FILED
COURT OF APPEALS
DIVISION II

08 OCT 23 PM 12: 00

STATE OF WASHINGTON
BY _____
DEPUTY

No. 38124-9-II

82567-0

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:

SCHAWN JAMES CRUZE,

PETITIONER.

REPLY IN SUPPORT OF PERSONAL RESTRAINT PETITION

Jeffrey E. Ellis #17139
Attorney for Mr. Cruze

Law Offices of Ellis, Holmes
& Witchley, PLLC
705 Second Ave., Ste. 401
Seattle, WA 98104
(206) 262-0300 (ph)
(206) 262-0335 (fax)

A. INTRODUCTION

Schawn J. Cruze is serving a life sentence after his judge concluded that Cruze's conviction for possession of methamphetamine *with a firearm* constitutes a strike. In his PRP, Cruze argued that he was not a persistent offender because only a *deadly weapon* enhancement, not a firearm, elevates an otherwise non-specified felony to a most serious offense. In response, the State calls Cruze's claim "nonsense," but then fails to discuss any case other than *State v. Taylor,* 97 Wn. App. 123, 982 P.2d 867 (1999), a case of marginal relevance which is easily distinguished.

Factually speaking, most firearms are deadly weapons. However, legally speaking, a prosecutor cannot charge and convict based on one enhancement and later switch to the other. The two enhancements involve factual overlap, but they are legally separate. A sentencing enhancement is an element of an offense that must be included and specified in a charging document. In *State v. Recuenco,* 163 Wn.2d 428, 180 P.3d 1276 (2008), the Washington Supreme Court held that the State cannot charge and convict a defendant with a deadly weapon enhancement and later seek to legally treat the conviction as including a firearm enhancement. The opposite is equally true. The State cannot convict a defendant of a firearm enhancement and later seek to treat that conviction as involving a deadly weapon enhancement.

B. ARGUMENT

1. INTRODUCTION

It is now undisputed that Cruze was convicted of VUCSA with a firearm enhancement. *See Response,* p. 1, 2. The question then is whether a firearm enhancement is always included within the deadly weapon enhancement which makes certain otherwise unspecified felony crimes "most serious offenses."

2. FIREARM ENHANCEMENTS ARE DISTINCT AND SEPARATE FROM DEADLY WEAPON ENHANCEMENTS

At the time the Three Strikes law was passed the definition of a "most serious offense" included any felony with a "deadly weapon verdict under RCW 9.94A.125." *See* former RCW 9.94A.030(21)(t). At that time, it was overwhelming clear that "deadly weapon" and "firearm enhancement" were not part of one whole for the simple reason that a firearm enhancement *did not exist*.

"Hard Time for Armed Crime" sought to differentiate between crimes committed with a firearm and those committed with some other deadly weapon. The Hard Time Act "'split the previous deadly weapon enhancement into *separate enhancements* for firearms and for other deadly weapons.'" *State v. Brown,* 139 Wash.2d 20, 25, 983 P.2d 608 (1999) (emphasis added).

However, for a time state appellate courts permitted a judge to make a factual finding supporting a firearm enhancement—even when not charged. *See, e.g., State v. Meggyesy,* 90 Wash.App. 693, 958 P.2d 319, *review denied,* 136 Wash.2d 1028, 972 P.2d 465 (1998); *State v. Rai,* 97 Wash.App. 307, 983 P.2d 712 (1999); *State v. Olney,* 97 Wash.App. 913, 987 P.2d 662 (1999).

In *State v. Recuenco,* 163 Wn.2d 428, 442, 180 P.3d 1276 (2008), the Washington Supreme Court overruled those cases and held:

> Recuenco was charged with assault with a deadly weapon enhancement, and he was convicted of assault with a deadly weapon enhancement, but he was erroneously sentenced with a firearm enhancement. We conclude it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury. In this situation, harmless error analysis does not apply. Therefore, we vacate the firearm sentence and remand for correction of the sentence.

Recuenco makes no sense if there is no legal distinction between a firearm and deadly weapon enhancement—especially considering that there was no factual dispute (Recuenco used a firearm during the crime).

Likewise, in *State v. DeSantiago,* 149 Wn.2d 402, 68 P.3d 1065 (2003), the Supreme Court approved the imposition of both a firearm and a deadly weapon enhancement for one crime noting that the Hard Time initiative "split" the deadly weapon sentence enhancement into "separate enhancements" for firearms and for other deadly weapons. The State's

argument in response that a firearm can merge into a deadly weapon enhancement merge ignores the *express separation* of these enhancements.

The State rests its entire argument on *State v. Taylor,* 97 Wn. App. 123, 982 P.2d 867 (1999), which it argues holds that a firearm is a "deadly weapon *per se,*" apparently both factually and legally speaking. The State's reliance on *Taylor* for any proposition here, much less as the legal linchpin of its case, is dubious at best.

Taylor does not involve a "sentencing enhancement." Instead, *Taylor* involves a second-degree assault where a "deadly weapon" was an essential element of the charge. More precisely, the question posed in *Taylor* was whether there was sufficient evidence to establish that a BB gun was a deadly weapon, as defined in the assault statute. While the court answered that fact-bound question affirmatively, the case says nothing about the relationship between the two "enhancements" at issue in this case.

Cruze does not dispute that the use of a firearm during a crime can support a deadly weapon enhancement—if that is what the State has charged. Obviously, in most cases the State will choose to charge a firearm enhancement, rather than a deadly weapon (if the facts support it), because of the increased sentence that follows. However, due to the patch-work nature of the SRA, there are several instances (in addition to the "most serious offense" elevation discussed herein) where a deadly weapon enhancement results in increased punishment not provided for by the

firearm counterpart. For example, certain drug offense levels are increased based on a deadly weapon, but not a firearm, enhancement. *See* RCW 9.94A.518 ("Any felony offense under chapter 69.50 RCW with a deadly weapon special verdict under RCW 9.94A.602."). Interestingly (and perhaps ironically), the definition of "serious offense," an element of VUFA in the First Degree includes a conviction for otherwise unspecified felonies with deadly weapon enhancements. *See* RCW 9.41.010 (12); 9.41.040 (1). Thus, there are times when the State may prefer to charge a deadly weapon enhancement (or both) even where the defendant uses a firearm during a crime.

Here, the State charged and convicted Cruze of a VUCSA with a firearm enhancement. The State cannot now transform that conviction into a VUCSA with a deadly weapon enhancement.

3. THIS PETITION IS TIMELY.

The State does not respond to Cruze's various arguments regarding the time bar, other than to argue that Cruze's sentence was proper and therefore, no exception applies. Cruze concedes that, if his sentence is proper, no exception to the time bar applies. However, if Cruze's life sentence is improper as he contends, then several exceptions (facial invalidity, sentence in excess of jurisdiction, and actual innocence/equitable tolling) apply. Thus, if Cruze is correct on the merits, his petition is timely.

4. THE SUCCESSOR RULE MANDATES TRANSFER OF THIS PRP TO THE SUPREME COURT

In its response, the State noted that Cruze previously filed a PRP attacking this judgment (previously unbeknownst to counsel)—a PRP dismissed without reaching the merits as time barred. As a result, under *In re Restraint of Perkins,* 143 Wn.2d 261, 19 P.3d 1027 (2001), and RCW 2.06.030, this Court should transfer this petition to the Washington Supreme Court. However, once transferred, there is no procedural bar to granting relief on this petition.

Because Cruze's first PRP was not decided on the merits, it is not a petition for similar relief barred by RAP 16.4 (d). *See In re Personal Restraint Petition of Cook,* 114 Wn.2d 802, 806-07, 792 P.2d 506 (1990).

Finally, the abuse of the writ doctrine applies only if the petitioner was represented by counsel throughout post-conviction proceedings. *In re Personal Restraint Petition of Jeffries,* 114 Wash.2d 485, 492, 789 P.2d 731 (1990).[1] Here, Cruze was *pro se*.

---

[1] Although not applicable, Cruze can navigate around the abuse of writ barrier. The abuse of the writ doctrine, borrowed from federal habeas law, states that if the petitioner was represented by counsel throughout post-conviction proceedings, it is an abuse of the writ for him to raise, in a successive petition, a new issue that was "available but not relied upon in a prior petition." *Kuhlmann v. Wilson,* 477 U.S. 436, 444 n. 6, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986)). The doctrine does not, however, apply if the claim is based upon intervening case law. *Id.* at 492-93. Here, *Recuenco* represents intervening caselaw which makes this issue available now, but not at the time of Cruze's first PRP.

Further, a post-conviction petitioner's claim that would otherwise be barred under abuse of writ doctrine can still be considered on the merits if the petitioner's actual innocence claim implicates a fundamental miscarriage of justice. *Carriger v. Stewart,* 132 F.3d 463, 477 (9th Cir.1997). The actual innocence exception was extended to claims of capital sentencing error in *Sawyer v. Whitley,* 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Acknowledging that the concept of "actual innocence" did not translate neatly into the capital sentencing context, the Supreme Court limited the exception to cases in which the applicant could show "by clear and convincing

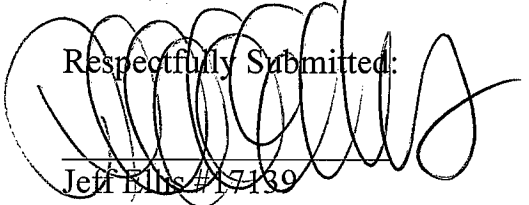
Thus, once this case is transferred to the Washington Supreme Court, there are no procedural barriers to relief. Schwan Cruze is not a persistent offender because his 1996 conviction for VUCSA with a firearm is not a strike.

C. CONCLUSION AND PRAYER FOR RELIEF

This Court should transfer this case to the Supreme Court. That Court should vacate Cruze's persistent offender finding and remand this case for re-sentencing.

DATED this 21st day of October, 2008.

Respectfully Submitted:



Jeff Ellis #17139
Attorney for Mr. Cruze
Law Offices of Ellis, Holmes
& Witchley, PLLC
705 Second Ave., Ste. 401
Seattle, WA 98104
(206) 262-0300 (ph)
(206) 262-0335 (fax)

---

evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Id.,* at 336. The exception has been further extended to error resulting in the imposition of an unauthorized sentence (*Wainwright v. Sykes,* 433 U.S. 72, 91, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)), especially where that sentence is increased as a result of an improper recidivist finding. *See Spence v. Superintendent,* 219 F.3d 162, 170-71 (2d Cir. 2000) (actual innocence exception applies in non-capital context. Exception depends not on the nature of the penalty, but on whether the error undermined the accuracy of the guilt or sentencing determination); *United States v. Mikalajunas,* 186 F.3d 490 (4th Cir. 1999) (Actual innocence exception applies to noncapital, habitual offender sentencings).

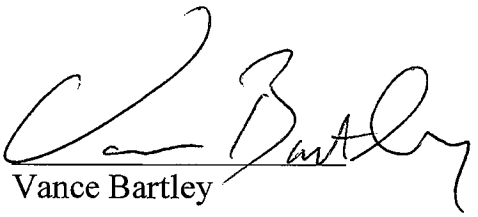
While Washington state courts have not fully discussed the "actual innocence" exception, it has long recognized that the incorrect calculations involving prior convictions involve a miscarriage of justice. "Moreover, a sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *In re Restraint of Johnson,* 131 Wn.2d 558, 569, 933 P.2d 1019 (1997).

CERTIFICATE OF SERVICE

I, Vance Bartley, certify that on October 21, 2008, I served the party listed below with a copy of the attached *Reply Brief* by mailing a copy, postage pre-paid, to:

Michael C. Kinnie
Sr. Deputy Prosecuting Attorney
Clark County Prosecuting Attorney
1013 Franklin St.
P.O. Box 5000
Vancouver, WA 98666-5000

10-21-08 Sea, WA
Date and Place


Vance Bartley

FILED
COURT OF APPEALS
DIVISION II
08 OCT 23 PM 12:01
STATE OF WASHINGTON
BY _____
DEPUTY