

No. 81939-4

IN THE WASHINGTON STATE SUPREME COURT

In re the Personal Restraint of:

JAMES EASTMOND ,

Petitioner.

REPLY
PERSONAL RESTRAINT PETITION

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STATE OF WASHINGTON
SUPREME COURT
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A. REPLY

1. *THE STATE CONCEDES THAT THIS PERSONAL RESTRAINT PETITION IS PROPERLY BEFORE THIS COURT.*

The State does not dispute that Eastmond's Personal Restraint Petition is timely and that that relief is *not* barred by any retroactivity analysis.

2. *THE STATE DOES NOT DISPUTE THAT EASTMOND WAS CONVICTED ONLY OF BEING ARMED WITH A DEADLY WEAPON.*

The State concedes that Eastmond was found guilty only of being armed with a deadly weapon. That concession should result in reversal of Mr. Eastmond's sentence and a remand for resentencing. The remaining arguments by the State are simply a rehash of arguments rejected by this Court in *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005) (*Recuenco I*) and *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) (*Recuenco II*).

This Court has never held that the remedy for a *Recuenco* violation is a remand for a new trial on the sentencing issue. Such a remand would violate the double jeopardy clauses of the State and Federal Constitutions.

The State had the opportunity to properly charge and instruct the jury in this case and they failed to do so.

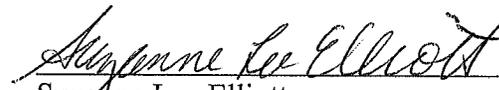
State v. Ervin, 158 Wash. 2nd 746, 147 P.3rd 567 (2006), has no application to this case. In that case this Court considered whether double jeopardy barred retrial after a hung jury and order for mistrial. In this case, there was no mistrial. The jury returned a verdict. Eastmond is simply asking this Court to reverse a sentence that exceeds the proper sentence for the verdict that was returned.

This Court should provide immediate relief to Mr. Eastmond on this issue. If this Court grants relief, Mr. Eastmond would be released almost immediately and the Court would not need to reach the double jeopardy issue raised at pages 7 to 15 of his Petition.

B. CONCLUSION

This Court should grant the Petition.

Respectfully submitted this 20th day of October 2008.


Suzanne Lee Elliott
WSBA 12634

CERTIFICATE OF SERVICE

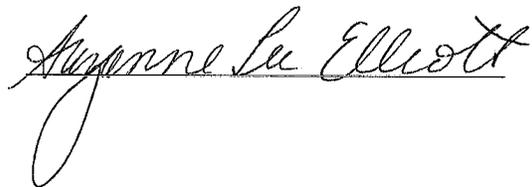
I declare under penalty of perjury that on October 20, 2008, I served one copy of the foregoing document by United States Mail, postage prepaid,

to:

Mr. Thomas Curtis
Snohomish County Prosecuting Attorney's Office
Snohomish County Courthouse
3000 Rockefeller Ave.
Everett, WA 98201-4060

And to:

Mr. James Eastmond #821591
Monroe Correctional Complex
PO Box 777
Monroe, WA 98272

A handwritten signature in cursive script that reads "Suzanne Lu Elliott". The signature is written in black ink and is positioned above a horizontal line.