NO. 62247-1-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DEMICKO THOMAS,

Appellant.

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

APPELLANT'S STATEMENT OF ADDITIONALS GROUNDS

DEMICKO THOMAS 991403 F-N D-5
STAFFORD CREEK CORRECTIONAL CENTER
191 CONSTANTINE WAY
ABERDEEN, WASHINGTON 98520

NO. 6224-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DECLARATION OF DEMICKO THOMAS

DEMICKO THOMAS,

Appellant.

DECLARATION

1. I Demicko Thomas, declare, that the foregoing statements contained in this declaration are true and correct.

2. I Demicko Thomas, further, declare, that the legal briefings filed on ~~my~~ my own behalf, are handwritten, due to my not having access to a typewriter.

3. I Demicko Thomas, would further, declare, that the paper consisting of my legal briefings, is the only paper available to me at this time. Therefore, I humbly request of this Court filing such documents, as drafted.

4. Here, within the contents of my legal briefings, this Court shall discover that I have made reference to Former RCW 9.94A.310(3), such reference is due to the manner which I were charged, by way of information and later convicted, by way of jury trial.

5. Although, the trial court permitted the State to Amend the charging information, nearly, 5 years proceeding the jury's verdict. I make reference to RCW 9.94A.310(3), in light of the unconstitutional manner which the trial court permitted the State to Amend the charging information.

6. Thus, if this Court declines to acknowledge my making reference to RCW 9.94A.310(3), throughout, my legal briefings, in respect to the unit of prosecution, double jeopardy challenges brought forth, in sections (2) and (3).

7. I hereby, humbly request of the Court conducting such analysis under the statutory language provided that in RCW 9.94A.510(3), as the unit of prosecution, double jeopardy challenges are unfettered, by either subsections

language.

8. Moreover, for the purposes of the double jeopardy challenge presented, I within the context of my legal briefings, clearly and unmistakably assert, the legal basis and foundation of my contentions.

9. I would further, note, that the unit of prosecution challenge set forth, in my legal briefings, is not identical to the argument brought forth, by my appellate counsel.

10. Although, my briefings are in no way intended, to place less emphasis as to my appellate counsel's briefings. But rather, I simply, seek to apprise this Court of the well-established rule of law set forth, by the United States Supreme Court, thereby, praying, of this Court to properly adjudicate my legal contentions.

11. Therefore, I humbly request of this Court to review my legal briefings in its entirety.

Respectfully Submitted

DEMICKO THOMAS DECLARANT

JUNE 21, 2009
DATE

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A. SUMMARY OF ARGUMENT

In the instant case, the appellate Demicko Thomas upon being returned back to the trial court, for the purpose of being resentenced ordered by this Court. Prior to being transported back to the Superior Court of King County, from the Department of Corrections, filed upon his own behalf, defense Presentence Report Motion and Memorandum of Law. CP___, sub. no. 368; 377B.

Thereby, bringing forth, prior to the resentencing proceeding a unit of prosecution, double jeopardy challenge, in respect to the sentencing court entering conviction and sentences on six RCW 9.94A.310(3) counts. Mr. Thomas, further, brought forth a multiplicity double jeopardy challenge. See 8/19/08 RP 13. Here, in the instant case, Thomas, contends that the trial court committed a "plain error of law" by failing to apply the correct double jeopardy legal analysis to the facts of his case, as mandated by the United States Supreme Court in Bell, i.e., (the unit of prosecution) test.

Accordingly, such analysis must be performed, when a defendant has been convicted for violating a single statutory provision multiple times, for purposes of the constitutional guaranty against double jeopardy. Thomas, further, contends that the Legislature has failed to clearly and unmistakably denote the unit of prosecution, of ANY of the weapon enhancement sections e.g., (RCW 9.94A.310(3); RCW 9.94A.510(3) now RCW 9.94A.533(3)), requiring the rule of lenity to be applied.

Finally, Thomas, contends, that the statutory definition of firearm defined in RCW 9.41.010(1) is unconstitutionally vague and/or ambiguous, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

B. ASSIGNMENT OF ERROR

1. The trial court in imposing upon Mr. Thomas, six five-year enhanced penalties, provided that of RCW 9.94A.310(3)(e), violates the Fifth and Fourteenth Amendment of the Federal Constitution and Article I, section 9; 22 of the Washington State Constitution.

2. The trial court in failing to apply the correct legal analysis, mandated, by Adel and Bell, i.e., (When a defendant has been convicted of violating a single statutory provision multiple times), the double jeopardy, unit of prosecution test must be applied, to protect a defendant from multiple convictions, for what amounts to a single unit of crime.

3. The trial court in entering multiplicitous firearm enhancement conviction and sentences upon Thomas, exposed him to double jeopardy, in violation of the Double Jeopardy Clause.

4. The trial court in failing to apply the correct rule of law, to the errors assigned in paragraphs 2 and 3, constitute a "plain error of law."

5. The trial court lacked authority to impose the enhanced penalty proscribed by RCW 9.94A.310(3)(e), as the statutory definition of firearm provided, that of RCW 9.41.010(1), is unconstitutionally vague and/or ambiguous.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Washington courts have repeatedly rejected that weapon enhancements violate double jeopardy. **FN 1**. However, the United States Supreme Court in Bell and the Washington State Supreme Court in Adel, mandate. When a defendant has been convicted, of violating a single statutory provision multiple times, the Court must conduct a unit of prosecution, double jeopardy analysis test, protecting a defendant from being convicted twice, for committing just one unit of crime.

Here, must this Court conduct a unit of prosecution, double jeopardy test, in light of the six penalties entered against Thomas, provided that of RCW 9.94A.310(3)(e)?

2. If the Legislature has failed to clearly and unmistakably denote, the unit of prosecution of a statutory provision, does such failure, require this Court to apply the rule of lenity? Here, has the Legislature clearly and umistakably denoted the unit of prosecution of RCW 9.94A.310(3)?

FN 1 Washington courts have repeatedly rejected arguments that weapon enhancements violate double jeopardy, in light of charging both, a substantive crime, consisting of the use of a firearm or deadly weapon as an element, as well as a firearm or deadly weapon enhancement. See State v. Claborn, 95 Wn.2d 629, 636-638, 628 P.2d 467 (1981); see also State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), rev. pending, 2007 WASH. LEXIS. 102 (2007); State v. Huested, 118 Wn. App. 92, 95, 74 P.3d 672 (2003). However, the Supreme Court in presently considering this issue in State v. Kelly, 146 Wn. App. 370, 189 P.3d 853 (2008), review granted, 165 Wn.2d 1027 (2009).

3. In the trial court imposing multiplicitous conviction and sentences upon Thomas, does such entering of multiplicitous conviction and sentences, violate the Double Jeopardy Clause, in light of the unit of prosecution, double jeopardy test? Here, must this Court strike the multiplicitous conviction and sentences?

4. In the trial Court failing to apply the correct legal analysis mandated, by Bell and Adel, i.e., (unit of prosecution) test, to the facts of his case. Does such error constitute a "plain error of law," thereby, requiring this Court to apply the correct legal analysis to the facts of his case or remand Thomas, back to the trial court, instructing the trial court to conduct such analysis?

5. Here, Thomas' sentence was enhanced under RCW 9.94A.310(3)(e), based upon the unconstitutionally vague and/or ambiguous statutory language, provided that of RCW 9.41.010(1), as RCW 9.41.010(1) provides the statutory definition of firearm, for purposes of the enhanced penalty, provided that of RCW 9.94A.310(3) now RCW 9.94A.533(3). Here, in the instant case, Thomas, contends that statutory definition of "firearm", is unconstitutionally vague and/or ambiguous. Because the phrase 'may be fired' is not simply, ambiguous, but it also fails to provide adequate notice to citizens and adequate standards to prevent arbitrary enforcement.

Here, must this Court strike Thomas' enhanced penalties provided that of RCW 9.94A.310(3)(e), due to the statutory definition of firearm provided that of RCW 9.41.010(1), being unconstitutionally vague? Or must this Court strike Thomas' enhanced penalties, due to the statutory definition of firearm provided that of RCW 9.41.010(1), being ambiguous, thereby, applying the rule of lenity?

D. STATEMENT OF THE CASE

On June 24, 2004, Mr. Thomas was convicted in King County Superior Court, of one count of robbery in the first degree; one count of attempted robbery in the first degree; three counts of kidnapping in the first degree; one count of assault in the first degree and one count of possession of a firearm in the first degree. Each of the following allegations contained the following language, except that of the possession of a firearm offense:

> And I, further do accuse the defendant DEMICKO BILLIE THOMAS at the said time of being armed with a handgun a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310(3). **FN 2**

Mr. Thomas, timely appealed the conviction. On July 23, 2007, the Court of Appeals in an unpublished opinion, vacated Thomas' sentence and remanded for resentencing based on the issues properly conceded by the State. **FN 3**

The purpose of the hearing was to recalculate Thomas' standard range for sentencing purposes, and impose a new sentence, based on several

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FN 2 See Amended Information attached as, Appendix A.

FN 3 This Court ordered Thomas' resentencing in an upublished opinion in COA NO. 56540-1-I.

errors found by the Court of Appeals. CP 37, 48, 66 (slip op. c 3, 15, 31).

Thus, in Thomas, filing upon his own behalf defense Presentence Report Motion and Memorandum of Law. Such filing from its content, would appear to have put the trial court on Judicial Notice, **FN4**, of the correct legal analysis which should have been applied, to the facts of his case. i.e., (the unit of prosecution, double jeopardy) test, setout in Adel and Bell, prior to the court entering a new judgment and sentence, in respect to the six violations of a single statutory provision. See 8/19/08 RP10; 8/19/08 RP 13.

Despite, such notice, the trial court proceeded to enter the erroneous conviction and sentences against Thomas, in total disregard of the well-established law, set forth in Adel and Bell. Here, such error on behalf of the trial court was not simply "plain," but also, a manifest error of law. Although, Thomas, correctly objected, See 8/19/09 RP10; 8/19/09 RP13; 8/25/09 RP16. An error of constitutional magnitude may be raised for the first time on appeal. See RAP 2.5.

FN4 See e.g., In re Marriage of Campbell, 37 Wn. App. 840, 845, 683 P.2d 604 (1984) (A court can take judicial notice of legislative facts that enable the court to interpret the law); See also Clean v. State, 130 Wn.2d 782, 835, n.36, 928 P.2d 1054 (1996) (quoting Black's Law Dictionary 848 (6th ed. 1990) ("Judicial notice is limited to facts which, from their nature are not properly the subject of testimony, or which are universally regarded as established by common notoriety.")).

E. ARGUMENT.

1. MR. THOMAS' CONVICTION AND SENTENCES PROVIDED THAT OF RCW 9.94A.310(3) CONSTITUTE THE SAME OFFENSE FOR DOUBLE JEOPARDY PURPOSES, IN LIGHT OF THE "UNIT OF PROSECUTION," TEST SETOUT IN ADEL.

In the instant case, the trial court entered erroneous conviction and sentences upon Mr. Thomas, for his allegedly violating a single statutory provision multiple times i.e., (RCW 9.94A.310(3)). The trial court in entering the erroneous conviction and sentences, clearly and unmistakably violated the State and Federal Double Jeopardy Clause. Which provides: "That no person shall be subject for the same offense, to be twice put in jeopardy of life or limb," U.S. Const. Amend. V.

Similarly, the Washington State Constitution provides that: "[N]o person shall be . . . twice put in jeopardy for the same offense". Wash. Const. art I, § 9. These two clauses provide identical protection. FN 6. 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).

FN 6 See State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (citing In re Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000)).

(a) The double jeopardy analysis mandated by the United States Supreme Court in Bell, adopted by the Washington State Supreme Court, in Adel, required the trial court now, this Court to determine "what act or course of conduct' the Legislature has defined as the punishable act i.e., (the unit of prosecution.'), when a defendant is convicted of violating a single statutory provision multiple times.

When the Legislature defines the scope of a criminal act (unit of prosecution), double protects a defendant from being punished multiple times, for committing just one unit of crime. See State v. Adel, 135 Wn.2d 239, 965 P.2d 798 (1998) (citing Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955).

Here, in the instant case, Thomas, did raise a double jeopardy argument within the trial court, prior to the trial court entering a new judgment and sentence. Despite, Thomas' objecting to the trial court, entering multiple conviction and sentences e.g., (six violations of a single statutory provision, RCW 9.94A.310(3)), in light of the unit of prosecution, double jeopardy protections. See 8/19/08 RP 10; 8/25/08 RP 16. The trial court entered the erroneous judgment and sentence, totally, disregarding the correct legal analysis mandated, by Adel and Bell.

Moreover, the trial court's failure to recognize the applicable standard, which should have been applied to the facts of Mr. Thomas' case, constitutes a "plain error of law." In addition to being "objetively unreasonable." A state court decision is 'objectively unreasonable', where it is founded, "in part, on a clear factual error," Wiggins v. Smith, 539 U.S. 510, 528, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), "fails to evaluate the totality of the available [pertinent]

evidence," Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); or rests upon an unduly narrow framing of the constitutional question, Wiggins, supra, 539 U.S. @ 527-28.

Here, in the instant case, the trial court should have acknowledged an applied, the rule of law, set forth in Adel and Bell. Double jeopardy is a constitutional issue that may be raised for the first time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000); see also State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005)(review is de novo)).

(b) The unit of prosecution analysis bars the imposition of multiple firearm enhancements in the instant case. The unit of prosecution "test" is unique, in that it involves a question of constitutional magnitude, and ultimately decided on statutory interpretation and legislative intent. Adel, supra, 136 Wn.2d @ 635.

The question whether a defendant's double jeopardy protections have been violated, is a question of law reviewed de novo. State v. Frodert, 84 Wn. App. 20, 25, 924 P.2d 93 (1996).

In the instant case, the prosecutor accused Mr. Thomas, of committing two robberies, which were to have occurred on or about September 21, 2002 and December 28, 2002. For the September incident, the prosecutor charged him with the crimes of attempted first degree robbery; first degree Kidnapping; first degree assault and first degree possession of a firearm. For the December 28th incident, the prosecutor charged him with two counts of first degree robbery and two counts of first degree Kidnapping.

As asserted, six of the above-noted offenses contained the following allegation:

> And I, . . . further do accuse the defendant DEMICKO BILLIE THOMAS at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310 (3).

See (Appendix A, supra).

Here, in the instant case, Thomas' six firearm enhancements charged under the same single statutory provision, constitute the same offense for double jeopardy purposes. In light of the "unit of prosecution", test set forth in Adel and Bell. See e.g., Adel, supra, 136 Wn.2d @ 633.

Therefore, this Court should not, and must not, simply, reject Thomas' double jeopardy challenge. Nor should this Court, analyze the facts of Thomas' unit of prosecution, double jeopardy challenge under Blockburger v. United States, 284 U.S 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). **FN7.**

FN7 The test setout in Blockburger, is often used to determine whether the Legislature intended to allow punishment under multiple provisions. Under this test, the court compares the elements of the offense to see whether "each provision requires proof of a fact, which the other does not." 284 U.S. @ 304. The application of the test focuses on the statutory elements of the offense. Id. In unit of prosecution cases, the Blockburger, test is not used. See e.g., Adel, supra, 136 Wn.2d @ 634; see also Sanabria v. United States, 437 U.S. 54, 70 n.24, 57 L.Ed.2d 43, 98 S.Ct. 2170 (1978).

Rather, this Court must apply the rule set forth in Adel, (declining to apply the "same evidence" test, where there was only a single violation of a single statute)). 136 Wn.2d @ 633. The proper inquiry is "what 'unit of prosecution' has the Legislature intended as the punishable act under the specific statute. Id. @ 634.

Here, in the instant case, the rule setout in Blockburger, is inapplicable. Thus, in a unit of prosecution case, the first step is to analyze the statute in question. Adel, 136 Wn.2d @ 632. When interpreting a statute, the court must first look to its plain language. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A reading that produces absurd results, must be avoided because it will not be presumed that the Legislature intended absurd results. State v. Delgado, 148 Wn.2d 723, 733, 63 P.3d 792 (2003).

Once the unit of prosecution is determined, an analysis is necessary to decide whether under the facts of the case, more than one unit of prosecution is present. See Tvedt, supra, 153 Wn.2d @ 717; see also State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005) (The lower court's determination as to the unit of prosecution of a statute is reviewed de novo)).

Here, RCW 9.94A.310 (3) provides in relevant part:

For additional time to be added to an offender's standard range if the offender or an accomplice was armed with a firearm:

> (3) The following additional time shall be added to the standard range for felony crimes after July 23, 1995 if the

offender or an accomplice was armed with a firearm as defined in RCW 9.41.010.

RCW 9.94A.310(3), the statute part of the Hard Time For Armed Crime Act of 1995 (Initiative 159), was designed to provide increased penalties for criminals using or carrying deadly weapons; provide greater punishment for those using or carrying firearms; to "stigmatize" the use of weapons, and to hold individuals such as judges accountable for their sentencing for serious crimes. LAWS OF 1995, ch. 129 § 1 (Findings and Intent). See (Reproduced Copy of Findings and Intent, attached as, Appendix B).

Here, in the instant case, the statute in question refers in relevant part, to "a firearm" or other "deadly weapon" used during the commission of a criminal transaction. Although, the focus of RCW 9.94A.310(3), appears to be on the following:

> "Whether an offender or an accomplish was armed with "a firearm, or other deadly weapon."

See e.g., State v. Moses, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002) (Legislative intent is primarily revealed by the statutory language)). Therefore, in directing the Court's attention to the word "a" in the section's prohibition against: If an offender or an accomplice was armed with "a firearm." Such plain an ordinary

meaning of the word "a" is a singular 'one'. See State v. DeSantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003) @ 419-20 (citing State v. Nichols, 865 S.W.2d 435, 437 (Mo. Ct. App. 1993)). Where a term has a well accepted, ordinary meaning a regular dictionary may be consulted, to ascertain the term's definition. See City of Spokane ex. rel. Wastewater Mgmt. Dept v. Dep't of Revenue, 145 Wn.2d 445, 454, 38 P.2d 1010 (2002).

Where the Legislature provides no statutory definition and a court gives a term its plain and ordinary meaning by reference to a dictionary, the court will avoid a literal reading of a statute which would result in unlikely absurd or strained consequences. See Fraternal Order of Eagles, Tenino Aerie no. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002).

For example, in DeSantiago, the court held, that the firearm enhancement statute's use of the words "a firearm" means, a defendant may be punished for each firearm involved. 149 Wn.2d @ 419-20. The court further, held, that a majority of courts considering the meaning of "a weapon" or "a firearm" have interpreted "a" to mean that the defendant may be punished for each weapon involved. Id. **FN 8.**

Thereby, holding:

FN 8 See e.g., United States v. Alverson, 666 F.2d 341, 347 (9th cir. 1982); Grappin v. State, 450 So.2d 480, 482 (Fla. 1984) ("[T]he phrase to receive or possess 'a firearm' has been held to express a legislative intent to allow separate prosecutions for each firearm."). DeSantiago, supra, 149 Wn.2d @ 419-20. See also Graham, supra, 153 Wn.2d @ 400-07 ("A person 'means' a defendant may be punished for each person endangered.")).

"We find that the use of the article 'a' in reference to 'a firearm'. . . . clearly shows that the Legislature intended to make "each firearm a separate unit of prosecution." Id.

Therefore, each knife which defendant carried concealed upon or about his person, is an allowable unit of prosecution. Id.

Here, unlike DeSantiago, who received a firearm enhancement for the shotgun he carried, and a deadly weapon enhancement for the knife his accomplish displayed.

Thomas, received six firearm enhancements, for allegedly being armed with a single firearm, during two criminal transactions. Here, in the instant case, Thomas, contends, that the imposition of the six firearm enhancements for his allegedly being armed with "a single firearm," on separate dates, is a double jeopardy violation of the most basic sort, in light of the unit of prosecution, double jeopardy provisions.

Therefore, to view such otherwise, would rest on a slippery slope of prosecutorial discretion to multiply charges. See In re Snow, 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658 (1887) • 282. In light of such, this Court is nevertheless faced with the same essential question here, as those courts faced under the unit of prosecution framework: Does the plain language of RCW 9.94A.310(3), clearly and unmistakably

indicate that the Legislature intended to allow the prosecutor, to arbitrarily divide up ongoing criminal conduct e.g., (a single criminal transaction), into separate time periods; criminal categories and/or criminal unit of prosecutions?

Here, in the instant case, in the form of sentencing enhancements, to be imposed based upon a defendant or an accomplice, being armed with "a single firearm", during a criminal transaction, which in essence is a single unit of prosecution. Further, once this Court determines the unit of prosecution of the statutory language in question, does the imposition of six firearm enhancements in the instant case, offend the Double Jeopardy Clause?

Although, the legislative history indicates that the Legislature intended to legislate against a grave evil, and that possession of "a firearm" or other "deadly weapon," during the commission of a criminal transaction, is sufficient enough to constitute that evil. However, the legislative intent to impose criminal penalties for armed criminals, does not necessarily imply that the possession of "a single firearm," during a single criminal transaction, should result in ad infinitum. **FN 9.**

Thereby, resulting in hundreds of firearm or deadly weapon enhancements, or in the case of Thomas, six firearm enhancements, for what is and/or amounts to a single unit of prosecution. Mr. Thomas, in further, proposition of his legal contentions would pointout, that the prosecutor in his own very words i.e., (the charging information), clearly and unmistakably characterizes each of the charged . . . .

FN 9 See Adel, supra, 136 Wn.2d @ 635 (citing Brown v. Ohio, 423 U.S. 101, 97 S.Ct. 2221, 53 L.Ed. 187 (1977) ("[T]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient, of dividing a single crime into a series of

violations, not excluding the six firearm enhancement counts. As being:

> Apart of a common scheme or plan, so closely connected, in respect to time, place and occasion. That it would be difficult to separate proof, from one charge, from proof from the other.

See (Appendix A, supra).

In light of such admission, it would appear to be rather, contradictory for this Court to now, characterize, the charged violations provided that of RCW 9.94A.310 (3), as separate crimes or in the instant case, units of prosecution. Especially, in light of the prosecuter further, conveying in its charging information:

> That Thomas, was armed with "a single firearm," i.e., (a single unit of prosecution).

Id. (Appendix A).

Here, in the instant case, the double jeopardy challenge, in light of the unit of prosecution "test" is properly before this Court: The question: "What act

temporal spatial units:). See also e.g., Callanan v. United States, 364 U.S. 587, 597, L.Ed.2d 312, 81 S.Ct. 321 (1961); United States v. Charga, 653 F.2d 26, 29 (1st Cir. 1981) ("[I]t has long been the law that a prosecuter cannot divide a continuing crime into bits and pieces and prosecute, separately for each:")).

or course of conduct' has the Legislature denoted as the punishable act, in respect to RCW 9.94A.310(3)"? **FN10.** Furthermore, whether the imposition of the six firearm enhancements in the instant case, exposed Thomas, to double jeopardy?

Here, in the instant case, Thomas, asserts that upon this Court examining the statutory language in question, weighed against the unit of prosecution, the answer will be in the positive. Moreover, if the Legislature has failed to denote the unit of prosecution in a criminal statute, the United States Supreme Court has declared, the ambiguity should be construed in favor of lenity. Adel, supra, 136 Wn.2d @ 634-35 (citing Bell, supra, 349 U.S. @ 84)).

Thus, this Court must not skirt the unit of prosecution, double jeopardy challenge before it, as Adel and Bell, mandate, such double jeopardy, unit of prosecution test be performed, when a defendant has been convicted for a violation of a single statutory provision multiple times. Thomas, therefore, pray of this Court to apply the correct legal analysis to the facts of his case, rather, than shielding the weapon enhancement statute in question, from the constitutional constraints of the Fifth and Eighth Amendment of the State and Federal Constitution. **FN11.**

Accordingly, striking four of the unconstitutionally imposed firearm enhancements, to do otherwise would be a double jeopardy violation of the most basic sort. See e.g., State v. Knight, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008) (The appropriate remedy for double jeopardy violations is to dismiss with prejudice the convictions that violate double jeopardy.)). Id. @ 810.

FN10 See Adel, supra, 136 Wn.2d @ 634.

FN11 The prohibition against cruel and unusual punishment is applicable to the States through the Fourteenth Amendment. See Robinson v. California, 370 U.S. 660, 666-67, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

(c) The Legislature in failing to denote the unit of prosecution of RCW 9.94A.310(3), requires this Court to apply the rule of lenity, thereby, dismissing the enhanced penalties imposed in counts I, III, IV, V, VI and VII.

The rule of lenity grounded in part, on the need to give "fair warning" of what is encompassed by a criminal statute. See United States v. Bass, 404 U.S. 336, 348, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971). The rule of lenity is one of "three related manifestations of the fair warning requirement, of the Due Process Clause." See United States v. Lanier, 520 U.S. 259, 266, 137 L.Ed.2d 432, 117 S.Ct. 1219 (1997).

Here, in the instant case, Thomas, contends that the Legislature has failed to clearly and unmistakably denote the unit of prosecution of the statutory language in question. Although, the Legislature could have clearly and unmistakably denoted the unit of prosecution of RCW 9.94A.310 (3), the question is: did it do so? Upon this Court examining the statutory language in question, the answer will be in the negative.

Therefore, in its role as prosecutor of the Double Jeopardy Clause, such requires the Legislature to clearly and unmistakably denote the unit of prosecution in a criminal statute. If the Legislature has failed to denote the unit of prosecution in a criminal statute, the United States Supreme Court has declared the ambiguity should be construed in favor of lenity. See Adel, supra, 136 Wn.2d e 634-35 (citing Bell, supra, 349 U.S. e 83-84)).

A statute which is susceptible to two or more reasonable interpretations is ambiguous. See State v. Carter, 138 Wn. App. 350, 356, 157 P.3d 420 (2007). A statutory is unambiguous only "when the statutory language admits of only one meaning." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Statute interpretation is a question of law that is reviewed de novo. Phillilines v. Bernard, 151 Wn.2d 376, 383, 88 P.3d 939 (2004).

In the instant case, an analysis is necessary to determine whether the Legislature has clearly and unmistakably denoted the unit of prosecution, of the statute in question. The plain language of the statute is the "starting place in such an inquiry." See Staples v. United States, 511 U.S. 600, 605, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). If the Legislature has failed to denote the unit of prosecution of RCW 9.94A.310(3), this Court must apply the rule of lenity, mandated, by, Adel and Bell. **FN12.**

Accordingly, in examining the statutory language in question, in addition to the statutory scheme and legislative history, such appears to aptly frame this Court's task: The question, "Has the Legislature clearly and unmistakably denoted the unit of prosecution of RCW 9.94A.310(3)"?

Here, RCW 9.94A.310(3) provides:

See (Reproduced Copy of the sections language, attached as, Appendix C).

In 1998, the Washington State Supreme Court interpreted such statutory language to mean, "that while the statute required multiple-enhancements to run consecutively to the base sentence, they could be run concurrently to each other. See In re Charles, 135 Wn.2d 239, 254, 955 P.2d 798 (1998). Such holding, by the Charles court, illustrates the ambiguity which has been associated with the statutory language in question. **FN13.**

FN12 See Adel, supra, 136 Wn.2d @ 634-35 (citing Bell, supra, 349 U.S. @ 84)).

FN13 See State v. Fenter, 89 Wn.2d 57, 62, 569 P.2d 67 (1977)(Legislature is presumed to know the Supreme Court's decisions and consider them in later legislation)).

Since the Charles decision, the Legislature has recodified and amended the weapon enhancement statute. In spite, of the Legislature amending the statutory language, in light of Charles. The Legislature has never, clearly and unmistakably denoted the unit of prosecution of ANY of the weapon enhancement sections. See e.g., RCW 9.94A.310(3),(4); RCW 9.94A.510(3),(4) now RCW 9.94A.533(3),(4). **FN 14.** The Legislature is presumed to be aware of its enactments and judicial construction of them. See Chandler v. Otto, 103 Wn.2d 268, 274, 693 P.3d 71 (1984).

Although, the Supreme Court in a case of first impression, see e.g., DeSantiago, supra, held:

> "We find that the use of the article 'a' in reference to 'a firearm.' . . . clearly shows that the Legislature intended to make "each firearm a separate unit of prosecution."

149 Wn.2d. 419-20.

In further, holding:

> Therefore, each knife which defendant

FN 14 See Bellevue Fire Fighters Local 1604 v. City of Bellevue, 100 Wn.2d 748, 753, 675 P.2d 592 (1984) (Courts are presumed to be aware that members of the legislature were aware of prior drafts of the Bill at the time . . . amendments of [the statute were enacted]).

carried concealed upon or about his person, is an allowable unit of prosecution.

Id.

In spite, of such decision, Justice MADSEN, in his concurring / dissenting opinion, stated the following:

> "Indeed, the majority must resort to cases involving units of prosecution, which have no bearing on the Legislative intent underlying the sentence enhancement statute, because there is so little foundation for the majority's conclusion. Far from clear, legislative intent, cannot be discerned from the statutory language used or otherwise, and the rule of lenity therefore, applies.

Id. e 422.

Here, in the instant case, although, dictum, has no legal effect. The dictum provided that of Justice MADSEN, should not be totally disregarded, especially, when trying to establish the true unit of prosecution, of the statute in question. Furthermore, the DeSantiago, court, in failing to resort to cases involving unit of prosecution, appears to have narrowly framed the unit of prosecution, question,

presented in: DeSantiago, Id. @ 422. **FN 15**; **FN 16**. Issues involving statutory construction are reviewed de novo. State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

Here, in the instant case, due to the odd nature of the statutory language in question, making the unit of prosecution somewhat difficult to establish, Justice MADSEN'S dictum appears to be rather, logical. Therefore, in further looking to establish the true unit of prosecution of RCW 9.94A.310 (3). Mr. Thomas, would invite the Court to examine the: Certificate of Enrollment Initiative No. 159, Chapter 129 Laws of 1995 54th Legislation 1995 Regular Session. See (Reproduced Copy of Certificate of Enrollment, attached as, Appendix D). **FN 17**.

In examining the document, such language does no more, than recite the same identical language, provided that of the (Findings and Intent), see (Appendix B, supra,) @ 443-44. Furthermore, the General Statement of Purpose and Findings and Intent section, concerning penalties are silent, as to the unit of prosecution of the statutory language in question. Thereby, failing to provide any guidance.

FN 15 The statute in effect during the DeSantiago, holding, was RCW 9.94A.510(3),(4).

FN 16 See e.g., Iannelli v. United States, 420 U.S. 770, 791, 43 L.Ed.2d 616, 95 S. Ct. 1284 (1975) (Unless, therefore, it can be shown that the Legislature "clear[ly] and unmistakab[ly] "intended the unit of prosecution to be read narrowly, the rule of lenity requires a court to resolve any ambiguity in favor of invalidating the multiple punishments)).

FN 17 See State v. Reding, 119 Wn.2d 685, 690, 835 P.2d 1019 (1992) (In the past, the Supreme Court

Thus, in further, examining the legislative history of RCW 9.94A.310 (3), the statute part of the Hard Time For Armed Crime Act. Mr. Thomas, ask of the Court to direct its attention to the: House Bill Report, HI 159. See (Reproduced Copy of the House Bill, attached as, Appendix E).

In examining the document, consisting largely of brief disscusions of the Hard Time For Armed Crime Act, and its purpose. Obviously, such Bill lends no assistance, in resolving the precise question presented to this Court: "Has the Legislature clearly and unmistakably denoted the unit of prosecution of RCW 9.94A.310(3)."? **FN18.**

Although, the testimony for the Bill, provided that of: Corrections and Law Justice, e p. 7 of Appendix E, provides in relevant part,

> "By distinguishing between enhancements for guns and those for other deadly weapons, and further distinguishing among the three classes of felonies, the Initiative makes deadly weapon enhancements more proportional to the seriousness of the criminal act. Crimes involving guns deserve higher enhancements than those involving other deadly

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has looked to legislative Bill Reports and analysis to discern legislative intent)).

FN18 See Louisiana - Pacific Corp., v. Asarco. Inc., 131 Wn.2d 587, 599, 934 P.2d 685 (1997) (Testimony by House Staff Members does not inform legislative intent)).

weapons. Id.

Here, in the instant case, it is apparent from the provided testimony, that the House Bill Report, appears to be concerned with the distinguishing between enhancements for guns and those for other deadly weapons; in addition to distinguishing among the three classes of felonies; thereby, seeking to make the deadly weapon enhancement more proportional to the crime.

Obviously, such testimony, does nothing to solve the special difficulty of determining the legislative intent, as to the unit of prosecution of the statutory language in question. Thus, in looking further, into the legislative history of the Hard Time For Armed Crime Act. Mr. Thomas, respectfully, ask of this Court to direct its attention to the: Senate Bill Report, SI 159. See (Reproduced Copy of the Senate Bill Report, attached as, Appendix F).

Here, the testimony in respect, to the Senate Bill Report, provides in relevant part,

> "Sentence enhancements for crimes committed with a firearm or other deadly weapon are lengthened. The enhancements apply to all felony convictions, with the exception of a few crimes that necessarily involve a firearm".

Id.

In further, conveying:

> "The Initiative responds to the public's concerns about crimes involving firearms by increasing penalties for these crimes.

Id. @ p.2 **FN 19.**

Here, in the instant case, the above-noted language appears to simply address the time structures, of the sentence enhancement for crimes committed with a firearm or other deadly weapon e.g., (any Class A felony committed with a firearm is eligible for a 60 month enhancement, in contrast, to a Class A felony committed with any weapon other than a firearm, is eligible for a 36 month enhancement, etc)). See also (Appendix C, supra.).

Thus, in examining the language provided that of the Senate Bill Report, such simply, lends no assistance in resolving the precise question presented to this Court: "Has the Legislature clearly and unmistakably denoted the unit of prosecution of RCW 9.94A.310(3)."? Here, by its text, RCW 9.94A.310(3) criminalizes

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FN 19 See State v. Ramirez, 140 Wn.App. 278, 288 n.7, 165 P.3d 61 (2007), review denied, 163 Wn.2d 1036 (2008) (Court's do not generally turn to the comments of a single Legislature to establish legislative history, nor does a Court rely on the public's comments before the legislative committees)).

being armed with a firearm during the commission of a criminal transaction. The statute imposes a penalty on an offender or an accomplice, who, during the commission of a criminal transaction . . . . was armed with . . . . a firearm.

Here, in the instant case, Thomas, asserts, that in the legislative history of RCW 9.94A.310(3), offering no support, as to the true unit of prosecution of the statutory language in question. This Court, must analyze the criminal statute. In doing so, Thomas, contends that there are different interpretations which can be derived, as to the unit of prosecution of the statute in question.

For example, the first, interpretation which can be derived is that,

> "Each individual 'firearm carried during the commission of a criminal transaction is an allowable unit of prosecution."

<u>See</u> <u>DeSantiago</u>, supra, 149 Wn.2d 419-20.

Obviously, such has semantic plausibility. The Second, interpretation which can be derived from the statutory language is that, the unit of prosecution is a "course of conduct." For example, by its text RCW 9.94A.310(3), in criminalizing the being armed with a firearm during the commission of a criminal transaction. Expressly, bears out the suggestion: <u>The conduct of being armed with a firearm constitutes the active verbs</u> ("if an offender or an accomplice was armed with a firearm."). Though, the emphasis is on the being armed with a firearm, simply,

being armed with or possession of a firearm is not the unit of prosecution.

As obviously, many citizens exercise their Second Amendment rights, by routinely using, carrying, or possessing a firearm, and RCW 9.94A.310 (3), obviously, does not prohibit that law abiding conduct. Instead, it regulates the being armed with a firearm, during the commission of a criminal transaction. Thus, the operative word, being that of "commission".

The definition of "commission" is defined as,

> 1. A warrant or authority, from the government or a court, that empowers the person named to execute official acts. 2. The authority under which a person transacts business for another. 3. A body of persons acting under lawful authority to perform certain public services. 4. The act of doing or perpetrating (as a crime).

See Black's Law Dictionary, Second Pocket Edition (2001) @ p. 112

Also see Webster's II Dictionary, Third Edition (2005) @ p. 147, defines commission as,

> 1a. Official permission to carry out a task. b. The permission so granted. c. The task of consigned. d. A document conferring such permission. 2. A group authorized to carry out certain functions

or tasks. **3.** A perpetration < commission of a felony > **4.** An allowance to a salesperson or agent for his or her services. **5.** A certificate conferring the rank of a commissioned office.

Here, there can be no question, that the unit of prosecution of RCW 9.94A.310 (3) is a course of conduct. See Universal C.I.T Credit Corp., 344 U.S. 218, 221, 97 L.Ed. 260, 73 S.Ct. 227 (1952); State v. Root, 141 Wn.2d 701, 710 P.3d 214 (2000); Adel, supra, 136 Wn.2d 630, 634. **FN 20.**

For example, here, the statute in question focuses on the defendant's conduct of being armed with "a firearm," not on the effect of the defendant's conduct, as such is obviously accounted for in other sections of the criminal code. Furthermore, in sifting through the Legislative history of the statute in question, thereby, attempting to divine the legislature's intent, as to the unit of prosecution of RCW 9.94A.310(3) or for that matter any of the firearm enhancement sections e.g., RCW 9.94A.510(3) now RCW 9.94A.533(3). Such will simply, muddy the waters already clouded by the legislature's failure, to clearly and unmistakably denote the unit of prosecution of the statute in question. See Adel, supra, 136 Wn.2d 634-35; Bell, supra, 349 U.S. 84.

Thus, in Thomas, providing this Court with various documents in respect to the Hard Time For Armed Crime Act, such documents have been provided as extrinsic aids to assist this Court attempt to establish the true unit of prosecution, of the statute in question. As here, the question remains: Has the Legislature clearly and unmistakably denoted

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FN 20 The above-noted cases establish that the "unit of prosecution" may be a course of conduct.

the unit of prosecution of RCW 9.94A.310(3); RCW 9.94A.510(3) now RCW 9.94A.533(3)?

Thus, because argumentative skill could persuasively and not unreasonably reach conflicting constructions, due to the Legislature failing to denote the unit of prosecution of the statute in question. This Court must follow the rule of law, mandated in Adel and Bell, thereby, concluding that the statute in question does not unambiguously denote the unit of prosecution, applying the rule of lenity.

Accordingly, this Court must dismiss Thomas' firearm enhancements, or at the very least Thomas, should receive single firearm enhancements for each incident. Thereby, rendering the unit of prosecution a "course of conduct".

2. THE TRIAL COURT ENTERED MULTIPLICITIOUS FIREARM ENHANCEMENT CONVICTION AND SENTENCES AGAINST THOMAS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT OF THE STATE AND FEDERAL CONSTITUTION

(a) The rule of multiplicity stems from the Fifth Amendment to the State and Federal Constitutions. The entering of multiplicitous conviction and sentences in the instant case, violate the Fifth and Fourteenth Amendment to the State and Federal Constitutions. **FN 21**. The United States and Washington State Constitution' Double Jeopardy Clauses are 'identical in thought, substance and purpose'. State v. Schoel, 54 Wn.2d 388, 391, 341 P.2d 481 (1959). Where the language of the State Constitution is similar to that of the Federal Constitution, the court

gives the same interpretation to the State Constitution provision, as the United States Supreme Court gives the Federal Constitution. See State v. Linton, 122 Wn. App. 73, 76, 93 P.3d 183 (2004).

The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after an aquittal, (2) a second prosecution for the same offense after conviction and (3) multiple punishment 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 by, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

Here, in the State of Washington criminal charges may be commenced against a defendant by one of four different procedures: (1) filing of an information by the prosecutor in Superior Court, see Const. art. I § 25 and RCW 10.37.026; (2) grand jury indictment see RCW 10.28; (3) inquest proceedings, see RCW 36.24, and (4) filing of a criminal complaint before a magistrate, see RCW 10.16, all four are established recognized and legally permissible methods for determining the existence of probable cause.

In most instances, the prosecuting attorney functions in his own official capacity directly and exclusively, in determining probable cause, filing an information document directly in the Superior Court. See State v. Jefferson, 79 Wn.2d 345, 485 P.2d 77 (1971) @ 347.

FN 21 See Wash. Const. art I, section 9; Wash. Const. art I, section 3; see also The Constitution of the United States Amendment V and XIV.

Here, in the instant case, Thomas, was charged by way of information. Such document charged Thomas, with multiplicitous counts of RCW 9.94A.310(3), in violation of the Double Jeopardy Clause. Multiplicity is charging a single offense in several counts. See State v. Notile, 116 Wn.2d 831, 847, 809 P.2d 190 (1990). See also United States v. Fleming, 19 F.3d 1325, 1330 (10th cir. 1991) (quoting United States v. Dashney, 937 F.2d 532, 540 n.7 (10th cir. 1991), cert. denied, 513 U.S. 826 (1994) ([M]ultiplicity refers to multiple counts of an indictment which covers the same criminal behavior)).

If sentences are imposed on each of [a] multiplicitous indictment the defendant is not forced to serve the erroneous sentence. See Lanius v. United States, 575 F.2d 770, 772 (9th cir. 1978) (per curium). Court's review the interpretation and application of the Double Jeopardy Clause de novo. State v. Knight, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008) (citing State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

b) The trial court erred in entering conviction and sentences on the six RCW 9.94A.310(3) counts, although, RCW 9.94A.310(3) does not authorize, or if it does, the Double Jeopardy Clause prohibits the imposition of multiplicitous conviction and sentences, in light of the unit of prosecution, double jeopardy provisions.

The Supreme Court addressed the issue of multiplicity of charges involving drug possession in State v. Adel, supra. In Adel, the inquiry was what "unit of prosecution" the Legislature intended as the punishable act under the specific criminal statute. In answering this inquiry, the Supreme Court reaffirmed that if the Legislature has failed to denote the unit of prosecution in a criminal statute, the United States Supreme Court has declared the ambiguity should be construed in favor of lenity. Adel, 136 Wn.2d @ 634-35 (citing Bell, supra, 349 U.S. @ 84)).

Therefore, as asserted, throughout the course of Thomas' briefings, the charging information charged him with violating a single statutory provision 7 times, stemming from two criminal transactions. (Appendix A, supra). Thomas, was convicted on six of the RCW 9.94A.310(3) counts, with the trial court dismissing one of the multiplicitous counts. **FN 22.**

Where a jury finds a defendant guilty of multiplicitous charges, the court should "enter judgment on only one of the statutory offenses". See Ball v. United States, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

Here, in the instant case, this Court in determining whether Thomas' conviction and sentences are multiplicitous, must first, determine the allowable unit of prosecution of the statute in question. See United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221, 97 L.Ed. 260, 73 S.Ct. 227 (1952); Adel, supra. In determining the unit of prosecution of a particular statute, the court must examine the language of the statute at issue. Adel, 136 Wn.2d @ 634-35. Once the unit of prosecution is decided, the court must determine whether, under the facts of the case more than one unit of prosecution is present. Tvedt, supra, 153 Wn.2d @ 717.

FN 22 See e.g., United States v. Marquardt, 786 F.2d 771, 778 (7th Cir. 1986) (Dictum) (Multiplicitous indictment may prejudice jury against defendant by creating impression of more criminal activity than in fact occurred)); United States v. Headrad, 499 F.2d 1003, 1005 (5th Cir. 1974) ("A multiplicitous indictment not only subjects the defendant to numerous sentences for one offense, but also 'prejudice[s] the defendant and confuse[s] the jury by suggesting that not one, but several crimes have been committed); United States v. Brandon, 17 F.3d 409, 422 (1st Cir. 1994) (Multiplicitous indictment violates 5th Amendment Double Jeopardy Clause, because it raises danger that defendant will receive more

When the language in a statute is plain, there is no room for judicial construction, because the legislative intent is determined solely from the language used. Bravo v. Dolsen Cos., 125 Wn.2d 745, 753, 888 P.2d 147 (1995). Court's may not read into a statute matters that are not in it, and may not create legislation under the guise of interpreting a statute. Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2000) @ 21. If the Legislature has failed, to denote the unit of prosecution in the statute, the Court must resolve the ambiguity, and must do so in favor of the defendant charged with having violated the statute. Adel, supra, 136 Wn.2d @ 634-35 (citing Bell, supra, 349 U.S. @ 84)).

Accordingly, in looking to the wording of the statute in question. See (Appendix C, supra). If it is found by this Court, the legislative intent as to the unit of prosecution to be less than "clear and unmistakable," this Court would then be required to apply the rule of lenity. **FN 23.** As this Court must construe the statutory language against the harsher penalties, that result from multiplicitous punishment. See United States v. Clements, 471 F.2d 1253, 1254 (9th cir. 1972); United States v. Edick, 603 F.2d 772, 773-74 (9th cir. 1979); United States v. UCO Oil Co., 546 F.2d 883, 836-38 (9th cir. 1976), cert. denied, 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357 (1977)).

FN 23 See e.g., Bifulco v. United States, 447 U.S. 381 [65 L.Ed.2d 205, 100 S.Ct. 2247] (1980), the court recognized that the rule of lenity principles of statutory construction applies, not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, (quoting Lander v. United States, 358 U.S. 169, 178, [L.Ed.2d 199, 79 S.Ct. 209] (1958).

Here, in the instant case, Thomas, asserts that the rule of law mandated in Adel and Bell, is clear. Therefore, upon this Court performing a unit of prosecution test, in respect to the facts of Thomas' case, it will become apparent that the trial court erroneously entered multiplicitous conviction and sentences, at his sentencing proceeding.

The remedy for meritorious multiplicity claims, is for the court to vacate the multiplicitous conviction and sentences. See Ball, supra, 470 U.S. • 864. Accordingly, four of Thomas' firearm enhancements must be striken in accordance with Ball.

Further, if this Court upon conducting a unit of prosecution analysis, in light of the statutory language in question, finds that the Legislature has clearly and unmistakably failed, to denote the unit of prosecution of the statutory language in question this Court must apply the rule of law set forth in Adel and Bell, thereby, applying the rule of lenity, dismissing the firearm enhancements entered against Thomas.

c) Thomas, correctly objected to the imposition of the entering of the multiplicitous conviction and sentences, however, even if Thomas had failed to object to the entering of the erroneous conviction and sentences, such would be reviewable under the "plain error doctrine".

Here, in the instant case, Thomas, objected to the imposition of the multiplicitous conviction and sentences, in light of the unit of prosecution, double jeopardy provisions. See 8/19/09 RP 10; 8/19/09 RP 13; 8/25/09 RP 16. Moreover, Thomas, throughout the course of his legal briefings, clearly and unmistakably demonstrated to the trial court the distinction between objections to multiplicity in the form of an information and/or indictment which can be

waived.

In constrast, to multiplicitous conviction and sentences, which cannot be waived. See e.g., Lounius, supra, 575 F.2d @ 772; United States v. Smith, 424 F.3d 992, 1000 @ n.4 (9th cir. 2005) (Multiplicity of sentences is unlike the issue of multiplicity of an indictment, which can be waived if not raised below)).

For example, in Lounius the court held that a defendant's guilty plea to a multiplicitous indictment, did not constitute waiver of the right to raise a double jeopardy claim as to his multiplicitous conviction and sentences. 575 F.2d @ 771-72. The Lounius court further, recognized, that even if sentences are imposed on each count of a multiplicitous indictment, the defendant is not forced to serve the erroneous sentence, because of any waiver. Id. (quoting United States v. Rosenbarger, 536 F.3d 715, 721-22 (6th cir. 1976) @ 721-22.

The court recently reaffirmed this principle in United States v. Ankeny, 502 F.3d 829, 838-39 (9th cir. 2007). In Ankeny, the defendant did not object to a multiplicitous indictment before pleading guilty. Id. @ 88. Instead, he moved to dismiss the multiplicitous counts only after the District Court accepted his guilty plea. Id. The court rejected the Government's argument that Ankeny, waived any objection to the form of the indictment, by failing to object before the District Court accepted his guilty plea.

The District Court in holding, that Ankeny need not objected before his guilty plea was accepted, as the court observed that "any objection to the indictment presumably would have had been overruled, because the government still would have had the opportunity to present proof of separate acquisition and possession. Id. Thereby, holding, Ankeny logged his objection at the appropriate time, by moving to dismiss the multiplicitous counts prior to sentencing. Id.

The District Court further, observed, that "the plain error standard applies when the defendant failed to raise the issue of multiplicitous sentences, in the District Court, which was not the case of Ankeny." Id. In further noting, that "even if the plain error standard did not apply, defendant's conviction of multiple counts of being a felon in possession of a firearm, rather, than a single count, harmed his substantial rights. . . . . ." Id. 839 (internal citations omitted).

Here, in the instant case, Thomas, would point out that Federal case law distinguishing between objections to multiplicitous conviction and sentences, follows, explicit Supreme Court precedent. See e.g., Ball, supra, 470 U.S. 865, the Supreme Court held, that the District Court has a duty to resolve multiplicitous charges, only after the jury returns a guilty verdict on the multiplicitous charges. Id.

In further, holding, "should the jury return guilty verdicts for each [multiplicitous] count, ... the District Court judge, should enter judgment on only one of the statutory offenses." Id. Here, in the instant case, Thomas, is challenging only the imposition of the multiplicitous conviction and sentences. **FN24.** Moreover, Thomas' objection was timely, therefore, the trial court should have analyzed his multiplicitous, double jeopardy challenge under the unit of prosecution test. See Adel, supra; Univ. C.I.T. Credit Corp., supra.

Thus, in the trial court failing to apply the correct rule of law, to the facts of Thomas case, in respect, to both the unit of prosection challenge in section 1, in addition the multiplicitous double jeopardy challenge, here, such constitutes a "plain error of law."

FN24 Although, Thomas, is not contesting the form of the information in his legal briefings, however, Thomas' appellate counsel in her opening brief thrust forth a challenge to the form of the information.

This Court should find Thomas' objection as timely, although, it appears that a defendant need not object, to a sentence that is erroneously imposed and/or unconstitutional.

Moreover, the well-established rule of law set forth, by the United States Supreme Court is clear, "that a court has a duty to resolve multiplicitous charges, only after the jury returns a guilty verdict on the multiplicitous charges." See Ball, supra, 470 U.S. 865. This Court must review the trial court's error under the "plain error doctrine," or vacate, the multiplicitous conviction and sentences.

3. THE TRIAL COURT COMMITTED A PLAIN ERROR OF LAW IN FAILING TO APPLY THE CORRECT DOUBLE JEOPARDY ANALYSIS TO THE FACTS OF THOMAS' CASE, PRIOR TO ENTERING A NEW JUDGMENT AND SENTENCE

a) Thomas, contends that the error on behalf of the trial court was plain. Under plain error review, a defendant must show (1) an error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. See Johnson v. United States, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). . . "[A]n error is not plain unless it is 'clear' or obvious.' " See United States v. Olano, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

Plain error is so clear-cut, so obvious, a competent judge should be able to avoid it without objection. Id. (internal citations omitted).

Here, in the instant case Thomas, clearly and unmistakably brought forth, to the attention of the trial court, the correct double jeopardy legal analysis which should have been applied to the facts of his case; prior, to the trial court entering a new judgment and sentence. See Supp. CP__, sub. no. 368; 377B (Defense Presentence Report, Motion and Memorandum of Law; Defense Reply Brief, Motion and Memorandum Law); see also 8/19/08 RP 10.

Despite, Thomas, apprising the trial court of the correct legal analysis i.e., (the double jeopardy, unit of prosecution) test, set forth in Adel, supra, 136 Wn.2d @ 634 (citing Bell, supra.)). Which instructs court's of the following:

> For purposes of the constitutional guaranty against double jeopardy, whether a defendant may be separately convicted of multiple violations of a single criminal statute depends upon what the Legislature intends the "unit of prosecution" to be under the statute.

Adel, 136 Wn.2d @ 629-30.

The trial court nonetheless proceeded, to enter a new judgment and sentence against Thomas. Here, Thomas, asserts, that Adel, is instructive, but Bell, is controlling. Moreover, it can be not doubt, that Thomas apprised the court of the applicable law, prior, to the trial court entering a new judgment and sentence against him.

Here, in the instant case Thomas' double jeopardy challenges brought forth, should have been analyzed under the unit of prosecution, test. Prior to the trial court entering a new judgment and sentence. **FN 25.**

Even more troubling, the trial court upon its very own admission conveyed on the record, to have readover Thomas' legal briefings. Such briefings, here, in the instant case clearly, thrust forth Thomas' double jeopardy challenges. See 8/19/08 RP 13. Thus, in placing reliance on the trial court's admission, in light of such admission, it appears that the trial court willfully committed a "plain error of law," such error may very well constitute a "manifest error of law". **FN 26.**

FN 25 The Double Jeopardy Clause's protection against cumulative punishments is designed to ensure that the sentencing discretion of courts is confined to the limits established by the Legislature. Ohio v. Johnson, 467 U.S. 493, 499, 104 S.Ct. 2536, 2541, 81 L.Ed.2d 425 (1984).

The Double Jeopardy Clause serves principally as a restraint on courts and prosecutors, not on the Legislature. Brown v. Ohio, supra; see also Bell, supra, (the Legislature has the power, limited by the Eighth Amendment, to define criminal conduct and set out the appropriate punishment for that conduct)). 349 U.S. 82.

FN 26 An error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record.

Here, in the instant case, Thomas, had met the first prong of the Johnson and Olano test. Thus, in addressing the Second, prong of the test. Thomas, contends that the entering of multiple conviction and sentences, against him affected his substantial rights.

Such is due to the collateral consequences, associated with being charged, convicted and sentenced multiple times, for his being accused of violating a single statutory provision i.e., RCW 9.94A.310(3), multiple times during two criminal transactions. For example, each of the RCW 9.94A.310(3) counts, although, contrary, to the sections statutory language, carried with it a mandatory 5 year consecutive sentence.

Thereby, imposing additional punishment, that would not have been imposed absent,

a) Thomas, being charged, convicted and sentenced multiple times for being accused a violating a single statutory provision multiple times, contrary to the double jeopardy, unit of prosecution test, and

b) If the trial court would have applied the rule of law set out in In re Charles, supra; which authorizes sentencing courts to run the enhancement penalty charged pursuant to RCW 9.94A.310(3), to be run concurrently, rather, than consecutively. **FN 27.**

See Rutledge v. United States, 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996).

Furthermore, Thomas, has been exposed to the possibility of an increased sentence under a recidivist statute for a future offense. See e.g., RCW 9.94A.310(3)(d) now RCW 9.94A.533(3)(d). **FN 28**; see also Ball, supra, 470 U.S. @ 864-85; Rutledge, supra.

Here, the imposition of an erroneously imposed sentence, even a concurrent sentence can have significant collateral consequences, that the trial court cannot foretell at the time of decision. See e.g., Guam v. Torre, 68 F.3d 1177, 1180 (9th cir. 1995)(quoting Ball, 470 U.S. @ 864-65)("The law is plain that multiple convictions apart from concurrent sentences, carry 'adverse collateral consequences that may not be ignored.'); see also e.g., United States v. Kincaid, 898 F.2d 110, 112 (9th cir. 1990)(Noting, that although, neither the defendant nor the court could "identify a specific prejudice which may stem from his erroneous sentence, we are unwilling to place upon [the defendant] the risk that such a prejudice will manifest itself in the future")).

FN 27 Thomas, did further, object to the trial court entering consecutive firearm enhancement terms, in light of the manner in which he were charged provided that of the charging information. See Supp. CP___, sub. no. 377 (Defense Motion and Memorandum of Law); see also 8/19/88 RP 18.

FN 28 If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, any and all firearm enhancements under this subsection shall be twice the amount of the enhancement listed.

Thus, here, in the instant case, its readily apparent that the collateral consequences associated with Thomas, receiving multiple penalties for what amounts to a single unit of prosecution, affects, Thomas' substantial rights.

Thomas, would further, pointout, that the United States Supreme Court in Bell, mandated, that if the Legislature has failed to denote the unit of prosecution in a criminal statute, the ambiguity should be construed in favor of lenity. 349 U.S. @ 84. This reasoning has also been recognized by the Washington State Supreme Court, see Adel, supra, 136 Wn.2d @ 634-35.

Obviously, such mandate is relevant here, in the case at bar. In assuming arguendo, let's say, the trial court had in fact applied the correct legal analysis to the facts of Thomas' case, and determined upon such application of the unit of prosecution test. That the Legislature had failed, to clearly and unmistakably denote the unit of prosecution of RCW 9.94A.310 (3), such finding by the trial court would have required the trial court to apply the rule of lenity, thereby, imposing a single firearm enhancement for each incident i.e., (the September 21st, incident and the December 28th, incident) or possibly, imposing a single enhancement penalty.

Here, in the instant case, such further, affects Thomas' substantial rights, and thereby, justify, this Court striking the multiple conviction and sentences imposed against Thomas, provided that of RCW 9.94A.310 (3). See Rutledge, supra, 517 U.S. @ 302-07.

In concluding, the trial court's error is serious enough to " 'affect [] the fairness, integrity or public reputation of judicial proceedings. See Olano, supra, 507 U.S. @ 732 (quoting United States v. Young, 470 U.S. 1, 15, 84 L.Ed.2d 1, 105 S.Ct. 1038 (1985) . . . . Therefore, due to the trial court imposing six penalties

against Thomas, for being accused and convicted of violating a single statutory provision multiple times, each of which carry significant potential, for collateral consequences which the trial court was or should have been fully aware of, prior, to entering a new judgment and sentence against Thomas.

Here, in the case at bar, Thomas, contends that the error on behalf of the trial court in its failure, to apply the well-established law set forth in Adel and Bell, i.e., (the double jeopardy, unit of prosecution) test, seriously affect the fairness of the judicial proceeding. Furthermore, such error on behalf of the trial court exposed Thomas, to double jeopardy which makes his convictions fundamentally unfair.

Consequently, this Court must acknowledge that the error on behalf of the trial court constitute, "a plain error of law," as any assumption to the contrary, would be tantamount, seriously affecting the fairness of the judicial proceeding here, in the instant case.

Lastly, the ends of justice would not be served, by this Court's refusal and/or failure to acknowledge the trial court's error as being a plain error of law. Therefore, this Court should strike four of the firearm enhancements imposed against Thomas, at the new sentencing proceeding, or at the very least, this Court should remand Thomas' case back before the trial court, with instructions, ordering the trial court to apply the correct double jeopardy, unit of prosecution test, to the facts of Thomas' case.

As here, in the instant case, such is necessary to avert an actual miscarriage of justice, which implies that if the correct rule of law would have been applied to the facts of Thomas' case, i.e., (the double jeopardy, unit of

prosecution) test, to the facts of Thomas case as brought forth, in his double jeopardy unit of prosecution challenges.

Such would have precluded the trial court from imposing and/or entering a judgment, as to the six consecutive five-year enhancement penalties. Rather, the trial court would have had to impose either a single firearm enhancement for each incident i.e., (the September 21st incident and the December 28th incident). Thomas, would also reassert, that if the trial court would have determined upon conducting a double jeopardy, unit of prosecution test, that the Legislature failed to denote the unit of prosecution of the statutory language in question. The trial court would have had to apply the rule of lenity.

Accordingly, this Court should remand Thomas' case or strike four of the firearm enhancements imposed against Thomas.

4. THE STATUTORY DEFINITION OF FIREARM DEFINED IN RCW 9.41.010 IS UNCONSTITUTIONALLY VAGUE AND/OR AMBIGUOUS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 3 OF THE STATE CONSTITUTION

a) A statute is "void for vagueness" if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. The due process vagueness doctrine under the Fourteenth Amendment and Article I, section 3 of the State Constitution requires that citizens have a fair warning of proscribed conduct. See City of Spokane v. Douglass, 115 Wn. 2d 171,

178, 795 P.2d 693 (1990).

A statute is unconstitutionally vague if it (1) . . . . does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) . . . . does not provide ascertainable standards of guilt to protect against arbitrary enforcement." Id. (citing Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

Here, in the instant case, Mr. Thomas, is challenging the statute in question on both grounds. Under the first ground, "[t]he Due Process Clause of the Fourteenth Amendment to the United States Constitution, requires statutes to provide fair notice of the conduct they proscribe. See State v. Watson, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007). To meet this standard, 'the language of a penal statute must be sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties.'" Watson, 160 Wn.2d @ 6-7 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)).

A statute fails to provide the required notice if it 'either forbids or requires the doing of an act in terms so vague, that men of common intellingence must necessarily guess as its meaning and differ as to its application.' Watson, 160 Wn.2d @ 7 (quoting Connally, 269 U.S. @ 391. Under the Second ground, "the due process clause requires that a penal statute provide adequate standards to protect against arbitrary, erratic, and discriminatory enforcement. See Douglass, supra, 115 Wn.2d @ 180.

A statute is unconstitutionally vague on this ground if it "'contain[s] no standards and allow[s] police officers, judge or jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any

given case." Id. e 181 (quoting State v. Maciolek, 101 Wn.2d 259, 267, 676 P.2d 996 (1984)).

Here, in the instant case, Thomas, has standing to bring forth a constitutional challenge as to the constitutionality of the statute in question. **FN 29**. Moreover, Thomas' vagueness challenge may be raised for the first time on appeal. **FN 30**. Therefore, Thomas, brings forth such constitutional challenge, as to the manner in which RCW 9.41.010; statutory definition of "firearm" has been applied to his alleged conduct.

The constitutionality of a statute is an issue of law that is reviewed de novo. Watson, supra; also see State v. Cubias, 155 Wn.2d 549, 552, 120 P.3d 929 (2005) (A constitutional challenge is reviewed de novo)). A ambiguous statute is one which

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FN 29 Criminal defendant's must establish standing to challenge the vagueness of a statute; generally, one must claim the statute is vague as to one's own conduct. See State v. Farmer, 116 Wn.2d 414, 420, 805 P.2d 200 (1991); see generally City of Tacoma v. Luvene, 118 Wn.2d 826, 845, 827 P.2d 1374 (1992) (discussing standing to bring facial challenge); State v. Brown, 50 Wn.App. 405, 409, 748 P.2d 276 (1988) ("When the challenge asserts that the statute under which the defendant is charged is in its entirety unconstitutionally vague on its face, the challenge has standing.").

FN 30 In the context of sentencing established case law holds, that illegal or erroneous sentences may be challenged for the first time on appeal. See State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); see e.g., State v. Moen, 129 Wn.2d 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996) (imposition of a criminal penalty that does not comply with sentencing statutes may be raised for the first time on appeal); State v. Jones, 118 Wn.App. 199, 204 n.4, 207-08, 76 P.3d 258 (2003)

different parties can reasonably interpret in more than one way. See State v. Roggenkamp, 15 Wn.2d 614, 621, 106 P.3d 196 (2005). A statute that is susceptible to two or more reasonable interpretations is ambiguous. See Carter, supra; (quoting State v. Faust, 93 Wn.App. 373, 376, 967 P.2d 1284 (1998).

The rule of lenity requires statutory ambiguities be resolved in favor of the defendant. In re Charles, supra. Courts review statutory construction de novo. State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996).

b) RCW 9.41.010 defines firearm for purposes of the State activating the weapon enhancement section e.g., RCW 9.94A.310(3) now RCW 9.94A.533(3), as a weapon or device from which a projectile or projectiles 'may be fired' by an explosive such as gunpowder.

The sentencing reform act (SRA) of 1981, contains two provisions for enhancing sentences on the basis of a defendant's use of a weapon. The more general provision, RCW 9.94A.310(3) now RCW 9.94A.533(3), provides for various

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(challenging sentence conditions raised for the first time on appeal); State v. Paine, 69 Wn.App. 873, 884, 850 P.2d 1369 (1993) (case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence that error can be addressed for the first time on appeal"); State v. Anderson, 58 Wn.App. 107, 110, 791 P.2d 547 (1990) ("A challenge to a sentence that is contrary to law may be raised for the first time on appeal"); See also In re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996); State v. Loux, 69 Wn.2d 855, 858, 420 P.2d 693 (1966), overruled in part, by Moen, 129 Wn.2d 545; State v. Nitsch, 100 Wn.App. 512, 519, 997 P.2d 1000 (2000). In accordance with these authorities in addition to RAP 2.5, Thomas' vagueness challenge to the statutory definition of firearm, may be raised for the first time on appeal.

enhancements (depending on the class of the crime), if the offender was "armed with a firearm" as defined in this chapter." Thus, for purposes of the enhancement penalty, the firearm must meet the statutory definition of firearm as defined in RCW 9.41.010, which provides:

> A weapon or device from which a projectile or projectiles "may be fired" by an explosive such as gunpowder.

Therefore, in turning to the statutory phrase under challenge i.e., ('may be fired'), in the sections language. Thomas, contends, that the phrase 'may be fired' is unconstitutionally vague and/or ambiguous. Furthermore, the phrase 'may be fired' provided that of RCW 9.41.010, begs the question: What does it mean? FN 31.

FN 31 The current penalty enhancement for offenders armed with firearms were enacted under the "Hard Time For Armed Crime Act." LAWS of 1995, ch. 129 (Initiative Measure No. 159) (codified at Former RCW 9.94A.310 now 9.94A.533). Although, the drafters of the Act documented their Findings and Intent, the findings do not deal with whether a firearm must be operable during the commission of the crime.

Before 1983, "firearm" was not defined under the Uniform Firearms Act. LAWS of 1935, ch. 172, Sec. 18 (codified as Amended RCW Sec. 9.41.010 - 9.41.810). Instead, Former RCW 9.41.010(1) simply, provided:

As here, the Legislature has never provided a statutory definition, of the phrase 'may be fired,' for purposes of defining firearm. When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. See State v. Sullivan, 143 Wn.2d 162, 184-85; 19 P.3d 1012 (2001); see also Medina v. Pub. Util. Dist. No. 1 of Benton County, 147 Wn.2d 303, 315, 53 P.3d 993 (2002).

Court's will not read into a statute matters which are not there, nor modify a statute by construction. King County v. Seattle, 70 Wn.2d 988, 991; 425 P.2d 887 (1967). It is neither the function nor the prerogative of courts to modify legislative enactments. See Anderson v. Seattle, 78 Wn.2d 201, 202, 471 P.2d 87 (1970).

"short firearm Ø or 'pistol Ø as used in RCW 9.41.010 through RCW 9.41.160 means any firearm with a 'barrel less than twelve inches in length." Former, RCW 9.41.010 (1)(1971). But in April of 1983, the Legislature Amended the Uniform Firearms Act and added the following definition: "'{F}irearm' as used in this chapter means a weapon or device from which a projectile "may be fired" by explosive such as gunpowder." LAWS of 1983, ch. 232, Sec. 1 (3).

Two months prior, the Washington Supreme Court decided, State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983), overruled on other grounds by, State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988). In Pam, the court said: Under Former RCW 9.41.025 now RCW {repealed}, the State must prove the presence of a "firearm," which is defined under WPIC 2.10 as a "weapon from which a projectile "may be fired" by an explosive such as gunpowder." A gun-like object incapable of being fired is not a firearm" under this definition. Pam, 98 Wn.2d e 753-54 (footnote omitted)(emphasis added). This language could be read as limiting the definition of firearm to a gun that was operable at the time of crime.

Here, in the instant case, Thomas, asserts the phrase 'may be fired' is broad and denotes a certain measure of possibility or potentially. See e.g., Black's Law Dictionary 993 (7th ed. 1999), defining 'may' as:

> 1. Is permitted to <the plantiff may close>. • This is the primary legal sense – usu. termed the "permissive" or "discretionary" sense. 2. Has a possibility (to); might <the defendant may win on appeal>. Cf. CAN. 3. Loosely, is required to; shall; must <if two or more defendant's are jointly indicted, any defendant who so requests may be tried separately>. • In dozens of cases, courts have held may to be synonymous with shall or must, usu. in an effort to effectuate legislative intent.

See also e.g., Black's Law Dictionary, Second Pocket Edition 443 (2001), defining 'may' as:

> 1. Is permitted to; 2. Has a possibility (to); might. cf. CAN. 3. Loosely, is required to; shall; must, in dozens of cases, courts have held may to be synonymous with shall or must, usu. in an effort to effectuate legislative intent.

Webster's II Third Edition Dictionary 440 (2005), defines 'may' as:

> Might 1. To be allowed or permitted to <you may borrow the car.> 2.– Used to indicate a measure of likelihood or possibility <it may snow tonight.> 3.– Used to express a desire or wish, purpose, contingency, or result.

Webster's Third New International Dictionary 1396 (1986), defines 'may' in part, as:

> 'To have the ability or competence.'

Here, in the instant case, Thomas, contends that the phrase 'may be fired' fails to qualify, at what point in time the firearm must be capable of being fired, e.g., (at the time of manufacture,' upon being tested by Law Enforcement officials; while in a perpetrator's possession; at a time near to the time of the perpetrator's possession; at any time; past, present, or future; during the commission of a crime; it might mean a firearm is a weapon or device from which a projectile or projectiles may be fired by an explosive, at a time near to, or at least remote from, the time of the perpetrator's possession), or it might have other meanings. Therefore, the question: What does the phrase 'may be

fired' mean, for purposes of defining firearm?

A court cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question. See Miller v. French, 530 U.S. 327, 341, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000)(quoting United States v. Locke, 471 U.S. 84, 96, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985). A statute's plain reading must make the interpretation reasonable. See Soundgarden v. Elkenberry, 123 Wn.2d 750, 757, 871 P.2d 1050, cert. denied, Soundgarden v. Gregoire, 513 U.S. 1056 (1994). Thus, in the court considering a facial challenge, the court analyzes the statutory language itself and does not rely on the facts of the case. City of Seattle v. Webster, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990), cert. denied, 500 U.S. 908 (1991).

Here, in the instant case, Thomas, would note in proposition of the unconstitutionally vague and/or ambiguous challenge brought forth, that in respect to the phrase 'may be fired' at issue here. The jury instructions charged to the jury, in his case conveyed the following:

> 1) That the defendant possessed a "firearm" that was operable at the time of the commission of the crime; and

See CP 917 (Instruction 32)

> 2) That the firearm must be capable of firing a projectile by an explosive such as gunpowder.

See CP 916-17. (Reproduced Copy of Jury Instructions attached as, Appendix G).

Here, in the instant case, the significance of Thomas, noting, the instructions charged to the jury is to illustrate that the phrase 'may be fired' in reference to the statutory definition of firearm, provided that of RCW 9.41.010(1), appears to indicate that a firearm must be operable, during the commission of a crime; in addition to being capable of firing a projectile, by an explosive such as gunpowder. See CP 916-17 (Instruction 32). **FN 32.**

Obviously, such has semantic plausibility in light of the phrase 'may be fired' clearly indicating that a firearm must be capable of firing a projectile or projectiles, at a past, present or future time and/or as the jury instructions provided, the firearm must be operable at the time of the commission of the crime. **FN 33.** At a minimum the phrase 'may be fired' cries for legislative clarification. **FN 34.**

FN 32 See 11 Washington Practice : Washington Pattern Jury Instructions : Criminal 2.10.01 (Supp. 2005)(WPIC).

FN 33 See State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). In Recuenco, the State Supreme Court reaffirmed its longstanding holding, "to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a 'firearm': 'A weapon or device from which a projectile may be fired by an explosive such as gunpowder.' The court further held, that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement; citing, State v. Pam, 98 Wn.2d 748, 745-55, 659 P.2d 454 (1983), overruled in part on other grounds by, State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988).

Moreover, in the constitutional sense, vagueness means that persons of ordinary intelligence are obliged to guess as to what conduct the ordinance proscribes. See Douglass, supra, 115 Wn.2d 179.

Furthermore, the United States Supreme Court has identified "the requirement that a Legislature establish minimal guidelines to govern law enforcement" as the more important of the vagueness doctrine's dual elements, noting, that '[w]here the Legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors and juries to pursue their personal predilections.' See Kolender v. Lawson, supra, (citing Smith v. Goguen, 415 U.S. 556, 574-75, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974).

Here, in the instant case, Thomas, contends that the lack of such minimal guidelines in regards to the statutory language in question, has led to the standardless sweeping identified by the United States Supreme Court. Thereby, allowing prosecutors, judges and juries to pursue their personal predilections. For example, Thomas, was convicted of three firearm enhancements pursuant to RCW 9.94A.310(3)(e), provided that of the statutory language included in RCW 9.41.010(1).

The problem with Thomas' convictions, is that there was no evidence introduced at trial that the alleged firearm he were to have possessed, in relation to counts

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FN 34 The rule that penal laws are to be construed strictly . . . is perhaps not much less old than construction itself. See United States v. Wiltberger, 18 U.S. 76, (5 Wheat.) [5 L.Ed. 37] (1820). The rule is designed to ensure that individuals have a fair notice of what the law requires, so as to avoid arbitrary enforcement. McBoyle v. United States, 283 U.S. 25, 27, 75 L.Ed. 816, 51 S.Ct. 340 (1931).

I, III and IV met the statutory definition of firearm, provided that of the unconstitutionally vague and/or ambiguous statutory language contained in RCW 9.41.010(1). Furthermore, there was no evidence introduced at trial, that the alleged firearm was operable or capable of firing a projectile or projectiles by an explosive such as gunpowder.

Even more troubling, there was no evidence introduced at trial that the alleged firearm, could have been rendered operational with reasonable effort and within a reasonable time period. Such is due to there being no firearm introduced into evidence to establish that the alleged firearm met, the unconstitutionally vague and/or ambiguous statutory definition of "firearm" contained in RCW 9.41.010(1).

Here, in the instant case, Thomas, makes reference of such due to his contending that the phrase 'may be fired' in regards to the statutory language contained in RCW 9.41.010(1), as to the definition of "firearm" being overly subjective, thereby, allowing prosecutors, judges and juries, to subjectively decide what conduct the statute proscribes and what conduct will comply with the statute's unconstitutionally vague and/or ambiguous language.

Thomas, in further, proposition of his legal contentions would pointout, that both Division One and Division Two Court of Appeals, have identified the statutory language 'may be fired' contained in RCW 9.41.010, as ambiguous. And rather, than applying the correct rule of law, to such findings i.e., (the rule of lenity) and or strike the statute for being unconstitutionally vague. The Washington State Court's of Appeals studiously ignored the ambiguous language. See e.g., State v. Padilla, 95 Wn. App. 531, 978 P.2d 1113 (1999) (The statutory definition of 'firearm' is ambiguous, because the language 'may be fired' is susceptible to more than one reasonable interpretation); see also e.g., State v. Faust, 93 Wn. App. 373, 967 P.2d 1204 (1989) (The definition of firearm is ambigous the language "a weapon or device from which a projectile or projectiles 'may be

fired' clearly indicates that a firearm must be capable of firing a projectile at some point in time, but it is not clear whether the firearm must be operable at the time when the crime is committed)).

Here, in the instant case, Thomas, asserts that due to the Washington State Court's of Appeals ignoring, the ambiguous language which Thomas, argues is overly subjective such has led to the standardless sweeping condemned, by the United States Supreme Court and the Fourteenth Amendment of the United States Constitution. See Kolender v. Lawson, supra; Smith v. Goguen, supra.

Moreover, the approach taken by the Washington State Court's of Appeals, is inconsistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant, on the basis of legislative pitfalls within the text of a particular penal statute, **FN 35**; as once it is determined that the statutory text is ambiguous, the rule requires that the more lenient interpretation prevail, to do otherwise, would be contrary to the notice requirement "that criminal statutes provide fair warning of what conduct is rendered illegal. See McBoyle, supra, 283 U.S. @ 25, 27; see also Liparota v. United States, 471 U.S. 419, 427, 105 S.Ct. 2084, 85 L.Ed.2d 434. . . . (1985) (The rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendering illegal)).

FN 35 See e.g., State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1347 (1997) @ 21 (citing Adams v. Dep't of Soc. & Health Servs., 38 Wn. App. 13, 16, 683 P.2d 1133 (1984)(Court's may not add language to a clear statute, even if [the court] believes the Legislature intended something else, but failed to express it adequately) see also ANNOT., 50 A.L.R. 3d 1164, 1170-71 (1973)(One of the primary purposes of any legislative definition is to specifically, indicate what it is that the Legislature intends to prohibit.)).

Although, here, the Washington State Court's of Appeals, with its warrant of textual ambiguity continues, to ignore the unconstitutionally vague and apparent ambiguous textual language i.e., ('may be fired') within RCW 9.41.010(1). Such of which appears to have become the driving force, behind the Washington State Court's of Appeals broadening such unconstitutionally vague and apparent ambiguous statutory language, rather, than narrowing its scope to meet the constitution requirements, of the Fourteenth Amendment of the United States Constitution. **FN 36**; **FN 37**.

For example, the Washington State Court's of Appeals, have further, blurred such unconstitutionally vague and apparent ambiguous statutory language, by incorporating its idiology as to what the phrase 'may be fired' entails. As the phrase 'may be fired' has now, taken upon the concept of meaning, unloaded, malfunctioning and disassembled guns, "that can be rendered operational with reasonable effort and within a reasonable time period". **FN 38**.

FN 36 See Diversified Inv. P'ship v. Dep't of Soc. & Health Servs., 113 Wn.2d 19, 24, 775 P.2d 947 (1989) (The Legislature may not delegate its purely legislative functions)).

FN 37 Washington State Court's decide the vagueness issue under Federal Constitutional law. See Douglass, supra.

FN 38 See Padilla, supra; Faust, supra; State v. Wade, 133 Wn.App. 855, 873, 138 P.3d 168 (2006), review denied, 160 Wn.2d 1002 (2007); State v. Berrier, 110 Wn.App. 639, 645, 41 P.3d 1198 (2002).

Here, in the instant case, Thomas, contends that the problem with this form of broadening statutory language, which has been clearly established as being ambiguous, not to mention overly subjective. Is that criminal convictions are being obtained, despite, the constitutional violations associated with the unconstitutionally vague and apparent ambiguous statutory language contained in RCW 9.41.010(1). **FN 39.**

Moreover, the Washington State Court's of Appeals, in identifying with the ambiguity within the statutes text, rather, than applying the correct rule of law as asserted i.e., (the rule of lenity), and/or striking the statute for being unconstitutionally vague, has taken an alternative approach, thereby, enlarging the unconstitutionally vague and apparent ambiguous statutory language. Such of which has created an additional ambiguity, within the statutes text, as to the phrase 'may be fired'.

For example, as asserted, the phrase 'may be fired' despite, its outstanding ambigous form, now, means:

a) Unloaded
b) Malfunctioning
c) disassembled

guns, "that can be rendered operational with reasonable effort and within a reasonable time period." Here, in the instant case, Thomas, contends that

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FN 39 See Lorell v. Griffen, 303 U.S. 444, 452, 82 L.Ed. 949, 58 S.Ct. 666 . . . . . (1938) (No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes); see also

now, the question becomes two-fold:

1) What does 'may be fired' mean for the purposes of defining "firearm."? and

2) What does the language "can be rendered operational with reasonable effort and within a reasonable time period constitute, for the purposes of defining the phrase 'may be fired,' in respect to a firearm."?

Here, the word <u>reasonable</u> appears to be the operative word, in light of this additional ambiguous language. In the absence of specific statutory definition[5], the court gives words their common legal or ordinary meaning, court's give non-technical words their dictionary definition. <u>See</u> <u>Chester</u>, supra, 133 Wn.2d @ 22.

Here, the word reasonable, is defined as,

> **1.** Able to reason : rational. **2.** Consistent with reason : logical. **3.** Not extreme :

<u>Lanzetta v. New Jersey</u>, supra, 306 U.S. @ 453.

moderate <reasonable rates>.

See Webster's II Dictionary, Third Edition (2005) @ 592-93; see also e.g., Black's Law Dictionary, Second Pocket Edition 584 (2001), which defines reasonable as,

> 1. Fair, proper, or moderate under the circumstances <reasonable pay>. 2. According to reason <your agreement is reasonable but not convincing>. 3. (Of a person) having the faculty of reason <a reasonable person would have looked both ways before crossing the street>.

Here, in the instant case, Thomas, contends that the Washington State Court's of Appeals, in its broadening the unconstitutionally vague and apparent ambiguous statutory language, has yet, to define or elucidate the phrase 'may be fired'.

Therefore, it would appear to be contrary, to the Due Process Clause of the Fourteenth Amendment of the United States Constitution, to further, muddle the unconstitutionally vague and apparent ambiguous statutory language, which this Court under its own admission, found "the statutory definition of firearm' ambiguous, because the language 'may be fired' is susceptible to more than one reasonable interpretation'. See Padilla, supra. Now, the question begs:

What does the language "can be rendered operational with reasonable effort and within a reasonable time period," mean, for the purposes of defining the phrase 'may be fired,' in respect to a "firearm, notwithstanding, the unconstitutionally vague and apparent ambiguity of the phrase under challenge?

Here, in the instant case, Thomas, asserts that this Court invalidate the statute in question, for vagueness due to its overly subjective language, as other court's have done. For example, in City of Bellevue v. Lorang, the court invalidated criminal laws for vagueness when they are overly subjective, as the court observed:

> 'What is forbidden by the Due Process Clause are criminal statutes that contain no standards and allow police officers, judge and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case. Thus. . . . we struck down statutes containing inherently subjective terms, such as loiter or wander, wanders and prowls with unlawful purpose [and] lawful excuse.'

140 Wn.2d 19, 30, 992 P.2d 476 (2000) @ 31 (quoting State v. Maciolek, 101 Wn.2d 259, 267, 676 P.2d 996 (1984)).

Here, Thomas, contends that not only is the phrase 'may be fired' unconstitutionally vague and ambigous, but also, that the manner which RCW 9.41.010(1)s textural language is being interpreted, in light of the catch-all phrase 'may be fired,' such has led to Washington State Court's of Appeals, to hold, that the State need not introduce the actual deadly weapon at trial, witness testimony alone, may provide sufficient evidence. **FN 40.**

Such appears to totally disregard the well-established holding set forth, in In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1970).

Thus, in turning to the applicability of the vagueness doctrine, which in the instant case is two-fold. First, this Court must address the doctrine's "notice requirement," this basic rule should be familiar to this Court: A statute will be deemed unconstitutionally vague if "persons of common intelligence, must necessarily guess at its meaning and differ as to its application. See State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982) @ 98-99 (citing Connally v. Gen. Constr. Co., supra.

Second, this Court must address the due process principle, the vagueness doctrine enforces, that criminal convictions should not be based on

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FN 40 See e.g.; State v. McKee, 41 Wn.App. 22, 31, 167 P.3d 575 (2007), In McKee, the defendant argued, that for purposes of a firearm enhancement, "the State must prove that he was armed during commission of the crime, with a firearm" defined as a weapon 'from which a projectile or projectiles may be fired by an explosive such as gunpowder.' The court held, the State need not introduce the actual deadly weapon at trial; witness testimony alone, may provide sufficient evidence.

See also e.g., State v. Anderson, 94 Wn.App. 151, 158, 971 P.2d 585 (1999) rev'd on other grounds, No. 67826-0, 2000 WL 1125302 (Aug 18, 2000), Anderson, was charged with second degree unlawful possession of a firearm

arbitrary or ad hoc determinations of criminality. See State v. Richmond, 102 Wn.2d 242, 683 P.2d 1093 (1984) e 244. Here, in this Court performing a vagueness test, in light of the unconstitutionally vague and ambiguous statutory language in question.

This Court shall find that RCW 9.41.010s phraseology, in respect to the challenged phrase 'may be fired' in the sections textural language does not pass constitutional muster. Furthermore, this Court shall once again discover, the statutory definition of "firearm" is ambiguous, because the phrase 'may be fired' remains outstanding and is susceptible to more than one reasonable interpretation.

As the Legislature in employing the specific words 'may be fired' in the sections textural language, clearly, indicates legislative intent that for purposes of the definition of firearm, as defined in RCW 9.41.010 (1):

> A weapon or device from which a projectile or projectiles 'may be fired' by an explosive such as gunpowder

That for a firearm to meet this statutory language, the firearm must be able to

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and argued that the evidence at trial was insufficient to prove the gun was an operational "firearm," in further, arguing that the State failed to meet its burden of proving that he possessed a firearm as defined by RCW 9.41.010 (1) because the gun was never test-fired. Anderson, 94 Wn.App. 159. Despite, such the court held, that sufficient evidence was presented from which any rational trier of fact could conclude that the gun was a 'real gun and not a toy gun. Anderson, 94 Wn.App. 162.

fire a projectile or projectiles, i.e., (operable), at some point in time. The question: Does such mean,

a) At the time of manufacture?
b) Upon being tested by Law Enforcement officials?
c) While in the perpetrator's possession?
d) At a time near to the time of the perpetrator's possession?
e) At any time, past, present, or future?
f) During the commission of a crime?
g) At a time near to, or at least remote from, the time of the perpetrator's possession?

h) Or does it mean something else?

Here, in the instant case Thomas' vagueness challenge is sufficiently ripe. Moreover, this Court should strike RCW 9.41.010(1) as being unconstitutionally vague, in respect to the phrase 'may be fired,' thereby, further, striking the enhancement penalties imposed pursuant to RCW 9.94A.310(3), provided that of RCW 9.41.010(1).

At the very least this Court must apply the rule of lenity, thereby, finding the phrase 'may be fired' ambiguous. Thus, dismissing the enhancement penalties imposed pursuant to RCW 9.94A.310(3), provided that of RCW 9.41.010(1).

F. CONCLUSION

Mr. Thomas respectfully requests his case be remanded for a new sentencing hearing, striking the firearm enhancements imposed in violation of the double jeopardy (the unit of prosecution doctrine), and in violation of

double jeopardy, in the trial court entering multiplicitous conviction and sentences against Thomas, as such was a plain error of law, lastly, Thomas, respectfully requests of this Court to remand his case, for resentencing striking the enhancement penalties imposed pursuant to RCW 9.94A.310(3), provided that RCW 9.41.010(1).

DATED this 21st day of June 2009.

Respectfully Submitted.

DEMICKO THOMAS 991403 F-N D-5 (Appellant)
Stafford Creek Correctional Center
191 Constantine Way
Aberdeen, Washington 98520

Appendix A

FILED
03 MAY -2 PM 2:55
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON, Plaintiff, v. DEMICKO BILLIE THOMAS Defendant.	No. 03-1-00029-5 KNT AMENDED INFORMATION

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse DEMICKO BILLIE THOMAS of the crime of **Robbery in the First Degree**, committed as follows:

That the defendant DEMICKO BILLIE THOMAS in King County, Washington on or about December 28, 2002, did unlawfully and with intent to commit theft take personal property of another, to-wit: Jewelry from the person and in the presence of Nanacy Farrell against her will, by the use or threatened use of immediate force, violence and fear of injury to such person or her property and to the person or property of another and in the commission of and in immediate flight therefrom, the defendant displayed what appeared to be a firearm and a deadly weapon, to-wit: a handgun;

Contrary to RCW 9A.56.200(1)(a)(ii) and 9A.56.190, and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant DEMICKO BILLIE THOMAS at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310(3).

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse DEMICKO BILLIE THOMAS of the crime of **Robbery in the First Degree**, a crime of the same or similar character as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant DEMICKO BILLIE THOMAS in King County, Washington on or about December 28, 2002, did unlawfully and with intent to commit theft take personal property of another, to-wit: Jewelry, from the person and in the presence of Masako Kuranishi, against her will, by the use or threatened use of immediate force, violence and fear of injury to such person or her property and to the person or property of another and in the commission of and in immediate flight therefrom, the defendant displayed what appeared to be a firearm and a deadly weapon, to-wit: a handgun;

Contrary to RCW 9A.56.200(1)(a)(ii) and 9A.56.190, and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant DEMICKO BILLIE THOMAS at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310(3).

COUNT III

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse DEMICKO BILLIE THOMAS of the crime of **Kidnapping in the First Degree**, a crime of the same or similar character as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant DEMICKO BILLIE THOMAS in King County, Washington on or about December 28, 2002, did intentionally abduct Nancy Farrell, a human being, with intent to facilitate commission of the felony of Robbery in the First Degree and flight thereafter;

Contrary to RCW 9A.40.020(1)(b), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant DEMICKO BILLIE THOMAS at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310(3).

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

COUNT IV

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse DEMICKO BILLIE THOMAS of the crime of **Kidnapping in the First Degree**, a crime of the same or similar character as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant DEMICKO BILLIE THOMAS in King County, Washington on or about December 28, 2002, did intentionally abduct Masako Kuranishi, a human being, with intent to facilitate commission of the felony of Robbery in the First Degree and flight thereafter;

Contrary to RCW 9A.40.020(1)(b), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant DEMICKO BILLIE THOMAS at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310(3).

COUNT V

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse DEMICKO BILLIE THOMAS of the crime of **Attempted Robbery in the First Degree**, a crime of the same or similar character as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant DEMICKO BILLIE THOMAS in King County, Washington on or about September 21, 2002, did unlawfully and with intent to commit theft attempt to take personal property of another, to-wit: Merchandise, from the person and in the presence of Chuck Hohner, against his will, by the use or threatened use of immediate force, violence and fear of injury to such person or his property and to the person or property of another and in the attempted commission of and in immediate flight therefrom the defendant was armed with a firearm, to-wit: a handgun and displayed what appeared to be a firearm; attempt as used in the above charge means that the defendant committed an act which was a substantial step towards the commission of the above described crime with the intent to commit that crime.

Contrary to RCW 9A.28.020, 9A.56.200(1)(a)(i) and 9A.56.190, and against the peace and dignity of the State of Washington.

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
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(206) 296-9000

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant DEMICKO BILLIE THOMAS at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310(3).

COUNT VI

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse DEMICKO BILLIE THOMAS of the crime of **Kidnapping in the First Degree**, a crime of the same or similar character as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant DEMICKO BILLIE THOMAS in King County, Washington on or about September 21, 2002, did intentionally abduct Chuck Hohner, a human being, with intent to facilitate commission of the felony of Robbery in the First Degree and flight thereafter;

Contrary to RCW 9A.40.020(1)(b), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant DEMICKO BILLIE THOMAS at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310(3).

COUNT VII

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse DEMICKO BILLIE THOMAS of the crime of **Assault in the First Degree**, a crime of the same or similar character as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant DEMICKO BILLIE THOMAS in King County, Washington on or about September 21, 2002, with intent to inflict great bodily harm, did assault Chuck Hohner with a firearm and force and means likely to produce great bodily harm or death, to-wit: did fire a gun at Chuck Hohner;

Contrary to RCW 9A.36.011(1)(a), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant DEMICKO BILLIE THOMAS at said time of being armed with a handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310(3).

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

COUNT VIII

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse DEMICKO BILLIE THOMAS of the crime of Unlawful Possession of a Firearm in the First Degree, a crime of the same or similar character as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant DEMICKO BILLIE THOMAS in King County, Washington, time intervening between September 21, 2002 and December 31, 2002, previously having been convicted in King County of the crime of Robbery in the Second Degree, a serious offense as defined in RCW 9.41.010, knowingly did own, have in his/her possession, or have in his/her control, a handgun, a firearm as defined in RCW 9.41.010;

Contrary to RCW 9.41.040(1)(a),(2)(a), and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: _____
Roger S. Rogoff, WSBA #23362
Senior Deputy Prosecuting Attorney

Norm Maleng
Prosecuting Attorney
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Appendix B

Passed the Senate March 10, 1995.
Passed the House April 10, 1995.
Approved by the Governor April 20, 1995.
Filed in Office of Secretary of State April 20, 1995.

CHAPTER 127

[Substitute Senate Bill 6028]

HARASSMENT OF A CHILD

AN ACT Relating to harassment; and amending RCW 10.14.020 and 10.14.040.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 10.14.020 and 1987 c 280 s 2 are each amended to read as follows:

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Unlawful harassment" means a knowing and wilful course of conduct directed at a specific person which seriously alarms, annoys, ((~~or~~)) harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct is contact by a person over age eighteen that would cause a reasonable parent to fear for the well-being of their child.

(2) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."

Sec. 2. RCW 10.14.040 and 1987 c 280 s 4 are each amended to read as follows:

There shall exist an action known as a petition for an order for protection in cases of unlawful harassment.

(1) A petition for relief shall allege the existence of harassment and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.

(2) A petition for relief may be made regardless of whether or not there is a pending lawsuit, complaint, petition, or other action between the parties.

(3) All court clerks' offices shall make available simplified forms and instructional brochures. Any assistance or information provided by clerks under this section does not constitute the practice of law and clerks are not responsible for incorrect information contained in a petition.

(4) No filing fee may be charged for a petition filed in an existing action or under an existing cause number brought under this chapter in the jurisdiction

where the relief is sought. Forms and instructional brochures shall be provided free of charge.

(5) A person is not required to post a bond to obtain relief in any proceeding under this section.

(6) The parent or guardian of a child under age eighteen may petition for an order of protection to restrain a person over age eighteen from contact with that child upon a showing that contact with the person to be enjoined is detrimental to the welfare of the child.

Passed the Senate March 10, 1995.
Passed the House April 10, 1995.
Approved by the Governor April 20, 1995.
Filed in Office of Secretary of State April 20, 1995.

CHAPTER 128

[Senate Bill 5200]

USE TAX—EXCEPTION FOR AIRCRAFT TRAINING EQUIPMENT TRANSFERRED TO WASHINGTON BECAUSE OF BASE CLOSURE

AN ACT Relating to use tax on aircraft training equipment transferred to Washington state as a result of base closure; adding a new section to chapter 82.12 RCW; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. **Sec. 1.** A new section is added to chapter 82.12 RCW to read as follows:

The provisions of this chapter shall not apply in respect to the use of naval aircraft training equipment transferred to Washington state from another naval installation in another state as a result of the base closure act, P.L. 101-510, as amended by P.L. 102-311, 102-484, 103-160, 103-337, and 103-421.

NEW SECTION. **Sec. 2.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate March 9, 1995.
Passed the House April 11, 1995.
Approved by the Governor April 20, 1995.
Filed in Office of Secretary of State April 20, 1995.

CHAPTER 129

[Initiative 159]

HARD TIME FOR ARMED CRIME ACT

AN ACT Relating to increasing penalties for armed crimes; amending RCW 9.94A.310, 9.94A.150, 9A.36.045, 9A.52.020, 9A.56.300, 9A.56.030, 9A.56.040, 9A.56.150, 9A.56.160, 9.41.040, and 10.95.020; reenacting and amending RCW 9.94A.320; adding new sections to chapter 9.94A RCW; adding a new section to chapter 9A.56 RCW; creating new sections; repealing 1994

1st sp.s. c 7 s 510; repealing 1994 1st sp.s. c 7 s 511; repealing 1994 1st sp.s. c 7 s 512; and prescribing penalties.

Be it enacted by the People of the State of Washington:

NEW SECTION. **Sec. 1.** FINDINGS AND INTENT. (1) The people of the state of Washington find and declare that:

(a) Armed criminals pose an increasing and major threat to public safety and can turn any crime into serious injury or death.

(b) Criminals carry deadly weapons for several key reasons including: Forcing the victim to comply with their demands; injuring or killing anyone who tries to stop the criminal acts; and aiding the criminal in escaping.

(c) Current law does not sufficiently stigmatize the carrying and use of deadly weapons by criminals, and far too often there are no deadly weapon enhancements provided for many felonies, including murder, arson, manslaughter, and child molestation and many other sex offenses including child luring.

(d) Current law also fails to distinguish between gun-carrying criminals and criminals carrying knives or clubs.

(2) By increasing the penalties for carrying and using deadly weapons by criminals and closing loopholes involving armed criminals, the people intend to:

(a) Stigmatize the carrying and use of any deadly weapons for all felonies with proper deadly weapon enhancements.

(b) Reduce the number of armed offenders by making the carrying and use of the deadly weapon not worth the sentence received upon conviction.

(c) Distinguish between the gun predators and criminals carrying other deadly weapons and provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms.

(d) Bring accountability and certainty into the sentencing system by tracking individual judges and holding them accountable for their sentencing practices in relation to the state's sentencing guidelines for serious crimes.

Sec. 2. RCW 9.94A.310 and 1992 c 145 s 9 are each amended to read as follows:

FIREARM AND OTHER DEADLY WEAPON ENHANCEMENTS INCREASED.

(1)

TABLE 1

Sentencing Grid

SERIOUSNESS SCORE	OFFENDER SCORE 0	1	2	3	4	5	6	7	8	9 or more
XV	Life Sentence without Parole/Death Penalty									
XIV	23y4m 240- 320	24y4m 250- 333	25y4m 261- 347	26y4m 271- 361	27y4m 281- 374	28y4m 291- 388	30y4m 312- 416	32y10m 338- 450	36y 370- 493	40y 411- 548
XIII	12y 123- 164	13y 134- 178	14y 144- 192	15y 154- 205	16y 165- 219	17y 175- 233	19y 195- 260	21y 216- 288	25y 257- 342	29y 298- 397
XII	9y 93- 123	9y11m 102- 136	10y9m 111- 147	11y8m 120- 160	12y6m 129- 171	13y5m 138- 184	15y9m 162- 216	17y3m 178- 236	20y3m 209- 277	23y3m 240- 318
XI	7y6m 78- 102	8y4m 86- 114	9y2m 95- 125	9y11m 102- 136	10y9m 111- 147	11y7m 120- 158	14y2m 146- 194	15y5m 159- 211	17y11m 185- 245	20y5m 210- 280
X	5y 51- 68	5y6m 57- 75	6y 62- 82	6y6m 67- 89	7y 72- 96	7y6m 77- 102	9y6m 98- 130	10y6m 108- 144	12y6m 129- 171	14y6m 149- 198
IX	3y 31- 41	3y6m 36- 48	4y 41- 54	4y6m 46- 61	5y 51- 68	5y6m 57- 75	7y6m 77- 102	8y6m 87- 116	10y6m 108- 144	12y6m 129- 171
VIII	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y 41- 54	4y6m 46- 61	6y6m 67- 89	7y6m 77- 102	8y6m 87- 116	10y6m 108- 144
VII	18m 15- 20	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y 41- 54	5y6m 57- 75	6y6m 67- 89	7y6m 77- 102	8y6m 87- 116
VI	13m 12+- 14	18m 15- 20	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y6m 46- 61	5y6m 57- 75	6y6m 67- 89	7y6m 77- 102
V	9m 6- 12	13m 12+- 14	15m 13- 17	18m 15- 20	2y2m 22- 29	3y2m 33- 43	4y 41- 54	5y 51- 68	6y 62- 82	7y 72- 96
IV	6m 3- 9	9m 6- 12	13m 12+- 14	15m 13- 17	18m 15- 20	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57	5y2m 53- 70	6y2m 63- 84
III	2m 1- 3	5m 3- 8	8m 4- 12	11m 9- 12	14m 12+- 16	20m 17- 22	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57	5y 51- 68
II	0-90 Days	4m 2- 6	6m 3- 9	8m 4- 12	13m 12+- 14	16m 14- 18	20m 17- 22	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57
I	0-60 Days	0-90 Days	3m 2- 5	4m 2- 6	5m 3- 8	8m 4- 12	13m 12+- 14	16m 14- 18	20m 17- 22	2y2m 22- 29

NOTE: Numbers in the first horizontal row of each seriousness category represent sentencing midpoints in years(y) and months(m). Numbers in the second and third rows represent presumptive sentencing ranges in months, or in days if so designated. 12+ equals one year and one day.

Appendix C

2000

Adult Sentencing Guidelines Manual

SENTENCING
GUIDELINES
COMMISSION
STATE OF WASHINGTON

RCW 9.94A.310 Table 1--Sentencing grid. (Effective until July 1, 2001.)
FOR CRIMES COMMITTED AFTER JULY 24, 1999

SERIOUSNESS LEVEL	OFFENDER SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XVI	Life Sentence without Parole/Death Penalty									
XV	23y 4m 240 - 320	24y 4m 250 - 333	25y 4m 261 - 347	26y 4m 271 - 361	27y 4m 281 - 374	28y 4m 291 - 388	30y 4m 312 - 416	32y 10m 338 - 450	36y 370 - 493	40y 411 - 548
XIV	14y 4m 123 - 220	15y 4m 134 - 234	16y 2m 144 - 244	17y 154 - 254	17y 11m 165 - 265	18y 9m 175 - 275	20y 5m 195 - 295	22y 2m 216 - 316	25y 7m 257 - 357	29y 298 - 397
XIII	14y 4m 123 - 164	15y 4m 134 - 178	16y 2m 144 - 192	17y 154 - 205	17y 11m 165 - 219	18y 9m 175 - 233	20y 5m 195 - 260	22y 2m 216 - 288	25y 7m 257 - 342	29y 298 - 397
XII	9y 93 - 123	9y 11m 102 - 136	10y 9m 111 - 147	11y 8m 120 - 160	12y 6m 129 - 171	13y 5m 138 - 184	15y 9m 162 - 216	17y 3m 178 - 236	20y 3m 209 - 277	23y 3m 240 - 318
XI	7y 6m 78 - 102	8y 4m 86 - 114	9y 2m 95 - 125	9y 11m 102 - 136	10y 9m 111 - 147	11y 7m 120 - 158	14y 2m 146 - 194	15y 5m 159 - 211	17y 11m 185 - 245	20y 5m 210 - 280
X	5y 51 - 68	5y 6m 57 - 75	6y 62 - 82	6y 6m 67 - 89	7y 72 - 96	7y 6m 77 - 102	9y 6m 98 - 130	10y 6m 108 - 144	12y 6m 129 - 171	14y 6m 149 - 198
IX	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46 - 61	5y 51 - 68	5y 6m 57 - 75	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144	12y 6m 129 - 171
VIII	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46 - 61	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144
VII	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116
VI	13m 12+ - 14	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 6m 46 - 61	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102
V	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29	3y 2m 33 - 43	4y 41 - 54	5y 51 - 68	6y 62 - 82	7y 72 - 96
IV	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 2m 53 - 70	6y 2m 63 - 84
III	2m 1 - 3	5m 3 - 8	8m 4 - 12	11m 9 - 12	14m 12+ - 16	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 51 - 68
II	0 - 90 Days	4m 2 - 6	6m 3 - 9	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57
I	0 - 60 Days	0 - 90 Days	3m 2 - 5	4m 2 - 6	5m 3 - 8	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29

NOTE: Numbers in the first horizontal row of each seriousness category represent sentencing midpoints in years(y) and months(m). Numbers in the second and third rows represent presumptive sentencing ranges in months, or in days if so designated. 12+ equals one year and one day.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by 75 percent.

(3) The following additional times shall be added to the presumptive sentence 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. 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 an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the presumptive sentence determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection.

(b) Three years for any felony defined under any law as a class B felony or with a maximum sentence of ten years, or both, and not covered under (f) of this subsection.

(c) Eighteen months for any felony defined under any law as a class C felony or with a maximum sentence of five years, or both, and not covered under (f) of this subsection.

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, any and all firearm enhancements under this subsection shall be twice the amount of the enhancement listed.

(e) Notwithstanding any other provision of law, any and 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. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.150(4).

(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.

(g) If the presumptive sentence under this section exceeds the statutory maximum for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender as defined in RCW 9.94A.030. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(4) The following additional times shall be added to the presumptive sentence for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly

weapon as defined in this chapter other than 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 deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the presumptive sentence determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection.

(b) One year for any felony defined under any law as a class B felony or with a maximum sentence of ten years, or both, and not covered under (f) of this subsection.

(c) Six months for any felony defined under any law as a class C felony or with a maximum sentence of five years, or both, and not covered under (f) of this subsection.

(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) of this section, or both, any and all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed.

(e) Notwithstanding any other provision of law, any and all deadly weapon 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. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.150(4).

(f) The deadly weapon 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.

(g) If the presumptive sentence under this section exceeds the statutory maximum for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender as defined in RCW 9.94A.030. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(5) The following additional times shall be added to the presumptive sentence if the offender or an accomplice committed the offense while in a county jail or state correctional facility as that term is defined in this chapter and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility as that term is defined in this chapter, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the presumptive sentence determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(a)(1) (i) or (ii) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(a)(1) (iii), (iv), and (v);

(c) Twelve months for offenses committed under RCW 69.50.401(d).

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(6) An additional twenty-four months shall be added to the presumptive sentence for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.128.

(7) An additional two years shall be added to the presumptive sentence for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055. [2000 c 132 § 2. Prior: 1999 c 352 § 2; 1999 c 324 § 3; prior: 1998 c 235 § 1; 1998 c 211 § 3; prior: 1997 c 365 § 3; 1997 c 338 § 50; 1996 c 205 § 5; 1995 c 129 § 2 (Initiative Measure No. 159); (1994 sp.s. c 7 § 512 repealed by 1995 c 129 § 19 (Initiative Measure No. 159)); 1992 c 145 § 9; 1991 c 32 § 2; 1990 c 3 § 701; prior: 1989 c 271 § 101; 1989 c 124 § 1; 1988 c 218 § 1; 1986 c 257 § 22; 1984 c 209 § 16; 1983 c 115 § 2.]

Comment

The 1986 amendments provided that the 12-month deadly weapon penalty applies to those offenses defined in RCW 9.94A.030 as drug offenses, instead of applying only to Delivery or Possession of a Controlled Substance with Intent to Deliver. The term "drug offense," as defined in the SRA, excludes simple possession, forged prescriptions and violations of the Legend Drug Act.

The 1986 revisions also clarified that the deadly weapon penalties apply to anticipatory offenses.

The 1989 Legislature added two enhancements for some drug crimes committed in certain locations: (1) violations of RCW 69.50.401(a) committed within 1,000 feet of a school or school bus zone, and (2) violations of RCW 69.50.401(a) or (d) committed within a county jail or state correctional facility.

The 1990 Legislature amended the sentencing grid to add a new Level XII, and renumber Levels XII through XIV. The sentence ranges in Level XI were increased.

The 1990 Legislature amended the enhancement for certain drug crimes near schools to also apply to Manufacture, Delivery, and Possession with Intent to Deliver in parks, public transit vehicles and transit stop shelters (RCW 69.50.435).

The 1992 Legislature added Assault of a Child 2 to the crimes eligible for deadly weapon penalties.

The 1994 Legislature amended subsection (4)(c) to apply the previous 12-month deadly weapon enhancement to all violent offenses not subject to a longer enhancement. This was repealed and replaced in 1995 by Initiative 159.

The enactment of Initiative Measure No. 159 by the 1995 Legislature split the previous deadly weapon enhancement into separate enhancements for firearms and for other deadly weapons, and broadened their application to all felonies except those in which using a firearm is an element of the offense. The enhancements double when the offender has previously (but on or after July 23, 1995) been sentenced to a deadly weapon enhancement under (3) or (4).. The enhancements must run consecutively to any other sentence, as long as the period of total confinement does not exceed

the statutory maximum for the offense. The amendments increased the enhancement (where the weapon is not a firearm) for Burglary 1 from 18 months to two years and reduced the enhancement for Theft of Livestock 2 from one year to six months.

Although the 1995 amendments to subsections (3) and (4) in Initiative 159 prohibit weapon enhancements from running concurrently to other sentencing provisions, the Initiative did not amend RCW 9.94A.400, which provides for concurrent sentencing of multiple counts except under circumstances specified in that section.

Subsections (3) and (4) limit the total sentence for each count to the statutory maximum, even with weapon enhancements. However, it is unclear whether the maximum consists of the entire weapon enhancement plus the remainder of the base sentence, or of the base sentence plus whatever part of the weapon enhancement remains within the maximum. This issue is especially important in multiple-count cases, where the statutory maximum for the most serious count would limit the total sentence in the absence of weapon enhancements, but may not if weapon enhancements are computed consecutively.

The 1996 Legislature increased from 15 months to 18 months the enhancement for Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver Methamphetamine in a county jail or state correctional facility. The Legislature also authorized local governments to designate additional "drug free zones" at or around defined "civic centers," under RCW 69.50.435, for purposes of the 24-month enhancement for drug offenses committed within such areas.

The 1998 Legislature clarified that when an offender is being sentenced for more than one offense, the firearm enhancement or enhancements and or deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to the enhancement. This takes effect for crimes committed on or after June 11, 1998.

The 1998 Legislature also clarified that for all offenses sentenced under RCW 9.94A.310, all firearm or deadly weapon enhancements run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements. This takes effect for crimes committed on or after June 11, 1998.

The 1998 Legislature required that an additional two years be added to the presumptive sentence for Vehicular Homicide committed while under the Influence of Intoxicating Liquor or any Drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055.

The 1998 Legislature required that if the firearm enhancement or the deadly weapon enhancement increases a sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced. As a result, in such a case the underlying sentence must be reduced so that the total confinement time does not exceed the statutory maximum. This takes effect for crimes committed on or after June 11, 1998.

The Supreme Court of Washington in Post Sentencing Review of Charles, 135 Wn.2d 239 (1998), ruled that when two or more offenses each carry firearm enhancements, the determination of whether multiple current sentences are to run concurrently or consecutively is governed by RCW 9.94A.400.

In State v. Barajas, 88 Wn. App. 387 (1997), the Court of Appeals ruled that when a convicted drug offender is subject to both RCW 69.50.435 (which doubles the maximum sentence that may be imposed for a drug offense committed in or near a public place or facility as specified by the statute) and RCW 9.94A.310(3) (which mandates enhanced sentences for offenses committed while armed with a firearm), the maximum sentence on which to determine the length of the firearm enhancement is the statutory maximum for the offenses as doubled by RCW 69.50.435.

The 1997 Legislature increased the maximum term of total confinement in the standard range for Level XIII. However, the minimum term in that range applied only to sentences for Murder 2 because the Legislature amended limiting language in RCW 9.94A.040(4)(b) only for Murder 2 offenses. The new standard ranges for Murder 2 applied to crimes committed on or after July 27, 1997. The 1999 Legislature resolved the conflict within Level XIII that arose after the 1997 legislative session. A new Level XIV was created for Murder 2 only, with its unique "range widths" as outlined in 9.94A.040(4)(b). The "range widths" for the offenses remaining at Level XIII were returned to their pre-1997 status, and offenses previously at Levels XIV and XV were moved up to Level XV and a new Level XVI, respectively (for offenses committed on or after July 25, 1999).

The 1999 Legislature provided exceptions to serving mandatory minimum sentences in total confinement for offenders granted an "extraordinary medical placement" authorized under RCW 9.94A.150(4).

Appendix D

CERTIFICATION OF ENROLLMENT

INITIATIVE NO. 159

Chapter 129, Laws of 1995

54th Legislature
1995 Regular Session

Hard time for armed crime act

EFFECTIVE DATE: 7/23/95

Passed by the House January 27, 1995
Yeas 88 Nays 6

CLYDE BALLARD

Speaker of the House of Representatives

Passed by the Senate April 20, 1995
Yeas 39 Nays 5

R. LORRAINE WOJAHN

President of the Senate

CERTIFICATE

I, Timothy A. Martin, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **INITIATIVE NO. 159** as passed by the House of Representatives and the Senate on the dates hereon set forth.

TIMOTHY A. MARTIN

Chief Clerk

CERTIFICATE

I, Marty Brown, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE INITIATIVE 159** as passed by the Senate and the House of Representatives on the dates hereon set forth.

MARTY BROWN

Secretary

FILED

April 21, 1995 - 4:57 p.m.

Secretary of State
State of Washington

INITIATIVE 159

AN ACT Relating to increasing penalties for armed crimes;

amending RCW 9.94A.310, 9.94A.150, 9A.36.045, 9A.52.020, 9A.56.300, 9A.56.030, 9A.56.040, 9A.56.150, 9A.56.160, 9.41.040, and 10.95.020; reenacting and amending RCW 9.94A.320; adding new sections to chapter 9.94A RCW; adding a new section to chapter 9A.56 RCW; creating new sections; repealing 1994 1st sp.s. c 7 s 510; repealing 1994 1st sp.s. c 7 s 511; repealing 1994 1st sp.s. c 7 s 512; and prescribing penalties.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** FINDINGS AND INTENT. (1) The people of the state of Washington find and declare that:

(a) Armed criminals pose an increasing and major threat to public safety and can turn any crime into serious injury or death.

(b) Criminals carry deadly weapons for several key reasons including: Forcing the victim to comply with their demands; injuring or killing anyone who tries to stop the criminal acts; and aiding the criminal in escaping.

(c) Current law does not sufficiently stigmatize the carrying and use of deadly weapons by criminals, and far too often there are no deadly weapon enhancements provided for many felonies, including murder, arson, manslaughter, and child molestation and many other sex offenses including child luring.

(d) Current law also fails to distinguish between gun-carrying criminals and criminals carrying knives or clubs.

(2) By increasing the penalties for carrying and using deadly weapons by criminals and closing loopholes involving armed criminals, the people intend to:

(a) Stigmatize the carrying and use of any deadly weapons for all felonies with proper deadly weapon enhancements.

(b) Reduce the number of armed offenders by making the carrying ~~and use of the deadly weapon~~ not worth the sentence received upon conviction.

(c) Distinguish between the gun predators and criminals carrying other deadly weapons and provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms.

(d) Bring accountability and certainty into the sentencing system

by tracking individual judges and holding them accountable for their sentencing practices in relation to the state's sentencing guidelines for serious crimes.

Sec. 2. RCW 9.94A.310 and 1992 c 145 s 9 are each amended to read as follows:

FIREARM AND OTHER DEADLY WEAPON ENHANCEMENTS INCREASED.

(1) TABLE 1

Sentencing Grid

SERIOUSNESS SCORE	OFFENDER SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XV	Life Sentence without Parole/Death Penalty									
XIV	23y4m 240-320	24y4m 250-333	25y4m 261-347	26y4m 271-361	27y4m 281-374	28y4m 291-388	30y4m 312-416	32y10m 338-450	36y 370-493	40y 411-548
XIII	12y 123-164	13y 134-178	14y 144-192	15y 154-205	16y 165-219	17y 175-233	19y 195-260	21y 216-288	25y 257-342	29y 298-397
XII	9y 93-123	9y11m 102-136	10y9m 111-147	11y8m 120-160	12y6m 129-171	13y5m 138-184	15y9m 162-216	17y3m 178-236	20y3m 209-277	23y3m 240-318
XI	7y6m 78-102	8y4m 86-114	9y2m 95-125	9y11m 102-136	10y9m 111-147	11y7m 120-158	14y2m 146-194	15y5m 159-211	17y11m 185-245	20y5m 210-280
X	5y 51-68	5y6m 57-75	6y 62-82	6y6m 67-89	7y 72-96	7y6m 77-102	9y6m 98-130	10y6m 108-144	12y6m 129-171	14y6m 149-198

Appendix E

HOUSE BILL REPORT
HI 159

As Passed House:
January 27, 1995

Title: An initiative relating to penalties for armed crimes.

Brief Description: Increasing penalties for armed crimes.

Sponsors: People of the State of Washington.

Brief History:
Committee Activity:
Corrections: 1/10/95, 1/17/95 [DP];
Law & Justice: 1/10/95, 1/24/95 [DP].
Floor Activity:
Passed House: 1/27/95, 88-6.

HOUSE COMMITTEE ON CORRECTIONS

Majority Report: Do pass. Signed by 9 members: Representatives Ballasiotes, Chair; Blanton, Vice Chair; Sherstad, Vice Chair; Quall, Ranking Minority Member; Tokuda, Assistant Ranking Minority Member; Koster; Radcliff; K. Schmidt and Schoesler.

Minority Report: Do not pass. Signed by 2 members: Representatives Cole and Dickerson.

Staff: Rick Neidhardt (786-7841).

HOUSE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass. Signed by 14 members: Representatives Padden, Chair; Delvin, Vice Chair; Hickel, Vice Chair; Appelwick, Ranking Minority Member; Costa, Assistant Ranking Minority Member; Carrell; Chappell; Cody; Lambert; McMahan; Morris; Robertson; Sheahan and Smith.

Minority Report: Do not pass. Signed by 1 member: Representative Veloria.

Staff: Pat Shelledy (786-7149).

Background: Initiative 159 amends numerous statutes dealing with penalties for armed crime. Many of these same statutes were amended in 1994 (E2SHB 2319) to increase penalties for armed crime. Some of the 1994 amendments were conditioned on the passage of a funding referendum last November. The voters approved Referendum 43 at last November's election, thereby retaining the increased penalties in law. For this reason, references in this analysis to current law include the effects of the 1994 legislation.

Deadly Weapon Enhancements. Under the Sentencing Reform Act, adult

felony sentencing involves calculation of standard sentence ranges. For example, a standard range might be 12 to 14 months. Sentencing judges then use these standard ranges in sentencing a defendant, although under certain circumstances the judges can go above or below this range or impose an alternative sanction.

Under current law, standard sentence ranges are increased for certain crimes if the conviction includes a finding that the offender (or an accomplice) was armed with a deadly weapon. The following lengths of time are added to the standard range for the following crimes:

-Two years for rape 1, robbery 1, and kidnapping 1;
-18 months for burglary 1;
-One year for escape 1, kidnapping 2, theft of livestock 1 or 2, drug offenses, burglary 2 committed in non-dwellings, and all violent offenses that are not otherwise eligible for the two-year or 18-month enhancement.

Other felonies do not receive these deadly weapon enhancements.

First Degree Reckless Endangerment. The crime of first degree reckless endangerment is committed by recklessly discharging a firearm from a motor vehicle in a manner which creates a substantial risk of death or serious physical injury.

The crime has a seriousness level of V, which yields a standard range of six to 12 months of confinement for a first-time offender. The crime is a class B felony (maximum punishment of 10 years of confinement).

Theft of Firearms. Under current law, theft of a firearm has a seriousness level of V, which yields a standard sentence range of six to 12 months for a first-time offender. The offense is a class C felony (maximum punishment of five years).

Possession of Stolen Firearms. Under current law, possession of a stolen firearm has the same penalty as theft of a firearm.

Unlawful Possession of a Firearm. Current law criminalizes the possession of a firearm by persons who have been previously convicted of certain offenses. The convictions that render this possession illegal are: serious offenses, domestic violence offenses, harassment offenses, felonies in which a firearm was used or displayed, felony drug offenses, and certain repeat DWI offenses Possession of a firearm is also illegal for adults who were previously involuntarily committed under certain mental health laws and for people under the age of 18, subject to some exceptions.

Unlawful possession of a firearm does not currently include within its scope juveniles who were previously involuntarily committed for mental health treatment.

The crime of unlawful possession of a firearm has a seriousness level of III, which yields a standard sentence range of one to three

months for a first-time offender. The crime is a class C felony (maximum punishment of five years).

Restoring Right to Possess Firearm. Under a law passed in 1994, certain people who would otherwise be covered by the statutory definition of unlawful possession of a firearm may have their right to possess a firearm restored.

People who are subject to unlawful possession of a firearm because they received three DWI convictions within a five-year period can have their rights restored by petitioning the court and showing they have had five continuous years without further conviction for an alcohol-related offense.

People who are subject to unlawful possession of a firearm because they were previously involuntarily committed for mental health treatment can have their rights restored by petitioning the court and showing that the circumstances resulting in the commitment no longer exist and are not reasonably likely to recur.

The 1994 law does not provide similar procedures for the other classes of people who are subject to unlawful possession of a firearm.

Aggravated First Degree Murder. Aggravated first degree murder is defined as premeditated first degree murder coupled with the presence of additional "aggravating circumstances."

Current law specifies a list of aggravating circumstances, which includes: killing certain governmental officers; committing murder for pay; killing multiple victims; committing murder to conceal a crime or a person's identity; and committing murder during or immediately in flight from certain enumerated crimes, including residential burglary.

The sentence for aggravated first degree murder is either the death penalty or life imprisonment without possibility of release or parole.

Burglary. Under current law, first degree burglary is committed when a person unlawfully enters a dwelling, with intent to commit a crime, if the person either is armed with a deadly weapon or assaults another person. If these same acts are committed in a building other than a dwelling, the crime committed is instead second degree burglary.

First degree burglary has a seriousness level of VII, which yields a standard sentence range of 15-20 months for a first-time offender, although if the offender was armed, an additional 18 months is added to the standard range. First degree burglary is a class A felony (maximum punishment of life imprisonment).

Second degree burglary has a seriousness level of III, which yields a standard sentence range of one to three months for a first-time offender, although if the offender was armed, an additional 12 months is added to the standard range. Second degree burglary is a

class B felony (maximum punishment of 10 years).

Sentencing Documents and Plea Agreements. Judgment and sentence forms are completed whenever a defendant is convicted of a felony. The forms state the crime of conviction and the sentence being imposed. In cases where a plea agreement is reached between the defendant and the prosecutor and is approved by the judge, the judgment and sentence forms do not necessarily include the terms of the plea agreement.

The Sentencing Guidelines Commission is authorized to collect information from sentencing documents for all adult felons. The commission may further establish a computerized sentencing information system that tracks this information for each individual superior court judge.

Prosecuting Standards. Current law sets out recommended (non-binding) standards to guide prosecutors in making their charging decisions. The recommended standards distinguish between crimes against persons and other crimes. For crimes against persons, the standards recommend charges be filed, subject to some exceptions, if sufficient admissible evidence exists which, when considered in light of the most plausible, reasonably foreseeable defense, would justify conviction by a reasonable and objective fact-finder. For "crimes against property/other crimes," the standards recommend charges be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

Current law lists 41 felonies as being crimes against persons, including various degrees of murder, kidnapping, assault, assault of a child, rape, rape of a child, robbery, arson, burglary, manslaughter, extortion, indecent liberties, incest, vehicular homicide, vehicular assault, child molestation, and other offenses.

Juvenile Offenders. Juvenile offenders who are prosecuted under the Juvenile Justice Act are sentenced according to a disposition scheme that is different from the adult sentencing scheme. Juveniles are directly subject to adult sentencing provisions only if they are prosecuted as adults.

As in the adult system, juvenile sentencing involves calculation of standard ranges. That calculation is based in part on the crime's "offense category" which is based on the seriousness of the offense. Unless the Legislature has specified an offense category for a particular offense, the offense category is determined by the offense class (A, B, C, gross misdemeanor, misdemeanor). Consequently, the offense category for theft of a firearm, possession of a stolen firearm, and unlawful possession of firearms is "C." The offense category for reckless endangerment in the first degree is "B." The Legislature can directly amend the juvenile disposition standards or can indirectly amend them by changing the classification of a crime that does not have specified offense category.

Another way the Legislature can indirectly affect the disposition scheme for juveniles is to create new crimes or degrees of crimes or to change the definition of crimes.

Summary of Initiative: Deadly Weapon Enhancements. The Initiative applies deadly weapon enhancements to all felonies, except for theft of a firearm, possessing a stolen firearm, unlawfully possessing a firearm, first degree reckless endangerment, possession of a machine gun, and use of a machine gun in a felony.

If the deadly weapon is a **firearm**, the enhancements are:

Five years for class A felonies;
Three years for class B felonies; and
18 months for class C felonies.

If the deadly weapon is **other than a firearm**, the enhancements are:

Two years for class A felonies;
One year for class B felonies; and
Six months for class C felonies.

Each of these enhancements is doubled for an offender who has previously received a firearm enhancement or a deadly weapon enhancement under these new provisions. For example, a class A felony committed with a firearm yields a 10-year enhancement if the offender has a previous conviction with a deadly weapon finding.

The deadly weapon enhancements are mandatory and cannot be served concurrently with any other sentence.

An offender cannot earn good-time credits or other earned early release time for any portion of the sentence that results from a deadly weapon enhancement.

First Degree Reckless Endangerment. The seriousness level is raised to level VII, which yields a standard sentence range of 15-20 months for a first-time offender.

Theft of Firearms. The seriousness level is raised to level VI, which yields a standard sentence range of 12-14 months for a first-time offender. The crime is changed from a class C felony to a class B felony, thereby increasing the maximum penalty to 10 years' imprisonment. Each firearm is to be treated as a separate offense.

Possession of Stolen Firearms. The crime is changed from a class C felony to a class B felony, thereby increasing the maximum penalty to 10 years' imprisonment. The seriousness level is unchanged, as the 1994 law (E2SHB 2319) already had set the level at V. Each firearm is to be treated as a separate offense.

Unlawful Possession of a Firearm. The crime is separated into two degrees.

Unlawful possession of a firearm in the first degree is committed when the person's previous conviction was for a crime from the

following list:

-a crime that is defined as a serious offense;
-residential burglary;
-first degree reckless endangerment; and
-Class A and B felony drug offenses.

Unlawful possession of a firearm in the second degree encompasses every other way in which the crime can be committed under the current law.

Unlawful possession of a firearm in the second degree can also be committed by a juvenile involuntarily committed for mental health treatment pursuant to RCW 71.34.090.

The crime in the first degree is assigned a seriousness level of VII, which yields a standard sentence range of 15-20 months for a first-time offender. The crime is a class B felony, creating a maximum sentence of 10 years.

The crime in the second degree has the same penalty provisions as does the current law, i.e., a seriousness level of III and categorization as a class C felony.

If the person is also serving time for possession of a stolen firearm or stealing a firearm, the time served for unlawful possession of firearms must be served consecutively with the other offenses.

Restoring Right to Possess Firearm. The eligibility for restoring the right to possess a firearm is expanded. People with a previous conviction that subjects them to committing unlawful possession of a firearm can petition the court to re-gain their right to possess a firearm. The right can be restored if five or more consecutive years have passed without being convicted of a crime, as long as the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.360. People with previous convictions for sex offenses or class A felonies are not eligible under this provision.

Aggravated First Degree Murder. The number of aggravating circumstances is expanded to include murders committed: in order to gain or further membership in an organization; during the course of a drive-by shooting; or, to avoid being sentenced to life imprisonment under the "Three Strikes, You're Out" Initiative. The Initiative also purports to add residential burglaries, but this addition was already made in a 1994 law (HB 2392).

Burglary. First degree burglary is no longer limited to dwellings; the crime can now be committed in any building.

Sentencing Documents and Plea Agreements. All recommended sentencing agreements and plea agreements are public documents and are to be recorded on the judgment and sentence form in cases involving violent offenses, most serious offenses, a deadly weapon finding, possession of a machine gun, possession of a stolen firearm, first

degree reckless endangerment, theft of a firearm, unlawful possession of a firearm, and use of a machine gun in a felony.

In cases involving these offenses, the judgment and sentence forms shall also include a section where the judges are to record their reasons for going outside the standard sentence range.

In these same cases, the judgment and sentence forms are to be sent to the Sentencing Guidelines Commission, which must compile annual and cumulative judicial records comparing each judge's sentencing practices to the standard ranges. The commission must make these comparative records available to the public.

Prosecuting Standards. The following crimes are to be treated as crimes against persons for purposes of the recommended prosecuting standards: crimes with a deadly weapon verdict, possession of a machine gun, possession of a stolen firearm, reckless endangerment 1, theft of a firearm, unlawful possession of a firearm in the first or second degree, and use of a machine gun in a felony.

Juvenile Offenders. The Initiative indirectly increases juvenile offender penalties by raising theft of a firearm and possession of a stolen firearm to class B felonies; by creating the crime of first degree unlawful possession of a firearm and establishing that crime as a class B felony; and by expanding the definition of first degree burglary to include burglaries of all buildings, not just dwellings.

Miscellaneous. Various agencies within the criminal justice system are authorized, but not required, to notify offenders of the penalties for armed crime.

As a technical matter, three sections from the 1994 session laws are repealed, and the underlying statutes are amended in their place.

Appropriation: None.

Fiscal Note: Available.

Effective Date: If passed by the Legislature and not referred to the people for a vote, the Initiative goes into effect ninety days after adjournment of the session in which it was passed.

Testimony For: (Corrections and Law & Justice) Armed crime will be severely punished. The costs of imposing longer sentences are justified by the benefits of protecting the public from armed criminals. The Initiative's fiscal impact will be mitigated by the deterrent effect of the new penalties. By distinguishing between enhancements for guns and those for other deadly weapons, and further distinguishes among the three classes of felonies, the Initiative makes deadly weapon enhancements more proportional to the seriousness of the criminal act. Crimes involving guns deserve higher enhancements than those involving other deadly weapons. Armed criminals need to be held accountable for their acts and not given second chances. The highest priority is public safety. The Initiative will stop people from carrying weapons. We need to

incarcerate armed criminals and keep them there for longer periods of time. A person in prison cannot harm the public. Citizens want strong solutions like this one. Increasing the length of incarceration has caused a decrease in crime rates. Judges need to be held accountable for their sentences.

Testimony Against: (Corrections and Law & Justice) We already have deadly weapon enhancements. The cost of enforcing the new penalties is substantial. Corrections costs have been steadily increasing even though the crime rate has remained flat. Repressive legislation is not the answer. The death penalty is wrong and should be reserved for the most serious murders. Too much reliance has been placed on building more prisons. Deadly weapon enhancements do not deter criminals; they do not think about getting caught. Giving greater enhancements for guns than for other deadly weapons can lead to unfair results. Earned early release is an important tool for managing inmates. The Initiative might adversely impact the rights of those involuntarily committed for mental health treatment.

Testified: (Corrections and Law & Justice) John Carlson, Chairman of I-159 campaign (in favor); Dave LaCourse, Coordinator of I-159 campaign (in favor); Representative Tom Campbell (in favor); Laurie Willman, victim of armed crime (in favor); Cheryl Terry, victim of armed crime (in favor); Sheryl Kinard, victim of armed crime (in favor); Perry Buck, attorney (opposed); Ed Mead, National Lawyers Guild (opposed); Tony Lee, Washington Association of Churches (opposed); John Ladenburg, Pierce County Prosecutor (in favor); Jim Krider, Snohomish County Prosecutor (in favor); Norm Maleng, King County Prosecutor (in favor); Bernardean Broadous, Thurston County Prosecutor (in favor); Larry Fehr, Washington Council on Crime and Delinquency (no position); Tom Rolfs, Department of Corrections (no position); Elizabeth Ambrose, Washington Protection and Advocacy System (opposed); Mike Patrick, Washington State Council of Police Officers (in favor); Roger Swayze, Seattle resident (opposed); and Brian Judy, National Rifle Association (in favor).

Appendix F

SENATE BILL REPORT
SI 159
As Passed Senate, April 20, 1995

Brief Description: Increasing penalties for armed crimes.

Sponsors: People of the State of Washington.

Brief History:
Committee Activity: Law & Justice: 1/10/95, 2/1/95 [DP-WM].
Ways & Means: 3/22/95, 4/6/95 [DP].
Passed Senate, 4/20/95, 39-5.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass and be referred to Ways & Means.
Signed by Senators Smith, Chair; Hargrove, Haugen, Johnson, Long, McCaslin, Quigley, Roach and Schow.

Staff: Susan Carlson (786-7418)

Background: In recent few years, the public has become increasingly concerned about violent crime, and especially about crimes involving firearms. Current laws provide for enhanced penalties for certain crimes committed with a deadly weapon, which includes a firearm. However, it is felt that penalties for crimes involving firearms should be increased, and that the deadly weapon sentence enhancements should apply to more crimes. There is also concern that judges be held accountable for their sentencing practices.

Washington Citizens for Justice has sponsored and obtained signatures for an initiative to the legislature addressing these and other concerns. The initiative is entitled the "Hard Time for Armed Crime Act."

Summary of Bill: Sentence enhancements for crimes committed with a firearm or other deadly weapon are lengthened. The enhancements apply to all felony convictions, with the exception of a few crimes that necessarily involve a firearm. The sentence for a crime committed while armed with a firearm is enhanced by an additional five years for class A felonies, three years for class B felonies, and 18 months for class C felonies. The sentence for a crime committed while armed with a deadly weapon is enhanced by an additional two years for class A felonies, one year for class B felonies, and six months for class C felonies. No earned early release is allowed on the enhanced portion of the sentence, and the enhancement cannot be served concurrently with any other sentence. The enhancements are doubled for repeat offenders.

The Sentencing Guidelines Commission is required to track sentencing information by judge, and provide a comparison of each judge's sentencing practices with the standard sentence range.

Two degrees of unlawful possession of a firearm are created. First degree possession, a class B felony, is committed if a person possesses a firearm after conviction for any serious offense,

residential burglary, first degree reckless endangerment, or a class A or B felony level drug offense. Second degree unlawful possession, a class C felony, is committed if a person possesses a firearm after a conviction for any other felony drug offense, or other felony involving a firearm, conviction for any domestic violence or harassment offense, three convictions within five years for driving a motor vehicle while intoxicated, involuntary commitment for mental health treatment, or unlawful possession by a person under 18 years of age.

The crime of possession of a stolen firearm is removed from the theft of a firearm statute and made a separate class B felony crime. The seriousness level for the crime of reckless endangerment in the first degree is increased from level 5 to level 7.

The death penalty may be imposed upon conviction of aggravated first degree murder if the murder was gang-related, involved a drive-by shooting, or was committed to avoid prosecution as a persistent offender.

Appropriation: None.

Fiscal Note: Available.

Effective Date: If passed by the Legislature, 90 days after session; if submitted to the people at the next general election and passed, 30 days after the election.

Testimony For: The initiative responds to the public's concerns about crimes involving firearms by increasing penalties for those crimes. By providing for the tracking of sentencing information, judges will be held accountable for their decisions. The death penalty should be a potential penalty for gang-related murders, drive-by murders, and murders to avoid prosecution as a persistent offender.

Testimony Against: the initiative inappropriately increases the number of offenders who would be classified as persistent offenders. Mandatory minimum sentences do not reduce violent crime but do result in increased prison costs. The circumstances allowing imposition of the death penalty should not be expanded.

Testified: PRO: John Carlson, Dave La Course, Washington Citizens for Justice; Mike Patrick, Washington State Council of Police Officers; Brian Judy, National Rifle Assn.; Norm Maleng, John Ladenburg, Jim Krider, Bernadean Brodous, Washington Assn. of Prosecuting Attorneys; Cherl Terry, Sheryl Kinard, citizens; CON: Dan Fessler, Washington Defenders Assn.; David Zuckerman, Washington Assn. of Criminal Defense Lawyers; Elizabeth Ambrose, Washington Protection and Advocacy System; Ned Dolejsi, Washington State Catholic Conference; Harriet Walden, citizen; Susan Moss, Knoll Lowney, Roger Swayze, Families Against Mandatory Minimums; K. L. Shannon, Mothers Against Police Harassment; NEUTRAL: Chase Riveland, Steve Westman, Dept. of Corrections; PRO & CON: Larry Fehr, Washington Council on Crime and Delinquency.

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass.
Signed by Senators Loveland, Vice Chair; Bauer, Cantu, Finkbeiner, Gaspard, Hochstatter, Johnson, Long, McDonald, Roach, Sheldon, Strannigan, Sutherland and West.

Staff: Linda Brownell (786-7913)

Testimony For: There is no need to delay implementation of the initiative. Victims need more protection and violent criminals need more punishment. This will help to put a stop to violent crime. There are many ways to pay for the initiative including opening work ethic camps and the drug offender sentence option. I 159 is a continuation of the tough laws passed by the Legislature last year. Judges must be held accountable for their sentencing practices.

Testimony Against: There are concerns about the fiscal impacts and the expanding corrections budget. Also, this initiative will impact local courts, increasing their workloads as more people are brought to trial. The initiative adversely affects inmate management by not allowing earned early release for a portion of their sentence. The expansion of the death penalty to the drive-by shooting section may be unconstitutional. There is concern that the offender sentence is increased not due to the amount of violence committed, but just by the presence and type of weapon.

Testified: PRO: Laurie Willman; Dave LaCourse, Washington Citizens for Justice; CON: Senator Kohl; Tom Wales, Washington State Bar Assn.; Kay Frank, King County Bar Assn.

Attachment G

No. 32

For purposes of a special verdict the State must have proved the defendant guilty of the count to which the special verdict pertains, and in addition the State must prove each of the following elements beyond a reasonable doubt:

(1) That the defendant was armed with a firearm at the time of the commission of the crime; and

(2) That the firearm was capable of discharging a projectile by an explosive such as gunpowder; and

(3) That the firearm was operable at the time of the commission of the crime.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there is a connection among the defendant, the crime, and the firearm. An operable weapon, even if unloaded, may still be a firearm if it is capable of discharging a projectile by an explosive such as gunpowder.

If you find unanimously from the evidence that each of these elements has been proved beyond a reasonable doubt as to any count for which you find the defendant guilty of a crime, it will be your duty to return a special verdict of "yes" for that count.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then

it will be your duty to return a special verdict of "no" for that count.

Request No. 10
Defendant
WPIC 2.07.02;
WPIC 2.10

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 24 PM 4:51

NO. 62247-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,
Respondent,

CERTIFICATE OF SERVICE AND PROOF OF NOTICE

v.

DEMICKO THOMAS,
Appellant,

CERTIFICATE OF SERVICE

I served the following documents, in the manner indicated below to the person(s) identified below. The term "Mail" indicates that the documents were deposited in the U.S. Mail, first-class postage prepaid. Date of service is date of signature, unless otherwise stated. Service is by Mail unless otherwise stated.

DOCUMENTS SERVED: Appellant's Statement of Additional Grounds; Declaration of Demicko Thomas

PERSON(S) SERVED:

THE CLERK OF THE COURT OF APPEALS, DIVISION ONE
MR. RICHARD D. JOHNSON
One Union Square
600 University Street
Seattle, Washington 98101-4170

Ms. Nancy P. Collins {Appellate Counsel}
1511 3rd Avenue., Suite #701
Seattle, Washington 98101-3635

Ms. Randi J. Austell {Prosecuting Attorney}
516 3d Avenue., Suite #5th
Seattle, Washington 98104-2385

Service of all documents on the above-mentioned party, were delivered by U.S. Mail on June 21, 2009. I Demicko Thomas declare and certify under penalty of perjury under the Laws of Washington (RCW 9A.72.085) and under the Laws of the United States (28 U.S.C. 1746) that the foregoing statement is true. Signed at Aberdeen, Washington:

June 21, 2009

DEMICKO THOMAS, Appellant — Date

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 24 PM 4:51

DECLARATION OF DOCUMENT FILING AND MAILING/DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 62247-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for ☒ **respondent Randi Austell - King County Prosecuting Attorney-Appellate Unit,** ☐ **appellant** and/or ☐ **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.

MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: June 24, 2009