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63142-0

No. 63142-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

EDO ASLANYAN,

Appellant,

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

FEB 12 2010

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**APPELLANT'S SUPPLEMENTAL BRIEF  
[CORRECTED]**

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## **I. INTRODUCTION**

The following supplemental brief addresses whether a 60 month firearm enhancement imposed on the Appellant following his conviction for Assault in the first degree violates the constitutional prohibition against double jeopardy?

This issue is brought before this Court in response to counsel's review of two cases that have been recently argued before the State Supreme Court.<sup>1</sup> Due to counsel's belief the outcome of these cases would affect the sentence imposed in this case, counsel is compelled to present supplemental briefing.

The two cases are:

- (1) State v. Kelley, 146 Wn. App. 370, 189 P.3d 853 (2008), review granted, 165 Wn.2d 1027, 203 P.3d 379 (2009) (#82111-9)
- (2) State v. Aguirre, 146 Wn. App. 1048 (2008), review granted, 165 Wn.2d 1036, 205 P.3d 131 (2009) (#82226-3)

## **II. SUPPLEMENTAL ISSUE PRESENTED**

Whether the 60 month firearm enhancement imposed by the trial court following conviction for Assault in the first degree violated double jeopardy?

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<sup>1</sup> October 29, 2009.

### III. STATEMENT OF FACTS

Mr. Aslanyan was convicted following jury trial of Assault in the first degree. The amended information<sup>2</sup>, filed prior to trial, accused the defendant of;

On or about December 4, 2007, with intent to inflict great bodily harm, did assault Tigran Koshkaryan with a firearm and force and means likely to produce great bodily harm or death, to wit: a handgun, and did inflict great bodily harm upon Tigran Koshkaryan.<sup>3</sup>

On the same document the State accused Mr. Aslanyan of being armed with a firearm. RCW 9.94A.533. Id.

The court instructed the jury Assault in the first degree was committed when a person, with intent to inflict great bodily harm, assaults another and inflicts great bodily harm or assaults another with a firearm.

(CP 141)

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<sup>2</sup> CP 41

<sup>3</sup> Per RCW 9A.36.011, the prosecutor modified the language of the statute in the amended information. Rather than using the statutory "or," the prosecutor used the term "and."

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

- (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
- (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
- (c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony.

The trial court instructed the jury to fill out a special verdict regarding whether the defendant was armed with a firearm if they found him guilty. (CP 156-157) Upon finding the defendant guilty, the jury filled out the special verdict finding the defendant was armed with a firearm. (CP 159)

The trial court sentenced the defendant to 120 months. (CP 184) Specifically, the court imposed an exceptional sentence downward from the standard range.<sup>4</sup> Therefore, he received a sentence of 60 months for assault in the first degree, and 60 months for the firearm enhancement.

#### **IV. ISSUE RAISED FOR FIRST TIME ON APPEAL**

##### **RULE 2.5 CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW**

**(a) Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the

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<sup>4</sup> Standard range was 93 to 123 months.

trial court if another party on the same side of the case has raised the claim of error in the trial court.

An error may be raised for the first time on appeal if it is a manifest error involving a constitutional right. State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004). An error is manifest, warranting review of an error raised for first time on appeal, if it results in actual prejudice to the defendant or the defendant makes a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. State v. Nguyen, 165 Wn.2d 428, 197 P.3d 673 (2008). A “manifest error,” warranting review of error raised for first time on appeal, is an error that is unmistakable, evident or indisputable. State v. Nguyen, supra. The burden is upon the defendant to make the required showing that an unpreserved error was a manifest error affecting a constitutional right, so as to allow review of the error on appeal. State v. Nason, 146 Wn. App. 744, 192 P.3d 386 (2008).

A double jeopardy claim can be raised for the first time on appeal. State v. Zumwalt, 119 Wn. App. 126, 82 P.3d 672 (2003), affirmed 153 Wn.2d 765, 108 P.3d 753. Mr. Aslanyan respectfully contends this argument is constitutionally based and represents a manifest error. Further, the issue in his case has a practical and identifiable consequence to his

total amount of incarceration for his conviction. Thus, he respectfully requests this Court to review the issue.

#### **V. ARGUMENT**

No person may be “twice put in jeopardy of life or limb” for the same offense. In re Personal Restraint of Fletcher, 113 Wn.2d 42, 46, 776 P.2d 114 (1989). This is a constitutional guarantee applied to the states by the Fourteenth Amendment. Id.; State v. Springfield, 28 Wn. App. 446, 449, 624 P.2d 208 (1981). The Washington Constitution affords identical protection against double jeopardy. CONST. art. I, § 9; State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

The double jeopardy clause protects against multiple punishments for the same offense. See North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). To determine if separate prosecutions violate double jeopardy, courts utilize the Blockburger, or “same elements,” test. U.S. v. Dixon, 509 U.S. 688, 697, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993).

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires

proof of a fact which the other does not. Blockburger v. U.S., 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

The sentencing enhancement Mr. Aslanyan received came from the “Hard Time for Armed Crime” initiative. (Codified RCW 9.94A.533) The statute enhances terms of incarceration in instances where a crime is committed while possessing a firearm or deadly weapon. Certain offenses are exempt. RCW 9.94A.533(3)(F). Assault in the first degree is not listed as an exempted offense.

Kelley<sup>5</sup> argued before the State Supreme Court (October 29, 2009) that the Court must re-visit double jeopardy analysis in cases where identical facts are used to convict a defendant for an assault where a firearm is used and are further used impose a firearm enhancement. (See Appendix A – Kelley – Petition for Discretionary Review) Division One had previously rejected the argument. See State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006).

Kelley argued double jeopardy analysis must be re-visited based upon the Supreme Court decisions Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Sattazahn v. Pennsylvania, 537

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<sup>5</sup> Kelley was convicted of multiple offenses including Assault in the second degree involving a deadly weapon. He further received a firearm enhancement on all convictions.

U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). Blakely<sup>6</sup> and Apprendi<sup>7</sup> require jury findings to support sentence enhancements. Ring and Sattazahn held that aggravating factors used to impose a death penalty operate as elements of a greater offense implicating double jeopardy. (Kelley Brief, pg. 7) Justice Scalia, from the plurality opinion in Sattazahn, found “no principled reason to distinguish” between what constitutes an offense for purposes of the Sixth Amendment right to a jury trial and what constitutes an offense for purposes of the Fifth Amendment’s double jeopardy Clause. (Kelley Brief, pg. 7)

Acknowledging RCW 9.94A.533 exempts certain firearm offenses from the enhancement, Kelley argued the initiative’s intent was unclear whether the intended result was to impose redundant punishment for crimes where punishment has already been increased due to the fact a firearm was involved. (Kelley Brief, pg. 8)

Aguirre made the identical argument. (Appendix B – Aguirre - Petition for Review, pg. 22)

Here, Mr. Aslanyan was convicted of Assault in the first degree. The State’s information accused him, with intent to inflict great bodily

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<sup>6</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

<sup>7</sup> Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

harm, of assaulting the victim with a firearm and force and means likely to produce great bodily harm. (CP 41) The State further accused him of being armed with a firearm for purposes of the enhancement. Id.

While conceivably there is more than one way to commit Assault in the first degree, here the State charged only one means: use of a firearm. Without use of a firearm, Mr. Aslanyan could not have been charged with the crime. Mr. Aslanyan was punished because he used a firearm to inflict great bodily harm on the victim. From these facts the trial court imposed the additional firearm enhancement to his sentence.

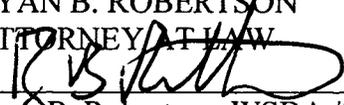
## **VI. CONCLUSION**

This issue is presently before the State Supreme Court, and all parties are waiting for a decision. Mr. Aslanyan respectfully contends that if the Supreme Court rules in favor of Mr. Kelley and/or Mr. Aguirre, the decision will impact his sentence, eliminating the 60 month enhancement.

Mr. Aslanyan therefore respectfully requests this Court to accept the filing of this argument.

RESPECTFULLY SUBMITTED this 12 day of February, 2010.

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# APPENDIX A

82111-9

**FILED**  
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STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION II

No.

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STATE OF WASHINGTON

BY                       
DEPUTY

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

DUSTIN R. KELLEY, Petitioner.

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PETITION FOR DISCRETIONARY REVIEW

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Court of Appeals No. 35944-8-II  
Appealed from the Superior Court for Pierce County  
Superior Court Cause No. 06-1-00938-1

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## **A. IDENTITY OF PETITIONER**

Your Petitioner for discretionary review is Dustin R. Kelley, the Defendant and Appellant in this case.

## **B. COURT OF APPEALS DECISION**

The Petitioner seeks review of the opinion in the Court of Appeals, Division II, cause number 35944-8-II, which was filed on August 12, 2008. A copy of the opinion is attached hereto in the Appendix. No motion for reconsideration has been filed in the Court of Appeals.

## **C. ISSUES PRESENTED FOR REVIEW**

- A. Is the Double Jeopardy Clause violated when the court imposes a firearm enhancement for a conviction in which the underlying offense was elevated because a handgun was used?

## **D. STATEMENT OF THE CASE**

### ***Factual History:***

This case arose from the shooting of Beau Pearson. On February 22, 2006, at around 5:30 p.m., Pearson, Kelley Kowalski, and Valerie Greenfield were hanging out in a trailer that was located in the back yard of Klaus Stearns. RP 227-28, 536. Stearns stepped out to talk with his mother at the main house. RP 539. While he was out, a man entered the trailer and got into an argument with Pearson. RP 606, 581.

Greenfield was sitting next to Pearson when he argued with the shooter. RP 606. She was not listening to their discussion, but remembers that the man asked Pearson if he had ever been shot before. RP 609. Pearson said that he had. RP 609. The man turned and walked toward the door, then turned around with two guns. RP 609. The man said: "I'll smoke you and your bitch, too." RP 609. Pearson turned to Greenfield, said he was sorry, and pushed her away. RP 610. Pearson stood up and the man began to shoot. RP 610. More than one shot was fired. RP 612. The man then ran from the trailer. RP 612. Greenfield felt one gun might be pointed at her, but she was not hit by any bullets in the small space. RP 620.

Kowalski was on the phone facing away from the altercation and a radio was blaring loud music. RP 582. Kowalski turned when she heard the shots. RP 582. She saw Pearson slumped over and Greenfield leaving. RP 582. The shooter was gone. RP 584.

Stearns was on the back porch when he heard the shots. RP 540. Immediately after hearing "popping noises," he saw a man he identified as Dustin Kelley leave the trailer, then Greenfield, then Kowalski. RP 540. He went to the trailer, looked in, saw Pearson, and called 911. RP 540. Pearson died at the scene. RP 524.

***Procedural History:***

Dustin Kelley was arrested two weeks after the shooting. RP 475. He was charged with first degree murder (premeditated intent), unlawful possession of a firearm, and second degree assault (intentional assault with a deadly weapon, to wit: Handgun(s)). CP 8-9. Additionally, the State charged two firearm enhancements each to the murder charge, as well as the second degree assault charge. CP 8-10. Kelley was convicted on all three charges, and he was given a total of four firearm enhancements to his sentence. CP 83. He was given 524 months for first degree murder, with 120 months of firearm enhancements, 60 months for unlawful possession of a firearm, and 48 months for second degree assault, with 72 months of firearm enhancements. CP 83.

Kelley appealed his convictions, arguing that he was deprived of effective assistance of counsel when his attorney failed to introduce evidence of his mental illness and argue this affected his ability to form the requisite intent and that the imposition of two firearm enhancements on the second degree assault conviction violated double jeopardy. See Appellant's Brief.

On August 12, 2008, the Court of Appeals, Division II, affirmed Kelley's convictions and sentence, holding that a firearm enhancement can

be imposed on a conviction where use of a firearm is an element of the underlying crime without offending Double Jeopardy. Opinion at 5. This portion of the opinion was published.

### **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

The petitioner asserts that the issues raised by this Petition should be addressed by the Supreme Court because this case: raises a significant question under the Constitution of the United States and involves an issue of substantial public interest that should be determined by the Supreme Court, as set forth in RAP 13.4(b).

#### **ISSUE 1: THE IMPOSITION OF FIREARM ENHANCEMENTS FOR SECOND DEGREE ASSAULT WITH A HANDGUN VIOLATED THE CONSTITUTIONAL PROHIBITIONS ON DOUBLE JEOPARDY.**

The double jeopardy clause of the United States Constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. 5. The Fifth Amendment’s double jeopardy protection is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Washington’s constitution provides that no individual shall “be twice put in jeopardy for the same offense.” Wash. Const. art. 1, §9. This Court gives Article 1, Section 9 the same interpretation as the United

States Supreme Court gives to the Fifth Amendment. *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

To determine if separate prosecutions violate double jeopardy prohibitions, the courts utilize the *Blockburger*, or “same elements” test. *United States v. Dixon*, 509 U.S. 688, 697, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993).

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

*Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Two offenses are the same offense for purposes of double jeopardy analysis when one offense is necessarily included within the other and, in the prosecution for the greater offense, the defendant could have been convicted of the lesser. *State v. Roybal*, 82 Wn.2d 577, 582,

512 P.2d 718 (1973). Thus, conviction or acquittal on a lesser included offense bars the government from prosecuting the defendant for the greater offense. *Green v. U.S.*, 355 U.S. 184, 190-91, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Likewise, 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. *State v. Freeman*, 153 Wn.2d 735, 770-71, 108 P.3d 753 (2005).

In *Apprendi* and *Blakely*, the Court clarified the long-standing requirement that any fact that increases the maximum punishment faced by a defendant must be submitted to a jury and proved beyond a reasonable doubt, even if the fact is labeled a “sentencing enhancement” by the legislature. *Blakely v. Washington*, 542 U.S. 296, 306-7, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). “Our decision in *Apprendi* makes clear that “[a]ny possible distinction” between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” *Blakely*, 542 U.S. at 306-7. Accordingly, the Supreme Court treats sentencing factors,

like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. *Blakely*, at 306-7.

The Supreme Court has also held that “aggravating factors” that may make a defendant eligible for an exceptional sentence or the death penalty “operate as the functional equivalent of an element of a greater offense.” *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), quoting *Apprendi*, 530 U.S. at 494 n. 19.

The aggravating factors that make a defendant eligible for the death penalty also operate as elements of a greater offense for purposes of double jeopardy. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111-12, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). In fact, in *Sattazahn*, Justice Scalia, writing for a plurality of the Court, found “no principled reason to distinguish” between what constitutes an offense for purposes of the Sixth Amendment right to a jury trial and what constitutes an offense for purposes of the Fifth Amendment’s Double Jeopardy Clause. 537 U.S. at 111. (“If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that “acquittal” on the offense of “murder plus aggravating circumstance(s).”

In *State v. Recuenco*, 154 Wn.2d 156, 162-3, 110 P.3d 188 (2005), the Washington Supreme Court held that facts to support a firearm

enhancement must be proved to the jury.<sup>1</sup> Like the aggravating factors in *Ring*, the additional finding increases the punishment faced by the defendant and so operates as the functional equivalent of an element of a greater offense.

Here, in count three, Kelley was convicted of second degree assault while armed with a deadly weapon, namely a handgun. CP 9-10, 79. By special verdict, the jury again found Kelley was “armed with a firearm” when he committed the assault. RP 894.

RCW 9.94A.533, the “Hard Time for Armed Crime” initiative, shows the voters’ intent to create exemptions for crimes where possessing or using a firearm is a necessary element of the crime, such as drive-by shooting or unlawful possession of a firearm. RCW 9.94A.510(3)(f). However, it appears that the voters were unaware of the similar problem of redundant punishment created when a firearm enhancement is added to a crime where the punishment has already been increased due to the necessary element of involvement of a firearm. There is no language showing the intent to punish crimes committed with a firearm again with a firearm enhancement. This is a change from prior law, where the

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<sup>1</sup> The Supreme Court overruled *Recuenco’s* holding that *Blakely* errors cannot be harmless error, but not the application of *Apprendi* and *Blakely* to firearm enhancements. *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006).

legislative intent to attach two punishments was clear in the language itself. *See State v. Adlington-Kelly*, 95 Wn.2d 917, 924, 631 P.2d 954 (1981).

The “Hard Time for Armed Crime” initiative was passed long before *Apprendi* and *Blakely* reshaped the sentencing landscape. Thus, state law did not view additional findings triggering an increased sentence as implicating the rights to a jury trial, due process of law, or double jeopardy. *Cf., former RCW 9.94A.535.*

Because under *Blakely* and *Apprendi* factual findings that support sentencing enhancements constitute elements of a crime, they also constitute a new, greater offense for purposes of double jeopardy. There is “no principled reason to distinguish” between the statutory elements of the crime—which in this case included possession of a “deadly weapon”—and the statutory firearm enhancement—which again punishes for the same finding. *See Sattazahn*, 537 U.S. at 111-12 (“The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence not only delimits the boundaries of . . . important constitutional rights, like the Sixth Amendment right to trial by jury, but also provides the foundation for our entire double jeopardy jurisprudence.”)

Division I of this court has previously rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon is an element of the underlying offense. *See e.g. State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), 137 Wn. App. 1, 150 P.3d 643, 2007 Wn. App. LEXIS 102 (2006); *State v. Husted*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003). The state Supreme Court addressed this issue under the old firearm enhancement statute, which contained different language, and held there was no double jeopardy violation. *State v. Adlington-Kelly*, 95 Wn.2d 917, 631 P.2d 954 (1981). The state supreme court has not addressed the affect of *Blakely* and *Apprendi* on this question.

Kelley's assault charge was elevated to a higher degree by the element of being armed in committing the crime. RCW 9A.36.021(1)(c). Therefore, again elevating the crime for the same underlying act—use of a firearm—violates double jeopardy. This court should reverse and remand with the direction that the firearm enhancements be vacated. *See State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007).

## F. CONCLUSION

The Supreme Court should accept review for the reasons indicated in Part E, reverse the court of appeals, reverse Kelley's firearm

enhancements added to his conviction for assault and remand for resentencing.

DATED: September 3, 2008.

By: Rebecca W. Bouchey  
Rebecca Wold Bouchey #26081  
Attorney for Petitioner

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
FILED  
COURT OF APPEALS  
DIVISION II

CERTIFICATE OF SERVICE

I certify that on the 3<sup>rd</sup> day of September 2008, I caused a true and correct copy of this Petition for Review to be served on the following via prepaid first class mail:

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# APPENDIX B

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NO. \_\_\_\_\_

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STATE OF WASHINGTON

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SUPREME COURT OF THE STATE OF WASHINGTON

NO. 36186-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

\_\_\_\_\_  
STATE OF WASHINGTON,

Respondent,

v.

DANIEL MARSHALL AGUIRRE,

Petitioner.

\_\_\_\_\_  
PETITION FOR REVIEW

\_\_\_\_\_  
Sheryl Gordon McCloud  
WSBA No. 16709  
710 Cherry St.  
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ORIGINAL

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**A. IDENTITY OF PETITIONER**

Daniel Aguirre, defendant and appellant, asks this Court to review the Court of Appeals decision designated in Section B.

**B. COURT OF APPEALS DECISION**

A copy of the decision affirming Mr. Aguirre's conviction and sentence is contained in Appendix A.

**C. ISSUES PRESENTED FOR REVIEW**

The state's theory was that Mr. Aguirre raped his girlfriend, Ms. Laughman, because he was angry, jealous, barring her from contact with peers, and afraid she would leave him. The defense theory was that they had consensual sex; that Mr. Aguirre was the one who broke up with Ms. Laughmann; and hence that she harbored bias, resentment and a motive to lie. No one in the house at the time of the alleged acts could corroborate assault or rape; no forensic evidence corroborated the claims; and Ms. Laughmann made conflicting statements about whether any crime had occurred. Hence, credibility was the key issue.

1. Did the trial court's admission of the "domestic violence" expert's opinion about how Ms. Laughman's actions and conflicting statements fit those of a rape victim, constitute impermissible vouching?

2(a). Did exclusion of evidence that the complainant tried to contact Aguirre through his brother, after the time that she claimed that

she was trying to get away from him, on the ground that it was impeachment on a collateral issue, violate evidence rules and the constitutional right to present a defense?

2(b). Did exclusion of evidence regarding complainant “seeing” another man on the ground that it violated the rape shield statute violate the language of that statute and the constitutional right to present a defense?

2(c). Did exclusion of other evidence challenging the complainant’s credibility, and revealing her bias, violate the constitutional right to present a defense?

3. The court defined “unlawful force” in the instruction on assault as “any force” used without “consent.” Since unlawful force depends on the defendant’s subjective viewpoint, not the victim’s, did this misstate the law?

4. Following *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), *rev’d on other grounds*, 548 U.S. 212 (2006) – which held that any fact increasing the statutory maximum penalty is akin to an element of the crime – does the state violate double jeopardy protections by charging second-degree assault based on a deadly weapon, plus a deadly weapon enhancement, for the same weapon?

5. Did denial of the motion for a continuance to substitute retained counsel at sentencing deprive Mr. Aguirre of his right to retained counsel of choice?

**D. STATEMENT OF THE CASE**

**1. THE CHARGES**

The state charged Daniel Aguirre with two counts of assault and one count of rape for acts allegedly occurring during one night. Count I charged that he intentionally assaulted his girlfriend, Emily Laughman, on August 26-27, 2006, and “recklessly inflicted substantial bodily harm,” in violation of RCW 9A.36.021(1)(a) (and RCW 10.99.020, the domestic violence statute). CP:8. The jury acquitted on that count.

Count II charged second-degree assault with a deadly weapon, under a different portion of that statute (RCW 9A.36.021(1)(c)), on the same dates, for intentional assault “with a deadly weapon,” “a combat knife.” It also alleged a deadly weapon enhancement for that knife. Count III charged second-degree rape in violation of RCW 9A.44.050(1)(a), at the same time, with “forcible compulsion.” CP:9. The jury convicted of those two counts, and on the weapon enhancement.

**2. OVERVIEW: CREDIBILITY WAS THE KEY ISSUE**

Both Emily Laughman and Daniel Aguirre were in the Army. They were both trained in combat, and they both held difficult jobs

requiring knowledge of the use of force: she was in the military police and had been a guard at both Fort Leavenworth and Guantanamo Bay (2/13/07 VRP:325-26); he had served in Iraq and taught hand to hand combat to soldiers (including Laughman) at the NCO Academy. *Id.*, VRP:327-28.

It was undisputed that the two had sex, and that they had a romantic relationship. She claimed that it was rape and assault causing bruises, and that the rape occurred because he was angry, jealous, and afraid she would leave him.<sup>1</sup> He claimed that they had had consensual sex and consensually engaged in play-fighting so any bruises resulted from that, and that she was reacting negatively because he then tried to break off the relationship.

The key issue at trial was credibility. 2/15/07 VRP:890-902 (state closing, arguing key issue of credibility); *id.*, VRP:926-30 (defense closing, explaining defense theory about complainant's motive to lie because Aguirre broke up with her after consensual sex).

### 3. TRIAL TESTIMONY

The conflicting testimony of Ms. Laughman and Mr. Aguirre is incorporated by this reference from the Opening Brief, at pp. 6-12. That Brief includes descriptions of the far-ranging testimony that the

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<sup>1</sup> *E.g.*, 2/13/07 VRP:459-62 (nurse testimony about bruising).

complainant was allowed to present, from Mr. Aguirre's supposed jealousy and limitations on her contact with peers, as well as threats about what he would do to her if she left him. It includes her explanations of why she failed to report any assault or rape to Mr. Aguirre's roommate, whom she saw after the disputed sex while smoking in the living room, and to explain the fact that she told the officer who inquired about her welfare a day later (following a hang up 911 call) that she was practicing combat moves with him, not fighting. It also includes the domestic violence expert's testimony that such denials are consistent with a rape victim profile.

On the other hand, that Brief shows that the trial court prevented Daniel Aguirre from presenting his side of the story on precisely these topics.

Even with the lopsided nature of the evidence that the trial court admitted and excluded, the jury did not completely believe Ms. Laughman. They acquitted on Count I, the first assault she claimed had occurred that evening.

#### **4. SENTENCING**

Mr. Aguirre retained a new lawyer (undersigned counsel) for sentencing. The state opposed the joint motion of Mr. Aguirre, his trial counsel, and newly retained counsel to continue sentencing to enable

retained counsel to represent Mr. Aguirre effectively. *See* Opening Brief, pp. 12-13.

The trial court imposed a standard range sentence of 26 months on Count 2. On Count 3, it imposed a concurrent standard range minimum term of 125 months and a maximum term of life. The deadly weapon enhancement runs consecutively to both. CP:129.

**E. ARGUMENT IN FAVOR OF REVIEW**

**1. ADMISSION OF TESTIMONY FROM THE “DOMESTIC VIOLENCE” EXPERT ABOUT HOW MS. LAUGHMAN SUFFERED FROM A CYCLE OF VIOLENCE WITH MR. AGUIRRE CONSTITUTED IMPERMISSIBLE VOUCHING; THE APPELLATE COURT’S DECISION TO THE CONTRARY CONFLICTS WITH *BLACK*<sup>2</sup> AND DECISIONS BARRING VOUCHING**

**a. The Domestic Violence Expert’s Testimony, Admitted Over Defense Counsel’s Continuing Objection, and the Appellate Court’s Ruling**

Over the defendant’s continuing objection (2/14/07 VRP:538-41), state’s witness Cheryl Stines, Thurston County Sheriff’s Department, testified as an expert in domestic violence. She reiterated Ms. Laughman’s testimony, and explained how each bit of it (though all of it was disputed) – Mr. Aguirre’s supposed jealousy and control; her supposed embarrassment about reporting; and her demeanor – was

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<sup>2</sup> *State v. Black*, 109 Wn.2d 336, 341, 348-50, 745 P.2d 12 (1987).

consistent with Laughman being a victim of domestic violence, and with Aguirre being a perpetrator of violence. 2/14/07 VRP:493-537.

The defense objected and the Court of Appeals agreed that this objection preserved the challenge to admissibility of this testimony for appeal. But it ruled that the expert did not vouch because “she did not directly comment on Aguirre’s guilt or Laughman’s credibility.” *State v. Aguirre*, 2008 Wash. App. LEXIS 2202, at \*25.

b. **The Appellate Court’s Decision Conflicts With Controlling and Persuasive Precedent Holding that Testimony Bolstering Credibility is Impermissible Vouching, Even if There is No Direct Statement That The Expert “Believes” the Complainant.**

The appellate court’s decision that the expert did not vouch because she did not directly say she believed the victim conflicts with several lines of authority.

It conflicts with this Court’s ruling that just such testimony, that a complainant’s demeanor fits a pattern consistent with that of a rape victim, constitutes impermissible opinion testimony, where it implies that the alleged victim is telling the truth. *State v. Black*, 109 Wn.2d 336, 341, 348-50 (social worker’s testimony that alleged victim fit profile of rape victim was impermissible opinion testimony). Contrary to the appellate court below, this Court in *Black* came to that conclusion even though the

expert did not *directly* testify that the complainant was telling the truth – inferences arising from the bolstering sufficed. As this Court stated: “No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, *whether by direct statement or inference.*” *Id.*, at 109 Wn.2d at 348 (emphasis added).

This Court properly relied on prior decisions of this Court for that holding. *Id.* (citing *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1987) and *State v. Haga*, 8 Wn. App. 481, 507 P.2d 159, *review denied*, 82 Wn.2d 1006 (1973) (opinion testimony of ambulance driver that defendant had not shown signs of grief following the murders of his wife and daughter was wrongfully admitted because the jury could infer from this that driver believed defendant was guilty)). The appellate court’s decision thus conflicts with *Garrison* and *Haga* on this point, also.

It is true that since *Black*, *Garrison*, and *Haga*, Washington courts have “made clear that expert testimony generally describing symptoms exhibited by victims may be admissible when relevant and when not offered as a direct assessment of the credibility of the victim.” *State v. Stevens*, 58 Wn. App. 478, 496, 794 P.2d 38, *review denied*, 115 Wn.2d 1025 (1990). *See also State v. Ciskie*, 110 Wn.2d 263, 279-80, 751 P.2d 1165 (1988). This Court, however, has never addressed the lurking conflict between *Black*’s preclusion of such testimony as vouching even if

it bolster's the victim's credibility inferentially, and lower court's later holdings that bolstering may be permissible if it is not direct.

The conflict implicates not just this case law on vouching and on E.R. 702, concerning the admissibility of expert testimony, but also the right to due process and a fair trial. U.S. Const. V, XIV; Wash. Const. art. 1, §3. This is because introduction of expert testimony concerning the implications of Mr. Aguirre's and Ms. Laughman's demeanor – based on Laughman's testimony about their demeanors and rejecting Aguirre's testimony and proffered testimony on that topic – is a personal opinion concerning witness veracity.<sup>3</sup> It is most prejudicial in a case like this: “the existence of a dispute in the evidence as to the credibility of a witness – a matter that be definition is for the jury to resolve – makes the prosecutor's placement of his thumb on the scales all the more impermissible.”<sup>4</sup>

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<sup>3</sup> *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005) (arguing that the officers risk losing their jobs if they lie, so they must have “came in here and told you the truth” impermissible vouching); *United States v. Combs*, 379 F.3d 564, 574-76 (9th Cir. 2004) (same).

<sup>4</sup> *Weatherspoon*, 410 F.3d 1142, 1148. See *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005) (prosecutorial bolstering of witness testimony prejudicial, because “jury's verdict turned almost entirely upon the credibility of the complaining witness and the defendant.”).

2. **TESTIMONY THAT DIRECTLY CONTRADICTS THE COMPLAINANT ON THE STATE'S THEORY OF THE CASE IS DIRECT NOT COLLATERAL; EXCLUSION OF THIS AND OTHER EVIDENCE VIOLATES EVIDENCE RULES AND THE RIGHT TO PRESENT A DEFENSE.**

a. **Precluding Cross-Examination of the Complainant on Her Relationship With Another Man as Violative of the Rape Shield Statute Contradicts the Language of that Statute and Violates the Right to Present a Defense**

The judge barred defense counsel from cross-examining the complainant about being in a relationship with another man and about how the impact of that caused Mr. Aguirre to pull back from their relationship, thus refuting the notion that she was the one who wanted to leave him. 2/13/07 VRP:368-71, 372. The judge rejected a detailed offer of proof (2/15/07 VRP:722-27) that Mr. Aguirre be allowed to testify about how he found out that the complainant was seeing someone else, and how that influenced his desire to break things off with her.

The judge reasoned that allowing Mr. Aguirre to give any more than one line about the fact that Ms. Laughman went out with someone else would violate the rape shield statute (2/15/07 VRP:736), even though defense counsel clearly stated he was not going to ask anything about sex – just about the fact that she saw someone else. 2/15/07 VRP:739. The judge also reasoned that defendant's testimony on this topic – of

Laughman dating another man during the time period when Laughman claimed that she was dominated by Aguirre and barred from seeing her peers – had no probative value (2/15/07 VRP:741), even though Ms. Laughman’s credibility, bias, and motive to lie formed the central element in dispute in this credibility case.

The appellate court upheld the trial court’s decision on the ground that even if the judge excluded testimony about the complainant “seeing someone” else because it was supposedly a “euphemism for having sex,” defense counsel elicited it anyway – so the question of whether the rape shield statute really barred admission of such evidence was not presented. *Aguirre*, 2008 Wash. App. LEXIS 2202, \*\*17-18 & n.4.

It is correct that Mr. Aguirre did testify once that the complainant was seeing another man. But he was not permitted to testify about how that affected their relationship and he was not permitted to cross-examine the complainant about this topic. The trial court excluded the details of that relationship based on the “rape shield” law.

The trial court’s decision contradicts the rape shield law itself. That statute, RCW 9A.44.020, limits admission of certain “past sexual behavior” of the complaining witness – “marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards.” But the defense did not offer “past

sexual behavior.” It offered evidence that Laughman went out with someone else, and how that affected the dynamic with Mr. Aguirre.

The trial judge also stated that she would construe the rape shield statute broadly, to effectuate the legislature’s presumed goals. This contradicts the rule that criminal statutes must be construed under the rule of lenity, not the rule of broad construction.<sup>5</sup>

Even if the rape shield statute did, by its terms, apply, so does the constitutional right to present a defense. A state evidentiary rule, even a longstanding and well-respected one, cannot abridge the right to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (exclusion of defense evidence of third-party guilt, pursuant to a state evidentiary rule, unconstitutional). Thus, numerous jurisdictions have held that evidence of motive and bias is admissible under constitutional standards, regardless of rape shield statutes to the contrary – and the decisions of the courts below conflict directly with these authorities.<sup>6</sup>

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<sup>5</sup> *Ratzlaf v. United States*, 510 U.S. 135, 148, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); *United States v. Figueroa*, 165 F.3d 111, 119 (2d Cir. 1998).

<sup>6</sup> *E.g.*, *Boggs v. Collins*, 226 F.3d 728, 737 (6th Cir. 2000), *cert. denied*, 532 U.S. 913 (2001); *Commonwealth v. Black*, 487 A.2d 396 (Penn. 1985) (insofar as rape shield law barred demonstration of witness bias, interest or prejudice, it unconstitutionally infringed upon the defendant’s confrontation clause rights); *Summit v. State*, 697 P.2d 1374 (Nev. 1985) (defendant was denied right to confrontation where prior sexual history of complainant was offered to challenge credibility); *People v. Hackett*, 365 N.W.2d 120, 125 (Mich. 1984) (prior sexual conduct “may not only be relevant, but its admission may

b. **Excluding Testimony that the Complainant Was Trying to Be With Mr. Aguirre, After the Time She Claims the Rape Occurred and She Was Trying to Get Away From Him, as Impeachment on a Collateral Matter, Violates Evidentiary Rules and the Right to Present a Defense**

The trial judge further barred defense counsel from calling Daniel Aguirre's brother Jimmy Aguirre to testify about how Ms. Laughman was trying to chase Daniel Aguirre down, through Jimmy, via MySpace, by asking Jimmy how to locate Daniel and why he was not returning her calls. This was particularly inappropriate, given the fact that Ms. Laughman was allowed to testify that she was not chasing Mr. Aguirre down; that she dumped him and not the other way around; and,

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be required to preserve a defendant's constitutional right ;... *where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted.* ... evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge") (citations omitted) (emphasis added); *State v. Howard*, 426 A.2d 457 (N.H. 1981); *State v. Pulizzano*, 456 N.W.2d 325 (Wis. 1990) (prior sexual abuse of child victim by other adults material and constitutionally protected). See *Olden v. Kentucky*, 488 U.S. 227, 232, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (exclusion of black defendant's evidence about white complainant in kidnap, rape and sodomy trial about her living with boyfriend violated confrontation clause right; relevant to defense claim that sex was consensual and that complainant lied because of fear of her boyfriend). See also *People v. Cobb*, 962 P.2d 944, 951 (Colo. 1998) (evidence of sexual assault victim's prior conduct, relevant to defense theory, not inadmissible under rape shield statute: "While the jury conceivably might have inferred that [the victim] was engaged in an act of prostitution, evidence does not become inadmissible under either Rule 404(b) or the rape shield statute simply because it might indirectly cause the finder of fact to make an inference concerning the victim's prior sexual conduct."); *People v. Golden*, 140 P.3d 1, 4, 5 (Colo. App. 2005), *review denied*, 2006 Colo. LEXIS 568 (2006) (evidence that victim was in "committed romantic relationship" at time of alleged crime admissible despite rape shield statute, because it bore on question of her credibility and possible motive for telling her roommates that she had been sexually assaulted).

specifically, that she did not try to use Jimmy Aguirre to chase the defendant, Daniel Aguirre, down and find out why he was not calling her any more after this alleged rape.<sup>7</sup>

The Court of Appeals upheld preclusion of this evidence as impeachment on a collateral matter. *Aguirre*, 2008 Wash. App. LEXIS 2202, at \*\*12-13. It relied primarily on *State v. Fankhouser*, 133 Wn. App. 689, 693, 138 P.3d 140 (2006), in defining this material as collateral.

The appellate court's decision conflicts with *Fankhouser*, with controlling authority of this Court, and with persuasive authority of other jurisdictions, on what is a collateral matter. *Fankhouser* actually held that exclusion of proposed cross-examination there was error, because it sought to elicit direct evidence of *bias* and *motive to lie*, and that is not collateral; it cited precedent of this court and the appellate courts to the same effect:

Tuttle's testimony did not concern a collateral matter. [I]t was proof that Lukes made a recent false accusation against Fankhouser for the same crime .... The prior accusation was also the precipitating event that led to Lukes working for the police and performing the controlled buy underlying the current charge. In this situation, proof establishing the falsity of the initial accusation is relevant and admissible to show the accuser's ongoing bias or

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<sup>7</sup> 2/14/07 VRP 588-89 (offer of proof regarding Jimmy Aguirre's testimony on this topic); *id.*, VRP:592 (excluded as impeachment on a collateral issue); 2/13/07 VRP: 429-30 (Ms. Laughman admits putting Jimmy Aguirre on her "friends" list for MySpace but denies trying to contact him repeatedly to find Danny and find out why he was no longer taking her calls).

underlying motive for the current accusation. *See State v. Demos*, 94 Wash.2d 733, 736-37, 619 P.2d 968 (1980) (evidence of a prior allegation is irrelevant absent proof of falsity); *State v. Harris*, 97 Wash.App. 865, 872, 989 P.2d 553 (1999) (same), *review denied*, 140 Wash.2d 1017, 5 P.3d 10 (2000); *State v. Mendez*, 29 Wash.App. 610, 630 P.2d 476 (1981) (trial court did not abuse its discretion in refusing to admit prior allegation since the date of the allegation was unknown). Our ruling is consistent with the wide latitude afforded a defendant in a criminal trial to explore fundamental elements such as the motive, bias, and credibility of the State's key witnesses. *State v. Darden*, 145 Wash.2d 612, 619, 41 P.3d 1189 (2002).

*Fankhauser*, 133 Wn. App. at 694.

Jimmy Aguirre's excluded testimony directly contradicted Laughman's claim that she was not chasing Daniel Aguirre. This is not collateral under the definition cited above, but direct evidence on both sides' theories of the case.

The appellate court's decision therefore conflicts with *Fankhauser* on the definition of "collateral." It also conflicts directly with the following decisions of this Court and the appellate courts holding that extrinsic evidence is admissible to impeach a witness's testimony in circumstances virtually identical to the ones presented here, that is, in a rape case where the complainant's "motive to lie" is "crucial," or in any case where the witness's post-crime conduct is inconsistent with his or her testimony about the crime. *State v. Lubers*, 81 Wn.2d 614, 623, 915 P.2d 1157 (1996) (extrinsic evidence cannot be used to impeach witness on

collateral issue but “Where the credibility of the complaining witness is crucial, her possible motive to lie is not a collateral issue.”); *State v. Petrich*, 101 Wn.2d 566, 574, 683 P.2d 173 (1984) (evidence of victim's inconsistent conduct following incident, that is, failure to promptly report sexual contact, not merely collateral, and witness may be impeached on it with extrinsic evidence); *State v. Kritzer*, 21 Wn.2d 710, 713-15, 152 P.2d 967 (1944) (in prosecution for assault with a gun, where defendant admitted owning shotgun but denied possessing any other gun, state could impeach by introducing testimony that shortly after assault he had a rifle in his home); *State v. Brown*, 48 Wn. App. 654, 660, 739 P.2d 1199 (1987) (trial court erred in excluding extrinsic evidence that prosecutrix in rape case had taken LSD at point in time close to the rape, because it was relevant direct evidence concerning “the central contention of a valid defense,” *i.e.*, her ability to perceive and relate events).

The appellate court’s decision also conflicts with authority from numerous other jurisdictions holding that a subject is collateral only if it is not related to the witness’s direct testimony.<sup>8</sup> It conflicts with authority

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<sup>8</sup> *United States v. Negrette-Gonzales*, 966 F.2d 1277, 1280 (9th Cir. 1992) (defense witness takes responsibility for cocaine and exonerates defendants, but refuses to answer government’s question on cross-examination to reveal the names of her suppliers due to fear of reprisal; Ninth Circuit holds, “identity of her source was collateral to the issues at trial and to her testimony on direct,” so striking testimony was reversible error); *United States v. Lord*, 711 F.2d 887 (9th Cir. 1983) (defense witness in cocaine conspiracy trial bolsters entrapment defense but, on cross-examination, refuses to name suppliers; striking

holding that a subject is collateral if it is designed to test credibility generally, rather than by specific reference to the issues concerning the case.<sup>9</sup> It conflicts with authority holding that a subject is collateral if it concerns “other crimes” or acts about which there was no direct testimony.<sup>10</sup> Whether Aguirre was forcing himself on Laughman or vice versa was the central issue here.

The right to present witnesses is especially strong where they would *rebut* evidence introduced by the government.<sup>11</sup> Since the

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her testimony was error, because a court “may apply this sanction only when the question asked pertains to matters directly affecting the witness’s testimony; the judge may not use the sanction when the privileged answer pertains to a collateral matter”).

<sup>9</sup> See *United States v. Sturgis*, 578 F.2d 1296, 1300 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978) (question is “whether the questions propounded are designed to test sincerity and truthfulness or are ‘reasonably related’ to the subject covered on direct.”).

<sup>10</sup> *United States v. Yip*, 930 F.2d 142, 147 (2d Cir.), *cert. denied*, 502 U.S. 868 (1991) (no error in district court’s refusal to strike government witness’ testimony “when witness refused on cross-examination to answer questions – claiming his Fifth Amendment privilege – regarding a check cashing and kickback scheme he was allegedly involved in ... . The scheme was not the subject of direct examination, and it was therefore a collateral matter bearing solely on [the witness’] credibility.”); *United States v. Zapata*, 871 F.2d 616, 624-25 (7th Cir. 1989) (prosecution witness’s invocation of Fifth Amendment on cross-examination was permissible, because “all of the unanswered questions did not go to the exculpation of Mr. Zapata from the July transaction with which he was charged, but rather, were directed at [witness’s] prior involvement in drug trafficking in Miami and Chicago.”); *United States v. Williams*, 626 F.2d 697, 699-702 (9th Cir.), *cert. denied*, 449 U.S. 1020 (1980) (lead government witness in robbery case testifies that she and the defendant robbed bank and she pled guilty; on cross-examination she asserts the Fifth Amendment in response to questions about whether she committed other, prior burglaries; no error in trial court’s failure to strike testimony because this was “collateral”).

<sup>11</sup> *Fankhauser*, 133 Wn. App. at 695 (“Even initially inadmissible evidence should be allowed if it is necessary to explain or contradict inadmissible evidence offered by the opposing party. *State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995),

proffered evidence would have rebutted Laughman's testimony on who broke up with whom, the right to present this proffered evidence must be considered especially strong.

c. **Excluding Other Testimony Also Violated the Right to Present a Defense**

The judge barred defense counsel from eliciting not just the Jimmy Aguirre testimony and background about the complainant's relationship with another man. She also excluded evidence that the complainant had previously recanted and barred the defendant from giving the most effective testimony – that is, details – about how he felt towards Laughman after learning that she had another boyfriend, and why it was he who wanted to break up. Opening Brief, at 14-21. Exclusion violated the constitutional right to present a complete defense regardless of evidentiary rules to the contrary. *Holmes v. South Carolina*, 547 U.S. 319, 324.

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*review denied*, 129 Wn.2d 1007 (1996).”). See also *United States v. Whitman*, 771 F.2d 1348, 1351 (9th Cir. 1985); *United States v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980).

3. THE APPELLATE COURT RECOGNIZED THAT A CHALLENGE TO THE DEFINITION OF UNLAWFUL FORCE CAN BE RAISED FOR THE FIRST TIME ON APPEAL. UPHOLDING THE INSTRUCTION DEFINING “UNLAWFUL FORCE” AS ANY UNCONSENTED TOUCHING, HOWEVER, CONFLICTS WITH THE RULE THAT THE FOCUS MUST BE ON THE DEFENDANT’S SUBJECTIVE VIEWPOINT.

a. The Jury’s Question; the Trial Court’s Answer; and the Appellate Court’s Ruling.

On Friday, Feb. 16, 2007, during deliberations, the jury asked: “Define ‘unlawful force’ as used in Instruction #12.” CP:61.<sup>12</sup> “Unlawful force” had not been previously defined in the instructions. The court answered: “Unlawful force as used in Instruction #12 refers to any force alleged to have occurred that was not consented to and that otherwise meets the definition of assault as contained in Instruction #12.” CP:61. The appellate court reviewed the challenge to this instruction raised for the first time on appeal because of its “constitutional magnitude.” It ruled, however, that the instruction was correct. *Aguirre, id.* at \*\*27-29 & n.6.

b. The Appellate Court Erred in Ruling that Unlawful Force Could be Defined as Unconsented Touching.

“Unlawful force” is *not* any force “not consented to.” It is a much narrower category.

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<sup>12</sup> Three Jury Questions were included on the Designation of Clerk’s Papers (CP:2), however, the Index to Clerk’s Papers does not differentiate between the three. Undersigned counsel is assuming that the Jury Notes are in sequential order.

First, the definition of “unlawful touching” provided by the court was wrong under the WPIC’s. WPIC 17.02 defines lawful force and unlawful force. It states:

It is a defense to a charge of assault in the second degree that the force used was lawful as defined in this instruction.

The use of 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 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 and prior to 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.*

WPIC 17.02 (emphasis added). It focuses on the defendant’s reasonable belief, and the state’s burden in proving that the defendant’s belief was not reasonable. WPIC 17.04 continues this definition by focusing on the fact that it is the defendant’s subjective intent that matters, and not whether the alleged victim subjectively consented, or whether another, different, observer would objectively think that she had consented:

*A person is entitled to act on appearances in*

*defending himself*, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

WPIC 17.04.

The trial court's supplemental instruction on the definition of "unlawful force" did not contain the subjective element required by these instructions. It was an incorrect definition of "lawful force" under the WPIC's.

It was also incorrect under *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) and *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) – since those decisions confirm the need to focus on the defendant's subjective intent in deciding whether his force is lawful.

The judge's answer even conflicted with the rationale for the WPIC on lawful and unlawful force. As the Comment to WPIC 35.50, defining "assault," explains, the definition of assault-battery (the one at issue here) focuses on the fact that "a bodily contact is offensive if it offends a reasonable sense of personal dignity." RESTATEMENT (SECOND) OF TORTS, § 19 (as quoted in WPIC 35.50 Comment). The contact "must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the *social usages* prevalent at the time and place

at which it is inflicted.” *Id.*, § 19 Comment (a) (as quoted in WPIC 35.50 Comment) (emphasis added).

The “social usage[]” in this case – according to Mr. Aguirre – was play-fighting based on combatives. That is a pretty rough “social usage.” It is far different from, and involves a much higher standard of proof than, the unconsented-touching standard in the supplemental instruction.

c. **It Was Also Error to Provide This Definition in a Supplemental Instruction, After the Parties Had Argued and the Jury Had Retired.**

It was also error to provide a supplemental instruction on this important topic after the case had already been argued and the jury had retired. The appellate court’s decision to the contrary conflicts with the general rule that supplemental instructions “should not go beyond matters that either had been, or could have been, argued to the jury.” *State v. Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990).<sup>13</sup>

4. **THE APPELLATE COURT UPHELD CONVICTIONS OF SECOND-DEGREE ASSAULT WITH A DEADLY WEAPON PLUS A DEADLY WEAPON ENHANCEMENT FOR THE SAME WEAPON. IN LIGHT OF *BLAKELY* AND *RECUENCO*, THIS VIOLATES DOUBLE JEOPARDY CLAUSE PROTECTIONS.**

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<sup>13</sup> See also *Stanley v. Allen*, 27 Wn.2d 770, 781-82, 180 P.2d 90 (1947) (reversing judgment for defendant in auto accident case where belated, changed, instruction added the word “negligently,” and thereby improperly elevated the plaintiff-pedestrian’s burden); *State v. Hobbs*, 71 Wn. App. 419, 859 P.2d 73 (1993) (reversible error to modify instruction after jury begins deliberating by eliminating element).

Mr. Aguirre was convicted of both second-degree assault with a deadly weapon and a deadly weapon enhancement for use of that same weapon. In the past, the Washington courts have rejected double jeopardy challenges to the charging of both a substantive crime having use of a deadly weapon as an element, as well as a deadly weapon enhancement.<sup>14</sup> Those challenges, however, have always been rejected on the ground that the underlying, substantive, statute was considered a crime containing the element of unlawful use of a weapon, but the deadly weapon enhancement statute was only a matter in enhancement of penalty – not an element.<sup>15</sup>

That logic does not survive *Appendi*,<sup>16</sup> *Blakely*, and *Recuenco*. In those cases, the courts made clear that any fact that increases the maximum penalty that may be imposed upon a criminal defendant is akin to an element of the crime, in that it must be proven to the jury beyond a reasonable doubt. The aggravating factor now acts as the *functional equivalent of an element* that must be charged in the Information. RCW 9.94A.602 increases the maximum sentence that might be imposed over

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<sup>14</sup> *E.g.*, *State v. Caldwell*, 47 Wn. App. 317, 320, 734 P.2d 542, *review denied*, 108 Wn.2d 1018 (1987) (robbery); *State v. Pentland*, 43 Wn. App. 808, 811, 719 P.2d 605, *review denied*, 106 Wn.2d 1016 (1986) (rape).

<sup>15</sup> *See, e.g.*, *State v. Claborn*, 95 Wn.2d 629, 628 P.2d 467 (1981) (first-degree assault); *State v. Husted*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003), *review denied*, 151 Wn.2d 1014 (2004) (same); *State v. Woods*, 34 Wn. App. 750, 755.

<sup>16</sup> *Appendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

and above the *Blakely* statutory maximum – *i.e.*, the standard Guidelines range – for the crime. Hence, following *Blakely*, *Apprendi*, and *Recuenco*, the enhancement statute is the functional equivalent of an element of the crime. Prior decisions holding that there is no double jeopardy problem because there is no duplication of elements between the underlying crime and the weapon enhancement must be reconsidered.

We acknowledge that this argument has been rejected, *e.g.*, *State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053 (2008). But the issue remains undecided by this Court.

**5. DENIAL OF THE MOTION TO CONTINUE TO ALLOW SUBSTITUTION OF COUNSEL DEPRIVED MR. AGUIRRE OF HIS RIGHT TO COUNSEL OF CHOICE.**

**a. The Motion for a Continuance and to Substitute Counsel for Sentencing, and the Court's Ruling.**

Mr. Aguirre retained new counsel (undersigned counsel) to represent him at sentencing. The state opposed the joint motion of Mr. Aguirre, his trial counsel, and newly retained counsel to continue sentencing to enable the newly retained lawyer to represent Mr. Aguirre effectively. Counsel explained that in order to present mitigating evidence concerning the characteristics of the defendant and the circumstances of the crime, it was necessary to obtain and review the transcripts of the trial and to prepare a social history of the defendant for the sentencing court.

The Opening Brief's explanation of counsel's motion and the court's ruling, at pp. 41-49, is incorporated by this reference.

b. The Appellate Court's Decision Upholding Denial of the Motion for a Continuance to Enable Substitution Violated the Right to Counsel of Choice.

A criminal defendant has a constitutional right to *retain* counsel of choice.<sup>17</sup> *State v. Roberts*, 142 Wn.2d 471, 516. This right applies to the sentencing proceeding. *See State v. Bandura*, 85 Wn. App. 87, 98, 931 P.2d 174, *review denied*, 132 Wn.2d 1004 (1997).

There are only a few limitations on the qualified right to counsel of choice. "A defendant may not insist on representation by an attorney he cannot afford or who, for other reasons, declines to represent the defendant." *State v. Roberts*, 142 Wn.2d 471, 516. The motion to substitute counsel cannot be done for improper or dilatory purposes. *United States v. Walters*, 309 F.3d 589, 592 (9th Cir. 2002), *cert. denied*, 540 U.S. 846 (2003). And a court may deny counsel of choice if it poses a conflict. *Wheat v. United States*, 486 U.S. 153, 164. Finally, the motion can be denied if it would cause *undue* delay. *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), *review denied*, 126 Wn.2d 1016 (1995).

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<sup>17</sup> *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); *State v. Roberts*, 142 Wn.2d 471, 516-17, 14 P.3d 713 (2000), *as amended*, 14 P.3d 713 (2001).

There was no conflict posed by the request to retain counsel, and Mr. Aguirre could obviously afford the lawyer whom he hired.

Counsel did request a continuance. But it was the *first* request for a continuance of sentencing; the defendant was incarcerated; and the continuance request was not made for dilatory improper purposes. Instead, the record clearly shows that it was made to give the court reporter time to prepare a transcript of the trial for new counsel to review. Under the authority cited above, denial of the request to retain a lawyer, where retaining that lawyer posed no conflict, was not done for the *purpose* of delay, and did not cause any *undue* delay, was constitutional error.

The appellate courts have developed the following test for determining whether a defendant's rights are violated by denial of a continuance to obtain counsel of choice for trial: "(1) whether the court had granted previous continuances at the defendant's request; (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; (3) whether available counsel is prepared to go to trial; and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature." *Roth*, 75 Wn. App. at 825.

Most of the decisions on this subject, however, have arisen in the

trial context. In that context, there is also the rule that once a case has been set for trial, a lawyer may not withdraw without “good and sufficient reason shown.” CrR 3.1(e). The focus on delay is therefore likely more stringent in the trial setting, than it need be at sentencing.

Even under this trial-stage test, however, the continuance requested here was reasonable: it was a first continuance request; there were no previous continuances or even requests to continue sentencing; the defendant had lost confidence in trial counsel and wanted his appellate counsel to substitute in as soon as possible, partly in order to help preserve issues for appeal; and newly retained counsel was competent and able to proceed with sentencing following review of the transcript and sought only enough time to have the reporter prepare the transcript, to read it, and to prepare a social history and mitigation packet for sentencing.

Of particular importance is that the factors focusing on delay do not make delay itself impermissible; they ask whether the right to retain counsel of choice would “delay the proceedings unduly,” not whether there would be justifiable and limited delay. *Roth*, 75 Wn. App. at 824. The question for this Court is whether the trial court’s decision that an eight-week delay in sentencing was “undue,” when it was undisputed that this amount of time was necessary to obtain and review the transcripts and present a social history of the defendant, was an abuse of discretion.

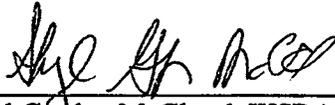
Given the fact that this was a first request for continuance, where the defendant was incarcerated, there was no evidence or tactical advantage that the state would have lost, *and no evidence that the victim could not have attended at the later date*, there is nothing about this delay that could be considered "undue." It was an inconvenience that should have counted less, in the balance, than the defendant's constitutional right.

**F. CONCLUSION**

For the foregoing reasons, review should be granted.

Dated this 31 day of October, 2008.

Respectfully submitted,



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