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SUPREME COURT OF THE STATE OF WASHINGTON

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NO. 36186-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DANIEL MARSHALL AGUIRRE,

Appellant/Petitioner.

PETITIONER'S
APPELLANT'S SUPPLEMENTAL BRIEF

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ORIGINAL

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I. INTRODUCTION

The Court of Appeals rejected Mr. Aguirre's double jeopardy challenge to his conviction of both assault with a deadly weapon and the deadly weapon enhancement. It relied on Division I's decision in *State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053, *cert. denied*, 129 S.Ct. 644 (2008), which reasoned that the logic of *Apprendi*,¹ *Blakely*,² and their progeny did not apply to Fifth Amendment Double Jeopardy Clause protections and did not apply to sentencing enhancements.

The appellate court erred on both points. The U.S. Supreme Court has already applied the reasoning of *Apprendi* to Fifth Amendment protections, and it has also applied the protections of *Apprendi*, *Ring*³ and *Blakely* to sentence enhancements. In fact, the enhancement at issue in *Blakely* itself was a sentencing enhancement under Washington's SRA. Further, the "enhancement" at issue here is not just a departure over a sentencing range based on judicial decisionmaking. The deadly weapon

¹ *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

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

³ *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

enhancement, RCW 9.94A.602, has always been provided to and decided by the jury in Washington, as required by the language of that statute, thus placing it even more clearly within the definition of “element” rather than “enhancement.” The appellate court’s decision that the Double Jeopardy Clause permits conviction of and consecutive punishment for two such jury-determined crimes with matching elements must therefore be reversed. Section II.

The Court of Appeals also rejected Mr. Aguirre’s contention that a supplemental instruction relieved the state of proving one of the elements of assault, that is, the element of unlawful force. That supplemental instruction told the jury that “unlawful force” was any unconsented touching that “otherwise” satisfied Instruction 12. But “unlawful force” does not mean any force used without consent; instead, the lawfulness of the force is determined by the intent of the defendant rather than the intent of the victim. Specifically, the force used is not unlawful – even if unconsented – unless it would be offensive to the average person, or intended to inflict bodily injury, or intended to inflict reasonable apprehension and imminent fear of bodily injury. Further, “otherwise” satisfying Instruction 12 does not mean satisfying Instruction 12’s teaching with regard to “unlawful force,” it means satisfying Instruction 12’s teachings on “other[]” things. By misdefining “unlawful force” and

referring the jury to Instruction 12 only for matters “otherwise” defined there, the supplemental instruction relieved the state of the burden of proving that Mr. Aguirre used “unlawful force” rather than just unconsented-to force. A Ninth Circuit case decided within the past month provides a persuasive framework for analyzing this, based on a very similar error. Section III.

II. THE APPELLATE COURT ERRED IN REJECTING THE DOUBLE JEOPARDY CHALLENGE ON THE GROUND THAT *BLAKELY* DOES NOT APPLY TO FIFTH AMENDMENT DOUBLE JEOPARDY CLAIMS OR TO “SENTENCE ENHANCEMENTS”

A. Mr. Aguirre’s Double Jeopardy Claim is Based on the Rule that the Deadly Weapon Sentence Enhancement, RCW 9.94A.602, Is the “Functional Equivalent” of An Element and a Crime

Mr. Aguirre was convicted of both second-degree assault with a deadly weapon and a deadly weapon enhancement, RCW 9.94A.602, for use of that same weapon. This Court is no doubt aware that Washington courts have consistently rejected double jeopardy challenges to convictions of both a substantive crime having use of a deadly weapon as an element plus the deadly weapon enhancement for the same weapon. Mr. Aguirre argued that those decisions must be reevaluated in light of *Apprendi*, *Blakely*, *Ring*, and *Recuenco*.⁴ In those cases, the courts ruled

⁴ *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), *rev’d on other*

that any fact that increases the maximum penalty that may be imposed upon a criminal defendant is akin to an element of the crime, and it must be proven to the jury beyond a reasonable doubt. Since the deadly weapon enhancement is the *functional equivalent of an element*, it is now clear that RCW 9.94A.602 – codifying that enhancement – increases the maximum sentence over the *Blakely* statutory maximum. Prior decisions holding that there is no double jeopardy problem because there is no duplication of elements between the underlying crime and the weapon enhancement must be reconsidered.

The Court of Appeals rejected this argument. It adopted the reasoning of *State v. Nguyen*, 134 Wn. App. 863, stating: “The *Nguyen* court 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.’” *Id.*, 134 Wn. App. at 868 (citing *Blakely*, 542 U.S. 296, 301). The Court of Appeals in *Aguirre*⁵ thus rejected the *Blakely* argument for three reasons: it followed *Nguyen*’s holding that *Blakely* was limited to Sixth Amendment issues and did not extend to Double Jeopardy Clause protections; it followed *Nguyen*’s holding that

grounds, 548 U.S. 212 (2006).

⁵ *State v. Aguirre*, 146 Wn. App. 1048, 2008 Wash. App. LEXIS 2202 (2008).

Double Jeopardy Clause protections applied to conviction issues but not sentencing enhancements; and it (at least implicitly) followed *Nguyen*'s holding that the legislature intended double punishments anyway.

B. *Blakely* Does Apply to Fifth Amendment, Double Jeopardy Claims

Apprendi and its progeny hold that aggravating factors or sentence enhancements must now be considered the “functional equivalent” of an element.⁶ The Court of Appeals decision in Mr. Aguirre’s case essentially holds that this “functional equivalent” language is limited in effect to Sixth Amendment claims, while we are raising a double jeopardy claim arising under a different constitutional protection.

The *Nguyen* and *Aguirre* appellate courts erred on this point. Actually, *Apprendi* itself was based on more than the Sixth Amendment. Its holding also encompassed the Fourteenth Amendment right to proof beyond a reasonable doubt. *Apprendi*, 530 U.S. 466, 476-77 (“At stake in this case are constitutional protections of surprising importance: the proscription of any deprivation of liberty without due process of law, Amdt. 14, and the ... [jury trial right], Amdt. 6.”). So the *Aguirre*

⁶ See *State v. Goodman*, 150 Wn.2d 774, 785-786, 83 P.3d 410 (2004) (citing with approval apportionments of *Apprendi* and *Ring v. Arizona*, 536 U.S. 584, 609, containing this “functional equivalent” language and analysis).

appellate court's first point – that these cases treat sentencing factors as the functional equivalent of elements only for Sixth Amendment purposes – is contradicted by the very language of *Apprendi*.

In fact, the decision in *Booker*⁷ – applying *Apprendi* to federal courts – rests upon yet another amendment, because it is the Fifth Amendment Due Process Clause, with its right to proof beyond a reasonable doubt, that is the only Due Process Clause binding the federal (as opposed to the state) courts. So, the appellate courts in both *Nguyen* and *Aguirre* erred in ruling that the “functional equivalent” language has nothing to do with the Fifth Amendment (the Amendment in which the Double Jeopardy Clause is located). Under *Booker*, it certainly does.

Booker also shows that it is not just the jury trial right or the right to proof beyond a reasonable doubt that the “functional equivalent” rule affects. It is even the right to be informed of all the charges. The *Booker* dissent, like the *Booker* majority, assumed that since the enhancing factor must now be considered akin to an element of the crime, this would now require such factors to be charged just as other elements are.⁸

⁷ *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

⁸ *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

Thus, following *Blakely*, *Apprendi*, *Booker* and *Recuenco*, the firearm enhancement statute is the functional equivalent of an element of the crime for not just Sixth Amendment purposes, but also for Fifth Amendment purposes. The Double Jeopardy Clause of the U.S. Constitution is located right there, in the Fifth Amendment.

C. Blakely Does Apply to Sentencing Enhancements

The *Aguirre* and incorporated *Nguyen* courts' next point is that double jeopardy protections apply only to elements, not to sentence enhancements. *Nguyen* contains citations to cases that rely on *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003), for this apparent rule; *Sattazahn* in turn followed *Monge v. California*, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) in holding that Double Jeopardy Clause protections did not apply to certain sentencing matters. *Nguyen* apparently reasons that *Blakely* protections apply to sentence enhancements since they are the functional equivalent of elements, but double jeopardy protections do not apply to sentence enhancements because those same enhancements are not the functional equivalent of elements.

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 ...’”).

These proposed rules are obviously contradictory. And the latter proposed rule – the one that the *Aguirre* appellate court had to rely on to reject Mr. Aguirre’s double jeopardy claim – finds no support in controlling precedent.

The U.S. Supreme Court has not conclusively answered whether double jeopardy clause protections apply to sentence enhancements of the sort presented here, which are the functional equivalent of elements. Three Justices, however, have indicated that the answer is yes, such element-enhancements are subject to Double Jeopardy Clause protections. In Part III of *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111-13, that Court expressed divergent views on the answer to that question, but did not ultimately resolve it. Justices Scalia, Rehnquist and Thomas recognized that the reasoning of *Apprendi* applies with equal force to the protections of the Double Jeopardy Clause:

We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment’s jury-trial guarantee and what constitutes an “offence” for purposes of the Fifth Amendment’s Double Jeopardy Clause. In the post-*Ring* world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment. 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).”

Sattazahn, 537 U.S. at 111-12 (citations omitted). Dissenting Justices argued that Double Jeopardy Clause protections should bar the death sentence at Sattazahn's retrial despite the hung jury at the first trial because the trial court had entered a default verdict of life at the first trial. *Id.*, 537 U.S. at 118-28. Hence, they did not comment on whether findings subject to the *Apprendi* rule are entitled to the same double jeopardy protections as are elements. Only Justices Kennedy and O'Connor explicitly rejected the reasoning of Part III.

Following *Sattazahn*, this Court has stated that "double jeopardy protections are inapplicable to sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an 'offense.'" *State v. Eggleston*, 164 Wn.2d 61, 70, 187 P.3d 233, *cert. denied*, 129 S.Ct. 735 (2008). This Court cited *Monge v. California*, 524 U.S. 721, 728, for this holding, explaining: "the [Supreme] Court has declined to extend this protection against retrial to noncapital sentencing aggravators, limiting the protection to death penalty determinations." *Id.*, 164 Wn.2d at 71. In *Monge*, a decision pre-dating *Apprendi* and *Ring*, the U.S. Supreme Court reasoned that any fact used to increase sentence was a sentencing factor, rather than an element of the crime, and hence only sentencing protections and not trial-like protections applied to such factors. *Id.* That decision, however, pre-dated *Apprendi*, *Ring* and

Blakely. Further, *Eggleston* cited *Monge* solely in the context of a *second* sentencing for a single crime in which a sentencing factor that was not one of the elements of the crime was at issue – just a sentencing matter, on which no jury had ever ruled.

In Mr. Aguirre's case, in contrast, the "sentence enhancement" factor is not just the functional equivalent of an element of the crime. It is an actual, separately described, statutorily defined, crime, that has always been submitted to the jury under RCW 9.94A.602, even pre-*Blakely*. The duplicative element of assault with a deadly weapon is the crime's element of use of a deadly weapon. Both the assault statute and the deadly weapon statute thus penalize use of what in Mr. Aguirre's case was exactly the same thing: use of the same "deadly weapon," a "combat knife," to perform the assault and to satisfy RCW 9.94A.602.

The *Eggleston* court's reasoning thus cannot apply here. Its statement about double jeopardy protections being inapplicable to sentencing factors was made in the context of a case in which the enhancements were exclusively sentencing factors that traditionally went to the judge rather than the jury. In Mr. Aguirre's case, in contrast, the deadly weapon enhancement is defined in its own statute, just like the crime of assault itself; the deadly weapon enhancement was submitted to the jury at the time of trial, just like the crime of assault itself and at the

same time as the assault itself; and the deadly weapon enhancement must be imposed at sentencing, just like punishment for the crime of assault itself, unlike the discretion vested in the judge about whether to impose the different sort of enhancements that allow a judge to exceed the Guidelines maximum under the SRA. In other words, the deadly weapon statutory enhancement is not the same sort of enhancement that was exempted from double jeopardy analysis by the *Eggleston* court.

It was more like the sort of separate crime sentence enhancement-element discussed almost two decades ago by the Eleventh Circuit in *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989), *cert. denied*, 496 U.S. 929 (1990). In *Delap*, the trial court found the evidence insufficient to support a felony murder theory at the defendant's first trial. Nevertheless, at the penalty phase of *Delap*'s second trial, the State relied on the aggravating factor that the murder was committed in the course of or in furtherance of a felony. *Delap*, 890 F.2d at 306-13. The Eleventh Circuit held that this violated Double Jeopardy Clause protections. The Court distinguished *Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 749, 90 L.Ed.2d 123 (1986), which, like *Monge*, refused to apply double jeopardy protections in a particular sentencing context, in part on the following basis:

[T]he concern of the *Poland* Court that capital sentencing

proceedings would be transformed into “minitrials” on each aggravating and mitigating factor, 476 U.S. at 156, 106 S.Ct. at 1755, simply is irrelevant to this case, *because the acquittal in question took place at the guilt/innocence phase of his first trial.*

Delap, 890 F.2d at 318-19 (emphasis added).

In Mr. Aguirre’s case – just as in *Delap*, and unlike in *Eggleston* – the aggravating sentencing factor of RCW 9.94A.602 was also determined by a jury in a guilt phase of the proceeding rather than as a separate sentencing matter, rather than by a judge, and rather than in a setting that gave the judge the discretion to ignore it. In that situation, the Eleventh Circuit recognized that the proceeding is trial-like rather than sentencing-like and, hence, double jeopardy protections must apply. The same reasoning should apply here.

D. The Double Jeopardy Inquiry Does Require Resort to Legislative Intent, But RCW 10.43.020 Shows An Intent to Bar Conviction of Greater and Lesser Offenses

The Double Jeopardy Clause forbids multiple punishments for “the same offence.” *See, e. g., North Carolina v. Pearce*, 395 U.S. 711, 717-718, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Washington Constitution article I, § 9, provides the same protection. Mr. Aguirre was convicted of assault with a deadly weapon and the deadly weapon enhancement; the state does not seem to dispute that under the legal test, the latter is a lesser included offense of the former. Typically, the legislature is deemed to

have intended to bar a conviction for a greater or lesser included offense. *See, e.g., Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). The question here is whether the legislature should be deemed to have that same intent in Mr. Aguirre's case.

The state no doubt takes the position that since both the assault statute, RCW 9A.36.021, and the deadly weapon enhancement statute, RCW 9.94A.602, are on the books, and neither one specifically mentions the other, the legislature must have intended that both apply at the same time. We acknowledge that this position finds some support in the fact that RCW 9.94A.533(4) specifies that the RCW 9.94A.602 enhancement applies to all offenses except those specifically listed in that section and second-degree assault is not there listed. *See Nguyen*, 134 Wn. App. at 868.

On the other hand, RCW 9.94A.602 does not mention RCW 9A.36.021 explicitly and that certainly does not help the state's argument, given the general rule against prosecution and punishment for both greater and lesser offenses. This leaves the intent of the legislature on this point less than clear.

There is one other statement of the legislature to consider, however. RCW 10.43.020, "Offense embraces lower degree and included

offenses,” provides: “When the defendant has been convicted or acquitted upon an indictment or information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, *or for any lower degree of that offense, or for an offense necessarily included therein.*” (Emphasis added.) This shows a legislative intent to bar conviction of and punishment for both greater and lesser offenses.

Given RCW 9.94A.602’s (and RCW 9.94A.533(4)’s) silence about its interplay with RCW 9A.36.021; given the general rule that lesser offenses merge with greater offenses; and given the more protective state statute barring conviction and punishment “for any lower degree of that offense, or for an offense necessarily included therein”; it follows that legislative intent about whether prosecution and punishment for second-degree assault with a deadly weapon and the deadly weapon enhancement is not that clear.

In fact, given the rule that “[a] statute is ambiguous if it is susceptible of two or more reasonable interpretations,” the deadly weapon enhancement statute is ambiguous on this point.⁹ The rule of lenity requires

⁹ *State v. Van Woerden*, 93 Wn. App. 110, 116, 967 P.2d 14 (1998), *review denied*, 137 Wn.2d 1039 (1998); *State v. Sunich*, 76 Wn. App. 202, 206, 884 P.2d 1 (1994); *State v. Garrison*, 46 Wn. App. 52, 54, 728 P.2d 1102 (1986).

this Court to resolve the ambiguity in favor of the criminal defendant.¹⁰

III. A RECENT NINTH CIRCUIT DECISION SUPPORTS THE ARGUMENT THAT THE TRIAL COURT'S SUPPLEMENTAL DEFINITION OF "UNLAWFUL FORCE" ESSENTIALLY WROTE THAT ELEMENT OUT OF THE INSTRUCTIONS

Mr. Aguirre was charged with two counts of assault in the second degree. Count I (of which he was acquitted) charged second-degree assault in violation of RCW 9A.36.021(1)(a). RCW 9A.36.021(1)(a) criminalizes assault where there is an intentional assault and reckless infliction of substantial bodily harm. CP:8. Count II charged second-degree assault on the same date under a different portion of that statute, RCW 9A.36.021(1)(c), which criminalizes "assault[ing] another with a deadly weapon." It characterized that weapon as, "to wit: a combat knife." *Id.*

The jury was given a single instruction defining assault to cover both counts. Instruction No. 12 listed the three common law definitions of assault, as follows:

¹⁰ *Ratzlaf v. United States*, 510 U.S. 135, 148, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); *United States v. Figueroa*, 165 F.3d 111, 119 (2d Cir. 1998); *State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996); *In re Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994); *Van Woerden*, 93 Wn. App. at 116 ("If there is no contrary legislative intent, we apply the rule of lenity, which resolves statutory ambiguities in favor of the criminal defendant.").

An assault is an intentional touching or striking of another person, *with unlawful force*, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, *with unlawful force*, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, *with unlawful force*, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

An act is not an assault, if it is done with the consent of the person alleged to be assaulted.

CP:86 (emphasis added). As the emphasis shows, each definition of assault includes the requirement that the jury find that the *actus reus* was done “with unlawful force.”

This “unlawful force” element was not just surplusage. It is a necessary element of each type of assault. As this Court is aware, the statutes criminalizing assault depend upon the common law for the definition of assault and the trial court’s Instruction No. 12 accurately picked up the three different types of assault recognized at common law – offensive-touching assault, battery-assault, and apprehension-assault –

plus the “with unlawful force” element of each. *See, e.g., State v. Stevens*, 158 Wn.2d 304, 308, 143 P.3d 817 (2006); *State v. Byrd*, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995).

It is axiomatic that the state must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). If the trial court instructs the jury in a way that would relieve the state of this burden, the error requires reversal. *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984); *State v. Roberts*, 88 Wn.2d 337, 340, 562 P.2d 1259 (1977).

Thus, the question presented here is whether the trial court’s answer to the jury’s question relieved the state of the burden of proving Mr. Aguirre’s use of “unlawful force.”

The jury was obviously concerned about whether the state had proven this element. It completely acquitted Mr. Aguirre of Count I, charged under RCW 9A.36.021(1)(a), the portion of the statute criminalizing intentional assault with reckless infliction of substantial bodily harm. It also submitted the note asking: “Define ‘unlawful force’ as used in Instruction #12.” CP:61. Instruction 12 was the definition of assault quoted above. “Unlawful force” was not defined anywhere else in the instructions.

The trial court answered: “Unlawful force as used in Instruction #12 refers to any force alleged to have occurred that was not consented to and that *otherwise* meets the definition of assault as contained in Instruction #12.” CP:61 (emphasis added). The appellate court reviewed the challenge to this instruction raised for the first time on appeal because of its “constitutional magnitude.” It ruled, however, that the instruction was correct, because even though it defined “unlawful force” as any amount of force at all, it also referred the jury back to Instruction No. 12 – the instruction that the jury had just asked about. *Aguirre*, 2008 Wash. App. LEXIS 2202 at **26-29 & n.6.

A very recent Ninth Circuit decision may offer a framework for analyzing this question. On August 19, 2009, that Court issued its decision in *United States v. Harrison*, ___ F.3d ___ (9th Cir. 2009), 2009 U.S. App. LEXIS 18600 (No. 08-10391). In *Harrison*, the defendant was convicted of two counts of assault, one by “forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with Officer Kirby,” in violation of 18 U.S.C. § 111(a). The Ninth Circuit noted that “force” is an element of the crime. It continued that “[t]he district court told the jury it could convict if ‘the defendant *intentionally used force* in assaulting, resisting, or intimidating’ Officer Kirby, and it clarified that ‘[t]here is use of force when one person intentionally physically ... intimidates ...

another.” *Id.*, 2009 U.S. App. LEXIS 18600 at *8 (emphasis added). The Ninth Circuit concluded that this was “plain error” requiring reversal despite the absence of an objection:

... While “a defendant may be convicted of violating section 111 if he ... uses any force whatsoever against a federal officer,” including a mere threat of force, ... the instruction here defined “force” out of the statute entirely by equating it with physical intimidation. As instructed, the jury could have convicted Harrison for no more than purposefully standing in a way that emphasized his size and strength.

Id. (citation omitted).

Thus, the Ninth Circuit ruled that the trial court instructed the jury in a manner that defined “force” out of the statute entirely by replacing it with physical intimidation.

This reasoning would require reversal in Mr. Aguirre’s case. In the *Harrison* case, “force” was an element; it was defined properly once; and it was defined improperly thereafter when an instruction equated force with physical intimidation. The Ninth Circuit reversed, even though there was one correct definition of force, because there was another incorrect definition of force thereafter that allowed conviction even if the defendant used physical intimidation.

In Mr. Aguirre’s case, the error was worse. Just as in *Harrison*, use of “unlawful force” (rather than force) was an element. However,

unlike in *Harrison*, “unlawful force” was never defined in the elements instruction; there was no proper definition of it to start with. Then there was an improper, or at least confusing, definition of it when the jury revealed that this was an important issue to them and that it was confusing; the trial court’s supplemental instruction defined “unlawful force” as “any force ... not consented to and that otherwise meets the definition of assault as contained in Instruction #12.” CP:61.

But “unlawful force” is not “any force ... not consented to.” In fact, a person cannot be convicted under RCW 9A.36.021 unless the force used was at least “harmful or offensive [to] an ordinary person who is not unduly sensitive” under definition one; “done with intent to inflict bodily injury” under definition two; and “done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury ...” CP:68. *See also State v. Byrd*, 125 Wn.2d 707, 712-3.

It is true that in addition to watering down the definition of force, the supplemental instruction also referred back to Instruction #12. But the reference back told the jury that “force” was any touching without consent and the jury should “otherwise” refer back to Instruction 12, even though Instruction 12 failed to define “unlawful force.” “Otherwise” means “in

other respects” or “under other circumstances.”¹¹ The watered-down definition of “unlawful force” combined with the general reference to “otherwise” relying on Instruction No. 12 thus eliminated from the jury’s consideration the fact that the key inquiry in deciding whether the force was lawful or unlawful was the defendant’s subjective mental state, rather than the alleged victim’s consent. It eliminated the subjective element from assault; gave an incorrect definition of “lawful force” under the WPIC’s; and provided an incorrect definition of “unlawful force” under *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) and *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), which emphasize the importance of the defendant’s subjective intent in deciding whether his force was lawful.

Thus, just as the jury in *Harrison* could have convicted if it believed that the defendant intimidated the officer without using actual force, the jury in *Aguirre* could have convicted if it believed that the defendant intimidated the complainant without using actual force. That is a possibility under the instruction, and it is a highly likely possibility under the facts presented – a credibility contest in which the jury rejected

¹¹ Definitions from dictionary.com, site last visited August 24, 2009: <http://dictionary.reference.com/browse/otherwise>.

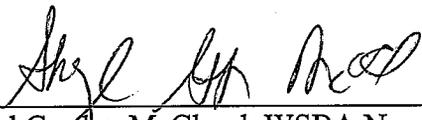
the complainant's version about Count I and hence acquitted Mr. Aguirre of using any force at all with regard to that count.

IV. CONCLUSION

For the foregoing reasons, the convictions should be reversed. Alternatively, the case should be remanded for resentencing.

DATED this 27th day of August, 2009.

Respectfully submitted,



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Attorney for Appellant and Petitioner,
Daniel Aguirre

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that on the 27th day of August, 2009, a copy of the APPELLANT'S SUPPLEMENTAL BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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