

GROUND I

THE MULTIPLE CONVICTIONS
IN THIS CASE CONSTITUTES
A VIOLATION OF MR. IRISH'S
FIFTH AMENDMENT DOUBLE JEOPARDY
CLAUSE CONSTITUTIONAL RIGHTS

Irish was convicted of Robbery in the first Degree, Count I; Assault in the Second Degree, Counts II, III, and IV; attempted Unlawful Poss. of a Controlled Substance, Count V; and Unlawful Poss. of a Firearm in the First Degree, Count VI. Counts I-V were also returned with a firearm enhancement.

Appellant contends that under State v. Freeman, 153 WN.2d 765, 108 P.3d 753 (2005). Counts II-V merge into the first degree robbery conviction. In Freeman, the Supreme Court held that, generally, first degree robbery and second degree assault are the same for double jeopardy purposes, and that these two crimes merge unless they have an independent purpose or effect.

Freeman was a consolidation of two cases: State v. Freeman and State v. Zumwalt. Zumwalt was charged with first degree robbery and second degree assault. After a jury convicted him of both offenses, Zumwalt moved to have the assault vacated as it merged with the robbery. The trial judge denied the motion and entered judgement on both convictions. Ultimately, the Washington State Supreme Court reversed Zumwalts convictions for the assault, holding that it merged with the first degree robbery conviction as there was no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.

Freeman, 153 WN.2d at 776. Given that the assault did not have an independent purpose except to facilitate the robbery, the assault merged into the robbery. Id. at 780. In the instant case, Mr. Irish's three second degree assault convictions merge into the first degree robbery conviction as the assaults, as charged, did not have an independent purpose except to facilitate the robbery VRP 158-62. The double jeopardy clauses of the Fifth Amendment and Const. Art. 1 § 9 protect a defendant against multiple punishments for the same offense. State v. Noltie, 116 WN.2d 831, 848, 809 P.2d 190(1991); State v. Vladovic, 99 WN. 2d 413, 423, 662 P.2d 853(1983). Despite this protection, the rule in this state has long been that where there are several charges against a defendant for the same act or transaction and convictions are obtained on all counts, if the sentences are made to run concurrently and do not exceed the penalty for one of the offenses of which the defendant was properly convicted, then that defendant is being punished "but once for his unlawful act" and double jeopardy is not an issue. State v. Johnson, 96 WN.2d 118, 124, 163 P.2d 583(1945). In Johnson, the court observed that the federal courts also do not find multiple punishment where sentences run concurrently, and added that "the leading Supreme Court decisions in the area of double jeopardy and multiple punishment raise the issue only in the context of 'cumulative' punishment through consecutive sentences" Johnson, at 931. This is no longer the case. In 1985, The United States Supreme Court observed that multiple convictions whose sentences are served concurrently may still violate the rule against double jeopardy. Ball v. United States, 470 U.S. 856, 864-65, 84 1.ed.2d 740, 105 S.Ct. 1668(1985).

Moreover, the Ball court held that: "The second conviction whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. Here, Appellant was convicted of all six charges, as charged, including five special verdict form convictions in excess of 186 mo.) And, like the Ball court stated "The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored." (Irish's court has implemented multiple punishments with concurrent sentences (CPSP 24 - 34) where the three second degree assault convictions clearly merge into the robbery conviction as the assaults, as charged, did not have an independent purpose except to facilitate the robbery (CPSP- 16). As in State v. Zumwalt. Accordingly, the Ball court Id. at 864-65 concluded that the mere fact that the sentences are concurrent will not shield multiple convictions from scrutiny under the double jeopardy clause, Both federal and state courts have cited Ball in concluding that double jeopardy concerns arise in the presence of multiple convictions, regardless of whether the resulting sentences are imposed consecutively or concurrently. See United

States v. Gomez-Pabon, 911 F.2d 847, 861 (1st Cir. 1990) (although defendants received concurrent rather than consecutive sentences for their dual convictions, adverse consequences still could result from the fact that two separate convictions issued) cert.denied, 498 U.S. 1074 (1991); United States v. Morehead, 959 F.2d 1489, 1506 (10th Cir.) (a criminal conviction, in addition to imprisonment and a penalty assessment, presents potentially adverse consequences), aff'd sub nom. United States v. Hill, 971 F.2d 1461 (1992); Chao v. State, 604 A.2d 1351, 1360 (Del. 1992) (The United States Supreme Court has held that, for purposes of double jeopardy, the term 'punishment' encompasses a criminal conviction and not simply the imposition of a sentence.") Other cases citing Ball as support assessing double jeopardy concerns in light of multiple convictions alone include United States v. Palafox, 764 F.2d 558, 564, 80 A.L.R.Fed. 763 (9th Cir. 1985); United States v. Johnson, 977 F.2d 1360, 1371 n.6 (10th Cir. 1992), cert.denied, 113 S.Ct. 1024 (1993); United States v. Lindsay, 985 F.2d 666, 670-71 (2nd Cir.), cert.denied, 114 S.Ct. 103 (1993); Byrd v. United States, 598 A.2d 386, 393 (D.C. Cir. 1991).

Additionally, the intent of Mr. Irish did not change throughout the course of his actions, Appellant was still at the scene of the crime when he was contacted by the police and was quickly apprehended VRP 153-54 His intent of robbing the store never changed to create or make "a substantial step" to attempt to deliver a controlled substance. Further, the intent never changed throughout the course of the robbery. As such, Count IV, attempted unlawful possession with intent to deliver, should also merge into the robbery as such was within the same course of conduct.

Accordingly, Counts II through V should merge with Count I Robbery in the First Degree and Count VI Unlawful possession of a firearm in the First Degree. Mr. Irish respectfully urges this court to merge Counts II through V with Counts I and that he only be re-sentenced on Count I, Robbery in the First degree with the deadly weapons enhancement and Count VI, Unlawful Possession of a Firearm in the First Degree. Given the aforementioned, the standard range for Count I should be 87 - 116 months plus 60 months for the firearm enhancement.

Additionally, the standard range for Count VI should be 41 - 54 months. The standard ranges are based on Mr. Irish's offender score being 7 for the first degree robbery and 5 for the unlawful possession of a firearm charge, given his criminal history. Finally, the sentences should be served concurrently.

GROUND II

**THE ACCOMPLISH LIABILITY STATUTE
WAS UNCONSTITUTIONALLY VAGUE AS APPLIED
TO IRISH'S JUROR INSTRUCTIONS,
AND VIOLATED HIS CONSTITUTIONAL RIGHTS
UNDER THE SIXTH AND FOURTEENTH AMANDMENT
TO THE UNITED STATES CONSTITUTION**

A statute is presumed constitutional; a challenger must prove the statute vague beyond a reasonable doubt. State v. Coria, 120 WN. 2d 156, 163, 839 P.2d 890 (1992). A vagueness challenge to a statute not involving First Amendment rights is evaluated as applied, using the facts of a particular case. Id. at 163; Spokane v. Douglas, 115 WN. 2d 171, 182, 795 P.2d 693 (1990): SEE also Kolender v. Lawson, 461 U.S. 352, 358, 75 L.Ed. 2d 903, 103

S.Ct.1855 (1983). The challenged law "is tested for unconsti-
tutional vagueness by inspecting the actual conduct of the par-
ty who challenges the ordinance and not by examining hypothe-
tical situations at the periphery of the ordinance's scope."
Douglass,115 WN.2d at 182-83. The fourteenth Amendment Due Pro-
Clause requires that citizens be afforded fair warning of pro-
scribed conduct. Douglass,115 Wn.2d at 178. A statute is un-
constitutionally vague if either: (1)... [it] does not define
the criminal offense with sufficient definiteness that ordin-
ary people can understand what conduct is proscribed, or (2)...
[it] does not provide ascertainable standards of guilt to pro-
tect against arbitrary enforcement." Id at 178. Here, In the
Amended Information, there is no language that indicates that
Mr. Irish is being charged as an accomplice for the conduct of
the other,unnamed individual. Rather, The information charges
Mr. Irish as a principal for Counts II and IV, Second Degree
Assault, for the conduct engaged in by the other individual (SRT 4-5)
against the assistant store manager and clerk. Although a def-
endant may challenge the sufficiency of the information for
the first time on appeal, we liberally construe the document
in favor of it's validity. State v. Kjorsvik,117 WN.2d 93,105-
06,812 P.2d 86 (1991). We consider (1) whether the necessary
facts appear in any form, or by fair construction can be found
in the charging document; and if so, (2) whether the defendant
nonetheless suffered actual prejudice as a result of the inart-
ful, vague,or ambiguous charging language. Id.; See also State
v. McCarty,140 WN.2d 420,425,998 P.2d 296 (2000). Such liberal
construction prevents what has been described as "sandbagging"
insofar as it removes any incentive to refrain from challeng-

ing a defective information before or during trial, when a successful objection would result in only an amendment to the information. Kjorsvik, 117 WN.2d at 103. Moreover, it reinforces the "primary goal" of the essential elements rule, which is to provide constitutionally mandated notice to the defendant of the charges against which he or she must be prepared to defend. Id. at 101; State v. Davis, 119 WN.2d 657, 661, 835 P.2d 1039 (1992).

The goal of notice is met where a fair, commonsense construction of the charging document "would reasonably apprise an accused of the elements of the crime charged." In this case, in Counts II and IV of the amended information there was no accomplice language that was set forth within the information itself. The State's theory on the case was that Mr. Irish and an accomplice teamed up to rob the store, and frankly, that's what formed the basis for the two assault II counts involving him which ultimately prejudiced Mr. Irish due to the fact that the information lacked essential elements to prove the state's theory that the Appellant assaulted the store clerk and the assistant manager.

State v. Laramie, 141 WN.App. 332. In this particular manner; notwithstanding that there was an accomplice instruction that was given and that was objected to. (TRP 131 -32). The State charged Mr. Irish with six crimes, three of which were second degree assault counts II; III; and IV (TRP at 154). When it instructed the jury on second degree assault, the court gave an instruction that included an alternative means of committing second degree assault based upon "accomplice liability" (instruction #5)

The Court also gave "to convict" instructions providing that one of the elements the jury needed to find was that Mr. Irish or an accomplice assaulted Michael Staten; Daniel Garibay and Jean-

elle O'dell, coupled with instructions of "intent"(Instruction#11&12).

Further, the State gave definitional instructions for a "reasonable apprehension of fear". (TRP at 133,135). Mr. Irish did not take exception to these instructions. Next, Mr. Irish argues that allowing the jury to consider the uncharged alternative means violated his rights under the Sixth Amendment to the United States Constitution, and Article I, section 22 of the Washington State Constitution. Appellant objected to allowing the jury to deliberate given the discrepancy between the charging document and the instructions (TRP at 169), and sought to have the charges dismissed (SRP at 4). This was sufficient to preserve the issue, which is, moreover, one of manifest error affecting a constitutional right. See State v. Chino, 117 WN.App. 531, 538, 72 P.3d 256 (2003). The trial court abused its discretion when it denied Irish's motion to dismiss Counts II and IV (SRP at 5), stating: "the charging document's only for information purposes". "Obviously, Mr. Irish was on notice that the theory was accomplice liability, based on the originally charging. (SRP at 5). When an information charges one of several alternative means, "it is error to instruct the jury that they may consider other ways or means by which the crime could have been committed." State v. Bray, 52 WN.App. 30, 34, 756 P.2d 1332 (1988). The manner of committing an offense is an element, and the defendant must be informed of this element in the information. Id. Where the instructional error favors the prevailing party, it "is presumed [to be] prejudicial unless it affirmatively appears... the error is harmless." Id. at 34-35; Chino, 117 WN. App. at 540. The state will undoubtedly argue that Mr. Irish suffered no prejudice because he knew prior to trial that

the evidence supported the alternative means. But this does not answer the problem that the jury was instructed on an uncharged alternative means, despite Appellants Constitutional right to be informed of the nature of the charges against him. U.S. Const. amend. VI; Wash. Const. art I, §22; see State v. Pelkey, 109 WN. 2d 484, 490 - 91, 745 P.2d 854 (1987). The error was necessarily prejudicial because, under the instructions given, in this case, the jury could have convicted Mr. Irish of second degree assault based on either the charged or the uncharged alternative means. SEE: State v. Severns, 13 WN. 2d 542, 548 -49, 552, 125 P.2d 659 (1942). For the aforementioned reasons this case should be reversed and remanded for re-sentencing...

GROUND III

**THE IMPOSITION OF FIREARM ENHANCEMENTS
IN ADDITION TO APPELLANTS OTHER SIX
CONVICTIONS VIOLATED HIS EQUAL PRO-
TECTIONS UNDER THE UNITED STATES
CONSTITUTION AMENDMENT FOURTEEN**

A jury convicted Mr. Irish of multiple convictions to which were: Robbery in the first degree; three assaults in the second degree; UPCS; and UPF. Appellant was in each case convicted and punished for the use of a firearm. The firearm convictions enhanced his sentence that violates the prohibition against Equal Protection. Mr. Irish contends that applying a firearm sentence enhancement to his conviction of Rob.I; Assault II's and UPCS violates equal protection rights because similarly situated offenders use of a machine gun, which is criminalized by same statute cannot have there sentences enhanced.

R.C.W 9.94A.533(3)(F). In State v. Berrier, 110 WN.App.639, 41 P.3d.1198(2002). As in this case, The jury convicted Berrier of violating RCW 9.41. 190. The trial court enhanced the sentence on this conviction under former RCW 9.94A.310(3)(2000) because berrier committed the crime of possessing a short-barreled shotgun while armed with a firearm - the short-barreled shotgun. The first statute makes the possession of a short-barreled shotgun illegal: The second statute enhances a felony conviction if the defendant is armed with a firearm, unless the felony conviction falls within the following exclusions:

The firearm enhancement in this section shall apply
to all felony crimes except the following:
Possession of a machinegun, possessing a stolen firearm, drive-by-shooting
theft of a firearm, unlawful possession of a firearm in the first
and second degree, and use of a machine gun in a felony.

Under the Washington and Federal Constitutions, persons similarly situated to the legitimate purposes of the law are guaranteed equal treatment. Wash.Const.art I § 12; U.S.Const.amend, XIV; State v. manussier, 129 WN. 2d 652, 672, 921 P.2d 473(1996). cert.denied 520 U.S. 1201 (1997). Equal Protection challenges are analyzed under one of three standards of review: strict scrutiny; intermediate scrutiny; or rational basis. Id. at 672 - 73. We review the legislative classification for a rational basis when then classification does not involve a suspect class or threaten a fundamental right. Id.

When a statute involves a physical liberty interest and does not involve a suspect class, no fundamental right is threatened. Id. at 673. Here, RCW 9.94A.533(3)(F) involves a suspect class. Thus, we review it under the rational basis test. Under the rational basis test, the challenged law must serve a legitimate state objective, the law must not be wholly irrelevant for achieving the objective. The legislature need not adopt the best mean; rather, the legitimate

goals. The person challenging the law must establish that the classification is purely arbitrary. (RCW 941. 190(1)) enhances a felony conviction if the defendant is armed with a firearm. But RCW 9. 94A 533(3)(F) exempts use of a machine gun in a felony from sentencing enhancements. This results in two subclasses of offenders under (RCW 941. 190 (1)). those who are subject to a firearm enhancement because of use of a firearm in a felony and those who are not subject to an enhancement because they use a machine gun in a felony.

Thus, the punishment differs for these two classifications. We must, therefore, determine whether the legislature had a rational basis for burdening one class of individuals more than another. Haddenham, v. State, 87 WN. 2d 145,150,550 P2d 9 (1976). RCW 9.94. 533 (3)(F) is part of a larger statute that was passed as part of the "Hard Time For Armed Crime" initiative in recognition that criminals carrying firearms are a more serious threat than other criminals. SEE Laws of 1995, Ch 129 §1(Initiative Measure NO. 159). The purpose of the initiative was to punish armed offenders more harshly to discourage the use of firearms. Nothing in this purpose is furthered by differentiating between the use of a firearm in a felony and the use of a machine gun in a felony. The purpose of exempting certain crimes from the firearm sentence enhancements in RCW 9.94A. 533(3)(F) appears to be that possession of a firearm is a necessary element of the underlying crime itself. But, this purpose applies equally to the use of a firearm in a felony as it does to the use of a machine gun in a felony: use of or possession is a necessary element of the underlying crime in both cases. (RCW 9.41. 190(1) (RCW 9.94A. 533 (3)(F). Here, Irish's reasoning leads in-

escapably to the conclusion that crimes involving firearm enhancements, such as First Degree Robbery as charged in this particular case, when "further enhanced" by firearm penalties violates his equal protection rights because such crimes include punishment for the act of being armed with a firearm but, "excludes" the use of a machine gun in a felony that "includes" the same such crimes RCW 9.41.190(1). Washington Courts have held that duplicative punishment such as that represented by the sentences imposed in this present case did not violate double jeopardy principles, Blakely Id. holding, for example, that sentencing for both first degree burglary and a deadly weapon enhancement did not violate double jeopardy. SEE Caldwell, 47 WN. App. (1987). This court reasoned that RCW 9,94A. 533, showed the Washington Legislatures intent that a person who commits certain crimes while armed with a deadly weapon receive an enhanced penalty even if being armed with a deadly weapon was an element of the offense. In contrast, Mr. Irish meets his burden of proven the firearm enhancement statute violates equal protection under the rational basis test. The most plausible explanation for the distinction is Legislative Oversight. Because the same statute makes it unlawful for the use of a machine gun in a felony, the legislature meant to refer to the entire statute when it exempted use of a machine gun in a felony from the enhancement statute. But legislative oversight does not excuse a violation of the equal protection clause. SEE In re Pers. Restraint of Bratz, 101 W R. Ppp. 662 -70, 5 P.3d 759 (2000). Appellant Irish interprets these cases as standing for the proposition that "there is no procedure in place for imposition of a firearm enhancement and none may be judicially created. For these reasons, this case should be remanded for re - sentencing.

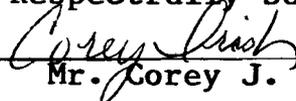
GROUND IV

THE SENTENCING COURT IMPROPERLY
CALCULATED APPELLANTS OFFENDER SCORE
BECAUSE HIS CURRENT AND PRIOR OFFENSES
CONSTITUTE THE SAME CRIMINAL CONDUCT

The major issue in this case relates to the application of RCW 9.94A. 525 and RCW 9.94A.589(1)(a). Under the particular circumstances of this case, as will be discussed below, the factors which makes this case one of particular significance are that the state applied a gratuitous calculation to Mr. Irish's offender score and the sentencing court failed to apply "same Criminal conduct" for the purpose of computing the score which makes his current sentence unlawfully exceptional under Blakely V. Washington, 542 U.S. 296,124 S.Ct. 2531,159 L.Ed. 2d 403 (2004). Under RCW 9.94A.589(1)(a) to determine with respect to other prior adult offenses and prior juvenile offenses for which sentences were served concurrently and whether those offenses "shall" be counted as one offense using the same criminal conduct analysis found in RCW. that yields the highest offender score without exceeding the appropriate standard range sentence for the current offense.

It is the effect of these facts which must be determine in a decision of this Appeal.

Respectfully Submitted,



Mr. Corey J. Irish, Appellant.

FILED
COURT OF APPEALS
DIVISION II

09 FEB -2 AM 9:35

STATE OF WASHINGTON
BY _____

State of Washington (DEPUTY)

v.

Corey J. Irish

NO. 37591 - 5 - II

**AFFIDAVIT OF SERVICE
BY MAILING**

STATEMENT OF ADDITIONAL GROUNDS

I, Corey J. Irish, being first sworn upon oath, do hereby certify that I have served the following documents:

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On this 27 th day of January, 2009.

Corey Irish 778787
Name & Number

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.