

NO. 80441-9

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BAYANI JOHN MANDANAS,

Appellant.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Do multiple current firearm enhancements run consecutively to each other, regardless of how the multiple current underlying convictions are scored?

2. Does imposing multiple current firearm enhancements violate double jeopardy, or was the Legislature clear that sentencing courts are to impose a firearm enhancement for each crime in which an enhancement applies?

**B. STATEMENT OF THE CASE**

Bayani Mandanas was charged in count I with second-degree assault and in count II with felony harassment. CP 16-17. A special firearm allegation was charged with each count. CP 16-17. Mandanas was tried by jury and convicted as charged.<sup>1</sup> CP 120-23.

The convictions stem from an assault on Carlos Padilla. Padilla had been involved in a romantic relationship with Mandanas' wife, Eleanor. This relationship took place while Mandanas and his wife were in divorce proceedings. 3RP 94-96.

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP--11/16/05; 2RP--11/17/05; 3RP--11/21/05; 4RP--11/22/05; 5RP--11/23/05; 6RP 2/10/06.

On December 20, 2004, Mandanas confronted Padilla as Padilla exited a medical clinic. 3RP 99-100. Mandanas punched Padilla in the face, hit him in the head with a gun, then pointed the gun at Padilla's head and threatened to kill him. 3RP 99-102. After initially trying to defend himself, Padilla began begging for his life as he backed up towards the clinic. 3RP 103-05. Padilla then went inside and sat down in a chair. 3RP 116. Mandanas followed Padilla into the clinic, again hit Padilla in the head with the gun and then fled when he heard that the police were being called. 3RP 33, 86, 116.

At sentencing, Mandanas argued that his convictions constituted the "same criminal conduct" under RCW 9.94A.589(1)(a), and therefore his convictions should not score against each other. The trial court rejected this claim. 6RP 4-5.

Mandanas also argued that--despite the mandatory language of RCW 9.94A.533(3)(e) reading otherwise--his two firearm enhancements should run concurrent to each other. Relying on State v. Callihan, 120 Wn. App. 620, 85 P.3d 979 (2004) and the plain language of RCW 9.94A.533(3)(e), the trial court rejected this claim as well. 6RP 5-6.

The court then imposed a term of three months each on count one and count two, to be served concurrently with each other, and consecutively to 36 and 18 month consecutive firearm enhancements. CP 169-76.

On appeal, Mandanas argued that the trial court erred in finding that his convictions did not constitute the "same criminal conduct" for scoring purposes. The Court of Appeals agreed, and ordered that Mandanas be resentenced consistent with the finding that his two offenses constitute the same criminal conduct for scoring purposes and therefore they should not have scored against each other.<sup>2</sup>

Mandanas also argued that his two firearm enhancements should run concurrent to each other, or in the alternative, that multiple enhancements violate double jeopardy. The Court of Appeals rejected these arguments, finding that the language of the

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<sup>2</sup> Apparently unnoticed until now, Mandanas actually received the sentence he sought on appeal. The standard range for second-degree assault with an offender score of one is 6 to 12 months; i.e., if the felony harassment count had scored against the second-degree assault. The standard range for second-degree assault with an offender score of zero is 3 to 9 months; i.e., if the felony harassment count had not scored against the assault. Mandanas received a three-month sentence, and the judgment and sentence reflects a standard range of 3 to 9 months. With felony harassment having a lower seriousness level, three months is the lowest possible standard range sentence available to Mandanas.

statute is clear, unambiguous, and specifically requires that all enhancements run consecutive to each other.

**C. ARGUMENT**

- 1. THE LANGUAGE OF RCW 9.94A.533 IS CLEAR, CONCISE AND NOT SUBJECT TO MULTIPLE INTERPRETATIONS: FIREARM ENHANCEMENTS "SHALL RUN CONSECUTIVELY TO ALL OTHER SENTENCING PROVISIONS, INCLUDING OTHER FIREARM OR DEADLY WEAPON ENHANCEMENTS."**

Mandanas contends that the firearm enhancement provisions of the "Hard Time for Armed Crime" statute, RCW 9.94A.533, do not mean what this Court has already said they mean; that multiple current firearm enhancements are served consecutively to each other. See State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 218 (2005) (the Legislature clearly knows how to require consecutive application of sentence enhancements and chose to do so only for firearms and other deadly weapons); State v. DeSantiago, 149 Wn.2d 402, 415-21, 68 P.3d 1065 (2003); Callihan, 120 Wn. App. 620.

In pertinent part, RCW 9.94A.533 provides:

(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 as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the 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. . . .

(a) Five years for any felony defined under any law as a class A felony. . .

(b) Three years for any felony defined under any law as a class B felony. . .

(c) Eighteen months for any felony defined under any law as a class C 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, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. . .**

(f) The firearm enhancements in this section shall apply to all felony crimes except the following:  
Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful

possession of a firearm in the first and second degree, and use of a machine gun in a felony;

RCW 9.94A.533 (emphasis added).<sup>3</sup>

Interpretation of a statute is a question of law reviewed by an appellate court *de novo*. In re Charles, 135 Wn.2d 239, 245, 955 P.2d 798 (1998). This case calls upon this Court to discern yet again the meaning of RCW 9.94A.533.

Prior to 1995, a sentencing court's decision under the Sentencing Reform Act to impose several sentences concurrently or consecutively was controlled by RCW 9.94A.400 (recodified at RCW 9.94A.589). In 1995, Initiative 159 entitled "Hard Time for Armed Crime" was submitted to the Legislature, and enacted without amendment. Laws of 1995, ch. 129. The purpose of the initiative was to increase sentences for armed crime. State v. Broadaway, 133 Wn.2d 118, 128, 942 P.2d 363 (1997).

In In re Charles, 135 Wn.2d 239, this Court was asked to determine whether the Legislature intended that multiple current firearm enhancements be served concurrently with or consecutively to each other. The defense argued that the phrase "any other

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<sup>3</sup> RCW 9.94A.533 was originally codified at RCW 9.94A.310, recodified at RCW 9.94A.510 by Laws of 2001, ch. 10, § 6, and recodified to its present location by Laws of 2003, ch. 53, § 1.

sentencing provisions" in the sentence, "[n]otwithstanding any other provision of law, any and all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provision," meant that a firearm enhancement could not run concurrently with a sentencing provision other than a firearm enhancement, but could run concurrently with another firearm enhancement. In re Charles, 135 Wn.2d at 247-48. The State argued that the phrase "other sentencing provisions" meant that any and all enhancements should run consecutively with every other sentencing provision and that this included other firearm enhancements. In re Charles, at 249. This Court held that both interpretations were reasonable and therefore the statute was ambiguous and the rule of lenity applied. In re Charles, at 250. As a result, because it was not clear that RCW 9.94A.310 was intended to require multiple firearm enhancements to run consecutively to each other, the provisions of RCW 9.94A.400 governed and dictated that firearm enhancements could run concurrently with each other when the underlying convictions ran concurrently with each other.

As a result of the decision in In re Charles, the Legislature amended RCW 9.94A.310 to clarify that it intended multiple current

enhancements to run consecutively to each other regardless of whether the base sentences run consecutively to or concurrently with each other. See ESB 5695, FINAL LEGISLATIVE REPORT, 1997-1998, 55th Wash. Leg., Reg. Sess.; DeSantiago, 149 Wn.2d at 416 (as a result of the 1998 amendments, firearm enhancements "are mandatory and, where multiple enhancements are imposed, they must be served consecutively to base sentences and to any other enhancements"); State v. Thomas, 150 Wn.2d 666, 80 P.3d 168 (2003) (under the amendments to former RCW 9.94A.310, the defendant's two firearm enhancements "are consecutive to the longest concurrent base sentence and to one another"); State v. Spandel, 107 Wn. App. 352, 359, 27 P.3d 613, rev. denied, 145 Wn.2d 1013 (2001) (robbery with two weapons, enhancements consecutive to each other); Callihan, 120 Wn. App. 620 (the meaning of the amended statute is clear--it provides that firearm enhancements shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements).

As this Court has already ruled, the language of the amended statute is not ambiguous. DeSantiago, supra; Thomas, supra. The plain language and legislative history of the current

statute establishes that all firearm and deadly weapon enhancements are to run consecutively to all other firearm and deadly weapon enhancements.

Despite the unambiguous language of RCW 9.94A.533, the legislative history of the statute, and case history showing why the statute was amended and the meaning of the current statute, Mandanas asserts that a scoring provision of the SRA necessitates a contrary result. Specifically, Mandanas claims that where two current offenses do not score against each other, firearm enhancements attached to those offenses must be served concurrently. This argument is not supported by the language of the statutes in question, nor any caselaw or legislative history.

In pertinent part, RCW 9.94A.589(1)(a) provides:

Except as provided in (b) or (c) of this subsection,<sup>[4]</sup> whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted

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<sup>4</sup> Subsection (b) deals with serious violent offenses. Subsection (c) deals with convictions for theft of a firearm, possession of a stolen firearm and illegal possession of a firearm by a convicted felon.

as one crime. Sentences imposed under this section shall be served concurrently.

RCW 9.94A.589(1)(a) (former RCW 9.94A.400).

RCW 9.94A.589(1)(a) serves two purposes. First, the statute instructs how to score current offenses. Second, the statute instructs whether sentences for current offenses are served concurrently with or consecutively to each other. How current offenses are scored has absolutely no effect on whether sentences (or enhancements) are served consecutively or concurrently under subsection (1)(a). Just as it was at the time this Court decided In re Charles, all sentences for current multiple offenses imposed under RCW 9.94A.589(1)(a) are to run concurrently, regardless of whether they score against each other or not. It is the language of RCW 9.94A.533 that governs whether enhancements are served consecutively or concurrently to the underlying offense(s) and to each other.

Mandanas also argues that the statute is ambiguous and that ruling against him would lead to absurd results. These arguments are not well taken.

First, unlike the situation in In re Charles, where the defendant and the Court identified the specific language of the

statute that was subject to multiple reasonable interpretations, Mandanas points to no such language that could lead to multiple reasonable interpretations of the statute here. In fact, he points to no language at all that he claims is ambiguous.

Second, his "absurd result" examples present situations that are factually impossible and examples that would apply to all multiple current offense cases, not just cases wherein the current offenses do not score against each other. For example, Mandanas claims a defendant firing a single shot and hitting one victim could be convicted of multiple offenses including attempted murder, and first, second, third and fourth degree assault--and be subject to the "stacking" of multiple enhancements. At a minimum, Mandanas' argument ignores principles of double jeopardy and lesser included offenses. See e.g., In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) (attempted murder and first-degree assault violate double jeopardy--one conviction must be vacated). In Mandanas' example, double jeopardy would necessitate the vacation of many of the underlying convictions and thus eliminate the corresponding firearm enhancements.

Mandanas also gives as an example the State artificially breaking an incident into multiple parts, charging multiple counts and thus stacking enhancements. For example, he argues that his own assault could have been broken down into multiple separate acts of assault with separate assault convictions and enhancements. This scenario is not possible. Where there are multiple acts that could constitute the charged crime but each act is part of a continuing course of conduct, there is but one count. State v. Crane, 116 Wn.2d 315, 326, 804 P.2d 10 (1991) (multiple assaults over a two-hour period constituted but one count). It is only where each act is separate and distinct that multiple counts can lie. Crane, 116 Wn.2d at 326 (citing State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984)).

In short, in order to rule as Mandanas desires, this Court would have to rule that the 1998 amendment to RCW 9.94A.533 (former RCW 9.94A.310), did not do as this Court has said it did-- clarify that all firearm enhancements for current offenses run consecutively to each other.

**2. THE LEGISLATIVE INTENT IS CLEAR; THE IMPOSITION OF MULTIPLE FIREARM ENHANCEMENTS DOES NOT VIOLATE DOUBLE JEOPARDY.**

Mandanas argues that the imposition of more than one firearm enhancement violates double jeopardy. This argument is not supported by the law and should be rejected. The legislative intent of the firearm statute is crystal clear: when a person commits certain crimes while armed with a firearm, that person will receive an enhanced sentence for each qualifying offense.

Without question, subject to constitutional constraints, the Legislature has the absolute power to define criminal conduct and assign punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). In many cases, a defendant's conduct, though a single act, may violate more than one criminal statute. Without question, a defendant can permissibly receive multiple punishments for a single criminal act that violates more than one criminal statute.<sup>5</sup> Calle, 125 Wn.2d 769. It is not enough that certain facts may be used to prove both charges. State v. Vladovic, 99 Wn.2d 413,

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<sup>5</sup> In Calle, the defendant was convicted of both rape and incest for but a single act of intercourse. This Court upheld the convictions, finding that the two convictions did not violate double jeopardy because the Legislature intended convictions under both statutes to be punished separately. Calle, 125 Wn.2d at 775-78.

419-20, 662 P.2d 853 (1983) (same facts used to prove kidnapping and robbery, both convictions allowed to stand). Double jeopardy is implicated only when the court exceeds the authority granted by the legislature and imposes multiple punishments where multiple punishments are not authorized. Calle, at 776. Thus, "[w]here a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005).

This Court has set forth a three-part test for determining whether multiple punishments were intended by the Legislature. The first step is to review the language of the statutes to determine whether the statute expressly permits or disallows multiple punishments. Calle, at 776. Should this step not result in a definitive answer, the court turns to step two to determine legislative intent, the two-part "same evidence" or "Blockburger" test.<sup>6</sup> This test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Offenses are the same "in fact" when

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<sup>6</sup> Referring to United States v. Blockburger, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Calle, at 777. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Calle, at 777. Should the statutes fail the first two tests, a strong presumption in favor of multiple punishments is created, a presumption that can only be overcome where there is "clear evidence" that the Legislature did not intend for the crimes to be punished separately. Calle, at 778-80.

The issue here is resolved at the very first step because that statute specifically authorizes multiple punishments. Where "a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under Blockburger. . . a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." State v. Harris, 102 Wn.2d 148, 160, 685 P.2d 584 (1984) (citing Missouri v. Hunter, 459 U.S. 359, 368-69,

103 S. Ct. 673, 74 L. Ed. 2d 535 (1983),<sup>7</sup> overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988)).

RCW 9.94A.533, provides that "additional times **shall** be added to the standard sentence range for felony crimes. . .if the offender or an accomplice was armed with a firearm" and, the offender is being sentenced for one of the crimes listed in the statute. RCW 9.94A.533(3) (emphasis added). The statute requires that "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." RCW 9.94A.533(3)(e). Finally, the statute provides that the "[f]irearm enhancements in this section **shall** apply to **all** felony crimes," except certain enumerated crimes not relevant here. RCW 9.94A.510(3)(f) (emphasis added). Second-degree assault is a qualifying offense. RCW 9.94A.533(3)(b) and RCW 9A.36.021(2)(a). Felony

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<sup>7</sup> In Hunter, the defendant was convicted of armed robbery and a separate crime which enhanced his punishment for committing a felony while being armed with a firearm. The Missouri Supreme Court found that the crimes were the "same offense" and therefore could not be punished separately. The United States Supreme Court disagreed. The Court held that it is irrelevant whether the crimes are the "same offense," when the legislative intent clearly shows they intended both crimes to be punished separately. Hunter, 459 U.S. at 368-69.

harassment is a qualifying offense. RCW 9.94A.533(3)(c) and RCW 9A.46.020(2).

The legislative intent is clear, unambiguous and unmistakable. Firearm enhancements attach to every qualifying offense. Harris, 102 Wn.2d 148 (armed robbery with a firearm enhancement does not violate double jeopardy because the Legislature clearly intended to punish both); State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006) (three weapons enhancements with three offenses does not violate double jeopardy); State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004) (defendant pointed a single gun at two people trying to repossess his car--statute "unambiguously shows legislative intent to impose two enhancements"); State v. Husted, 118 Wn. App. 92, 74 P.3d 672 (2003), rev. denied, 151 Wn.2d 1014 (2004) (defendant broke into a home and raped a victim at knifepoint--court found Legislature clearly intended two enhancements where there are two eligible offenses, notwithstanding the fact that being armed with a deadly weapon was an element of one of the offenses); State v.

Caldwell, 47 Wn. App. 317, 734 P.2d 542, rev. denied, 108 Wn.2d 1018 (1987) (first-degree burglary with a deadly weapon enhancement does not violate double jeopardy); State v. Pentland, 43 Wn. App. 808, 719 P.2d 605, rev. denied, 106 Wn.2d 1016 (1986) (with "unusual clarity" the Legislature clearly expressed that a person who commits first-degree rape with a knife receive an enhanced sentence notwithstanding the fact that being armed is an element of first-degree rape); DeSantiago, 149 Wn.2d 402 (if multiple firearms are carried or used during a single crime, the enhancements for each weapon must run consecutively).

Mandanas attempts to contrast State v. Claborn, 95 Wn.2d 629, 628 P.2d 467 (1981), wherein this Court found that multiple enhancements did not violate double jeopardy.<sup>8</sup> He argues in his petition that because his crimes occurred "during the same segment of time. . . and [the] offenses were inextricably intertwined,"

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<sup>8</sup> Claborn dealt with RCW 9.95.040 and RCW 9.41.025 (since repealed), two pre-SRA statutes that set certain minimum terms for offenses committed with a firearm. The Court rejected Claborn's double jeopardy claim because the two underlying offenses were not based upon the same facts; the burglary was complete before Claborn entered the home, his theft occurring later.

double jeopardy is violated. Mandanas' argument fails in many respects. First, he does not conduct a double jeopardy analysis, never discussing that the first step of a double jeopardy inquiry is to look at the specific statutory language. Here, this first step is dispositive. Second, Mandanas' argument is merely a claim that because the same facts were used to prove both enhancements, there is a double jeopardy violation. This is not the test for double jeopardy. Whether the same facts are used to prove two offenses is only a part of the "same evidence" test. The fact that the same facts may be used to prove two offenses is not dispositive.<sup>9</sup>

The legislative intent is clear, unambiguous and unmistakable. Firearm enhancements attach to every qualifying offense. The defendant's double jeopardy argument has no merit.

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<sup>9</sup> To the extent Mandanas may assert that proof of two charges based upon the same facts is dispositive, this type of double jeopardy analysis was rejected long ago. In 1993, the United States Supreme Court rejected the "same conduct" fact based test for determining double jeopardy. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, this Court did the same. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995); see also State v. Vaughn, 83 Wn. App. 669, 924 P.2d 27 (1996), rev. denied, 131 Wn.2d 1018 (1997) (recognizing rejection of the "same conduct" test).

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's sentence.

DATED this 30 day of <sup>June</sup>~~May~~, 2008.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

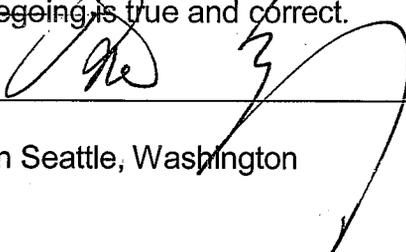
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Todd Maybrown, the attorney for the appellant, at Allen, Hansen & Maybrown, 600 Union Street, Suite 3020, Seattle WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. MANDANAS, Cause No. 80441-9, in the Supreme Court, for the State of Washington.

I certify under ~~penalty of perjury~~ of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

06/30/2008  
\_\_\_\_\_  
Date