

MICHAEL LATOURETTE #284666
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P.O. Box 7001
Monroe Washington (near 98272)

Division One Court of Appeals

MICHAEL LATOURETTE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent

Case No.: 66359-3-1

Reply Brief of Petitioner

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 FEB 24 AM 10:57

Identity of Petitioner

Comes now the petitioner MICHAEL LATOURETTE, appearing sui juris and in propria persona, and moves this court for relief as hereinafter enumerated for good reason and in the interests of justice, fairness and compliance with the tenets of law, jurisprudence, and constitutional liberties guaranteed to all citizens.

Petitioner asks that this court overlook any minor failings in his filings as required by the lesser pleading standard for pro se litigants stated in Haines v. Kerner , 404 U.S. 519 (1972) and Estelle v. Gamble, 429 U.S. 97, 106 (1976), and to give his argument due and fair consideration.

Statement of Facts

Petitioner does hereby incorporate by reference the statement of facts from reply brief to State's second motion to dismiss(hereinafter MTD2); and appends the following: since the petitioner commenced writing his reply to MTD2, the Division One Appellate Court has again issued mandate prematurely, as petitioner had unheard motions filed on the cause number in question, 59146-1-I, and has failed to respond to petitioner's objection to said mandate.

As the State raises numerous issues previously raised in MTD2, petitioner will incorporate portions of the arguments from his reply herein.

Issues Presented for Review

- 1.) Was Armstrong's denial of motion for change of judge and refusal of recusal an abuse of discretion?
- 2.) Where this court ordered petitioner resentenced in clear violation of controlling case law; state and federal supreme court holdings; and the state and federal constitutions, was it an abuse of discretion for the trial court to sentence petitioner in accord with these manifest violations?
- 3.) Can a pro se litigant be rendered ineffective by complete denial of legal resources; access to the courts; and, opportunity to present a defense?
- 4.) Was petitioner deprived of due process by denial of access to resources; lack of notice and opportunity; and, by being heard without the opportunity to prepare or file any motions, responses or mitigating factors?
- 5.) Where the state Supreme Court; this court; and the Court have all ruled that a charging document which fails to charge essential elements is insufficient, can the State by repeatedly denying the validity of these facts make them disappear, and overturn reasoned jurisprudence by the highest court of the state and forty years of established precedent ?
- 6.) Where jury instruction has been held to be manifest constitutional error, and where petitioner has claimed and argued ineffective assistance since immediately post trial, is a jury instruction which fails to meet constitutional requirements, and denies an accused a fair trial acceptable under our constitutions, laws, and the very concept of ordered liberty for which they stand?
- 7.) Where the only weapon charged was a firearm, the underlying offenses require either a firearm or deadly weapon which thusly must be based on a firearm finding, and where the jury was never instructed in a manner that would allow them to return a valid finding based on a firearm, can the verdict be allowed to stand?

Argument

- 1) Was Armstrong's denial of motion for change of judge and refusal of recusal an abuse of discretion? Did judicial bias affect the trial and post trial proceedings thereby denying petitioner fair hearing?

Where petitioner established and argued that the totality of Armstrong's actions, in toto, if not singularly served to deprive him of a fair trial; to force him to be denied access to the court; to be denied the opportunity to present a defense; and, to violate the appearance of fairness doctrine, it cannot be said that the judges refusal to recuse herself was not an abuse of discretion.

After being convicted on 9 December 2005, petitioner spent until 9 November 2006 trying to get a fair hearing before judge Armstrong, who refused to allow petitioner access to the courts, and did everything possible to obstruct petitioner, even going so far as to state on the record that 'none of your motions are filed properly' (see COA opinion in State v. LaTourette, 143 Wn. App. 1046, 1053 (2008) "Latourette, who had yet to serve or file his pleadings") and refusing to hear petitioners motions (except for motion to change judge {denied by Armstrong}, and motion for new counsel, heard by Judge Halpert, and denied due to her statement 'your dissatisfaction with his performance at sentencing {which would not take place for *seven months*} is not grounds for new counsel'). Interestingly, on the record at RP 1 22:14 – 23:6 Armstrong now claims petitioners motions *were* filed properly 'twenty or thirty of them,' yet makes no explanation for her refusal to hear them.

Petitioner filed motions under CrR 7.8, which Armstrong forwarded without providing petitioner notice of her intent to recharacterize as PRPs or opportunity to protest, amend or correct, in violation of State v. Smith, 144 Wn. App. 860, 184 P.3d 666 (2008); In re Pers. Restraint of Bailey, 141 Wn. 2d 20, 27-28, 1 P.3d 1120 (2000), (superior court decision on 7.8 not a bar to future collateral attack); In re Pers. Restraint of Vasquez, 108 Wn. App. 307, 313-14, 31 P.3d 16 (2001), (7.8 transferred to appellate court will act as bar to subsequent petition); City of Seattle v. Klein, 161 Wn. 2d 554, 566, 166 P.3d 1149 (2007), (notice required before deprivation of substantive right); Castro v. United States, 540 U.S. 375, 383, 124 S. Ct. 786, 157

L.Ed. 2d 778 (2003) (holding that recharacterization of a motion implicates due process; requires notice of intent; warning that such action may subject it to successive petition rule; and, opportunity to amend or withdraw motion to prevent subsequent bar); to the court of appeals.

When petitioner learned of the change of rules and refiled Armstrong again recharacterized and forwarded petitioners motions in direct violation of CrR 7.8 (c)(2), as amended 9/1/2007, which requires the judge determine: 1) if the motion is timely; 2) if the defendant makes a substantial showing that he is entitled to relief; and, 3) whether the motion requires factual or evidentiary hearing. Petitioner made a substantial showing of entitlement to relief; provided irrefutable evidence in the form of official police documents; sworn statements; and deposition, which jointly and severally provided proof incontrovertible of : ineffective assistance, as defense counsel knew Yohannes was a drug dealer and a thief with a history of assaultive behavior; prosecutorial misconduct, as Solseng knew Yohannes was a drug dealer, couldn't decide what color he wanted the 'gun' to be, had never seen, been aware of, or been in any way threatened with knives or baton, yet Solseng brought them as 'evidence'; perjury: as Solseng knew Yohannes was a drug dealer, yet told the jury there was no evidence his client was a drug dealer; knew Yohannes called police, yet told the jury repeatedly 'drug dealers don't call the cops'; and, abuse of discretion, as petitioner raised all these issues along with supporting documents in post trial motions under CrR 7.5, 7.8, and motions for new trial based on ineffective assistance, prosecutorial misconduct, and judicial bias.

“A decision is manifestly unreasonable if, based upon the applicable legal standard, their decision is outside the range of acceptable choices.” In re Custody of Halls, 120 Wn. App. 599, 606, 109 P.3d 15 (2005) (citations omitted). The applicable legal standard required judge Armstrong to make the determinations required by CrR7.8; her choosing not to do so – on two separate occasions – is clearly outside the range of acceptable choices, and therefore an abuse of discretion.

Post-conviction when petitioner advised the court he was moving for new trial based on grounds of ineffective assistance, and requested trial transcripts, Armstrong refused, and then stated petitioner 'failed to identify specific acts on the record' to support his claims, where a

mere claim of ineffective assistance and prosecutorial misconduct is sufficient to establish colorable need. This is a clear abuse of discretion and outside the range of legally acceptable choices where an accused has established that he is seeking review on ineffective assistance and prosecutorial misconduct, as in order to prevail an accused must show specific errors and/or omissions on the record; thusly denying petitioner access to said record was manifestly unjust, and constitutes an abuse of discretion. Had petitioner been able to raise all of his issues – *and have the court hear his motions* – based on the record and the additional evidence not used by the defense, the taxpayers could have been spared the expense of 7 years of litigation, thus far.

Judge Armstrong heard argument on the State’s motion in limine in re Yohannes admission to being a drug dealer on two occasions, yet simply watched as prosecutor Joe Solseng repeatedly perjured himself in front of the jury advising them that ‘there was no evidence [Yohannes] was a drug dealer’ that ‘drug dealers don’t use the police’ and that ‘everyone knows drug dealers don’t call the cops’ despite having clear and unequivocal knowledge that Yohannes was a self-confessed drug dealer, who called the cops. As allowing blatant and overt perjury in a criminal case denies a defendant a fair trial, this is clearly outside the range of legally acceptable choices, and constitutes a manifest constitutional error, as well as abuse of discretion.

All of these facts are clear and on the record, and all of these facts are clearly demonstrative of bias, abuse of discretion, and denial of any semblance of a fair trial, and thusly are demonstrative of a violation of constitutional magnitude, and Armstrong’s refusal to recuse herself has served to deny petitioner a fair hearing on each occasion he has been forced to submit motions to or appear before her. Where all these errors have been made by the same judge, and where each of these errors were crucial and sufficient to deny petitioner fair hearing; access to the courts; right to counsel; right to present a defense; and, to not be convicted by perjury and false evidence, there is simply no way that the ‘result of the proceeding may be relied on as having produced a just result.’

The appearance of fairness doctrine seeks to prevent “the evil of biased or potentially interested judge or quasi-judicial decision maker.” State v. Post, 118 Wn. 2d 596, 619, 826 P.2d 172 (1992); “The law goes farther than requiring an impartial judge; it also requires that the

judge appear to be impartial.” State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972); We determine whether a judge appears to be impartial by how “ ‘it would appear to a reasonably prudent and disinterested person.’ ” State v. Dugan, 96 Wn. App. 346, 354, 979 P.2d 885 (1999) (quoting Brister v. Tacoma City Council, 27 Wn. App. 474, 486-87, 619 P.2d 982 (1980), review denied 95 Wn. 2d 1006 (1981)).

The entire purpose of petitioner’s claims, argument, and protests of abuse of discretion was for the sole purpose of demonstrating the overwhelming bias which has infected every aspect of each appearance in front of judge Armstrong from the commencement of trial forward, thereby establishing his claim of judicial bias; abuse of discretion; manifest error; error under RCW 4.12.040 and the appearance of fairness doctrine; and, this has affected each and every appearance from trial in December of 2005 until resentencing November of 2010.

2.) Where this court ordered petitioner resentenced in clear violation of controlling case law; state and federal supreme court holdings; and the state and federal constitutions, was it an abuse of discretion for the trial court to sentence petitioner in accord with these manifest violations?

A trial court may not act in violation of established precedent and controlling case law without abusing its discretion. A court abuses its discretion when its decision “involved an unreasonable application of clearly established state [and/or] federal law as determined by [Washington State Supreme Court] or the Supreme Court.” State v. Davis, 141 Wn. 2d 798, 10 P.3d 977 (2000).

The State at RB19-23 (Argument 3.) has determined that our Court overturned State v. Nass, 76 Wn. 2d 368, 456 O.2d 347 (1969); State v. Frazier, 81 Wn. 2d 628, 635, 503 P.2d 1073 (1972); State v. Mims, 9 Wn. App. 213, 219, 511 P.2d 1383 (1973);); State v. Smith, 11 Wn. App. 216, 225, 521 P.2d 1197 (1974); State v. Cosner, 85 Wn. 2d 45, 50, 530P.2d 317 (1975); State v. Theroff, 95 Wn. 2d 385, 392, 622 P.2d 1240 (1980); In re Bush, 95 Wn. 2d 551, 554, 627 P.2d 953 (1981); State v. Crawford, 159 Wn. 2d 86, 94, 147 P.3d 1288 (2006); and, State v. Recuenco, 163 Wn. 2d 428, 433, 180 P.3d 1276 (2008) by its decision in State v. Williams-

Walker, 167 Wn. 2d 889, 225 P.3d 913 (2010), and backs this absurd statement by citing to one portion of it, taken out of context, and completely misunderstood. See RB21 wherein the State implies that the charging document is now irrelevant and that it doesn't matter what is alleged, the jury can determine anyone is guilty of anything – whether charged or not – thereby overruling the constitutional requirement allowing an accused to “demand the nature and cause of the accusation against him.”

Obviously, the State is mistaken, as our Court cited specifically to Frazier in its decision in Williams-Walker, and the requirement that a charge be presented to the jury “upon proper allegations” before an enhancement can be found or an accused be sentenced for an enhancement.

To simplify the matter, this court may simply take it that the entirety of the State's argument on weapon enhancements and jury instructions pertaining thereunto (RB19- 23) are demonstrative of either an abject failure to acquaint themselves with any case law relevant to enhancements for the last forty years, or an excess of frivolity, wasting the courts time on ludicrous, inane, jejune and entirely pointless argument, which lacks even the vaguest pretense of validity.

That much being said, what is the duty of the trial court where the appellate court makes a ruling which is clearly violative of established state law as determined by the Washington Supreme Court? Does the court then follow the erroneous appellate decision, risking censure by the supreme court, or does the court follow the state supreme court, and violate the terms of the appellate decision?

The only reasonable answer would be for the trial court to follow that of the higher court, as the supreme court of each state is the ultimate arbiter of the statutes and sets the legal precedents which each lower court must follow.

In the case at bar, where the decision of the appellate court was in direct contravention of the ‘enhancement rule’ which was specifically and unequivocally adopted by the court in State v.

Theroff, 95Wn. 2d 385, 392, 622 P.2d 1240 (1980) (quote follows), the court was required to follow the established rules of the Washington Supreme Court, ensure adequate colloquy on the record as to the reasons for deviation from the mandate, and thusly preserve the reasons for said deviation for review, while complying with the overarching authority of the supreme court.

The rule, as adopted in Theroff, *supra*, was stated as follows: “In State v. Cosner, 85 Wn. 2d 45, 50-51, 530 P.2d 317 (1975), Justice Hamilton writing for the court, said: ‘The appellate courts of this state have held that when the State seeks to rely upon either [deadly weapon statute] or [firearm statute] or both, due process of law requires that the information contain *specific allegations* to that effect, thus putting the accused person upon notice that enhanced consequences will flow with a conviction. *Failure of the State to so allege precludes reliance upon the statutes by the trial court* the Board of Prison Terms and Paroles (emphasis added).

We do not propose to recede from these holdings. Rather we again emphasize the necessity of prosecuting attorneys uniformly adhering to the announced rule. Preferably, compliance should take the form of pleading by statutory language and citation of the statute or statutes upon which they are proceeding, i.e., firearms and/or deadly weapons.’

We adopt the above language in this case. It is the rule in this state, clear and easy to follow. When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information.”

This rule has been referred to and followed by our Court to the present day, and is referenced in Recuenco III; the Williams-Walker cite to Frazier is based on the same premise and rule of law, and it has been consistently upheld by every court in the state, including this court, which references it in its decision in State v. Brian Leroy Siers, #63697-9-I (Div. One 11/29/2010).

As the trial court’s sentence served to violate the rulings of the highest court of the state, the constitution, and the legal precepts and reasoned jurisprudence which led to those rules, this was a manifest abuse of discretion.

. “A decision is manifestly unreasonable if, based upon the applicable legal standard, their decision is outside the range of acceptable choices.” In re Custody of Halls, 120 Wn. App. 599, 606, 109 P.3d 15 (2005) (citations omitted). The applicable legal standard is based on the hierarchy of law, and as such, the lower courts must follow the rulings of the higher; thusly, the superior court was required to follow the overarching authority of the state supreme court, and the rules of constitutionally protected liberty therein enumerated, and by failing to do so the courts decision was outside the range of acceptable choices, and the sentence was a manifest abuse of discretion.

3.) Can a pro se litigant be rendered ineffective by complete denial of legal resources; access to the courts; and, opportunity to present a defense?

“[A] defendant is constitutionally entitled to conduct his own defense. If he elects to do so by rejecting the services of an attorney to conduct his defense, he cannot be confined to his jail simply to look at the four walls and appear on the day of [his hearing] to defend himself. He must be afforded reasonable access...[the lack of which would] render Faretta meaningless to a confined defendant.” Milton v. Morris, 767 F.2d 1443, 1448 (9th Cir. 1985).

“In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that ‘in all the courts of the United States the parties may plead and manage their own causes personally or by the assistance of ...counsel...’” Faretta v. California, 422 U.S. 806, 812-13, 95 S. Ct. 2525 (1975).

Bounds v. Smith, 430 U.S. 817, 827-28, 97 S.Ct. 1491, 52 L. Ed. 72 (1977) held that post conviction, the states are required to provide adequate access, as pro se litigants “frequently raise

heretofore unlitigated issues ...[t]he need for new legal research...to make a meaningful...presentation to the trial court...is great.”

Where an *in propria persona* petitioner is denied all the resources, legal access, and materials necessary to act effectively in his own defense, the result is the same as where appointed counsel fails to research; familiarize himself; raise issues; rebut any claims; or in any manner present a defense, and this is unequivocally ineffective assistance of counsel, whether the party rendered ineffective is a licensed practitioner of law or an impoverished litigant in prison.

The things that would make an attorney ineffectual; inadequate time to research; being dropped into a trial the day he comes onto the case; total denial of access to filings and recommendations of the State; and lack of notice and opportunity to respond to same are equally capable of rendering a pro se litigant ineffectual, yet somehow the State seems to feel that the requirements of our constitution go out the window if a party is acting *in propria persona*.

“It is well established that prisoners have a constitutional right of access to the courts.” Whitney v. Buckner, 107 Wn. 2d 861, 865, 734 P.2d 485 (1987) (citing Bounds v. Smith, 430 U.S. 817, 821, 97 S.Ct 1491, 52 L. Ed. 2d 72 (1977)). This right is based on the due process clause of the Fourteenth Amendment. *Id.* (citing Wolff v. McDonnell, 418 U.S. 539, 579, 94 S.Ct. 2963, 41 L. Ed 2d 72 (1977)). Consequently, the courts should not erect procedural barriers for indigent prisoners. *Id.* At 865-66.

“[A]ccess to the courts means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary and appropriate in order to commence or prosecute court proceedings affecting one’s personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters.” Hatfield v. Bailleaux, 190 F.2d 632, 637, cert. denied, 368 U.S. 862 (1961).

Just as the right to appointed counsel is not satisfied unless the representation is meaningful, the right to represent oneself cannot be satisfied unless it is made meaningful by providing the accused the resources necessary to prepare an adequate pro se defense. By denying petitioner the

access reasonably necessary to an adequate defense the court rendered him ineffective, and thusly denied him a fair hearing in violation of 1§3 and 1§22 of the state constitution and the 5th, 6th, and 14th amendments to the federal constitution.

4.) Was petitioner deprived of due process by denial of access to resources; lack of notice and opportunity; and, by being heard without the opportunity to prepare or file any motions, responses or mitigating factors?

At RB 17 the State argues: “the State had read its sentencing recommendation into the record at the October 10th hearing” which was actually the hearing held on 20 October, wherein petitioner had no means of taking notes and was not served any papers or motions expressing any of States recommendations, and implies that this complied with due process requirements of ‘notice and opportunity’. Petitioner does not believe that having a wordy document read to one in the midst of a stressful adversarial scenario wherein one is denied the ability to take notes is sufficient to meet due process requirements, and certainly could not be expected to remember each word, phrasing, and underlying reason supporting the sentence recommendation, however, the court had no intention of allowing petitioner any legal access or resources to respond or file his own sentencing recommendations anyway. Had petitioner been an ‘attorney in fact’ the State would have *served* him with these matters in writing, however the State appears to hold pro se litigants to a much higher standard than trained professional litigators: we are required to have eidetic memories, thusly obviating the need to ever actually serve us papers or motions.

The State continually refers to “the mandate” when addressing the sentencing of petitioner on 10/20 (continued) and 11/10 of 2010, yet the record is clearly dispositive of the fact that mandate was not issued in this case until 30 December, 2011. See 59146-1-I. As such, how could a 2010 hearing or sentencing be bound by a mandate 13 months in the future? Yet the State (RB 12, 13, 14.....) continually refers to this mandate as if it were the basis for all *previous* actions, which is chronologically incompatible with reality and Einstein’s Theorem as well as physics as we know it. The State at RB13 says “[t]he Court also directed the trial court to strike the firearm enhancements and instead impose the deadly weapon enhancements.”

“The Court” is generally used solely as reference to the Supreme Court, state or federal, yet in petitioners case neither of those courts directed the trial court to impose uncharged enhancements, as this would be violative of the constitutions and the entire trend of precedent. Only this court did that.

At RB 14 the State claims “Latourette (sic) was not entitled to access legal resources and materials so that he could argue matters that were governed by the mandate” which still does not apprise us what this mandate is or when it was issued, as the only mandates issued to date were on 59146-1-I, the first one of which was ordered recalled by the state supreme court, and the second of which was not issued until over a year after petitioner was sentenced. Regardless, the State clearly seeks to establish a different standard of law for an *in propria persona* litigant than has been applied to any of the ‘nouveaux- nobility’ who are called attorneys. Never has an attorney been advised he “didn’t have the right to access legal materials and resources” throughout all history, and despite the fact that petitioner is incarcerated, he is still entitled to some level of due process.

Inmates retain the right to access the courts. In re Pers. Restraint of Addleman, 139 Wn. 2d 751, 754, 991 P.2d 1123 (2000). Inmates retain their right to due process. In re Pers. Restraint of Matteson, 142 Wn. 2d 298, 309-310, 12 P.3d 585 (2000). Bounds v. Smith, 430 U.S. 817, 827-28, 97 S.Ct. 1491, 52 L. Ed. 72 (1977) held that post conviction, the states are required to provide adequate access, as pro se litigants “frequently raise heretofore unlitigated issues ...[t]he need for new legal research...to make a meaningful...presentation to the trial court...is great.”

The State claims “[t]he record contradicts Latourette’s (sic) claim that he was denied notice and an opportunity to be heard,” yet somehow fails to apply the same standard used in measuring all other due process claims: that notice and opportunity must be reasonable under the circumstances. Where, as in the case at bar, the petitioner is defending *in propria persona* he should be entitled to the same due process considerations as if he were an attorney acting on his behalf: he should be served copies of all filings; served State’s sentencing recommendations; and, be granted adequate access to resources to allow him to respond and properly file his own

motions, objections, and recommendations. Where he is not granted this notice and opportunity, due process has been violated.

The right to present a defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). At a bare minimum, procedural due process requires notice and an opportunity to be heard (Soundgarden v. Eikenberry, 123 Wn. 2d 750, 768, 871 P.2d 1050(1994).

The essential elements of procedural due process are notice and an opportunity to be heard. In re Hendrickson, 12 Wn. 2d 600, 606, 123 P.2d 322 (1942). A litigant who is denied notice and opportunity to be heard is denied procedural due process of law in violation of article 1 section 3 of the Washington Constitution. Ware v. Phillips, 77 Wn. 2d 879, 884, 468 P2d 444 (1970) (quoting State ex rel. Adams v. Superior Court, 36 Wn. 2d 868, 877, 220 P.2d 1081 (1950). Where, as in the case at bar, petitioner was denied the opportunity to access legal materials and resources necessary to file pre-sentencing motions, – or any motions whatsoever – was denied notice by not being served copies of State’s motions, sentencing recommendations, or any other motions, it can not be said petitioner was allowed the benefit of due process as envisaged by the founders of this country or the framers of the constitutions.

5.)Where the state Supreme Court; this court; and the Court have all ruled that a charging document which fails to charge essential elements is insufficient, can the State by repeatedly denying the validity of these facts make them disappear, and overturn reasoned jurisprudence by the highest court of the state and forty years of established precedent ?

The State claims that petitioner ‘raises the insufficiency of the charging document for the first time’ which is manifestly untrue, as petitioner challenged the validity of the charging document on other grounds previously. On direct appeal in 59146-1-I petitioner challenged the validity of the information, as it is not backed by the certificate of probable cause or the police reports.

The State at RB 23 argues that petitioner may not refer to “weapon enhancements” as “aggravating factors” which would seem to lack reason, as the courts – both federal and state –

have long done so when making their reasoned decisions on them, and which State v. McCarty, and Apprendi v. New Jersey both imply are substantially similar, if not the same, whether labeled as ‘sentencing factors,’ ‘aggravating factors,’ or ‘enhancements,’ and goes on to state “[t]here was no due process violation.” The State is somewhat correct, as until the Powell decision there was no clear law on the inclusion of aggravating factors; however, *enhancements* have always been required to be included in the information in this state. In actual fact, this court based its decision in State v. Siers, #63697-9-I (Div. One 11/29/2010) on weapon enhancement cases, citing to Frazier. Our Courts clearly do not share the State’s opinion:

“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and found beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L. Ed. 2d 435 (2000) (quoting Jones v. United States, 526 U.S. 227, 243 n.6, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999)).

Washington’s law is clear and longstanding, see: In re Bush, 95 Wn. 2d 551, 554, 627 P.2d 953 (1981) (the enhanced penalty ‘allegation must be included in the information’); State v. Cosner, 85 Wn. 2d 45, 50-51, 530 P.2d 317 (1975) (‘due process of law requires that the information contain *specific allegations* ...putting the accused person upon notice that enhanced consequences will flow with a conviction’) (citing State v. Nass, 76 Wn. 2d 368, 456 P.2d 347 (1969)); State v. Smith, 11 Wn. App. 216, 225, 521 P.2d 1197 (1974) (‘it is required that the prosecutor allege...the factor [which] aggravates [the] offense and causes [a] defendant to be subject to a greater punishment’); State v. Mims, 9 Wn. App. 213, 219, 511 P.2d 1383 (1973) (‘due process of law requires notice in the information of a potentially greater penalty’); State v. Crawford, 159 Wn. 2d 86, 94, 147 P.3d 1288 (2006) (prosecutors must set forth their intent to seek enhanced penalties for the underlying crime in the information); *inter alia*.

The State of Washington has provided similar protections long before Apprendi, see State v. Powell, 167 Wn. 2d 672, 690, 223 P.3d 493 (2009), where the Supreme Court stated “The rule that a deadly weapon or firearm enhancement must be set forth in the charging instrument preceded Apprendi. See e.g., In re Pers. Restraint of Bush, 95 Wn. 2d 551, 554, 627 P.2d 953

(1981).” In State v. Williams-Walker, 167 Wn. 2d 889, 900, 225 P.3d 913 (2010), the Supreme Court stated “Even before the Court decided Apprendi we provided similar protections. In State v. Frazier, 81 Wn. 2d 628, 503 P.2d 192 (1972) we held: Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present , must be presented to the jury *upon proper allegations* and a verdict rendered thereon before the court can impose the harsher penalty” (emphasis added).

“[I]t is also true that accusation must precede conviction, and that no one can legally be convicted of an offense not properly alleged. The accused in criminal prosecutions, has a constitutional right to be apprised of the nature and cause of the accusation against him. Const. Art. 1 § 22. And this can only be made known by setting forth in the indictment or information every fact constituting an element of the offense charged. This doctrine is elementary, and of universal application, and is founded on the plainest principle of justice.” State v. Ackles, 8 Wash. 462,464-465,36 P. 597 (1894).

“Under our laws an indictment must be direct and certain, both as regards the crime charged and as regards the particular circumstances thereof, when they are necessary to constitute a complete crime.” Leonard v. Territory, 2 Wash. Terr. 381,392, 7 P. 872 (1885).

A charging document must describe the essential elements of a crime with reasonable certainty such that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense. State v. Leach, 113 Wn. 2d 679, 689, 782 P. 2d 552 (1989). Both statutory and implied elements must be included. State v. Kjorsvik, 117 Wn. 2d 93, 102, 812 P.2d 86 (1991). The essential elements rule requires that the information ‘allege facts supporting every element of the offense, in addition to adequately identifying the crime charged.’ Kjorsvik at 98 quoting Leach at 689. The core holding in Leach requires that a defendant be apprised of the elements of the charged crime and the conduct of the defendant which is alleged to have constituted the crime. Kjorsvik at 98. These critical facts must be found within the four corners of the charging document. Kjorsvik at 106. This is based on Washington Constitution 1§22; U.S.C. amendment VI; and CrR 2.1(b).

Federal Rule of Criminal Procedure 7 (c)(1) requires that an indictment be “a plain, concise and definite written statement of the essential facts constituting the offense charged.” A legally sufficient indictment must state the elements of the offense charged with sufficient clarity to apprise a defendant of the charge against which he must defend, and to enable him to plead double jeopardy. Hamling v. United States, 418 U.S. 87, 117, 41 L.Ed. 2d 590, 94 S.Ct. 2887 (1974).

State v. Davis, 39 Wn. App. 916, 922, 696 P.2d 627 (1985) “In State v. Theroff, 95Wn. 2d 385, 622 P.2d 1240 (1980) it was held that in respect to either enhancement statute [firearm] or [deadly weapon], the State must give a separate notice of intent to rely on or be precluded from imposition of enhanced punishment.” “Because the prosecutor here did not follow the rule, he may not now ask the court to impose the rigors of our enhanced penalty statutes upon the defendant.” State v. Theroff, 95Wn. 2d 385, 393, 622 P.2d 1240 (1980); “Once the State elects which specific charges it is pursuing and includes elements in the charging document, it is bound by that decision. We have not altered this requirement.” State v. Recuenco, 163 Wn. 2d 428 (2008); “Since both charging documents and jury instructions must identify the essential elements of the crime for which the defendant is charged (information) and tried (jury instructions), the dissents distinction is without a difference.” State v. McCarty, 140 Wn. 2d 420, 426 n.1, 998 P.2d 296 (2000); The State did not amend the information and, therefore, could not obtain a verdict for an uncharged enhancement. State v. Recuenco, 163 Wn. 2d 428, 435-36, 180 P.3d 1276 (2008); “Sentencing enhancements must be included in the information.” In re pers. Restraint of Bush, 95 Wn. 2d 551, 554, 627 P.2d 953 (1981); State v. Crawford, 159 Wn. 2d 86, 94, 147 P.3d 1288 (2006)

“ [T]he two justice concurrence in Powell, combined with the three justice dissent yields a majority holding affecting the procedure in post-Blakely cases: notice of aggravating factors must be given in the charging document. (State v. Powell, 167 Wn. 2d 672, 690, 223 P.3d 493 (2009) (Stephens, J., concurring); Powell, 167 Wn. 2d at 695 (Owens, J., dissenting); see also State v. Zakel, 61 Wn. App. 805, 808, 812 P.2d 512 (“Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring

on the narrowest grounds”) (citing Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977), *aff’d*, 119 Wn. 2d 563, 834 P.2d 1046(1992).” State v. Brian Leroy Siers, #63697-9-I (Div. One 11/29/2010).

In State v. Brian Leroy Siers, #63697-9-I (Div. One 11/29/2010) this court made its ruling based on weapon enhancement case law, and our Court holding in State v. Powell, 167 Wn. 2d 672, 690, 223 P.3d 493 (2009), and citing to In State v. Frazier, 81 Wn. 2d 628, 503 P.2d 192 (1972); In re Personal Restraint of Bush, 95 Wn. 2d 551, 554, 627 P.2d 953 (1981); and State v. Theroff, 95Wn. 2d 385, 392, 622 P.2d 1240 (1980); and, determined that where an accused is charged under one aggravating factor and the jury is instructed on a separate, different aggravating factor, the remedy is dismissal without prejudice: Failure to charge an aggravating factor in the charging document “cannot be limited to procedural due process under the Fifth Amendment, the requirement that aggravating factors be charged in the information ‘inheres in the Sixth Amendment Jury trial right’ and thus ‘applies to the states and binds us in this case.’” Powell, 167 Wn. 2d at 690 (Stephens, J., concurring).” State v. Brian Leroy Siers, #63697-9-I (Div. One 11/29/2010).

“Axiomatic in Washington law is the requirement that the charging document must ‘allege facts supporting every element of the offense’ in order to be constitutionally sufficient.” State v. Goodman, 150 Wn. 2d 774, 786, 83 P.3d 410 (2004) (quoting State v. Leach, 113 Wn. 2d 679, 689, 782 P.2d 552 (1989)).

“Constitutional due process right to be informed of charges is violated when a person is charged with a sentencing enhancement under one statute, then has his sentence enhanced under a second, different statute.” Gault v. Lewis, 489 F.3d 993, 997-98 (9th Cir. 2007).

The charging document in petitioners case failed to allege a deadly weapon enhancement; the jury was instructed on a deadly weapon enhancement; and, petitioner was resentenced to serve time for these uncharged enhancements. This constitutes manifest constitutional error, and the information was constitutionally insufficient.

The State's claim to the contrary would set constitutional liberty back into the ages of the Inquisition and the Star Chamber, and serve to reverse the last two hundred years of enlightened thinking; the basis behind our constitutions; the entire precept of reasoned jurisprudence; and, would serve to overturn established rulings specifically made on this exact subject: the requirement that an enhancement must be included in the information *by specific allegation* since Nass, Frazier, and Theroff.

6.)Where jury instruction has been held to be manifest constitutional error, and where petitioner has claimed and argued ineffective assistance since immediately post trial, is a jury instruction which fails to meet constitutional requirements, and denies an accused a fair trial acceptable under our constitutions, laws, and the very concept of ordered liberty for which they stand?

In petitioners case at each point in the jury instructions the jury was advised that: OCP 131:24 p. 1, ¶ 3) “[i]f you unanimously agree on a verdict...”; ¶ 4 “[i]f you unanimously agree on a verdict”; OCP 131:24 p. 2 ¶ 2 “[i]f you unanimously agree on a verdict...”; ¶ 3 “[i]f you unanimously agree on a verdict...”; p. 3, ¶ 1 “[i]f you unanimously agree on a verdict...”; p. 3 ¶ 2 “[s]ince this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form...” and when instructing on special verdicts, at OCP 131:26, the instruction states “[i]n order to answer the special verdict forms ‘yes’ you must unanimously be satisfied beyond a reasonable doubt that ‘yes’ is the correct answer. If you have a reasonable doubt as to the question, you must answer ‘no’”.

The instruction in Campbell uses the term ‘interrogatory’ rather than ‘verdict’ but aside from that is exactly the same as the instruction given in petitioners case, therefore, here as in State v. Bashaw, 169 Wn. 2d 133, 146, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn. 2d 888, 895, 72 P.3d 1083 (2003); as relied on by this court in State v. Kenneth Ozell Campbell, 66732-7-1 (Div. 1, 9/6/2011), “proper jury instructions for the special verdicts must similarly inform the jurors how to answer ‘yes’ or ‘no,’ both individually and collectively.” Campbell, *supra*, at ¶ 26.

Where a jury instruction serves to obfuscate rather than clarify the deliberative process, it serves to deny an accused due process of law under the Fifth, and Fourteenth Amendments and Article 1 §3, as it fails to allow each member of the jury the knowing opportunity to make a reasoned decision based on their own feeling, instead requiring them to conform; it serves to deny an accused the right to have a unanimous jury find every fact necessary under the jury trial guarantees of 1 §21; 1 § 22 of the Washington Constitution and the Sixth Amendment, as without the added and incorrect pressure of a unanimity requirement, jurors may well have felt free to express their doubts. This served to prejudice defendant by making the resulting verdict presumptively unreliable, and allowing a ‘forced’ verdict, and at this point there is no way to ascertain whether the result would have been the same absent the error.

State v. Kenneth Ozell Campbell, 66732-7-I (Div. 1, 9/6/2011), at ¶ 35: “[W]hen unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury was harmless. State v. Bashaw, 169 Wn. 2d 133, 147-48, 234 P.3d 195 (2010). Thus, while allowing for the theoretical possibility of harmless error in this context, the Supreme Court has set the bar high, indeed, for such a finding to be justified.”

7.) Where the only weapon was charged was a firearm, where the underlying offenses require either a firearm or deadly weapon which thusly must be based on a firearm finding, and where the jury was never instructed in a manner that would allow them to return a valid finding based on a firearm, can the verdict be allowed to stand?

In the case at bar, the information alleged specifically “a handgun, a firearm as defined in RCW 9.94.010” which inarguably requires the State to prove and the jury to find that petitioner was armed with a “firearm” i.e. “a weapon or device from which a projectile may be fired by means of an explosive such as gunpowder” and this clearly did not occur in the petitioners case.

State v. Pam, 98 Wn. 2d 748, 659 P.2d 454 (1983) held that to support a ‘firearm’ finding the jury must be instructed on and find “a weapon or device from which a projectile may be fired

by means of an explosive such as gunpowder”; State v. Tongate, 93 Wn. 2d 751, 613 P.2d 121 (1980), held that the jury must find a “gun in fact” rather than merely a “gun-like object” and in the case at bar the jury was not instructed in a manner that would require them, or even enable them, to return such a finding. A “to convict” instruction must contain all elements of the charged crime because the instruction dictates how the jury measures the evidence to reach a verdict. State v. Smith, 131 Wn. 2d 258, 263, 930 P.2d 121 (1980). “The State must prove every element of the charged offense beyond a reasonable doubt.” State v. Tongate, 93 Wn. 2d 751, 753, 613 P.2d 121 (1980) (citing In re Winship, 392 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 2d 368 (1970)).

The only weapon – deadly or otherwise – charged at any time was a firearm, however, to prove a firearm, “the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of ‘firearm’: a weapon or device from which a projectile may be fired by means of an explosive such as gunpowder.” State v. Recuenco, 163 Wn. 2d 428, 180 P.3d 1276 (2008); quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.10.01 (Supp. 2005) (WPIC).

Conclusion

For the reasons heretofore presented and based on the arguments herein presented this court should find good and sufficient cause to grant petitioner relief as required pursuant to the grounds argued and based on the rules, citations, and, authorities in the interests of correction of erroneous rulings; correction of manifest injustice; protection of constitutional liberties; compliance with the rulings of the state and federal courts; simple justice; and, in the keeping with the precepts and tenets upon which American jurisprudence is founded and the concept of reasoned liberty as envisaged by the founders of this country and the framers of our constitution. Additionally, as all petitioners arguments are based on prior holdings, *stare decisis* would require the court to correct its erroneous ruling.

Stare decisis doctrine holds “[the] court should reverse itself on an established rule of law only if the rule is shown to be incorrect or harmful.” State v. Lucky, 128 Wn.2d 727,735, 912 P.2d 508 (1970) (citing In Re Stranger Creek, 77 Wn. 2d 649, 653, 466 P.2d 508 (1970), and to

uphold the sentencing of petitioner for uncharged enhancements would serve to overrule the last 40 years of state supreme court cases on enhancements, the last hundred and twenty years of cases on charging documents, and the underlying constitutional principles upon which they were based. Here, the only harmful rulings were the prior erroneous holdings in petitioners case, which were violative of established precedent and rules of state and federal courts, therefore requiring correction in compliance with the rule of *stare decisis*.

Done by my hand and name on this 9th day of February of the year 2012, and again on the 17th day of February,


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