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Court of Appeals of Washington,  
 Division 2.  
 In the Matter of the PERSONAL RESTRAINT OF  
 Christopher DELGADO, Petitioner.  
 In the Matter of the Personal Restraint of **Ernesto  
 Meza**, Petitioner.  
**No. 35455-1-II.**

March 10, 2009.

**Background:** After convictions and sentences imposed by the Thurston Superior Court, [Daniel J. Berschauer](#), J., were affirmed on direct appeal, petitioners sought relief from personal restraint.

**Holding:** The Court of Appeals, [Quinn-Brintnall](#), J., held that special verdict finding that petitioners were “armed with a firearm,” which did not match special verdict instructions that defined only “deadly weapon,” did not support firearm enhancement.

Petition granted in part and denied in part.

West Headnotes

**[1] Habeas Corpus 197 ↪447**

[197](#) Habeas Corpus  
[197II](#) Grounds for Relief; Illegality of Restraint  
[197II\(A\)](#) Ground and Nature of Restraint  
[197k447](#) k. Deprivation of Fundamental or Constitutional Rights; Miscarriage of Justice. [Most Cited Cases](#)

**Habeas Corpus 197 ↪764**

[197](#) Habeas Corpus  
[197III](#) Jurisdiction, Proceedings, and Relief  
[197III\(C\)](#) Proceedings  
[197III\(C\)4](#) Conclusiveness of Prior Determinations  
[197k764](#) k. Matters Determined on Appeal. [Most Cited Cases](#)  
 A personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal un-

less the interests of justice require relitigation of that issue; petitioner may raise new issues, however, including both errors of constitutional magnitude and nonconstitutional errors.

**[2] Habeas Corpus 197 ↪442**

[197](#) Habeas Corpus  
[197II](#) Grounds for Relief; Illegality of Restraint  
[197II\(A\)](#) Ground and Nature of Restraint  
[197k442](#) k. Errors or Irregularities; Prejudice. [Most Cited Cases](#)

**Habeas Corpus 197 ↪447**

[197](#) Habeas Corpus  
[197II](#) Grounds for Relief; Illegality of Restraint  
[197II\(A\)](#) Ground and Nature of Restraint  
[197k447](#) k. Deprivation of Fundamental or Constitutional Rights; Miscarriage of Justice. [Most Cited Cases](#)  
 To obtain relief with respect to either constitutional or nonconstitutional claims, personal restraint petitioner must show that the error caused prejudice.

**[3] Habeas Corpus 197 ↪447**

[197](#) Habeas Corpus  
[197II](#) Grounds for Relief; Illegality of Restraint  
[197II\(A\)](#) Ground and Nature of Restraint  
[197k447](#) k. Deprivation of Fundamental or Constitutional Rights; Miscarriage of Justice. [Most Cited Cases](#)  
 To prevail on a claim of constitutional error, personal restraint petitioner must demonstrate actual and substantial prejudice.

**[4] Habeas Corpus 197 ↪447**

[197](#) Habeas Corpus  
[197II](#) Grounds for Relief; Illegality of Restraint  
[197II\(A\)](#) Ground and Nature of Restraint  
[197k447](#) k. Deprivation of Fundamental or Constitutional Rights; Miscarriage of Justice. [Most Cited Cases](#)  
 To prevail on a nonconstitutional claim, personal restraint petitioner must show a fundamental defect

which inherently results in a complete miscarriage of justice.

**[5] Habeas Corpus 197 ↪714**

**197 Habeas Corpus**

**197III** Jurisdiction, Proceedings, and Relief

**197III(C)** Proceedings

**197III(C)2** Evidence

**197k714** k. Weight and Sufficiency in

General. **Most Cited Cases**

Regardless of whether he bases his challenges on constitutional or nonconstitutional error, personal restraint petitioner must support his petition with facts or evidence supporting his claims of unlawful restraint and not rely solely on conclusory allegations.

**[6] Jury 230 ↪34(6)**

**230 Jury**

**230II** Right to Trial by Jury

**230k30** Denial or Infringement of Right

**230k34** Restriction or Invasion of Functions of Jury

**230k34(5)** Sentencing Matters

**230k34(6)** k. In General. **Most Cited**

**Cases**

**Sentencing and Punishment 350H ↪973.5**

**350H** Sentencing and Punishment

**350HIV** Sentencing Guidelines

**350HIV(H)** Proceedings

**350HIV(H)2** Evidence

**350Hk973** Degree of Proof

**350Hk973.5** k. Factors Enhancing

Sentence. **Most Cited Cases**

Any fact, besides the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

**[7] Sentencing and Punishment 350H ↪726(2)**

**350H** Sentencing and Punishment

**350HIV** Sentencing Guidelines

**350HIV(B)** Offense Levels

**350HIV(B)3** Factors Applicable to Several Offenses

**350Hk726** Dangerous Weapons or Destructive Devices

**350Hk726(2)** k. What Constitutes a Weapon. **Most Cited Cases**

Jury's finding in special verdict form that defendants were "armed with a firearm" did not support imposition of firearm sentence enhancement, where jury was instructed that it must find the defendants were armed with a "deadly weapon" in order to return the special verdicts, and the jury was not instructed on the definition of "firearm" for sentencing enhancement purposes, although "deadly weapon" was defined. **West's RCWA 9.94A.510, 9.94A.602.**

**[8] Habeas Corpus 197 ↪510(1)**

**197 Habeas Corpus**

**197II** Grounds for Relief; Illegality of Restraint

**197II(B)** Particular Defects and Authority for Detention in General

**197k503** Judgment, Sentence, or Order

**197k510** Computation

**197k510(1)** k. In General; Completion of Term. **Most Cited Cases**

Personal restraint petitioners who received firearm enhancement that was not supported by the jury's verdict suffered actual prejudice in that they received higher sentences than were authorized, and thus petitioners were entitled to relief.

**[9] Jury 230 ↪34(6)**

**230 Jury**

**230II** Right to Trial by Jury

**230k30** Denial or Infringement of Right

**230k34** Restriction or Invasion of Functions of Jury

**230k34(5)** Sentencing Matters

**230k34(6)** k. In General. **Most Cited**

**Cases**

A judge, rather than a jury, may find that criminal conduct for two crimes is "separate and distinct," for purposes of determining whether sentences for the two crimes should run consecutively. **West's RCWA 9.94A.589(1).**

**[10] Sentencing and Punishment 350H ↪605**

**350H** Sentencing and Punishment

**350HIII** Sentence on Conviction of Different

Charges

[350HIII\(B\)](#) Consecutive or Cumulative Sentences

[350HIII\(B\)3](#) Factors and Purposes  
[350Hk603](#) Offenses Committed in One Transaction, Episode, or Course of Conduct

[350Hk605](#) k. Separate Acts. [Most Cited Cases](#)

If the sentencing court finds that two or more crimes are not the “same criminal conduct,” then it has necessarily found that those crimes are “separate and distinct criminal conduct,” warranting consecutive sentences. [West’s RCWA 9.94A.589\(1\)](#).

**\*\*937** [Suzanne Lee Elliott](#), Attorney at Law, Seattle, WA, for Petitioners.

[Carol L. La Verne](#), Thurston County Prosecutor’s Office, Olympia, WA, for Respondent.

[QUINN-BRINTNALL](#), J.

**\*227** ¶ 1 Christopher Delgado and **Ernesto Meza** seek relief from personal restraint imposed after the State charged deadly weapon sentencing enhancements and the jury entered deadly weapon special findings, but the sentencing court imposed firearm enhancements. A panel of judges reviewed the petitions in order to consider the implications of our Supreme Court’s recent decision in [State v. Recuenco](#), [163 Wash.2d 428](#), [180 P.3d 1276](#) (2008) ([Recuenco III](#)).

¶ 2 In [Recuenco III](#), our Supreme Court held that the State cannot elect to charge a deadly weapon sentence enhancement and send deadly weapon jury instructions and special verdicts to the jury and then, at sentencing, request firearm enhancements. [163 Wash.2d 428](#), [180 P.3d 1276](#). Imposition of firearm enhancements in such a situation is never harmless error, the court held, because the defendant was not notified that he had to defend against a firearm enhancement and because the jury’s deadly weapon verdict did not authorize the firearm enhancement. [Recuenco III](#), [163 Wash.2d at 442](#), [180 P.3d 1276](#).

¶ 3 [Recuenco III](#) controls our decision here. When Delgado and Meza committed the offenses, former [RCW 9.94A.510\(3\)](#) (2000) governed firearm enhancements and former [RCW 9.94A.510\(4\)](#) and [RCW 9.94A.602](#) governed deadly weapon enhancements. The State charged that Delgado and Meza

committed their crimes “while armed with a deadly weapon” and it did not specify that the petitioners must defend themselves under the firearm enhancement provision, former [RCW 9.94A.510\(3\)](#). The jury was instructed only on the deadly weapon enhancement. Several special verdict forms state that Delgado and Meza had committed the crimes while armed with a “firearm,” but these special verdicts actually reflected the jury’s deadly weapon findings. On this basis, the sentencing court lacked authority to enter firearm enhancements.

¶ 4 The facts here are nearly identical to [Recuenco III](#) and, accordingly, we must apply the same remedy. We vacate the firearm enhancements and remand for entry of **\*228** corrected judgments and sentence imposing deadly weapon enhancements in lieu of the firearm enhancements.<sup>[FN1](#)</sup> *Accord* [State v. Bainard](#), [148 Wash.App. 93](#), [199 P.3d 460](#) (2009).

<sup>[FN1](#)</sup> Delgado was sentenced to two 60-month firearm enhancements, which should be replaced with two 24-month deadly weapon enhancements. *See* former [RCW 9.94A.510\(4\)\(a\)](#). Meza was sentenced to two 60-month firearm enhancements and two 36-month firearm enhancements; the resentencing court should substitute these with two 24-month deadly weapon enhancements and two 12-month deadly weapon enhancements. *See* former [9.94A.510\(4\)\(a\)-\(b\)](#).

FACTS

¶ 5 Ryan Waslawski had been selling drugs for Meza but decided to stop.<sup>[FN2](#)</sup> Waslawski and Meza arranged to meet for lunch. On January 9, 2003, Waslawski got into Meza’s truck. Delgado and William Kravis were **\*\*938** already sitting inside. Meza confronted Waslawski about why he stopped selling drugs for him, loaded a semi-automatic handgun, and drove down a gravel road. Delgado pointed out that an old man was crossing the road and might see them, so Meza drove to a vacant lot. Meza ordered everyone to get out of the truck and then shot Waslawski. Meza allowed Waslawski back in the car on the condition that he tell others that he was the victim of a drive-by shooting. Meza dropped Waslawski off at a service station where he called for help. At Harborview Hospital, doctors treated Waslawski for a [punctured lung](#), damage to his aorta, and nerve damage. Kravis later

cooperated with police and revealed that Meza had threatened to kill him and his family if he told police what had happened.

[FN2](#). Unless otherwise indicated, the facts are taken from the order affirming judgment and sentence for Delgado and Meza's direct appeal. Ruling Affirming Judgments and Sentences, Consol. Cause Nos. 30662-0-II and 31710-3-II, filed Dec. 3, 2004 ("Ruling").

¶ 6 The State charged Meza by third amended information with first degree attempted murder or, in the alternative, first degree assault (count I), first degree kidnapping (count II), and two counts of intimidating a witness (counts III, Waslawski, and IV, Kravis). The State also charged Delgado by second amended information with first degree \*229 attempted murder or, in the alternative, first degree assault (count I) and first degree kidnapping (count II).[FN3](#) For each of Meza's and Delgado's charges, the State alleged that the defendant or an accomplice committed the crime while "armed with a deadly weapon, to-wit: a firearm." Resp. to Pet., App. C, D.

[FN3](#). The State also charged Delgado with first degree rendering criminal assistance while armed with a deadly weapon-firearm (count III), but the jury acquitted on that charge.

¶ 7 The sentence enhancement portions of the informations cited [RCW 9.94A.602](#), which provided that a jury must enter a special verdict regarding the use of a *deadly weapon*. The informations also cited former [RCW 9.94A.510](#), which set forth both firearm and deadly weapon sentence enhancements. But the informations did not specify that the State was charging Meza and Delgado under former [RCW 9.94A.510\(3\)](#), the section relating to firearm enhancements, rather than, or in addition to, former [RCW 9.94A.510\(4\)](#), the section relating to deadly weapon sentence enhancements.

¶ 8 Meza and Delgado were tried together as co-defendants. The trial court instructed the jury:

Instruction No. 32

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of each of the crimes charged in this case.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.

Instruction No. 33

The term "deadly weapon" includes a firearm, whether loaded or not.  
Resp. to Pet., App. E. The trial court did not instruct the jury on the definition of "firearm."

\*230 ¶ 9 The jury found Meza guilty of attempted first degree murder (count I), first degree kidnapping (count II), and two counts of witness intimidation (counts III and IV). The jury also found Delgado guilty of first degree assault (the alternative in count I) and first degree kidnapping (count II).

¶ 10 In addition, the jury entered special verdicts. It specially found that Meza or another participant was "armed with a firearm" when he committed attempted first degree murder and first degree kidnapping, was "armed with a deadly weapon" when he committed witness intimidation as charged in count III, and was "armed with a firearm" when he committed witness intimidation as charged in count IV. The jury also entered special verdicts that Delgado or another participant was "armed with a firearm" when he committed each crime for which he was convicted, first degree assault and first degree kidnapping. The differing language of "armed with a firearm" and "armed with a \*\*939 deadly weapon" was preprinted on the special verdict forms. On Meza's and Delgado's judgments and sentences, the sentencing court entered firearm sentence enhancements for each count.

¶ 11 Meza and Delgado filed direct appeals with this court, which we consolidated and resolved through a ruling affirming judgment and sentence.[FN4](#) We is-

sued a mandate on September 19, 2005. Meza and Delgado filed timely PRPs on August 30, 2006, accompanied by briefs (written by private counsel) that are identical, other than the petitioner's name. We consolidated the petitions, stayed them pending our Supreme Court's decision in [Recuenco III](#), and ordered additional briefing on [Recuenco III's](#) effect on the petitions.

[FN4](#). In their direct appeals, both argued that the “firearm enhancement jury instructions were deficient.” Ruling at 1-2. Their arguments were limited, however, to the proposition that the jury instructions failed to require the jury to find that a nexus existed between the defendant, the crimes, and the weapon. We affirmed on this ground because uncontroverted evidence adduced at trial established the nexus and, therefore, any error was harmless. We rejected all other grounds raised.

#### \*231 ANALYSIS

##### PRP Standards

[\[1\]](#) ¶ 12 As a threshold matter, we note that a personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue. [In re Pers. Restraint of Taylor](#), 105 Wash.2d 683, 688, 717 P.2d 755 (1986). The petitioner may raise new issues, however, including both errors of constitutional magnitude and nonconstitutional errors. [In re Pers. Restraint of Cook](#), 114 Wash.2d 802, 812, 792 P.2d 506 (1990); [In re Pers. Restraint of Hews](#), 99 Wash.2d 80, 87, 660 P.2d 263 (1983).

[\[2\]\[3\]\[4\]\[5\]](#) ¶ 13 To obtain relief with respect to either constitutional or nonconstitutional claims, the petitioner must show that the error caused prejudice. [In re Pers. Restraint of St. Pierre](#), 118 Wash.2d 321, 328-29, 823 P.2d 492 (1992); [In re Cook](#), 114 Wash.2d at 810, 812, 792 P.2d 506. To prevail on a claim of constitutional error, the petitioner must also demonstrate actual and substantial prejudice. [In re Pers. Restraint of Mercer](#), 108 Wash.2d 714, 721, 741 P.2d 559 (1987). And to prevail on a nonconstitutional claim, the petitioner must show “a fundamental defect which inherently results in a complete miscarriage of justice.” [In re Cook](#), 114 Wash.2d at

[812](#), [792 P.2d 506](#). Regardless of whether he bases his challenges on constitutional or nonconstitutional error, he must support his petition with facts or evidence supporting his claims of unlawful restraint and not rely solely on conclusory allegations. [In re Cook](#), 114 Wash.2d at 813-14, 792 P.2d 506.

##### Recuenco III

¶ 14 The matters before us involve intense examination of [Recuenco III](#) in its contextual background. Accordingly, we begin with overview of that case.

[\[6\]](#) ¶ 15 Any fact, besides the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved \*232 beyond a reasonable doubt. [Apprendi v. New Jersey](#), 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In [Blakely v. Washington](#), 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the United States Supreme Court clarified its holding in [Apprendi](#), stating that “the ‘statutory maximum’ for [Apprendi](#) purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*”

¶ 16 In [State v. Recuenco](#), 154 Wash.2d 156, 160, 162-63, 110 P.3d 188 (2005), *rev'd on other grounds*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), our Supreme Court held that it was a [Blakely](#) violation for the sentencing court to enter a firearm enhancement upon the jury's return of a deadly weapon special verdict. The State had charged Arturo Recuenco with second degree assault while “armed with a deadly weapon, to-wit: a handgun, under the authority of [RCW 9.94A.125](#) and [9.94A.310](#).” [Recuenco](#), 154 Wash.2d at 159, 110 P.3d 188. Defense \*\*940 counsel and the prosecutor proposed identical special verdict forms instructing the jury that in order to answer the special verdict affirmatively, the State had to prove beyond a reasonable doubt that the defendant was armed with a “deadly weapon” when he committed assault. [Recuenco](#), 154 Wash.2d at 159, 110 P.3d 188. The jury found that Recuenco was armed with a deadly weapon, but the trial court imposed a firearm sentencing enhancement. [Recuenco](#), 154 Wash.2d at 159, 110 P.3d 188. It was undisputed that the only deadly weapon that Recuenco allegedly used in the assault was a gun. [Recuenco](#), 154 Wash.2d at 158-59, 110 P.3d 188.

¶ 17 Our Supreme Court held that the trial court violated Recuenco's right to a jury trial because the judge, not the jury, found the fact that Recuenco was armed with a firearm. [Recuenco](#), 154 Wash.2d at 162, 110 P.3d 188. The court also held that such errors regarding the right to jury findings could never be harmless. [Recuenco](#), 154 Wash.2d at 164, 110 P.3d 188.

¶ 18 The United States Supreme Court reviewed [Recuenco](#) and held that *Blakely* errors may be harmless. [Washington v. Recuenco](#), 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) ([Recuenco II](#)). The Court remanded back to the Washington \*233 Supreme Court to review the matter in light of its decision. [Recuenco II](#), 548 U.S. at 222, 126 S.Ct. 2546.

¶ 19 On remand, our Supreme Court took a markedly different legal approach than it did in [Recuenco](#). [Recuenco III](#), 163 Wash.2d at 431, 442, 180 P.3d 1276. The court acknowledged that it had previously treated the issue as “an error of judicial fact finding.” [Recuenco III](#), 163 Wash.2d at 441, 180 P.3d 1276. Upon close reexamination, however, the court re-focused its analysis:

The error in this case occurred when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. The trial court simply exceeded its authority in imposing a sentence not authorized by the charges.

[Recuenco III](#), 163 Wash.2d at 442, 180 P.3d 1276.

¶ 20 The [Recuenco III](#) court relied on several legal theories to support its holding. First, it discussed the enhancement as the State's pragmatic charging decision. [Recuenco III](#), 163 Wash.2d at 433-35, 180 P.3d 1276. The court reasoned:

[In [State v. Theroff](#), 95 Wash.2d 385, 622 P.2d 1240 (1980), w]e remanded for resentencing because “[w]hen prosecutors seek enhanced penalties, notice of their intent must be set forth in the information.” [Theroff](#), 95 Wash.2d at 392, 622 P.2d 1240. Thus, unless a complaint is properly amended, once the State elects which specific charges it is pursuing and includes elements in the

charging document, it is bound by that decision. We have not altered this requirement.

Recuenco's case is similar because it also involves a charging decision made by the State. The prosecutor chose to charge the lesser enhancement of “deadly weapon.” Former [RCW 9.94A.310\(4\)\(b\)](#). This provided Recuenco with notice of the charged offense and the ability to prepare a defense, as required by our state and federal constitutions. Moreover, consistent with the specific charge brought, the jury was instructed on the deadly weapon enhancement and specifically found Recuenco guilty of second degree assault while armed with a deadly weapon. There is nothing erroneous about that finding.

\*234 [Recuenco III](#), 163 Wash.2d at 435-36, 180 P.3d 1276 (footnotes omitted) (second alteration in original). To summarize, the State charged Recuenco with a deadly weapon sentencing enhancement when it wrote in the information that he was armed “with a deadly weapon, to-wit: a handgun.” [Recuenco III](#), 163 Wash.2d at 431, 435-36, 180 P.3d 1276. The deadly weapon charge was not defective but, rather, it was the State's choice. [Recuenco III](#), 163 Wash.2d at 435-36, 180 P.3d 1276. The State did not amend the information and, therefore, could not obtain a verdict for an uncharged firearm enhancement. [Recuenco III](#), 163 Wash.2d at 435-36, 180 P.3d 1276.

¶ 21 Second, the court discussed the adequacy of the evidence, jury instructions, and \*\*941 special verdict form. [Recuenco III](#), 163 Wash.2d at 437-39, 180 P.3d 1276. The court explained that proper jury instructions would have allowed the jury to enter a firearm special verdict only if the State met its burden to prove that the weapon Recuenco used was a firearm under the statutory definition, which requires that the weapon was operable. [Recuenco III](#), 163 Wash.2d at 437-39, 180 P.3d 1276; see also [RCW 9.41.010\(1\)](#) (defining “firearm”). The court also noted that the evidence was insufficient to support a firearm enhancement because “[t]he jury was not given facts supporting the firearm enhancements nor given instructions to determine if it was applicable in this case.” [Recuenco III](#), 163 Wash.2d at 439, 180 P.3d 1276.

¶ 22 Third, the court held that Recuenco did not receive notice of a firearm enhancement until sentenc-

ing and, therefore, imposition of such an enhancement violated his right to due process. [Recuenco III, 163 Wash.2d at 440-41, 180 P.3d 1276](#). On this point, the dissent urged that this issue should be analyzed as a post-verdict challenge to the charging document under [Kjorsvik](#), which requires liberal construction in favor of validity. [Recuenco III, 163 Wash.2d at 449-50, 180 P.3d 1276](#) (Fairhurst, J., dissenting) <sup>FNS</sup> (citing \*235 [State v. Kjorsvik, 117 Wash.2d 93, 102, 812 P.2d 86 \(1991\)](#)). Under that standard, the dissent argued, the information was sufficient because it contains citations to the statute for firearm and deadly weapon enhancements and states that the deadly weapon enhancement relates to a handgun. [Recuenco III, 163 Wash.2d at 449-50, 180 P.3d 1276](#) (Fairhurst, J., dissenting). The majority rejected this approach because, it reiterated, the information was not defective and the defendant had no duty to object to the State's choice to charge a deadly weapon enhancement instead of a firearm enhancement. [Recuenco III, 163 Wash.2d at 440-41, 180 P.3d 1276](#). In this context, we now turn to the relevant facts and analysis for Delgado's and Meza's cases.

[FNS](#). The court split five to four, with Alexander, C.J., Madsen, Sanders, and Owens, JJ., concurring with Justice C. Johnson's majority opinion and Johnson, Bridge, and Chambers, JJ., concurring with Justice Fairhurst's dissent. (As of the date of this opinion, Westlaw omits Justice Sander's concurrence, making it look like a plurality decision. The book version clarifies otherwise.)

#### Application of *Recuenco* III to Delgado's and Meza's Firearm Enhancements

[7] ¶ 23 Delgado and Meza argue that [Recuenco III](#) requires that we reverse each of their firearm sentence enhancements. We agree.

¶ 24 Again, for each of Meza's and Delgado's charges, the State alleged that the defendant or an accomplice committed the crime while “armed with a deadly weapon, to-wit: a firearm.” The jury was instructed to return special verdicts if the State proved beyond a reasonable doubt that the defendant was “armed with a deadly weapon” when he committed the charged crime. And the jury instructions specified that “[t]he term ‘deadly weapon’ includes any fire-

arm, whether loaded or not,” but the instructions did not define “firearm.” Resp. to Pet., App. E.

¶ 25 The jury specially found that Meza or another participant was “armed with a *firearm*” when he committed first degree attempted murder and first degree kidnapping, was “armed with a *deadly weapon*” when he committed witness intimidation of Waslawski (count III), and was “armed with a *firearm*” when he committed witness intimidation of Kravis (count IV). The jury also entered special verdicts that Delgado or another participant was “armed \*236 with a *firearm*” when he committed each crime for which he was convicted, first degree assault and first degree kidnapping. The differing language of “armed with a firearm” and “armed with a deadly weapon” was preprinted on the special verdict forms. The sentencing court entered firearm sentence enhancements for each count in which the jury returned a special verdict.

¶ 26 This case presents facts almost identical to those in [Recuenco](#) regarding Meza's conviction on count III. As in [Recuenco](#), the State alleged that each of Meza's and Delgado's crimes was committed while “armed with a deadly weapon, to-wit: a firearm.” [154 Wash.2d at 160, 110 P.3d 188](#) (analyzing \*\*942 charge that assault was committed while “armed with a deadly weapon, to-wit: a handgun”). In both cases, the trial courts instructed the jury that, in order to answer the special verdict affirmatively, the State had to prove beyond a reasonable doubt that the defendant was armed with a “deadly weapon” when he committed assault. [Recuenco, 154 Wash.2d at 159-60, 110 P.3d 188](#). And in both cases, the jury was instructed on the definition of “deadly weapon” but not on the definition of “firearm.” [Recuenco, 154 Wash.2d at 160, 110 P.3d 188](#). Relating only to Meza's count III, the jury returned a deadly weapon special verdict, but the sentencing court entered a firearm enhancement that the jury's deadly weapon verdict did not support. See [Recuenco III, 163 Wash.2d 428, 180 P.3d 1276](#).

¶ 27 The special verdict forms for all other counts, however, stated that Meza and Delgado were “armed with a firearm” when they committed the specified crimes. Thus, the question becomes whether this “firearm” language in the special verdict forms is legally sufficient to allow the sentencing judge to impose firearm enhancements. In [State v. Pharr, 131](#)

[Wash.App. 119, 124-25, 126 P.3d 66 \(2006\)](#), *review denied*, [160 Wash.2d 1022, 163 P.3d 794 \(2007\)](#), we considered this issue in the very similar context of a mislabeled weapon special verdict form that did not match the jury instructions. In [Pharr](#), the jury was instructed that, “[f]or the purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a \*237 firearm at the time of the commission of the crime.” [131 Wash.App. at 124, 126 P.3d 66](#) (emphasis added). The jury was also instructed on the definition of “firearm” for sentencing enhancement purposes. [Pharr](#), [131 Wash.App. at 124, 126 P.3d 66](#). Thus, the special verdict in [Pharr](#), although labeled “deadly weapon,” necessarily reflected the jury’s finding that the defendant was armed with a firearm. [131 Wash.App. at 124-25, 126 P.3d 66](#).

¶ 28 The present situation presents the same type of error as in [Pharr](#)—the special verdict forms were labeled incorrectly and they do not match the special verdict jury instructions. [131 Wash.App. at 124-25, 126 P.3d 66](#). Here, the jury was instructed that it must find the defendants were armed with a “deadly weapon” in order to return the special verdicts. And the jury was not instructed on the definition of “firearm” for sentencing enhancement purposes, although “deadly weapon” was defined. Thus, the special verdicts, although labeled “firearm,” necessarily reflect the jury’s findings that Meza and Delgado were armed with “deadly weapons” that were not necessarily operable firearms. [State v. Grisby, 97 Wash.2d 493, 509, 647 P.2d 6 \(1982\)](#) (“Jurors are presumed to follow instructions.”), *cert. denied*, [Frazier v. Washington, 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 \(1983\)](#). And a weapon is not a “firearm” under the statutory definition unless it is operable. [RCW 9.41.010\(1\)](#). Because the jury here did not find that Meza and Delgado were armed with operable firearms, the sentencing court exceeded its authority by entering a sentence that does not reflect the jury’s findings. See [Recuenco III, 163 Wash.2d at 439, 442, 180 P.3d 1276; Recuenco, 154 Wash.2d at 159-60, 110 P.3d 188](#).

[8] ¶ 29 This error is not subject to harmless error analysis regarding instructional error because the State did not charge Meza and Delgado with firearm enhancements and, therefore, the jury instructions contained no error. [Recuenco III, 163 Wash.2d at 442, 180 P.3d 1276](#). If harmless error analysis ap-

plied, we would almost certainly deny relief because it is undisputed that the deadly weapon in question was the gun that Meza used to shoot Waslawski and, therefore, the deadly weapon at issue meets the definition of “firearm” \*238 beyond a reasonable doubt. See [RCW 9.41.010\(1\)](#) (defining “firearm” as “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder”); [State v. Hall, 95 Wash.2d 536, 540-41, 627 P.2d 101 \(1981\)](#) (instructional error harmless beyond a reasonable doubt where uncontested that victim was shot with weapon). But because these are PRPs, we must determine whether the error in imposing firearm enhancements that the jury did not authorize caused actual prejudice. See [In re St. Pierre, 118 Wash.2d at 328-29, 823 P.2d 492; In re Cook, 114 Wash.2d at 810, 812, 792 P.2d 506](#). Because \*\*943 Meza and Delgado received higher sentences than the jury’s verdict authorized, the error actually prejudiced them. Thus, [Recuenco III](#) compels that we reverse each of Meza’s and Delgado’s firearm enhancements and remand to the trial court for resentencing and imposition of deadly weapon enhancements. [Accord Bainard, 148 Wash.App. 93, 199 P.3d 460](#).

#### Additional Arguments

¶ 30 Meza and Delgado additionally argue that the sentencing court (1) violated their right to jury trial when it found that convictions were separate and distinct criminal conduct for purposes of imposing consecutive sentences; (2) abused its discretion by imposing consecutive sentences because it failed to find, on the record, that crimes were separate and distinct; and (3) violated the prohibition against double jeopardy by imposing multiple sentencing enhancements for the use of one weapon. We deny relief on each of these grounds.

#### A. Consecutive Sentences-Right to Jury Trial

[9] ¶ 31 Meza and Delgado argue that a jury must find whether criminal conduct for two crimes is “separate and distinct” under [RCW 9.94A.589\(1\)](#), the statute that outlines whether two crimes should run consecutively. They acknowledge that our Supreme Court ruled to the contrary in [State v. Cubias, 155 Wash.2d 549, 556, 120 P.3d 929 \(2005\)](#). The United States Supreme Court also recently held that \*239 the right to jury trial does not inhibit states from allowing judges, rather than juries, to find facts necessary to

impose consecutive sentences for multiple offenses. [Oregon v. Ice](#), --- U.S. ---, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009). We follow the mandatory authority of [Cubias](#) and deny the petitions on this ground.

#### B. Consecutive Sentences-Abuse of Discretion

¶ 32 Next, Meza and Delgado argue that the sentencing court abused its discretion when it imposed consecutive sentences without first finding on the record that the crimes were separate and distinct. A trial court abuses its discretion if it bases its decision on untenable grounds or untenable reasons. [State v. Thang](#), 145 Wash.2d 630, 642, 41 P.3d 1159 (2002) (citing [State ex rel. Carroll v. Junker](#), 79 Wash.2d 12, 26, 482 P.2d 775 (1971)). The petitioners argue that the sentencing judge was operating under a misunderstanding of law when it “seem[ed] to have ruled that if the crimes were not the ‘same criminal conduct’ the [Sentencing Reform Act of 1981] required him to run the sentences consecutively.” PRP (Delgado) at 17.

[10] ¶ 33 Contrary to petitioner's assertions, Washington courts have held that the phrases “same criminal conduct” and “separate and distinct criminal conduct,” as used in [RCW 9.94A.589\(1\)](#), are merely opposites. Because the legislature failed to define “separate and distinct criminal conduct,” a court answers whether the conduct is “separate and distinct” by performing the test for “same criminal conduct.” [State v. Tili](#), 139 Wash.2d 107, 122-23, 985 P.2d 365 (1999). If the sentencing court finds that two or more crimes are not the “same criminal conduct,” then it has necessarily found that those crimes are “separate and distinct criminal conduct.” [Tili](#), 139 Wash.2d at 122-23, 985 P.2d 365; [State v. Channon](#), 105 Wash.App. 869, 877, 20 P.3d 476, review denied, 144 Wash.2d 1017, 32 P.3d 283 (2001); [State v. Price](#), 103 Wash.App. 845, 855, 14 P.3d 841 (2000), review denied, 143 Wash.2d 1014, 22 P.3d 803 (2001). The petitioners present no reason to diverge from this long-standing case law. We deny relief on this ground.

#### \*240 C. Double Jeopardy-Sentence Enhancements

¶ 34 Last, Meza and Delgado argue that the sentencing court violated the prohibition against double jeopardy by imposing multiple sentencing enhance-

ments for the use of one weapon. Petitioners acknowledge that our Supreme Court has held, in [State v. Claborn](#), 95 Wash.2d 629, 637, 628 P.2d 467 (1981), that sentencing enhancements are not “offenses” as contemplated by the double jeopardy clause's protection against multiple punishments for the same offense. But the petitioners urge us to reexamine the [Claborn](#)\*\*944 analysis in light of [Blakely](#). After petitioners filed their briefs, Divisions One and Two of this court rejected this argument, holding that (1) [Blakely](#) does not implicate double jeopardy and (2) sentence enhancements are not subject to double jeopardy analysis. [State v. Kelley](#), 146 Wash.App. 370, 374-75, 189 P.3d 853 (2008); [State v. Nguyen](#), 134 Wash.App. 863, 866-69, 142 P.3d 1117 (2006), review denied, 163 Wash.2d 1053, 187 P.3d 752, cert. denied, --- U.S. ---, 129 S.Ct. 644, 172 L.Ed.2d 626 (2008). We agree with those courts and deny relief on this ground.

¶ 35 In conclusion, we vacate Delgado's and Meza's firearm enhancements and remand to the trial court to impose, in their place, the deadly weapon enhancements that were charged by the State and found by a jury beyond a reasonable doubt. We deny relief on all other grounds.

¶ 36 Petition granted in part and denied in part.

We concur: [ARMSTRONG](#), J., and [PENoyer](#), A.C.J.

Wash.App. Div. 2, 2009.

In re Personal Restraint of Delgado

149 Wash.App. 223, 204 P.3d 936

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