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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is Dustin R. Kelley, the Defendant and Appellant in this case.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the opinion in the Court of Appeals, Division II, cause number 35944-8-II, which was filed on August 12, 2008. A copy of the opinion is attached hereto in the Appendix. No motion for reconsideration has been filed in the Court of Appeals.

C. ISSUES PRESENTED FOR REVIEW

- A. Is the Double Jeopardy Clause violated when the court imposes a firearm enhancement for a conviction in which the underlying offense was elevated because a handgun was used?

D. STATEMENT OF THE CASE

Factual History:

This case arose from the shooting of Beau Pearson. On February 22, 2006, at around 5:30 p.m., Pearson, Kelley Kowalski, and Valerie Greenfield were hanging out in a trailer that was located in the back yard of Klaus Stearns. RP 227-28, 536. Stearns stepped out to talk with his mother at the main house. RP 539. While he was out, a man entered the trailer and got into an argument with Pearson. RP 606, 581.

Greenfield was sitting next to Pearson when he argued with the shooter. RP 606. She was not listening to their discussion, but remembers that the man asked Pearson if he had ever been shot before. RP 609. Pearson said that he had. RP 609. The man turned and walked toward the door, then turned around with two guns. RP 609. The man said: "I'll smoke you and your bitch, too." RP 609. Pearson turned to Greenfield, said he was sorry, and pushed her away. RP 610. Pearson stood up and the man began to shoot. RP 610. More than one shot was fired. RP 612. The man then ran from the trailer. RP 612. Greenfield felt one gun might be pointed at her, but she was not hit by any bullets in the small space. RP 620.

Kowalski was on the phone facing away from the altercation and a radio was blaring loud music. RP 582. Kowalski turned when she heard the shots. RP 582. She saw Person slumped over and Greenfield leaving. RP 582. The shooter was gone. RP 584.

Stearns was on the back porch when he heard the shots. RP 540. Immediately after hearing "popping noises," he saw a man he identified as Dustin Kelley leave the trailer, then Greenfield, then Kowalski. RP 540. He went to the trailer, looked in, saw Pearson, and called 911. RP 540. Pearson died at the scene. RP 524.

Procedural History:

Dustin Kelley was arrested two weeks after the shooting. RP 475. He was charged with first degree murder (premeditated intent), unlawful possession of a firearm, and second degree assault (intentional assault with a deadly weapon, to wit: Handgun(s)). CP 8-9. Additionally, the State charged two firearm enhancements each to the murder charge, as well as the second degree assault charge. CP 8-10. Kelley was convicted on all three charges, and he was given a total of four firearm enhancements to his sentence. CP 83. He was given 524 months for first degree murder, with 120 months of firearm enhancements, 60 months for unlawful possession of a firearm, and 48 months for second degree assault, with 72 months of firearm enhancements. CP 83.

Kelley appealed his convictions, arguing that he was deprived of effective assistance of counsel when his attorney failed to introduce evidence of his mental illness and argue this affected his ability to form the requisite intent and that the imposition of two firearm enhancements on the second degree assault conviction violated double jeopardy. See Appellant's Brief.

On August 12, 2008, the Court of Appeals, Division II, affirmed Kelley's convictions and sentence, holding that a firearm enhancement can

be imposed on a conviction where use of a firearm is an element of the underlying crime without offending Double Jeopardy. Opinion at 5. This portion of the opinion was published.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The petitioner asserts that the issues raised by this Petition should be addressed by the Supreme Court because this case: raises a significant question under the Constitution of the United States and involves an issue of substantial public interest that should be determined by the Supreme Court, as set forth in RAP 13.4(b).

ISSUE 1: THE IMPOSITION OF FIREARM ENHANCEMENTS FOR SECOND DEGREE ASSAULT WITH A HANDGUN VIOLATED THE CONSTITUTIONAL PROHIBITIONS ON DOUBLE JEOPARDY.

The double jeopardy clause of the United States Constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. 5. 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’s constitution provides that no individual shall “be twice put in jeopardy for the same offense.” Wash. Const. art. 1, §9. This Court gives Article 1, Section 9 the same interpretation as the United

States Supreme Court gives to the Fifth Amendment. *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

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).

To determine if separate prosecutions violate double jeopardy prohibitions, the courts utilize the *Blockburger*, or “same elements” test. *United States v. Dixon*, 509 U.S. 688, 697, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993).

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. 306 (1932). Two offenses are the same offense for purposes of double jeopardy analysis when one offense is necessarily included within the other and, in the prosecution for the greater offense, the defendant could have been convicted of the lesser. *State v. Roybal*, 82 Wn.2d 577, 582,

512 P.2d 718 (1973). Thus, conviction or acquittal on a lesser included offense bars the government from prosecuting the defendant for the greater offense. *Green v. U.S.*, 355 U.S. 184, 190-91, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Likewise, 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. *State v. Freeman*, 153 Wn.2d 735, 770-71, 108 P.3d 753 (2005).

In *Apprendi* and *Blakely*, the Court clarified the long-standing requirement that any fact that increases the maximum punishment faced by a defendant must be submitted to a jury and proved beyond a reasonable doubt, even if the fact is labeled a “sentencing enhancement” by the legislature. *Blakely v. Washington*, 542 U.S. 296, 306-7, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). “Our decision in *Apprendi* makes clear that “[a]ny possible distinction” between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” *Blakely*, 542 U.S. at 306-7. Accordingly, the Supreme Court treats sentencing factors,

like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. *Blakely*, at 306-7.

The Supreme Court has also held that “aggravating factors” that may make a defendant eligible for an exceptional sentence or the death penalty “operate as the functional equivalent of an element of a greater offense.” *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), quoting *Apprendi*, 530 U.S. at 494 n. 19.

The aggravating factors that make a defendant eligible for the death penalty also operate as elements of a greater offense for purposes of double jeopardy. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111-12, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). In fact, in *Sattazahn*, Justice Scalia, writing for a plurality of the Court, found “no principled reason to distinguish” between what constitutes an offense for purposes of the Sixth Amendment right to a jury trial and what constitutes an offense for purposes of the Fifth Amendment’s Double Jeopardy Clause. 537 U.S. at 111. (“If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that “acquittal” on the offense of “murder plus aggravating circumstance(s).”

In *State v. Recuenco*, 154 Wn.2d 156, 162-3, 110 P.3d 188 (2005), the Washington Supreme Court held that facts to support a firearm

enhancement must be proved to the jury.¹ Like the aggravating factors in *Ring*, the additional finding increases the punishment faced by the defendant and so operates as the functional equivalent of an element of a greater offense.

Here, in count three, Kelley was convicted of second degree assault while armed with a deadly weapon, namely a handgun. CP 9-10, 79. By special verdict, the jury again found Kelley was “armed with a firearm” when he committed the assault. RP 894.

RCW 9.94A.533, the “Hard Time for Armed Crime” initiative, shows the voters’ intent to create exemptions for crimes where possessing or using a firearm is a necessary element of the crime, such as drive-by shooting or unlawful possession of a firearm. RCW 9.94A.510(3)(f). However, it appears that the voters were unaware of the similar problem of redundant punishment created when a firearm enhancement is added to a crime where the punishment has already been increased due to the necessary element of involvement of a firearm. There is no language showing the intent to punish crimes committed with a firearm again with a firearm enhancement. This is a change from prior law, where the

¹ 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).

legislative intent to attach two punishments was clear in the language itself. *See State v. Adlington-Kelly*, 95 Wn.2d 917, 924, 631 P.2d 954 (1981).

The “Hard Time for Armed Crime” initiative was passed long before *Apprendi* and *Blakely* reshaped the sentencing landscape. Thus, state law did not view additional findings triggering an increased sentence as implicating the rights to a jury trial, due process of law, or double jeopardy. *Cf., former RCW 9.94A.535.*

Because under *Blakely* and *Apprendi* factual findings that support sentencing enhancements constitute elements of a crime, they also constitute a new, greater offense for purposes of double jeopardy. There is “no principled reason to distinguish” between the statutory elements of the crime—which in this case included possession of a “deadly weapon”—and the statutory firearm enhancement—which again punishes for the same finding. *See Sattazahn*, 537 U.S. at 111-12 (“The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence not only delimits the boundaries of . . . important constitutional rights, like the Sixth Amendment right to trial by jury, but also provides the foundation for our entire double jeopardy jurisprudence.”)

Division I of this court has previously rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon is an element of the underlying offense. *See e.g. State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), 137 Wn. App. 1, 150 P.3d 643, 2007 Wn. App. LEXIS 102 (2006); *State v. Husted*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003). The state Supreme Court addressed this issue under the old firearm enhancement statute, which contained different language, and held there was no double jeopardy violation. *State v. Adlington-Kelly*, 95 Wn.2d 917, 631 P.2d 954 (1981). The state supreme court has not addressed the affect of *Blakely* and *Apprendi* on this question.

Kelley's assault charge was elevated to a higher degree by the element of being armed in committing the crime. RCW 9A.36.021(1)(c). Therefore, again elevating the crime for the same underlying act—use of a firearm—violates double jeopardy. This court should reverse and remand with the direction that the firearm enhancements be vacated. *See State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007).

F. CONCLUSION

The Supreme Court should accept review for the reasons indicated in Part E, reverse the court of appeals, reverse Kelley's firearm

enhancements added to his conviction for assault and remand for
resentencing.

DATED: September 3, 2008.

By: Rebecca W. Bouchey
Rebecca Wold Bouchey #26081
Attorney for Petitioner

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STATE OF WASHINGTON
BY _____
DEF BY _____

FILED
COURT OF APPEALS
DIVISION II

CERTIFICATE OF SERVICE

I certify that on the 3rd day of September 2008, I caused a true and correct copy of this Petition for Review to
be served on the following via prepaid first class mail:

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY

DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN ROSS KELLEY,

Appellant.

No. 35944-8-II

PART PUBLISHED OPINION

HUNT, J. — Dustin R. Kelley appeals his first degree murder, second degree unlawful firearm possession, and second degree assault jury convictions with firearm sentence enhancements. He argues that (1) his trial counsel was ineffective when he failed to present evidence of his mental illness at trial and failed to propose a diminished capacity jury instruction, and (2) the firearm sentence enhancement for his second degree assault conviction violates double jeopardy. We affirm.

FACTS

I. CRIMES

On February 22, 2006, at about 5:30 PM, Beau Pearson was visiting his friend Klaus Stearns in Stearns's mother's backyard trailer. Pearson had brought his friend Valerie Greenfield to "hang out" in the trailer with Stearns, and Stearns's friend, Kelly Kowalski. Stearns's mother,

Petra Scholl, paged him to talk about his day. Stearns left the trailer and went into his mother's house to speak with her.

While Stearns was gone, Dustin Kelley parked a blue Acura in the alley behind Scholl's house and trailer, went into the trailer, confronted Pearson, who was sitting on the bed with Greenfield, and asked Pearson if he had been shot before. Kelley then walked to the trailer door, turned around, drew out two guns, walked back to Pearson, and said, "I smoke you and your bitch, too." Report of Proceedings (Nov. 16, 2006) at 609.

Pearson turned to Greenfield, told her he was sorry, and pushed her out of the way. Kelley then shot Pearson at least eight times, left the trailer, and went through the property's back gate. Pearson's gunshot wounds were immediately fatal.

After hearing the gunshots and watching Kelley leave the trailer, Stearns saw Greenfield come out of the trailer with a "zombied out" look and walk past him without making eye contact. Kowalski also came out of the trailer acting "very upset." Stearns went into the trailer and found Pearson slumped forward on the bed. After checking to see if Pearson was alive, Stearns called 911.

Officers arrived at the scene, took statements from the witnesses, and collected evidence. In the blue Acura that Kelley had left parked in the alley, an officer found a magazine clip of .45 caliber rounds, which matched bullets found in the trailer and in Pearson's body.

II. PROCEDURE

The State charged Kelley with first degree murder, second degree unlawful firearm possession, and second degree assault. The State also alleged firearm sentence enhancements for the first degree murder and second degree assault charges.

A. Trial

At trial, Stearns, Scholl, Greenfield, Kowalski, law enforcement officers, a forensic scientist, and the county's medical examiner testified for the State. Detective Robert Yerbury testified that he had interviewed Kelley's girl friend, Molly Matlock, on the day of the murder. Matlock had told him that (1) Kelley's drug use was "[c]asual"; (2) Kelley appeared "pretty serious" the day of the murder; (3) Kelley did not appear under the influence of drugs on the day of the murder; and (4) on the day of the murder, Kelley had told Matlock that he was going to confront someone about his brother's missing stereo equipment.

Matlock testified for the defense that (1) Kelley had been using methamphetamine during the two weeks before the murder; (2) Kelley's behavior before the murder was "[n]othing out of the ordinary"; (3) Kelley sometimes carried a gun; and (4) Kelley was "pretty clear-headed."

Kelley proposed a voluntary intoxication jury instruction, but the trial court declined to give it because there had been no evidence that Kelley was intoxicated at the time of the shooting. Kelley's counsel did not propose a diminished capacity jury instruction.

The jury found Kelley guilty as charged and returned special verdicts finding that Kelley had committed premeditated first degree murder and second degree assault while armed with a deadly weapon.

B. Sentencing

The trial court sentenced Kelley to a standard range sentence of 524 months of confinement for his first degree murder conviction, 60 months for his unlawful firearm possession conviction, and 48 months for his second degree assault conviction, all to run concurrently. The trial court also imposed firearm sentence enhancements of 192 months to run

also imposed firearm sentence enhancements of 192 months to run consecutively to the sentences for Kelley's first degree murder and second degree assault convictions.

Kelley appeals.

ANALYSIS

I. FIREARM SENTENCE ENHANCEMENT

Kelley argues that (1) the firearm sentence enhancement on his second degree assault conviction violates double jeopardy; and (2) the United States Supreme Court's holding in *Blakely*¹ changes well-settled double jeopardy analysis in that *Blakely* characterizes the firearm sentence enhancement as an additional element of the underlying crime. Kelley concedes that Division I of our court² has rejected this double-jeopardy firearm-sentence-enhancement argument. Nevertheless, he argues that Division I did not correctly apply the law. We disagree.

Contrary to Kelley's argument, Division I correctly held that "[i]t is well settled that sentence enhancements for offenses committed with weapons do not violate double jeopardy even where the use of a weapon is an element of the crime." *State v. Nguyen*, 134 Wn. App. 863, 866, 142 P.3d 1117 (2006), *review denied*, ___ P.3d ___ (July 9, 2008). Nguyen argued that "the firearm enhancement 'acts like an element of a higher crime' and because the enhancement does not apply to certain crimes in which possession or use of a firearm is an element, the enhancement creates unintended, redundant punishment." 134 Wn. App. at 867. Nguyen's argument was identical to Kelley's argument.

¹ *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

² *State v. Nguyen*, 134 Wn. App. 863, 866, 142 P.3d 1117 (2006), *review denied*, ___ P.3d ___ (July 9, 2008).

In rejecting this argument, the *Nguyen* court noted that the legislature had provided exemptions from the firearm sentence enhancement for specific crimes and “[a]ny ‘redundancy’ in mandating enhanced sentences for other offenses involving use of a firearm is intentional.” 134 Wn. App. at 868. Division I also held that “*Blakely* does not implicate double jeopardy but rather involves the procedure required by the Sixth Amendment for finding the facts authorizing the sentence.” *Nguyen*, 134 Wn. App. at 868 (citing *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)). Adopting *Nguyen*, we hold that *Blakely* does not apply to Kelley’s double jeopardy argument, nor does it change well-settled double jeopardy analysis.

Following *Nguyen*, we hold that Kelley’s firearm sentence enhancement does not violate double jeopardy. Accordingly, we affirm his sentences.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Kelley also argues that his trial counsel was ineffective because he failed (1) to introduce evidence of Kelley’s mental illness at trial and (2) to propose a diminished capacity jury instruction. This argument fails.

A. Standard of Review

We review an ineffective assistance of counsel claim de novo. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). To prove ineffective assistance of counsel, a defendant must show deficient performance and prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743

P.2d 816 (1987). "If either part of the test is not satisfied, the inquiry need go no further." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). We give great judicial deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

B. Mental Illness Defense

Kelley first contends that his trial counsel should have presented evidence of his mental illness to the jury to show that he did not have the capacity to form the intent to murder Pearson. Kelley fails to show that his counsel's performance fell below an objective standard of reasonableness.

When a defense counsel knows,

or has reason to know of a capital defendant's medical and mental problems that are relevant to making an informed defense theory, defense counsel has a duty to conduct a reasonable investigation into the defendant's medical and mental health, have such problems fully assessed and, if necessary, retain qualified experts to testify accordingly.

In re Personal Restraint of Brett, 142 Wn.2d 868, 880, 16 P.3d 601 (2001). But Kelley does not point to evidence that his counsel knew or should have known, at the time of trial, that he had

potential mental illness. Thus, Kelley fails to meet his burden of showing that his counsel's performance was deficient.³

C. Diminished Capacity Jury Instruction

Kelley next contends that his trial counsel should have proposed a diminished capacity jury instruction. This argument also fails.

As we previously noted, Kelley cannot establish that his counsel knew or should have known that he had a mental illness at the time he committed the crimes. Where, as here, counsel did not know and could not have known that the defendant had a mental illness that affected his capacity to premeditate the murder, counsel's performance is not deficient for failing to propose a diminished capacity jury instruction.⁴ *Brett*, 142 Wn.2d at 868.

³ Moreover, the record shows only that correction facility doctors diagnosed Kelley with "[c]onduct [d]isorder" in 2002, when he was treated for his drug and alcohol addictions, and also for attention deficit hyperactivity disorder in 2003. Kelley's counsel did not receive this record until after trial.

Additionally, the record provides no further information about what type of conduct disorder Kelley had in 2002. There is *no* evidence in the record that Kelley suffered from a conduct disorder, attention deficit hyperactivity disorder, or any other type of mental illness in 2006, when he murdered Pearson. Nor is there evidence in the record that Kelley had a mental illness that would have actually affected his ability to premeditate a murder. Because the record does not establish that Kelley suffered from a mental illness in 2006 or that he had a mental illness that affected his ability to premeditate a murder, Kelley fails to show that his trial outcome would have differed. Thus, Kelley also fails to satisfy the second prong of the ineffective assistance of counsel test.

⁴ Furthermore, the record would not have supported giving such an instruction. To maintain a diminished capacity defense,

a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the specific intent to commit the crime charged.

State v. Ellis, 136 Wn.2d 498, 521, 963 P.2d 843 (1998). Kelley produced no such expert testimony. Thus, Kelley cannot establish that the trial outcome would have differed even if his counsel had proposed a diminished capacity jury instruction, because the trial court would have properly rejected the proposed instruction.

35944-8-II

We hold that Kelley has failed to show ineffective assistance of counsel.

We affirm.

Hunt, J.

Hunt, J.

We concur:

Van Deren, C.J.

Van Deren, C.J.

Penoyar, J.

Penoyar, J.