

NO. 36442-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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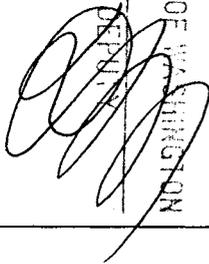
STATE OF WASHINGTON,

Respondent,

v.

LEON G. TONEY,

Appellant.

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FILED  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY 

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APPELLANT'S OPENING BRIEF

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ORIGINAL

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## ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a sentence above the Blakely<sup>1</sup> statutory maximum for the crimes.

2. (a) The state violated double jeopardy clause protections of the state and U.S. Constitutions by charging first-degree burglary and first-degree assault based on use of a deadly weapon, as well as a firearm enhancement for use of that same weapon; and

(b) The trial court violated double jeopardy clause protections of the state and U.S. Constitutions by imposing a judgment of conviction, and corresponding sentences, on both first-degree burglary and first-degree assault based on use of a deadly weapon, as well as a firearm enhancement for use of that same weapon.

3. The trial court erred in imposing the firearm enhancements, since the firearm enhancement statute, RCW 9.94A.510(3), contains no constitutionally valid procedure for judge or jury to determine if the firearm enhancement's elements are met.

## ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Under State v. Zavala-Reynoso, 127 Wn. App. 119, 110 P.3d 827 (2005), the trial court cannot impose a sentence above the

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<sup>1</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

statutory maximum for the crime – and the sentence that counts is the term of imprisonment when combined with the term of community placement. Following Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), does “statutory maximum” include the Blakely-statutory maximum (high end of the standard range), or is it instead limited to the pre-Blakely limit for the particular Class of felony when considered in the abstract?

2. Following Apprendi, Blakely, and State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), rev'd on other grounds, 548 U.S. 212 (2006) – in which the courts made clear that any fact that increases the maximum statutory penalty that may be imposed upon a criminal defendant is akin to an element of the crime, in that it must be proven to the jury beyond a reasonable doubt – does the state violate double jeopardy protections by charging first-degree burglary and first-degree assault based on use of a deadly weapon, as well as firearm enhancements for use of that same single weapon?

3. Following Martin,<sup>2</sup> Frampton,<sup>3</sup> Pillatos,<sup>4</sup> and Recuenco, it

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<sup>2</sup> State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980).

<sup>3</sup> State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981).

is clear that if there is no statutory procedure for imposition of an exceptional, aggravated, sentence, then the trial court cannot make up such a procedure. Since the firearm enhancement statute, RCW 9.94A.510(3), has no procedure for the jury to determine if the firearm enhancement's elements are met; and since the default SRA statute on sentencing procedures (applicable at the time of Mr. Toney's resentencing) used the preponderance of evidence standard and judicial decision-maker; was there a constitutionally valid procedure for imposing the 60-month firearm enhancement at the time of resentencing?

#### **STATEMENT OF THE CASE**

##### **I. PROCEDURAL HISTORY, FROM TRIAL THROUGH REINSTATEMENT OF THIS APPEAL**

Leon Toney was charged by Information on Dec. 23, 1996, with three crimes relating to an assault within a home in Tacoma. CP:1-6 (Information).

Count 1 charged Mr. Toney and two codefendants with burglary in the first degree, alleging that on Dec. 20, 1996, they entered 6802 East "E" Street, Tacoma, "and in entering or while in such building or in immediate flight therefrom, the defendant or another participant in the crime was armed with a handgun, a deadly weapon, that being a firearm ..." in

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<sup>4</sup> State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007).

violation of RCW 9A.52.020(1)(a) (first-degree burglary), RCW 9.41.010 (defining firearm), RCW 9.94A.310 (former statute listing additional times to be served for firearm and deadly weapon enhancements), and RCW 9.94A.370.

Count 2 charged Mr. Toney alone with first-degree assault on Patrick Callahan on the same date, along with another allegation that this was done “with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death, that being a firearm as defined in RCW 9.41.010 ....”

Count 4 charged Mr. Toney with unlawful possession of a firearm in the second degree, having previously been convicted of third-degree assault (a felony).

Counts 3 and 5 charged separate crimes against codefendants.

Mr. Toney was convicted as charged of Counts 1, 2 and 4, and the jury returned special verdict forms indicating that he was armed with a firearm during counts 1 and 2.

Sentencing occurred on August 28, 1997. The court imposed 75 months on Count 1, 216 months on Count 2, and 48 months on Count 3, to run concurrently. 8/28/97 VRP:544. The court also imposed two consecutive 60-month firearm enhancements. CP:51-61 (Judgment).

The Court of Appeals reversed a portion of the sentence, ruling

that the firearm enhancements had to run concurrently.<sup>5</sup>

Re-sentencing occurred on Sept. 29, 2000. CP:67-79 (new Judgment). Because Mr. Toney was not advised of his appellate rights at that resentencing hearing, his right to appeal was reinstated. State v. Toney, Wash.S.Ct. No. 80526-1, 12/5/07 Order. This appeal follows.

## II. TRIAL

Trial testimony established that on December 20, 1996, Mr. Toney and codefendants Billy Ray Griffin, Jr. and Tahaira Jemel Spice knocked on the door of a residence located at 6802 East E Street in Tacoma, Washington, in which Patrick Callahan, Steve Alex, and Dianna Ames lived. Dianna Ames had already been paid \$45.00 by Ms. Spice to sew some children's clothing, and Ames had not done so. Earlier in the day, Ms. Spice had angrily confronted Ms. Ames about her failure to complete the project, and it appeared that Spice returned later with Toney and Griffin to get even. 6/23/97 VRP: 43, 51 (Officer Fozzord); id., VRP:80 (Det. Kothstein); id., VRP 91-98, 101 (Callahan); id., VRP:134-43; 7/1/97 VRP:259-60 (Spice).

When Steve Alex opened the door, he was struck with something that knocked him unconscious. The three visitors – Griffin, Spice and

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<sup>5</sup> State v. Toney, No. 22392-9-II, 1999 Wash. App. LEXIS 822 (May 7, 1999), review denied, 139 Wn.2d 1027 (2000).

Toney – then rushed inside the house. According to Callahan and Ames, Leon Toney pushed Patrick Callahan into a nearby bathroom, and after a struggle, shot Callahan in the abdominal area. When Ames tried to assist Callahan, Spice grabbed Ames by the hair and slammed her head into a door jamb. Ames, Toney and Griffin then fled. 6/23/97 VRP:101-11 (Callahan); id., VRP:134-43 (Ames); id., VRP:164 (Alex); 7/1/97 VRP:222-25 (Griffin).

The victims provided descriptions of the suspects to responding police officers, and also provided Spice's address. 6/23/97 VRP:175-77, 181-82; 7/1/97 VRP:325. When officers went to the area of Spice's home, they found a black male who matched the description of one of the suspects running through a nearby yard. 6/23/97 VRP:53-54. He was later apprehended; it was Mr. Toney. 7/1/97 VRP:289-98 (testimony of officer whose dog tracked Toney). Spice and Griffin were arrested at Spice's residence. 7/1/97 VRP:27. All three were initially charged for their roles in the fight, but the charges against Spice and Griffin were resolved and they both testified for the state at Mr. Toney's trial.

#### **SUMMARY OF ARGUMENT**

A trial court cannot impose a sentence above the statutory maximum for the crime. The sentence that counts is not just the term of imprisonment, but also the term of community placement. Thus, the trial

court cannot impose a term of imprisonment which, when combined with the term of community placement, would exceed the statutory maximum for the crime. State v. Zavala-Reynoso, 127 Wn. App. 119.

Our understanding of what the “statutory maximum” means has, however, changed. Following Apprendi and Blakely, it is now clear that the “statutory maximum” includes the “Blakely-statutory maximum”: that is, the high end of the statutory standard sentence range. When Mr. Toney’s imprisonment sentence and community placement sentence are added together, they exceed that Blakely maximum. The sentence must therefore be vacated and remanded for resentencing. Argument Section I.

Mr. Toney’s sentence is defective for another reason, also. He was sentenced for not just first-degree assault and first-degree burglary based on use of a deadly weapon, but also for an additional, consecutive, firearm sentencing enhancement based on use of the same single weapon. In the past, Washington courts have rejected double jeopardy challenges to charging both a substantive crime having use of a deadly weapon or firearm as an element, as well as a deadly weapon or firearm enhancement. Those challenges, however, were always rejected on the ground that the underlying, substantive, statute was considered a crime containing the element of unlawful use of a weapon, while the enhancement statute was considered a matter in enhancement of penalty –

not a crime and not an element. That logic does not survive Apprendi, Blakely, and United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). In those cases, the Supreme Court made clear that any fact that increases the maximum penalty that may be imposed upon a criminal defendant is akin to an element of the crime, in that it must be proven to the jury beyond a reasonable doubt.

The Supreme Court did not limit its “element of the crime” interpretation of such factors increasing sentence to the Sixth or Fourteenth Amendment contexts. Indeed, any due process right at issue in Booker would have been rooted in the Fifth Amendment – since that is the only due process clause applicable to the federal government. It necessarily follows that Apprendi, Blakely, and Booker must apply with equal force to the double jeopardy clause protection of the Fifth Amendment – the one that is at issue here. Argument Section II.

There is one final problem with the application of the consecutive 60-month firearm enhancement to Mr. Toney. There is no statutory basis for imposing a firearm enhancement under RCW 9.94A.510(3) in Washington. That statute lists the *length* of the firearm enhancement sentence – 60 months. But it does not provide for jury sentencing, beyond a reasonable doubt, on that enhancement. Nor is there any other statutory provision for having a jury trial on the firearm sentencing enhancement,

anyplace else in the SRA. But sentencing is a legislative power, and, under an unbroken line of state Supreme Court cases culminating most recently in State v. Pillatos, 159 Wn.2d 459, the courts lack authority to construct sentencing procedures when the legislature has neglected to do so. At this point, the legislature has neglected to take that step for firearm enhancements; they have defined the enhancement, but not provided for the jury factfinding beyond a reasonable doubt that is necessary to implement it. Argument Section III.

For all three reasons, Mr. Toney's sentence should be vacated and his case should be remanded for resentencing.

#### ARGUMENT

**I. THE LENGTH OF THE IMPRISONMENT SENTENCE, WHEN COMBINED WITH THE COMMUNITY PLACEMENT SENTENCE, EXCEEDS THE STATUTORY MAXIMUM AS DEFINED BY APPRENDI AND BLAKELY**

**A. The Length of the Sentence Exceeds the Statutory Maximum as Defined by *Apprendi* and *Blakely***

In State v. Zavala-Reynoso, 127 Wn. App. 119, the court ruled that a trial court's sentence – combining the imprisonment portion and the community placement portion – could not exceed the statutory maximum sentence for the crime. It limits the maximum sentence that can be

imposed, when one adds up both the imprisonment time and the community placement time, to the statutory maximum for the crime.

The statutory maximum sentence to which the appellate court referred in Zavala-Reynoso was the statutory maximum for the crime in the abstract – in that case, ten years for a Class B felony – rather than the high end of the statutory standard sentence range. In Mr. Toney’s case, the abstract statutory maximum for the crimes of first-degree burglary and first-degree assault is life.

Following Apprendi and Blakely, however, the high end of the statutory standard sentence range must be considered, also. Those two controlling decisions hold that the high end of the statutory standard sentence range is actually a statutory maximum sentence.

The high end of Mr. Toney’s standard sentence range for Count 1, first-degree burglary, with an offender score of 6 and a seriousness level of VII, was 75 months (the range was 57-75). Yet he received a sentence of 75 months imprisonment plus a term of community placement to follow on that count. Similarly, the high end of his standard sentence range for Count II, first-degree assault, with an offender score of 6 and a seriousness level XII, was 216 months (the range was 162-216). Yet he received a sentence of 216 months imprisonment plus a term of community placement to follow on that count, also.

This violates the rule established by Zavala-Reynoso, 127 Wn. App. 119, when interpreted in light of Apprendi and Blakely. Mr. Toney's sentence – combining the imprisonment portion and the community placement portion – impermissibly exceeded the statutory maximum sentence for his crimes, when the statutory maximum is properly understood as the high end of the standard sentence range. Cf. State v. Adams, 138 Wn. App. 36, 155 P.3d 989, review denied, 161 Wn.2d 1006 (2007) (rejecting argument for applying Zavala-Reynoso to sentences above Guidelines maximum, without any consideration of Apprendi and Blakely).

The state will certainly argue that even after Apprendi and Blakely, the phrase “statutory maximum” still does not include the Blakely-statutory maximum (high end of the standard range), but is instead limited to the pre-Blakely limit for the particular Class of felony when considered in the abstract. But this interpretation of the phrase “maximum” or “statutory maximum” is incorrect.

The source of this phrase is the statute that controlled the sentencing that occurred in Mr. Toney's case. That sentencing statute provided, “a court may not impose a sentence providing for a term of confinement or community supervision or community placement which exceeds the *statutory maximum for the crime as provided in chapter 9A.20*”

RCW.” Former RCW 9.94A.120(13) (1998) (emphasis added). Under the referenced RCW 9A.20, the legislature has provided, in part, that the maximum sentence for a Class A felony – such as the first-degree assault and first-degree burglary for which Mr. Toney was sentenced – can be life.

But that is not all that RCW 9A.20 says. The relevant portion of that chapter and statute actually provides, “*Unless a different maximum sentence for a classified felony is specifically established by a statute of this state*, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following: (a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment ....” RCW 9A.20.021(1) (emphasis added).

As it turns out, “a different maximum sentence” is “specifically established by a statute of this state” for both first-degree assault and first-degree burglary. As the Blakely Court explained, the Washington Sentencing Guidelines are statutory and they do establish a different and lower statutory maximum for each of the crimes that they list. As discussed above, for first-degree assault in Mr. Toney’s case, that lower statutory maximum was 75 months. For first-degree burglary in Mr. Toney’s case, that lower statutory maximum was 216 months.

Thus, RCW 9.94A.120(13) governed Mr. Toney’s sentencing; it limited his sentence to the statutory maximum; it did not define statutory

maximum but provided a cross-reference to RCW 9A.20 to define it; the portion of RCW 9A.20 listing statutory maximum sentences for Class A felonies, RCW 9A.20.021, begins with the caveat that it is trumped if “a different maximum sentence” is “specifically established by a statute of this state”; and we know from Apprendi and Blakely that the SRA with its standard ranges provide just such “different maximum sentence[s],” which are “specifically established by a statute of this state.”

The conclusion therefore seems inescapable that under the relevant statutes, there are not one but two potential statutory maximum sentences that might limit the length of the imprisonment portion of the sentence when combined with the supervision portion of the sentence: the Class A felony statutory maximum listed in RCW 9A.20 and the SRA standard range Blakely-statutory maximum cross-referenced by RCW 9A.20.021 (since it is another “statute of this state”).

Even if this conclusion were not clearly compelled by the language of RCW 9A.20.021 incorporating the SRA standard ranges by reference, this conclusion is certainly permitted by that language. When there are two possible interpretations of the statutory language, the applicable rule of interpretation in a criminal case is clear: it is the rule of lenity.<sup>6</sup>

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<sup>6</sup> State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005) (if statute is ambiguous, rule of lenity requires that appellate court interpret statute in

Applying the rule of lenity to RCW 9A.20.021 compels the conclusion that the statutory maximum sentence must be construed to include the Blakely-statutory maximum.

Further, this is not just a question of statutory interpretation. There is a constitutional question posed, too – the same constitutional question that was posed in Apprendi and Blakely, that is, the Sixth and Fourteenth Amendment questions of whether the court can impose a sentence above a statutory maximum without factfinding by a jury to justify the increased sentence. There were no findings, by judge or jury, by any standard at all, to justify imposition of a sentence above any statutory maximum in Mr. Toney’s case. Interpreting the applicable statute to permit imposition of a sentence above the Blakely-statutory maximum without such findings thus poses the same Sixth and Fourteenth Amendment problems here, as it did in Blakely.

If this Court disagrees, it must still acknowledge that there is at least a constitutional issue lurking in the face of what seems like it might otherwise be a purely statutory issue. In such a situation, the rule of

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favor of defendant absent legislative intent to the contrary); State v. Hornaday, 105 Wn.2d 120, 127, 713 P.2d 71 (1986) (“fundamental fairness requires that a penal statute be literally and strictly construed in favor of the accused although a possible but strained interpretation in favor of the State might be found.”).

constitutional avoidance still compels this Court to adopt the interpretation of the statute that avoids the potential constitutional conflict.<sup>7</sup>

The result is the same. Mr. Toney's sentence exceeds – or arguably exceeds – the Blakely-statutory maximum for first-degree assault and burglary. The remedy for this error is re-sentencing.

**B. This Claim Can be Raised for the First Time on Appeal From Resentencing, Since it is a Sentencing Issue That Came to Light Only After *Apprendi* and *Blakely* Were Decided**

Mr. Toney can raise this claim for the first time on this appeal, despite the fact that it was not raised on the earlier appeal, because the legal basis for this claim had not yet been established at the time of his first appeal. Mr. Toney was charged in 1996, and the first Judgment was entered on September 29, 2000. Sentencing occurred on August 28, 1997. Then came the first appeal. On May 7, 1999, the Court of Appeals reversed a portion of the sentence, ruling that the firearm enhancements had to run concurrently.

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<sup>7</sup> Bostain v. Food Exp. Inc., 159 Wn.2d 700, 733, 153 P.3d 846, cert. denied, 128 S.Ct. 661 (2007) (“this court must always seek to construe statutes in a manner that avoids constitutional problems.”). See Tunstall v. Bergeson, 141 Wn.2d 201, 210, 5 P.3d 691 (2000) (where issue can be resolved on statutory grounds, court will avoid deciding the constitutional issues it poses), cert. denied, 532 U.S. 920 (2001).

All of this predated Apprendi and Blakely. Apprendi was decided in June of 2000; Blakely was decided in 2004. Yet those two cases – or, more accurately, Blakely itself which for the first time applied Apprendi's protections to Washington's sentencing scheme – form the basis for this claim. Thus, the first time that Mr. Toney could have raised this claim was after the 2000 resentencing, meaning after Apprendi and certainly Blakely had been decided.

**C. This Court's Arguably Contrary Conclusion in *Kilgore*<sup>8</sup> Is Distinguishable, Because that Remand Was Merely "Ministerial"**

We recognize that there is authority that is arguably to the contrary. In State v. Kilgore, this Court entered a 2-1 decision barring a criminal defendant from raising certain trial issues, which had not been challenged on a first direct appeal, in a second direct appeal following a second required sentencing.

The Kilgore Court began by reviewing the Washington Supreme Court's decision in State v. Barbiero, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). In that case, the Court stated the general rule that on remand from an appeal, the trial court has discretion to revisit an issue that the defendant did not raise in an initial appeal and, if the trial court does revisit such an issue, then the appellate court can address that issue in the

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<sup>8</sup> State v. Kilgore, 141 Wn. App. 817, 172 P.3d 373 (2007).

new appeal that follows. Id., 121 Wn.2d at 50-51 (citing RAP 2.5(c)(1)). The Kilgore Court continued that the Barbiero Court then ruled, that when the trial court does not address the new issue on remand, then the appellate court cannot address it for the first time on the new appeal. Id., 121 Wn.2d at 51.

This Court in Kilgore addressed whether that logic should apply when the issue could not possibly have been raised in the first appeal, because the legal basis for the claim had not yet arisen. In fact, the Kilgore Court dealt with a claim very similar to the one raised here, that is, a sentencing claim arising from Apprendi and Blakely.

The Kilgore majority then *extended* Barbiero to bar appeal of the new Apprendi and Blakely issues, if they were not addressed at the new trial court proceedings post-remand. The Kilgore majority gave several reasons for this conclusion.

The key reason was that in Kilgore, when the trial court declined to address these issues at the new resentencing hearing, that became something less than a full resentencing – it became a merely “ministerial” act. Kilgore, 141 Wn. App. 817, 829 (“When the trial court chose not to exercise its discretion under Barbiero to resentence Kilgore on remand ‘for further proceedings,’ *our remand became ministerial* in nature: The trial court merely corrected Kilgore’s original judgment and sentence by

ordering deletion of his two reversed convictions; the trial court did nothing to alter Kilgore's 1998 exceptional sentences for his five affirmed convictions.") (emphasis added). The Kilgore majority then concluded that since there was no real resentencing, just a ministerial act, there could be no real appeal of any issues. Id., 141 Wn. App. at 829-30 ("Again, as we have previously noted, there was no resentencing on remand for Kilgore to appeal. Kilgore had already exercised his right to appeal his original judgment and sentence, and he had lost on appeal with respect to his five affirmed convictions, the exceptional sentences for which he had chosen not to challenge.").

Mr. Toney's case is obviously quite different. His case was remanded for resentencing. The trial court conducted a *full* resentencing. Both sides made full presentations and sought specific sentences; the defense, in particular, presented evidence concerning Mr. Toney's changed life and new behavior while imprisoned. 9/29/00 VRP:3-5 (state agrees that firearm enhancement must run concurrently, does not dispute defense's ability to raise other issues at resentencing and also to ask for the low end of the range this time; state argues for high end of range); 9/29/00 VRP:6-7 (defense argues for low end of sentencing range).

The resentencing judge actively considered these presentations, and exercised discretion in coming to his final conclusion. He

acknowledged, “The truth of the matter is that Mr. Toney sort of is a problem for the Court in some ways. On the one hand, he’s obviously an intelligent young man. He both writes and speaks well. ... I think he has, in fact, taken steps to improve himself and appears to be sincere in those efforts, like he has basically just explained.” 9/29/00 VRP:12. The judge continued, “On the other hand, he has been convicted of several major offenses ...” Id. The court weighed these conflicting considerations and then imposed the high end of the standard sentence range on all charges, to run concurrently, along with two concurrent weapon enhancements, for a total sentence of 276 months (rather than the 336 months that had been imposed at the first sentencing hearing). 9/29/00 VRP:12-14.

So the Toney resentencing was anything but “ministerial.” It was full and substantive. And it resulted in a sentence that was different from the first one. Hence, even under the Kilgore majority’s main rationale, the instant appeal is not limited to matters that could have been raised at the first and only substantive sentencing hearing. Other issues are certainly available on this appeal.

The Kilgore majority expressed a second rationale for its decision, also. It ruled that that case became final with the conclusion of the first appeal, despite the fact that there was a remand, new proceedings, a resentencing, and a new appeal – and since it had previously become final,

nothing more could be raised. Kilgore, 141 Wn. App. at 829 (“The dissent maintains that (1) the Barbiero Court dismissed only old issues that Barberio could have raised in his first appeal, whereas Blakely presented a new issue that Kilgore could not have raised in his first appeal; and (2) Blakely should apply here because ‘Kilgore’s case did not become final when the mandate was filed[, our] remand was not ministerial in nature, [and] the trial court’s subsequent actions [are] appealable.’ Dissent at 20. We respectfully disagree.”).

The Kilgore dissent disagreed, explaining that the case did not become final until the sentence was finally adjudicated following remand. Kilgore, 141 Wn. App. at 831 (Amstrong, J. dissenting).

As discussed in the dissent, the Kilgore majority decision stands in tension with the Washington Supreme Court’s very recent decision in In re the Personal Restraint of Skylstad, 160 Wn.2d 944, 162 P.3d 413 (2007), as well as out-of-state law – an issue we seek to preserve for further review.

For purposes of adjudication in this Court, however, it is sufficient to note that when Mr. Toney was resentenced, he was really resentenced. The proceeding was full and adversarial; the judge considered the conflicting recommendations and the bases for those recommendations; and he then imposed a sentence that was different from the one that had

been imposed the first time. That was a true resentencing in the full sense of the term, to which the rule of Skylstad – that the case is not final until both the conviction and sentence are finally adjudicated – applies.

Finally, we respectfully note that a petition for review was timely filed by the appellant in Kilgore and that it is currently pending before the Washington Supreme Court in Case No. 81020-6.

Mr. Toney can therefore raise these sentencing issues for the first time on appeal, though we do recognize that, since they were not raised at the resentencing hearing, they are likely subject to RAP 2.5(a)(3)'s rule that they can be considered for the first time on appeal only if they are constitutional in nature. Fortunately for Mr. Toney, the Sixth and Fourteenth Amendment claims upon which Blakely and Apprendi rest fit neatly into that category.

**II. APPRENDI AND BLAKELY COMPEL THE CONCLUSION THAT APPLICATION OF THE FIREARM ENHANCEMENT VIOLATED THE PROTECTION AGAINST DOUBLE JEOPARDY; CONTROLLING WASHINGTON CASE LAW TO THE CONTRARY MUST BE RE-EVALUATED IN LIGHT OF THOSE NEW, CONTROLLING, DECISIONS**

**A. Apprendi and Blakely Compel Re-Evaluation of Prior Authority Holding that there is No Double Jeopardy Bar to Conviction of Assault with a Firearm, Plus a Firearm "Sentencing" Enhancement**

Mr. Toney was convicted of assault with a firearm, plus a firearm enhancement, and also burglary with a firearm plus a firearm enhancement. Assault as charged in this case – with a firearm – already had use of a firearm as an element, even before addition of the firearm enhancement. The same is true of the burglary of which Mr. Toney was convicted: it already had use of a firearm as an element, even before addition of the firearm enhancement.

In the past, Washington courts have consistently rejected double jeopardy challenges to charging both a substantive crime having use of a deadly weapon or firearm as an element, as well as a deadly weapon or firearm enhancement.<sup>9</sup>

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<sup>9</sup> E.g., State v. Caldwell, 47 Wn. App. 317, 320, 734 P.2d 542, review denied, 108 Wn.2d 1018 (1987) (robbery); State v. Pentland, 43 Wn. App. 808, 811, 719 P.2d 605, review denied, 106 Wn.2d 1016 (1986) (rape); State v. Woods, 34 Wn. App. 750, 665 P.2d 895, review denied, 100 Wn.2d 1010 (1983) (analyzing RCW 9.95.040, predecessor deadly weapon enhancement statute). See also State v. Warriner, 30 Wn. App. 482, 635 P.2d 755 (1981), rev'd on other grounds, 100 Wn.2d 459 (1983) (“Warriner first contends that because possession of a weapon was a necessary element of second degree assault, enhancement of the penalty under the firearm and deadly weapon statutes was improper under the rule of State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978), and violated the double jeopardy clause of the United States and Washington State Constitutions. This argument was considered and rejected in State v. Foster, 91 Wn.2d 466, 589 P.2d 789 (1979), which Warriner urges us to disregard. We have no authority to ignore controlling precedent, and decline to do so. We are bound by the Supreme Court’s holding in Foster and affirm the findings and sentence enhancement under both the firearm and deadly weapon statutes.”).

Those challenges, however, have always been rejected on the ground that the underlying, substantive, statute was considered a crime containing the element of unlawful use of a weapon, while the enhancement statute was a matter in enhancement of penalty – not a crime and not an element. See, e.g., State v. Claborn, 95 Wn.2d 629, 628 P.2d 467 (1981) (first-degree assault); State v. Husted, 118 Wn. App. 92, 95, 74 P.3d 672 (2003), review denied, 151 Wn.2d 1014 (2004) (same); State v. Woods, 34 Wn. App. 750, 755 (“RCW 9.95.040 does not offend the constitutional protection against double jeopardy by imposing multiple punishments based on a single deadly weapon finding even when applied to a defendant convicted of an offense where the use of a firearm or deadly weapon is an element of the underlying offense. ... RCW 9.95.040 does not create a separate criminal offense, and thus a separate punishment, but merely limits the discretion of the trial court and the Board of Prison Terms and Paroles in the setting of minimum sentences.”).

That logic does not survive Apprendi, Blakely, and Booker. In those cases, the Supreme Court made clear that any fact that increases the maximum penalty that may be imposed upon a criminal defendant is akin to an element of the crime, in that it must be proven to the jury beyond a reasonable doubt.

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The Washington Supreme Court said the same thing in State v. Womac, 160 Wn.2d 643, 661 n. 11, 160 P.3d 40 (2007) (“for Sixth Amendment purposes, elements and sentencing factors must be treated the same as both are facts that must be tried to the jury and proved beyond a reasonable doubt”).

Since any aggravating factor which is used to enhance punishment above the top of the standard range must be proven to a jury beyond a reasonable doubt, the aggravating factor now acts as the functional equivalent of an element that must be charged in the Information.

The Booker decision shows this. Its discussion about why engrafting a jury trial component onto the federal Sentencing Guidelines would directly contradict the intent of Congress shows that the majority assumed that such sentence-enhancing conduct would have to have been charged – *as an element* – for it to have been considered by a jury. Booker, 125 S.Ct. 738, 762-63 (Breyer, J.). Even the dissent made the same assumption. E.g., Booker, 125 S.Ct. 738, 774 (Stevens, J., dissenting) (“In many cases, prosecutors could avoid an Apprendi ... problem simply by alleging in the indictment the facts necessary to reach the chosen Guidelines sentence.”); id., 125 S.Ct. 738, 775 (Stevens, J., dissenting) (“The Government has already directed its prosecutors to allege facts such as the possession of a dangerous weapon or ‘that the

defendant was an organizer or leader of criminal activity ...”). See also Gault v. Lewis, 489 F.3d 993 (9<sup>th</sup> Cir. 2007) (reversing denial of habeas relief because state charged sentence enhancement under one statute, but court enhanced sentence based on another, different, statute).

The firearm enhancement statute certainly increases the maximum sentence that might be imposed over and above the Blakely statutory maximum – i.e., the standard Guidelines range – for the crime. Hence, following Blakely, Apprendi, and Booker, the firearm enhancement statute is the functional equivalent of an element of the crime.

Since it is essentially an “element,” rather than a matter simply in aggravation of penalty, the prior decisions holding that there is no double jeopardy problem because there is no duplication of elements between the underlying statute and the firearm enhancement statute must now be reconsidered.

It is true that in State v. Nguyen, 134 Wn. App. 863, 142 P.3d 117 (2006), review pending, 2007 Wash. LEXIS 102 (Jan. 30, 2007), Division I of the Court of Appeals rejected this argument. That case is pending on a petition for review to the Washington Supreme Court, and its holding is not binding on this Court; neither Division II nor the state Supreme Court have yet spoken on this issue.

**B. This Claim Can be Raised for the First Time on Appeal From the Resentencing That Followed Appendi**

We anticipate that the state will argue that Mr. Toney should be barred from raising this claim now, since he did not raise it on his first appeal (since the state raised a similar argument in opposition to Mr. Toney's motion to reinstate this appeal, and lost).

Mr. Toney could not have raised this claim on his first appeal. As discussed in Argument Section I above, Mr. Toney was charged in 1996, and the first Judgment was entered on August 29, 1997. Sentencing occurred on August 28, 1997. His first appeal was filed shortly thereafter and it was decided on May 7, 1999; the Court of Appeals reversed a portion of the sentence, ruling that the firearm enhancements had to run concurrently.

Thus, Mr. Toney's first sentencing, first appeal, and first decision on his first appeal, all predated Appendi and Blakely. But it is those two cases that form the basis for this double jeopardy claim (just as it is those two cases that form the basis for the claim discussed in the section above).

It is clear that those two cases form the basis for this claim, from looking at the argument in support of the claim. Mr. Toney was convicted of assault with a firearm, plus a firearm enhancement, and also burglary with a firearm plus a firearm enhancement. Assault as charged in this case

– with a firearm – already had use of a firearm as an element, even before addition of the firearm enhancement. The same is true of the burglary of which Mr. Toney was convicted: it already had use of a firearm as an element, even before addition of the firearm enhancement.

We acknowledged that the Washington courts have consistently rejected double jeopardy challenges to charging both a substantive crime having use of a deadly weapon or firearm as an element, as well as a deadly weapon or firearm enhancement.<sup>10</sup> We explained, however, that the state appellate courts had always reasoned that the underlying, substantive, statute was considered a crime containing the element of unlawful use of a weapon, while the enhancement statute was a matter in enhancement of penalty – not a crime and not an element.<sup>11</sup> After Apprendi had finally been decided, was the first time that Mr. Toney could have argued that that logic – distinguishing between elements and enhancements – had to be reevaluated in light of Apprendi, Blakely, and Booker.

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<sup>10</sup> E.g., State v. Caldwell, 47 Wn. App. 317, 320 (robbery); State v. Pentland, 43 Wn. App. 808, 811 (rape); State v. Woods, 34 Wn. App. 750 (analyzing RCW 9.95.040, predecessor deadly weapon enhancement statute).

<sup>11</sup> See, e.g., State v. Claborn, 95 Wn.2d 629 (first-degree assault); State v. Husted, 118 Wn. App. 92, 95 (same); State v. Woods, 34 Wn. App. 750, 755.

As we explained in Argument Section I(C), since this claim could not have been raised at the first sentencing; since this claim could be raised for the first time at the resentencing; and since the resentencing was full, robust, adversarial, and adjudicated with discretion, hence not ministerial, it can be raised for the first time now even under the logic of this Court's decision in Kilgore.

**III. APPLICATION OF THE FIREARM ENHANCEMENT WAS IMPERMISSIBLE, BECAUSE THERE IS NO STATUTORY PROCEDURE FOR APPLYING RCW 9.94A.510(3)'S FIREARM ENHANCEMENT AND THE TRIAL COURTS LACK INHERENT AUTHORITY TO CREATE SUCH PROCEDURES**

**A. There is No Statutory Basis For Jury Determination Beyond a Reasonable Doubt of the Firearm Sentencing Enhancement.**

Mr. Toney was convicted of first-degree assault plus a firearm enhancement and first-degree burglary plus a firearm enhancement. The court then imposed an additional 60-month sentence, consecutive to the sentence on the underlying conviction, because of these two concurrent firearm enhancements. CP:51-61 (Judgment).

But there is no statutory basis for imposing a firearm enhancement under RCW 9.94A.510(3) at all in Washington. That statute lists only the *length* of the firearm enhancement sentence – 60 months. It does not

provide for jury sentencing, beyond a reasonable doubt, or judicial sentencing following a guilty plea, or in any other manner.

Nor is there any other statutory provision for having a jury trial on the firearm sentencing enhancement, anyplace else in the SRA.

Sentencing is a legislative power. State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). It is the function of the legislature and not the judiciary to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975).<sup>12</sup> A defendant cannot extend the trial court's sentencing authority, even by agreeing to it. In re Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991). Superior Court judges therefore lack power to draft their own sentencing procedures.

That is precisely the conclusion reached by the Washington Supreme Court in State v. Pillatos, 159 Wn.2d 459. The Pillatos Court held that Superior Court judges lack inherent authority to craft sentencing procedures, when those procedures are not statutorily authorized – and, hence, the trial courts could not craft procedures for having jury trials on

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<sup>12</sup> “The legislature provides the minimum and maximum terms within which the trial court may exercise its discretion in fixing sentence.” State v. Le Pitre, 54 Wash. 166, 169, 103 P. 27 (1909). Accord State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, modified, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986) (upholding SRA against separation of powers and related challenge because (1) the legislature has the sole authority to set the terms under which the trial court can impose punishment for crimes and (2) the trial court has no independent inherent authority to punish for crimes).

aggravating sentencing factors before there was legislation on the books to authorize such procedures.

But Pillatos is not the only decision to come to this conclusion, and the rule that Superior Courts lack the power to craft their own sentencing procedures absent statutory authorization applies in numerous other contexts.

For example, the state Supreme Court reached a similar conclusion when a portion of Washington's death penalty sentencing scheme was declared unconstitutional and the state asked the Supreme Court to make up procedures of its own to "correct" the problem, and allow imposition of death sentences without specific legislative authorization of procedures to do so. The Washington Supreme Court, in State v. Martin, 94 Wn.2d 1, and State v. Frampton, 95 Wn.2d 469, refused. The Court declined to read into the former Washington death penalty statutes a procedure for empaneling a jury after a guilty plea since the legislature had not enacted such a procedure; the Court held that, however attractive the solution of rewriting the death penalty statute might be, "*we do not have the power to read into a statute that which we may believe the legislature has omitted.*" Martin, 94 Wn.2d at 8 (emphasis added).

The Martin, Frampton and Pillatos decisions are controlling. If the state Supreme Court cannot authorize a procedure to empanel a jury after a

guilty plea in order to consider whether a death sentence should be imposed absent specific statutory authorization; and if the state Supreme Court cannot authorize a procedure to empanel a jury to adjudicate aggravating sentencing factors post-Blakely absent specific statutory authorization; then it is hard to imagine that a lower Superior Court judge has authority to empanel a jury to determine whether a firearm enhancement should be imposed absent specific statutory authorization to do so.

**B. At the Time of Mr. Toney's Trial, the SRA Instead Used the Preponderance of Evidence Standard and the Judge as the Decisonmaker.**

There is no such specific statutory authorization for trial courts to empanel juries to determine whether the firearm enhancement should apply. In fact, when the trial court made up the procedure for implementing the firearm enhancement used in Mr. Toney's case, it was affirmatively contradicting the applicable statutes.

In RCW 9.94A.602, the Legislature set out a procedure for alleging and submitting to a jury the issue of whether the defendant was armed *with a deadly weapon*. But the legislature did not provide a similar mechanism for either the trial court or a jury to find that the defendant was armed with a firearm. Absent such a procedure, no firearm enhancement can be imposed. The relevant statute provided only for the length of the

enhancement; it did not purport to authorize the procedure for making the required predicate finding that the defendant was armed with a firearm.

The closest thing we have to a default procedure for imposition of sentencing enhancements under the SRA (prior to the enactment of SB 5477, and at the time of the trial) was RCW 9.94A.530(2). But that statute did not provide for jury sentencing at all – it provided, instead, that factors in support of an increased or exceptional sentence should be proven to the judge, by a preponderance of the evidence. It stated, “Where the defendant disputes material facts, the *court* must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing *by a preponderance of the evidence.*” (Emphasis added.)

“Court” means judge, or possibly, given context, commissioner or clerk – but not jury.<sup>13</sup> The “preponderance of the evidence standard”

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<sup>13</sup> RCW 13.04.011 (“(4) ‘Court’ when used without further qualification means the juvenile court judge(s) or commissioner(s)”; RCW 13.40.020 (“(6) ‘Court,’ when used without further qualification, means the juvenile court judge(s) or commissioner(s)”; RCW 26.19.011 (“(3) ‘Court’ means a superior court judge, court commissioner, and presiding and reviewing officers who administratively determine or enforce child support orders.”). See State v. Hackett, 122 Wn.2d 165, 172-73, 857 P.2d 1026 (1993) (“Throughout the rule the drafters refer to various responsibilities of or actions by the ‘court’ and the meaning can only be that the actions are by a person, *i.e.*, the judge.”); In re Dependency of J.B.S., 122 Wn.2d 131, 135, 856 P.2d 694 (1993) (“‘Court’ when used without further qualification means the *juvenile court judge(s) or commissioner(s).*” (Italics ours.)

means the preponderance of the evidence standard, not the beyond a reasonable doubt standard.

Submitting this sentencing enhancement factor instead to the jury, by the beyond a reasonable doubt standard, does not supplement, but affirmatively contradicts, the plain language of that existing statute. Thus there was no procedure for factfinding on this enhancement to implement, and none to constitutionally waive.

Further, the judiciary lacks the power to “interpret” a statute to mean the opposite of what it says. First, the plain language of an unambiguous statute controls unless there is a clearly expressed legislative intent to the contrary: “If the language of the act is unambiguous, the statute is not subject to judicial construction, as there is nothing to construe.” State v. Howell, 119 Wn.2d 513, 517, 833 P.2d 1385, 1387 (1992). Since there is no legislative intent to the contrary, the clear language of RCW 9.94A.530(2) – mandating a decision by the “court” by a “preponderance of the evidence” on the facts constituting aggravating factors – is the only possible construction of that statute.

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RCW 13.04.011(3).”); State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993) (“court” means “judge” or delegation to judge’s “clerk”); Bruett v. Real Property Known As 18328 11<sup>th</sup> Ave. NE, 93 Wn. App. 290, 301, 968 P.2d 913 (1998) (process of the “superior court” means “judicial writ”).

A court might certainly impose a *limiting* construction on an ambiguous statute. Arave v. Creech, 507 U.S. 463, 480, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). But where, as here, the statute is unambiguous, the court has no power to rewrite it to save it from constitutional challenge.<sup>14</sup>

The same result is compelled by application of the rules that provisions in a statute are to be read in the context of the statute as a whole,<sup>15</sup> and, under the rule of “*expressio unius est exclusio alterius*,” “[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode”;<sup>16</sup> “The exceptions become exclusive.”<sup>17</sup>

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<sup>14</sup> State ex rel. Evans v. Brotherhood of Friends, 41 Wn.2d 133, 247 P.2d 787 (1952) (unambiguous statutes are not subject to interpretation and construction; since penal provisions of gambling statute would not have been enacted without slot machine exception, act unconstitutional). Accord State v. Howell, 119 Wn.2d at 517.

<sup>15</sup> Pope v. University of Washington, 121 Wn.2d 479, 489, 852 P.2d 1055 (1993), corrected, 871 P.2d 590, cert. denied, 510 U.S. 1115 (1994); Malo v. Alaska Trawl Fisheries, Inc., 92 Wn. App. 927, 930, 965 P.2d 1124 (1998), review denied, 137 Wn.2d 1029 (1999).

<sup>16</sup> Botany Worsted Mills v. United States, 278 U.S. 282, 289, 49 S.Ct. 129, 73 L.Ed. 379 (1929); Washington Natural Gas Co. v. Public Util. Dist. No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969); State ex rel. Port of Seattle v. Department of Pub. Serv., 1 Wn.2d 102, 112, 95 P.2d 1007 (1939); State v. Kazeck, 90 Wn. App. 830, 953 P.2d 832 (1998).

<sup>17</sup> State v. Kazeck, 90 Wn. App. 830.

RCW 9.94A.530(2) lists the preponderance of evidence standard and court decision-maker for exceptional sentences. Creating a new category of proof standards and a new category of decision-maker for the statute that applied at the time of the Toney trial would make the list of prerequisites to exceptional sentences already in the statute nonexclusive. Such an interpretation would flout all the rules discussed in this section.

The conclusion is therefore inescapable that if the legislature failed to provide a procedure by which a firearm enhancement can constitutionally be imposed – that is, if the legislature has failed to provide a procedure for a jury determination beyond a reasonable doubt on the firearm enhancement allegation – then the trial court cannot make up such a procedure. Instead, following Pillatos, imposition of the enhancement is beyond the trial court's power.

This issue is also pending before the state Supreme Court. Nguyen, 134 Wn. App. 863, review pending, 2007 Wash. LEXIS 102.

**C. This Claim Can be Raised for the First Time on Appeal From the Resentencing That Followed Apprendi**

As with the other two issues based on Apprendi and Blakely (see Argument Sections I and II above), this issue could not have been raised before those cases were decided. And they were not decided until after

Mr. Toney's conviction and sentence on his first appeal were over. Thus, Mr. Toney could not have raised this claim on his first appeal.

As we explained in Argument Section I(C), since this claim could not have been raised at the first sentencing; since this claim could be raised for the first time at the resentencing; and since the resentencing was full, robust, adversarial, and adjudicated with discretion, hence not ministerial, it can be raised for the first time now even under the logic of this Court's decision in Kilgore.

#### CONCLUSION

For all of the foregoing reasons, the sentence should be vacated and the case remanded for full resentencing.

DATED: February 28, 2008

Respectfully submitted,



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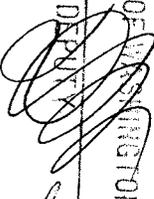
Sheryl Gordon McCloud, WSBA No. 16709  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 28<sup>th</sup> day of February, 2008, a copy of the foregoing APPELLANT'S OPENING BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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Sheryl Gordon McCloud