

COURT OF APPEALS
NO. 38586-4-II
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STATE OF WASHINGTON
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NO. 38586-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER PAUL PARTRIDGE,

Appellant.

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

The Honorable John Nichols, Judge

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. **Mr. Partridge was denied effective counsel when his trial attorney proposed incorrect self-defense instructions.**
2. **Mr. Partridge's sentence violates double jeopardy because it includes firearm enhancements in addition to convictions for first degree assault based on the use of a firearm.**

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **Effective counsel propose and argue jury instructions that help, not harm, their client. In Mr. Partridge's case, trial counsel proposed and argued an incorrect self-defense "act on appearances" instruction that undermined Mr. Partridge's own defense, that of self-defense. Was Mr. Partridge denied effective assistance of counsel?**
2. **The double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple punishments for the same offense. Mr. Partridge was convicted of two counts of first degree assault and the jury made a separate finding that he was armed with a firearm at the time of both offenses. Where Mr. Partridge received punishment for both the assaults and the firearm enhancements, was he punished twice for the same conduct in violation of his constitutional rights?**

C. STATEMENT OF THE CASE

1. **Procedural History.**

Mr. Partridge was charged in Clark County with two counts of assault in the first degree with firearm enhancements as follows:

COUNT 01 – ASSAULT IN THE FIRST DEGREE – 9A.36.011(1)(a)

That he, CHRISTOPHER PAUL PARTRIDGE, in the County of Clark, State of Washington, on or about September 18, 2007, with intent to inflict great bodily harm, did assault another person, to wit: Lorna Williams with a firearm or any deadly weapon or by force or means likely to produce great bodily harm or death; contrary to Revised Code of Washington 9A.36.011(1)(a).

And further, that the defendant did commit the foregoing offense while armed with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.533(3).

COUNT 02 – ASSAULT IN THE FIRST DEGREE – 9A.36.011(1)(a)

That he, CHRISTOPHER PAUL PARTRIDGE, in the County of Clark, State of Washington, on or about September 18, 2007, with intent to inflict great bodily harm, did assault another person, to wit: Mary McDaniel Williams with a firearm or any deadly weapon or by force or means likely to produce great bodily harm or death; contrary to Revised Code of Washington 9A.36.011(1)(a).

And further, that the defendant did commit the foregoing offense while armed with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.533(3).

CP 1-2.

Prior to trial, the court held a CrR 3.5 hearing in which two police officers testified. RP 7-24. Mr. Partridge did not put on a case and noted on the record that he did not dispute the admission of the CrR 3.5 statements. RP 23-24.

Mr. Partridge asserted self-defense to defend the charges. CP 28-30; RP 365-82 (closing argument). To that end, he proposed various jury instructions to include the following:

INSTRUCTION NO. 18

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great personal injury which is an injury that would produce severe pain and suffering, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 29; Supplemental Designation of Clerk's Papers (sub. noms. 109, 111.)

The jury returned with guilty verdicts as charged to include the firearm enhancements. CP 35-38.

At sentencing, the court entered an exceptional sentence downward of 6 consecutive months on each first degree assault. CP 43, 45. The court also imposed five consecutive years for each firearm enhancement for a total sentence of 132 months. CP 45-46. The court later entered written findings and conclusions on the exceptional sentence. See Supplemental Designation of Clerk's Papers (sub nom. 143).

2. Trial Testimony.

(a) The incident.

Mr. Partridge served as a heavy wheel mechanic in Iraq for a year in 2003 and 2004. RP 179-194. His unit was involved in the initial incursion into Iraq. Id. He saw and experienced a lot of bad things while serving in Iraq. Id. He came home a changed man. RP 139-40, 154, 195. He now has Post Traumatic Stress Disorder (PTSD), an anxiety-related disorder, related to his military experience. RP 271-72. His PTSD seems to have grown worse with the passage of time. RP 140-41, 154-55, 196-98.

In September 2007, Mr. Partridge was using his mechanical skills working at a equipment repair business in Forest Grove, Oregon. RP 198. On the days these incidents happened, he left work frustrated after having to stay late to finish a job. Exhibit 1.¹ After work, he went to the nearby home of a "battle buddy." It was Mr. Partridge's routine to stay at the buddy's home until traffic cleared making the 40-minute drive to Mr. Partridge's Vancouver home that much easier. Exhibit 1. On this particular day, he was frustrated also because he could not get any marijuana after work. Exhibit 1. He used the marijuana along with prescribed Prozac to

¹ Exhibit 1 is the recorded statement Mr. Partridge made to police after being arrested. Unfortunately, it was not transcribed into the record.

help his PTSD symptoms. Exhibit 1. Mr. Partridge felt a great deal of stress when driving related to his negative experiences in Iraq compounded by his PTSD. When he drove, he would be in a hyper-alert state watching for anything that would suggest danger. Danger to Mr. Partridge could be something as simple as a pothole or some trash in the road because in Iraq, either of those items could be an Improvised Explosive Device (IED). RP 199; Exhibit 1.

After a time, Mr. Partridge got into his car to make the trip home. Exhibit 1. He had a handgun in the car. He used the gun as a social outlet for target shooting with friends. While he was driving on Highway 26 in Oregon, a car got on his bumper and stayed there for miles even though the car had ample opportunity to go around Mr. Partridge. Exhibit 1. Irrationally, but symptomatic of his PTSD, Mr. Partridge became enraged. Exhibit 1. When the car finally moved in front of Mr. Partridge, Mr. Partridge followed the car and chased it through traffic for as much as half an hour until he was running low on gas. Exhibit 1.

Further down the road, on SR 500 in Vancouver, another driver Lorna Williams, realized that she was about to miss her exit and rather abruptly cut across a lane to get to the exit. RP 38-40. In doing so, she cut off Mr. Partridge who had to brake aggressively

to avoid a collision. RP 203. The next thing she knew, she and her passenger, daughter Mary McDaniel, had been shot at. RP 41-42, 54-55. The bullet pierced the lower part of the driver's door. RP 45. Although startled, neither Ms. Williams nor Ms. McDaniel were injured. RP 44, 55. They pulled off the road to a nearby mall and called the police. RP 57. The investigating officer found a single bullet inside the car at Ms. Williams' feet. RP 66-69.

Another motorist saw the shooting and called 9-1-1 with the license plate number of the shooter's, Mr. Partridge's, car. RP 93.

Mr. Partridge did not stay at the scene of the shooting. Instead, he continued to his home. RP 209-10. Later that evening, the police arrived at the home and arrested Mr. Partridge. RP 72, 103. The police found a semi-automatic handgun in the car's backseat. RP 73-74.

Later that evening, Mr. Partridge gave a taped statement to a police detective acknowledging that he was the shooter. RP 107, Exhibit 1. The taped statement was played for the jury during the trial. RP 107, 363. See Supplemental Designation of Clerk's Paper's (Exhibit 1).² The jury heard in the recorded statement Mr.

² See also Supplemental Designation of Clerk's Papers, Exhibit 15. Exhibit 15 is a transcript of the taped interview. The transcript was not given to the jury. Instead, the transcript is a record of what the jury actually heard during

Partridge acknowledge that when he shot the gun, it was with the intent to kill pursuant to his military training. “[Y]ou don’t fire a weapon with out trying to kill somebody right?” Exhibit 15, page 21; Exhibit 1.

(b) Mr. Partridge’s evidence supporting his self-defense claim.

To prove that he acted in self-defense, Mr. Partridge called his girlfriend, his mother, a battle buddy, and a psychologist. RP 137-299. His girlfriend and his mother explained the difference between the Chris Partridge before Iraq and the Chris Partridge after Iraq. RP 140-41, 151-157. Before Iraq, Mr. Partridge was an easy-going, out-going person who liked to work with disabled children. RP 153-54. After Iraq, he was a hermit who had problems holding a job. RP 141, 155. Loud noises scared him. RP 141. He had trouble sleeping. RP 157. He had nightmares, constantly reliving his experiences in Iraq. When he did sleep, it was most often during the day when it was safer to sleep. RP 157. He was hyper-vigilant, all the time on edge, and constantly afraid. RP 141, 155. He could not stand being around groups of people.

the playing of the CD, Exhibit 1. Exhibit 1 was stopped and restarted while being played to eliminate a portion of the interview that the trial court found irrelevant and inadmissible on Mr. Partridge’s motion.

His battle buddy, a man from Mr. Partridge's unit in Iraq, told about military life in Iraq when they both served there for a year in 2003-04. RP 158-168. As a mechanic, Mr. Partridge was tasked with the duty of getting trucks and boats up and running. RP 159. He worked on the vehicles, not in a secure shop, but instead where the vehicles came to a stop. RP 165-66. His unit was attacked several times. RP 160. The unit, and specifically Mr. Partridge, had to be constantly vigilant because of sniper fire. RP 167. When traveling, they traveled in convoys. RP 163-64. Their enemies would attempt to disrupt the convoys by cutting in and out of them forcing the soldiers to take aggressive action. RP 103-64. IED's could be, and were, anywhere. RP 167. Ambushes were frequent. RP 160-67. Any travel under an overpass was life-threatening because you never knew when someone would drop an explosive from an overpass. Id. Other than your fellow soldiers, you never knew who was friend or foe. Id.

D. ARGUMENT

- 1. MR. PARTRIDGE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PROPOSED AND ARGUED AN INCORRECT "ACT ON APPEARANCES" JURY INSTRUCTION.**

Mr. Partridge's counsel proposed and argued to the jury the following incorrect jury instruction:

INSTRUCTION NO. 18

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of *great personal injury* which is an injury that would produce severe pain and suffering, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 28. The instruction is incorrect because a claim of self-defense does not require that Mr. Partridge have a reasonable belief of "great personal injury." Instead, the correct instruction only required that Mr. Partridge have a reasonable belief of actual danger of injury. See Washington Pattern Instructions, Volume 11 (Third Edition), WPIC 17.04.

Trial counsel's proposal and argument of an incorrect jury instruction was not a legitimate trial strategy and Mr. Partridge incurred prejudice because of the error. Mr. Partridge is entitled to a new trial.

(a) An accused is entitled to effective representation.

The state and federal constitutions guarantee accused persons effective representation of counsel at all critical stages of

trial. U.S. Const. Amend 6; Const. Art 1 §§ 3, 22; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 1052, 80 L. Ed 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To obtain relief based on ineffective assistance of counsel, an appellant must establish that (1) his counsel's performance was deficient and (2) his counsel's deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. A claim of ineffective assistance of counsel presents a mixed question of law and fact that is reviewed de novo. *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

(b) Effective representation includes requesting and arguing only correct jury instruction.

Under *Neher*, the invited error doctrine bars claims of appellate error when the flawed jury instructions are proposed by defense counsel. *State v. Neher*, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989). However, in a criminal case where the offering of an incorrect jury instruction may constitute ineffective assistance of counsel, the reviewing court may reach the merit of the challenge anyway in determining if counsel was ineffective. *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (review is not precluded when invited error is the result of ineffectiveness of

counsel). The court should reach the merit of Mr. Partridge's claim of error and remand for retrial.

The Supreme Court held in *Walden* that the use of an "act on appearances" instruction – as used in Mr. Partridge's case - was error where the instruction required the defendant to fear "great bodily injury" because great bodily injury is not required and consequently, is a misstatement of the law. *State v. Walden*, 131 Wn.2d 469, 475-77, 932 P.2d 1237 (1997). Rather, one can fear merely actual injury even when that belief turns out to be mistaken. *Id.* at 477. As such, use of this instruction was reversible error because it failed to make the relevant legal standard for self-defense manifestly apparent to the average juror. *Id.* at 473. As the *Walden* court held, self-defense instructions must be given higher scrutiny than other jury instructions. Specifically, the *Walden* Court held that, "Jury instructions on self-defense must more than adequately convey the law Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror." *Walden* at 473, citing *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

The same instruction was given in *Rodriguez* and was found to be reversible error. *State v. Rodriguez*, 121 Wn.App. 180, 87 P.3d 1201 (2004). The following lays out the *Rodriguez* court's reasoning:

Now, standing alone or with other instructions to this jury on the question of self-defense, this statement would at least be innocuous and perhaps even an accurate statement of the law. The problem here is that the court also instructed the jury on the requirements of assault in the first degree. And as part of that charge to the jury, the court defined "great bodily harm" as follows:

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

This is the only definition of "great bodily harm" in the instructions to the jury. And when this definition is read into the self-defense instruction, the problem becomes apparent. Based on this definition of "great bodily harm," the jury could easily (indeed may have been required to) find that in order to act in self-defense, Mr. Rodriguez *had to believe he was in actual danger of probable death, or serious permanent disfigurement, or loss of a body part or function*. And this is precisely the problem the Supreme Court warned against in *State v. Walden*. Like the instructions that the court found objectionable in *Walden*, the instructions here "[b]y defining [great bodily injury] to exclude ordinary batteries, a reasonable juror could read [the instruction] to prohibit consideration of the defendant's subjective impressions of all the facts and circumstances, i.e., whether the defendant reasonably believed the battery at issue would result in great personal injury." (citation omitted).

Rodriguez, 121 Wn.App. at 185-86.

Mr. Partridge suffered similar prejudice when the trial court gave this “act on appearances” instruction which required him to fear “great bodily harm” in order to rely on his subjective belief of danger of injury. Just as in *Rodriguez*, the court in Mr. Partridge’s case gave the same definition of “great bodily harm.” Mr. Partridge testified that what he feared when being cut off in traffic was a “very big accident on that highway” and that he feared being injured in the accident. RP 204. He did not specify a level of injury but, as instructed, the jury could not even consider his self-defense claim without testimony that he feared an injury consistent with the “great bodily injury “ definition given to the jury. CP 21. Because such a fear was not required, defense counsel’s “act on appearances” instruction lowered the State’s burden of proof and caused obvious prejudice where self-defense was the only defense presented at trial. *Rodriguez*, 121 Wn.App. at 187.

(c) There was no legitimate tactical reason in proposing and arguing the incorrect “act on appearances” instruction.

The prejudice prong of a claim of ineffective assistance of counsel compares well to a harmless error analysis - essentially “no harm, no foul.” *Rodriguez*, 121 Wn.App. at 187. But as in *Rodriguez*, this particular flawed defense instruction struck at the

heart of Mr. Partridge's defense, i.e., that because of his experiences in Iraq and his resultant PTSD, he uncontrollably overreacted to events though the situation presented no risk of "great bodily harm" to himself. As instructed, the jury was required to find that Mr. Partridge was scared of death or at least permanent injury when Ms. Williams cut him off on the freeway. But as *Rodriguez* noted, "that is not the test." *Rodriguez*, 121 Wn.App. at 187.

As such, there is no conceivable reason why Mr. Partridge's lawyer would propose this instruction as a tactic or strategy to advance Mr. Partridge's position at trial. The net effect was to decrease the State's burden to disprove self-defense thereby causing prejudice to Mr. Partridge in defending his charges.

2. THE FIREARM ENHANCEMENT FOR ASSAULT COMMITTED WITH A FIREARM VIOLATES DOUBLE JEOPARDY.

Mr. Partridge was convicted of two counts of first degree assault based on the use of a firearm and his sentence was enhanced because of the gun use. Thus, Mr. Partridge was punished for the assault with a gun and each sentence was further increased because of the gun. Mr. Partridge was thereby twice convicted and punished for using a firearm in each of these

offenses in violation of the prohibition against double jeopardy found in the federal and state constitutions. Mr. Partridge's firearm enhancements must be vacated.

- a. **The double jeopardy provisions of the federal and state constitutions protect criminal defendants from multiple punishments for the same offense.**

The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life and limb" for the same offense, and the Washington Constitution provides that no individual shall be "twice put in jeopardy for the same offense." U.S. Const. Amend. 5; Wash. Const. Art 1 § 9. The Fifth Amendment's double jeopardy protection is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S Ct. 2056, 23 L.Ed.2d 707 (1969). Washington gives its double jeopardy provision the same interpretation as the United States Supreme Court gives to the Fifth Amendment. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Double jeopardy is a constitutional issue that may be raised for the first time on appeal. *State v. Bobic*, 140 Wn.2d 250, 257, 996 P.2d 610 (2000). Review is de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); *Gocken*, 127 Wn.2d at 100. While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. *Freeman*, 153 Wn.2d at 770-71.

b. The legislative intent must be reexamined after Blakely.

The Legislature has the power to define offenses and set punishments within the boundaries of the constitution. *Freeman*, 153 Wn.2d at 771; *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Thus, the first step in deciding if punishment violates the double jeopardy clause is to determine what punishment is authorized by the Legislature. *Freeman*, 153 Wn.2d at 771. Courts assume the punishment intended by the Legislature does not

violate double jeopardy. *Id*; *Albernaz v. United States*, 450 U.S. 333, 340, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981) (reasoning Congress is predominately body of lawyers and presumed to know the law). *Contra Albernaz*, 450 U.S. at 345 (Stewart, J. concurring) (Legislative intent is first step in determining if punishments violate double jeopardy, not controlling determination). Thus, to determine if the Legislature intended multiple punishment for the violation of separate statutes, courts begin with the language of the statutes. *Freeman*, 153 Wn.2d at 771-72.

RCW 9.94A.533 provides for additional time to be added to an offender's standard range if the offender was armed with a firearm:

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. . . .

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

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

RCW 9.94A.533.

The statute, part of the Hard Time for Armed Crime Act of 1995 (Initiative 195), was designated to provide increased penalties for criminals using or carrying guns, to “stigmatize” the use of weapons, and to hold individual judges accountable for their sentencing on serious crimes. Laws of 1995, ch. 129 § 1 (Findings and Intent). It provides that all firearm enhancements are mandatory and must be served consecutively to any base sentences and to any other enhancements. RCW 9.94A.533(3)(e); *State v. DeSantiago*, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003).

The language of the statute demonstrates that voters intended a longer standard sentencing range, and therefore greater punishment, for those who participate in crimes where a principal or an accomplice is armed with a firearm. But the statute creates a specific exception for those crimes where possession or using a firearm is a necessary element of the crime, such as drive-by shooting or unlawful possession of a firearm, demonstrating some

sensitivity to double jeopardy concerns, RCW 9.94A.533(3)(f). The voters apparently did not consider the problem of redundant punishment created when a firearm enhancement is added to a crime and using a firearm is the way the offense was committed.

Significantly, the Hard Time for Armed Crime Act was passed before *Blakely*, and other United States Supreme Court cases made it clear that the fact that exposes a person to increased punishment is an element of an offense. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004); *Ring v. Arizona*, 536 U.S. 584, 604-05, 122 S.Ct. 2428, 153 L.Ed.2d 18 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, n.19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Jones v. United States*, 526 U.S. 227, 243, 119 S.Ct. 1215, 153 L.Ed.2d 311 (1999) (Stevens, J., concurring). Those cases have made it clear that the relevant determination is not what label the fact has been given by the Legislature or its placement in the criminal or sentencing code, but rather the effect it has on the maximum sentence to which the person is exposed. *Apprendi*, 530 U.S. at 494; *Ring*, 536 U.S. at 602. The concept was succinctly stated in *Ring*:

If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and the aggravating

factor together constitute an aggravated crime. The aggravated fact is an element of the aggravated crime.

536 U.S. at 605.

This concept was reiterated when the United States Supreme Court considered whether double jeopardy principles were violated by seeking the death penalty on retrial after appeal where the first jury was unable to reach a unanimous verdict on whether to impose life or death. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). Justice Scalia³ explained the holding of *Ring* and its significance:

[W]e held that aggravating circumstances that make a defendant eligible for the death penalty “operate as ‘the functional equivalent of an element of a greater offense.’” That is to say, for purposes of the Sixth Amendment’s jury trial guarantee, the underlying offense of “murder” is a distinct, lesser included offense of “murder plus one or more aggravating circumstances.”

537 U.S. at 111 (internal citations omitted.) The Court went on to find “no principled reason to distinguish” what constitutes an offense for purposes of the Sixth Amendment and for purposes of double jeopardy. *Id.*

³ Justice Scalia wrote the opinion for the five-member majority. Justice O’Conner, given her resolute opposition to the rule articulated in *Apprendi*, dissented from Part III of Justice Scalia’s opinion. 537 U.S. at 117. Four justices dissented because they believed that the State was barred from seeking the death penalty at the second trial. *Id.* at 118-19. The dissenters specifically relied on *Ring* for the proposition that aggravating factors in death penalty cases are the equivalent of elements. *Id.* at 126 n.6 (Ginsburg, J., dissenting). Thus, a majority of the justices agree with Part III of Scalia’s opinion.

The need to reexamine the court's deferral to the Legislature in double jeopardy jurisprudence in light of *Blakely* has already been noted by legal scholars. Timothy Crone, "Double Jeopardy, Post *Blakely*," 41 Am. Crim. L. Rev. 1373 (2004). The problems of "redundant" counting of conduct under the Federal Sentencing Guidelines, for example, was thoroughly examined by one commentator, who called for a reorientation of double jeopardy analysis to protect defendants from unfairly consecutive sentences. Jacqueline E. Ross, "Damned Under Many Headings: The Problem of Multiple Punishment," 29 Am. J. Crim. L. 245, 318-326 (2002).

The voters and the Legislature were unaware that the firearm enhancements it created were an element of a higher offense because it increased the offender's maximum sentence. See *Blakely*, 124 S.Ct. at 2537-38; *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005)⁴ (violation of Sixth Amendment rights to due process and jury trial to sentence defendant to firearm enhancement when jury verdict supported only deadly weapon enhancement). Because a firearm enhancement acts like an element of a higher crime, the initiative simply adds a redundant

⁴ The Supreme Court overruled *Recuenco*'s holding that *Blakely* errors cannot be harmless error, but not the application of *Apprendi* and *Blakely* to firearm enhancements. *Washington v. Recuenco*, 548 U.S. 212, 126, S.Ct. 2546, 165 L.Ed.2d 466 (2006).

element of use of a firearm for crimes where use of a firearm was already an element, a result that voters would not have intended. See RCW 9.94A.533(3)(f).

c. Mr. Partridge's assault convictions are the same in fact and in law as the accompanying firearm enhancements.

When it is not clear if double punishments are authorized by statute, courts utilize the *Blockburger*, or "same elements" test to determine if two convictions violate double jeopardy. *United States v. Dixon*, 509 U.S. 688, 697, 113 S. Ct. 2849, 125 L.Ed2d 556 (1993); *Gocken*, 127 Wn.2d at 101-02. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932); *Dixon*, 113 S.Ct. at 2856. This is similar to Washington's "same elements" test for double jeopardy. *Calle*, 25 Wn.2d at 777. The test requires the court to look to the statutory offenses to determine if each crime, as charged, has elements that differ from the other. *State v. Gohl*, 109 Wn.App. 817, 821, 37 P.3d 293 (2001), *review denied*, 146 Wn.2d 1012 (2002).

Mr. Partridge's assault convictions were the same in fact and in law as his accompanying firearm enhancements. Factually, each involves the same criminal act as well as the same victim. Moreover, nothing else established the firearm enhancement which simply required Mr. Partridge to commit the assault with a firearm.

Legally, the assault convictions are the same in law as the firearm enhancements. The first degree assault statute, as it pertains to the charge, read;

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

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.

9A.36.011(1)(a). The jury was similarly instructed:

To convict the defendant of the crime of Assault in the First Degree, as charged in Count 1 [Count 2], each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 18, 2007, the defendant assaulted Lorna Williams [Mary McDaniel];
- (2) That the assault was committed with a firearm;
- (3) That the defendant acted with intent to inflict great bodily harm; and
- (4) That this act occurred in the State of Washington.

CP 19, 20.

The jury found Mr. Partridge was armed with a firearm during the commission of these offenses and RCW 9.94A.533(3) requires the sentencing court to add additional time to an offender's standard range score "if the offender ... was armed with a firearm as defined in RCW 9.41.010." But the assaults could not have been committed as alleged without Mr. Partridge being armed with a firearm.

Mr. Partridge was given an additional 10 years in prison for the firearm enhancements. The effect was to essentially sentence him for assaulting others with a firearm while armed with a firearm, and was thus convicted and punished twice for the use of a weapon. The addition of a firearm enhancement to Mr. Partridge's convictions placed him twice in jeopardy for use of a gun and violated the state and federal constitutions.

d. Conviction for both assault and the firearm enhancement violate Mr. Partridge's constitutional right to be free from double jeopardy and the firearm enhancements must be vacated.

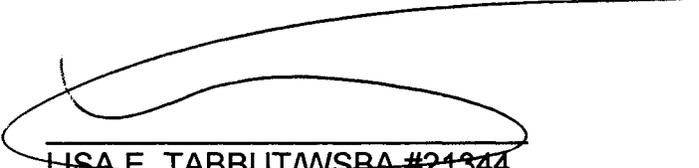
Mr. Partridge was punished twice – once for the assaults committed with a firearm and again for being armed with a firearm while committing the same assaults. Because both punishments are based upon the same facts and law, they violate the double

jeopardy provisions of the federal and state constitutions. The firearm enhancements must be vacated and this case remanded for resentencing. *Gohl*, 109 Wn.App. at 824.⁵

E. CONCLUSION

Mr. Partridge is entitled to a new trial. He was denied effective assistance of counsel when his attorney offered and argued an incorrect “act of appearances” instruction the lowered the State’s burden of proving that Mr. Partridge did not act in self defense. Additionally, the firearm enhancement violates state and federal double jeopardy and should be vacated.

Respectfully submitted this 18th day of June 2008.



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⁵ Both Division I and Division II of this court have previously rejected this challenge to the deadly weapon enhancements. See *State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053 (2008) (Divisions I); *State v. Kelley*, 146 Wn.App. 370, 189 P.3d 853 (2008) (Division II). However, the state Supreme Court has accepted review in *Kelley* on this issue (see 82111-9.) No oral argument date has been set in *Kelley*.

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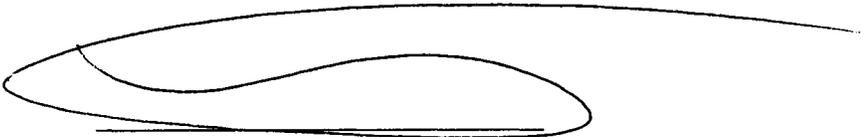
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE
OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on June 18, 2009.



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