convicted Mr. Lander of all charges, and returned special verdicts for Counts II and III. Verdict Forms I-IV, Special Verdict Forms A and B, Supp. CP. Each preprinted special verdict form indicated that the jury found that Mr. Lander "was armed with a firearm at the time of the commission of the crime..." Special Verdict Forms A and B, Supp. CP.

Mr. Lander appealed. His convictions were affirmed, but the sentence was vacated and the case remanded for a new sentencing hearing. At the new sentencing hearing, the court sentenced Mr. Lander to a total of 89 months in prison, which included consecutive firearm enhancements of 18 and 36 months. CP 6. Mr. Lander appealed a second time. CP 12.

## ARGUMENT

**I. THE SENTENCING COURT VIOLATED MR. LANDER'S CONSTITUTIONAL RIGHTS TO ADEQUATE NOTICE, TO DUE PROCESS, AND TO A JURY TRIAL BY UNLAWFULLY IMPOSING TWO CONSECUTIVE FIREARM ENHANCEMENTS.**

**A. Standard of Review**

Constitutional questions are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010).

B. Mr. Lander's case is controlled by *In re Delgado*.

Any fact, besides the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *In re Personal Restraint of Delgado*, 149 Wash.App. 223, 232, 204 P.3d 936 (2009) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)).

The court may not impose a firearm enhancement when the state has charged a deadly weapon enhancement. *Delgado*, at 234 (citing *State v. Recuenco*, 163 Wash.2d 428, 180 P.3d 1276 (2008)). This is so for two reasons: (1) a person can only be convicted of and sentenced for enhancements actually charged by the prosecution, and (2) imposition of a firearm enhancement without prior notice violates due process. *Delgado*, at 234-235. In addition, a firearm enhancement may not be imposed unless the state proves that the offender was armed with a working firearm. *Id.* Nor may a firearm enhancement be imposed when jury instructions outline the requirements for a deadly weapon special verdict. *Id.*

In *Delgado*, the prosecution alleged that the defendant was "armed with a deadly weapon, to wit: a firearm." *Id.*, at 235. The jury was

instructed to answer “yes” on a special verdict form if it found that the defendant was armed with a deadly weapon. *Id.* Despite the clarity of the charges and instructions, some of the preprinted special verdict forms reflected jury findings that the defendant was armed with a *firearm*, rather than a deadly weapon. *Id.*, at 235-236. The sentencing court imposed firearm enhancements rather than deadly weapon enhancements. *Id.*, at 236.

In accordance with *Recuenco*, the Court of Appeals vacated Delgado’s firearm enhancements and remanded for resentencing with deadly weapon enhancements. First, the Court noted that the jury findings were actually deadly weapon findings (even though some of the special verdict forms used the word “firearm” in place of the phrase “deadly weapon.”) *Delgado*, at 237.<sup>2</sup> Second, the Court noted that the defendant was not charged with firearm enhancements, and thus could not receive firearm enhancements under the theory that the disparity between the instructions and the special verdicts created only harmless error. *Id.*, at 237-238.

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<sup>2</sup> Because jurors were never even provided the definition of a firearm, the findings could not be interpreted as anything but deadly weapon findings. *Delgado*, at 237. A firearm enhancement may arguably be imposed based on a deadly weapon special verdict if the enhancement is properly charged and the jury’s guilty verdict on the substantive offense necessarily establishes that the offender used a firearm. *In re Personal Restraint of Rivera*, 152 Wash.App. 794, 218 P.3d 638 (2009). This argument is inapplicable to this case, since Mr. Lander was not properly charged with a firearm enhancement. Information, Supp. CP.

Under *Recuenco* and *Delgado*, Mr. Lander's firearm enhancements must be vacated and the case remanded for sentencing with deadly weapon enhancements. The Information alleged that Mr. Lander "was armed with a deadly weapon, to wit: a firearm," when he committed Counts II and III.<sup>3</sup> Information, Supp. CP. Upon a proper finding by the jury, this charging language authorized the sentencing court to impose deadly weapon enhancements of six months (Count II) and 12 months (Count III). *Recuenco, supra; Delgado, supra*. However, the sentencing court was not authorized to impose the lengthier firearm enhancements. *Recuenco, supra; Delgado, supra*.

Accordingly, Mr. Lander's firearm enhancements must be vacated. *Delgado, supra*.

### **CONCLUSION**

For the foregoing reasons, Mr. Lander's firearm enhancements must be vacated.

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<sup>3</sup> As in *Delgado*, the jury was provided instructions on the deadly weapon enhancement but verdict forms with the word "firearm." Instructions Nos. 31, 32; Special Verdict Forms A and B, Supp. CP.

Respectfully submitted on July 20, 2011.

**BACKLUND AND MISTRY**



Jodi R. Backlund, WSBA No. 22917

Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922

Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

David Lander, DOC #332642  
Washington State Penitentiary  
1313 N 13th Ave  
Walla Walla, WA 99362

and to:

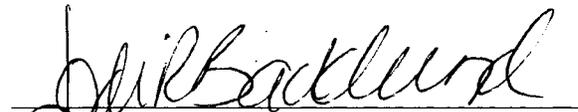
Thurston County Prosecutor's Office  
2000 Lakeridge Dr SW Bldg 2  
Olympia WA 98502-6045

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 20, 2011.

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

Signed at Olympia, Washington on July 20, 2011.

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

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