ELECTRONICALLY FILED DEC 01, 2014 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff/Appellee, vs. TAQUALA MONIQUE HOWSE, Defendant/Appellant.	SC 13-1997 AGCR192074

APPEAL FROM THE DISTRICT COURT

IN AND FOR JASPER COUNTY

HONORABLE JEFFREY HARRIS

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE AND FILING

The undersigned certifies that on the 26 day of November, 2014, he will electronically file this document and will mail one (1) copy to Appellant/Defendant Taquala Howse.

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11/26/14

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Statement of Issues Presented for Review iii

Routing Statement 1

Statement of the Facts.....1

Argument 2

Division I 2

Division II.....9

Division III 14

Conclusion 18

Request for Oral Argument.....18

Certificate of Compliance 19

TABLE OF AUTHORITIES

Cases

State v. Abbas, 561 N.W.2d 72 (Iowa 1997) 2, 9, 14

State v. Anspach, 627 N.W.2d 227 (Iowa 2001).....2, 9, 14

State v. Ashland, 145 N.W.2d 910, 259 Iowa 728 (Iowa 1966) 15, 16

State v. Finders, 743 N.W.2d 546 (Iowa 2008) 7

State v. Geier, 484 N.W.2d 167 (Iowa 1992) 5, 11

State v. Hemminger, 308 N.W.2d 17 (Iowa 1981) 10, 15, 16

State v. Lambert, 612 N.W.2d 810 (Iowa 2000) 2, 9, 14

State v. Lawr, 263 N.W.2d 747 (Iowa 1978) 8, 16

State v. Nichols, 276 N.W.2d 416 (Iowa 1979).....10, 15, 16

State v. Ortiz, 789 N.W.2d 761 (Iowa 2010).....3, 11

In the Interest of F.A.B., Minor Child, 4-086/03-1638 (Iowa App. 2004), March 10, 2004 .....6, 7, 9, 10

Statutes, Rules of Procedure

IC § 702.7.....1, 2, 3, 5, 6, 8, 9, 18

IC § 724.4(1).....2, 17

IC § 724.7.....17

Iowa R. App. P. 6.907 2

Iowa. R. App. P. 6.1101(2)(c).....1

Iowa. R. App. P. 6.1101(2)(f) 1

Iowa. R. App. P. 6.1101(3)(a) 1

Legislation

2008 Acts, ch. 1151, § 1 6

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Division I: Does, or should, the Legislature's 2008 amendment to the definitions section of the weapons chapter exclude stun guns from the definition of dangerous weapons, on the grounds that they produce pain and/or injury, but not immobility?

Division II: Should the Supreme Court overrule its previously established precedent that stun guns are dangerous weapons, on the basis that they are designed to avoid killing, and on the basis that new testimony regarding the non-lethality of these weapons has been received?

Division III: Should Howse's conviction be overturned on the basis that she never displayed her broken, inoperable stun gun to anyone, never placing anyone in fear of it?

ROUTING STATEMENT

Division I of this brief raises a substantial issue of first impression, and presents substantial questions of enunciating or changing legal principles, and accordingly should be retained by the Supreme Court. Iowa R. App. P. 6.1101(2)(c), (f). Division II contains a request for the Supreme Court to overrule previous case law and as such presents substantial questions of enunciating or changing legal principles, and accordingly should be retained by the Supreme Court. Iowa R. App. P. 6.1101(2)(f). Division III involves the application of existing legal principles and can be decided by the Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE FACTS

Taquala Howse was charged by Trial Information on July 24, 2013, with Carrying Weapons in violation of IC § 724.4(1). Trial Information, July 24, 2013, at 1; Appx. 1. The weapon she was carrying was a broken, inoperable stun gun that never left her purse. At issue is whether such a weapon qualifies as a dangerous weapon under IC § 702.7, the definitions section.

Howse waived her right to a jury trial. Waiver of Jury Trial, Oct. 3, 2013, at 1; Appx. 2. The case came on for a bench trial on Oct. 16, 2013. Transcript, Bench Trial, Oct. 16, 2013, at 1; Appx. 4. Howse was convicted by the court in a ruling issued that same day. Order, Oct. 16, 2013, at 1; Appx. 45. Howse was sentenced on Dec. 6, 2013. Order (sentencing), Dec. 6, 2013, at 1; Appx. 48.

Howse filed a notice of appeal on Dec. 11, 2013. Notice of Appeal, Dec. 11, 2013, at 1; Appx. 50.

ARGUMENT

DIVISION I

In a bench trial, a court's findings of fact have the effect of a special verdict. Iowa R. App. P. 6.907. Preservation of error is no barrier to a challenge to the sufficiency of the evidence following a bench trial. State v. Anspach, 627 N.W.2d 227, 231 (Iowa 2001). The standard of review for challenges to the sufficiency of the evidence is for correction of errors at law. State v. Lambert, 612 N.W.2d 810, 813 (Iowa 2000). No motion for a judgment of acquittal is required in criminal bench trials. State v. Abbas, 561 N.W.2d 72, 73-74 (Iowa 1997).

The argument of this division is that stun guns do not qualify as a "dangerous weapon[s]" under the 2008 amendments to IC § 702.7.

Analysis must begin with the relevant Code section. Howse was charged with the offense of Carrying Weapons pursuant to IC § 724.4(1). This Code section references "dangerous weapon[s]," which are defined in IC § 702.7. That Code section reads, in relevant part, a dangerous weapon is:

> any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed…or any portable device or weapon

> directing an electric current, impulse, wave, or beam that produces a high-voltage pulse designed to immobilize a person. IC § 702.7.

The rest of the statute discusses bows and arrows, guns, knives, and otherwise-safe objects being used as weapons. *See* IC § 702.7. None of those aspects are at issue in this case; it should be noted, however, that the phrase "serious injury," as opposed to just "injury," is only found in the sentence beginning with "Additionally," which is the sentence that refers to normal objects that are being used as weapons. Yet the District Associate Court's ruling often refers to "serious injury;" for example, Paragraph 7 says that "[s]erious injury and/or death can be inflicted by a stun gun[.]" Order, Oct. 16, 2013, at 3; Appx. 47.[1]

It is also unclear whether the court's ruling is convicting Howse under the specific section at the end of the statute that refers to electric devices, or under the general definition language that opens the section. The ruling can be read to be convicting Howse of both; they aren't mutually exclusive. For example, Paragraph 3 of the ruling states that the "State of Iowa has no affirmative burden to produce evidence as to how much high voltage a particular device will emit or produce." Order, at 3; Appx. 47. This statement is

[1] A similar mistake triggered a reversal in *State v. Ortiz*, 789 N.W.2d 761 (Iowa 2010). However, reversal is not required for this reason in the instant case, as a finding of "serious injury" would more than meet the requirement for a finding of "injury."

anomalous, as the State always carries the burden of proof in a criminal case; however, it is acknowledged that there is no case law that could have guided the court as to what amount of voltage counts as "high." This appeal does not argue that the present Court should impose an arbitrary amount of voltage that will henceforth qualify as "high" under this statute.

The inapplicability of this portion of the statute, however, comes not from the amount of voltage that Howse's stun gun did, or did not, produce, but rather from the word "immobilize." Howse's stun gun, had it been operable, would not have immobilized anyone. According to the testimony received by the court, Tasers cause immobility, and stun guns, which are the cartridges when removed from the Tasers, are used for pain compliance or deterrence. Stun guns only do not cause immobility.

The State's first witness, Kyle Jurgensen, testified that a "Taser" is a weapon that has probes that shoot out of it, and a "stun gun" is what is left when one removes the cartridge from a Taser and applies the cartridge directly to someone. Transcript, Bench Trial, Oct. 16, 2013, at 12; Appx. 15. He said, "The function of the stun gun is more of a pain compliance application, and the probes is [sic] more of a full-body lockup[.]" Id. The State's second witness, Greg Erie, testified:

> Q: Okay. So again, there's a difference between being Tased and being stunned with a stun gun, right?

> A: Yes.
> Q: Okay. So, would a Taser immobilize a person?
> A: Yes, Tasers do that.
> Q: Would a stun gun immobilize a person?
> A: If they're standing?
> Q: Yes.
> A: No, [be]cause if you stick it on, they jump – they jump back, so –
> Q: So, in your opinion a stun gun is more to get them to do what you want them to do?
> A: Exactly.
> Q: Okay. So –
> A: Or deter them or – you know, there's several functions of it. But yeah, it could be used as a compliance tool, too. Transcript, Bench Trial, 23-24; Appx. 26-27.

This testimony is in accordance with the factual findings made by the Supreme Court in the lone Iowa case regarding stun guns, *State v. Geier*, 484 N.W.2d 167 (Iowa 1992). In that case the court found that the defendant applied his stun gun to one of the victim's dogs, "which caused the dog to retreat." Id. at 169. In other words, the dog was not immobilized.

Deterrence presumes that the person being shocked will still be able to move; the point of the stun gun is to make them retreat. Pain compliance, likewise, assumes that the person being shocked continues to be able to move, but hopefully will choose to stop. Both purposes are exclusive of forced immobility.

Geier predates the Legislature's addition of the language at issue to this statute. The language in IC § 702.7 that relates to electrical devices was added

by 2008 Acts, ch. 1151, § 1, and first appears in the 2009 Code. *Geier* found stun guns to be dangerous weapons under the general definition section that opens the statute. There have been no cases on stun guns or Tasers since this new language in the Code was added.

The question, then, which as it relates to electrical devices is one of first impression, is whether the language the Legislature added in 2008 regarding the requirement that electrical devices produce immobility works as an exclusion of stun guns, which do not cause immobility, from the definition of "dangerous weapon[s]."

The issue of statutory interpretation of IC § 702.7 was addressed by the Court of Appeals in *In the Interest of F.A.B., Minor Child*, 4-086/03-1638, Iowa Court of Appeals, March 10, 2004. That case dealt with the question of whether a balisong, a butterfly knife with a four-and-one-half-inch blade, qualified as a "dangerous weapon" since it was shorter than the five inches listed by the statute. Id.

The court found that knives with blades longer than five inches are *per se* dangerous weapons, but knives that are shorter than five inches can still be proven to be dangerous weapons if they meet the general criteria that open the statute. Id. The court found that to do otherwise would ignore the open-ended, flexible nature of the statute that is typified by the words, "include, but are not limited to[.]" Id. The dissent cited several cogent rules of statutory

interpretation as well, including that specific statutes trump general ones, and the listing of specific items works as the exclusion of other items. Id.

At this point, Howse specifically requests that the Supreme Court or the Court of Appeals, whichever decides the case, either revisit and overrule *F.A.B.* to the extent it adopts the broad method of statutory interpretation, or decide the instant case utilizing the method of statutory interpretation favored by the dissent in *F.A.B.*, for the reasons stated therein.

It is acknowledged that Legislature clearly intended to exempt lawfully used bows and arrows from the definition of dangerous weapons, and there is not analogous language relating to electrical weapons that produce pain but not immobility. However, it is imperative that penal statutes be strictly construed. *See* State v. Finders, 743 N.W.2d 546, 548 (Iowa 2008). It is impossible to know whether the Legislature was aware of the different effects of Tasers, as opposed to stun guns, when it passed the 2008 amendment. But, it is clear from the language of the statute that the Legislature has made a policy determination that electrical weapons that produce immobility should definitely be considered dangerous weapons. The question is whether this determination forces a conclusion that electrical weapons that do not produce immobility are still dangerous weapons.

Such a determination would not mean that it would suddenly become legal to use stun guns to hurt people. The question is simply which statute or

statutes such cases should be brought under, and what elements of proof the State must meet.

In *State v. Lawr*, 263 N.W.2d 747 (Iowa 1978), the Supreme Court considered (according to the law as it existed before the new 1978 Iowa Criminal Code) whether a starter's pistol qualified as a "firearm." Id. at 748. In that case the defendant placed a starter's pistol directly on the victim's body and pulled the trigger, "causing a red spot or welt on her side about three or four inches in diameter." Id. at 749. After finding that a starter's pistol was not a firearm, since it did not fire any projectiles nor could it be readily adapted to do so, the court noted that the defendant "was surely guilty of an assault….The state simply accused him under the wrong statute." Id., 749-51.

If stun guns are determined by the present reviewing court to not be dangerous weapons, criminals who use them to inflict any pain at all, or any non-serious injuries, could still be prosecuted – but for assault. Similarly, a criminal who uses a stun gun repeatedly on a victim, to the point where the criminal's behavior manifests an intent to kill or inflict serious injury, provided it could be shown the stun gun could kill, could be prosecuted under IC § 702.7 pursuant to the sentence that begins with, "Additionally…." Just as it is imperative that penal statutes be strictly construed, it is imperative that our state's prosecutors know whether they have to prove serious injury, or just injury. The court's rulings in the instant case, as well as many of the

prosecutor's arguments, many of which reference "serious injury," indicate the need for clarity regarding these matters.

DIVISION II

In a bench trial, a court's findings of fact have the effect of a special verdict. Iowa R. App. P. 6.907. Preservation of error is no barrier to a challenge to the sufficiency of the evidence following a bench trial. *Anspach*, 627 N.W.2d at 231. The standard of review for challenges to the sufficiency of the evidence is for correction of errors at law. *Lambert*, 612 N.W.2d at 813. No motion for a judgment of acquittal is required in criminal bench trials. *Abbas*, 561 N.W.2d at 73-74.

Should the present reviewing court adopt and continue the method of statutory interpretation employed by the court in *F.A.B.*, the discussion in the instant case would then shift to whether Howse's conviction could be upheld under the general definition language that opens the statute. That language reads, again, in relevant part: "[A]ny instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, *and* which is capable of inflicting death upon a human being when used in the manner for which it was designed[.]" IC § 702.7 (emphasis added).[2]

[2] Courts have not always treated these parts of the statute as a first and second prong of one category of dangerous weapon, and have sometimes separated them out as two separate categories. The juvenile court in *F.A.B.*, for example, "concluded the balisong is a dangerous weapon within the meaning of section 702.7 because it is an instrument primarily for use in

Upon initial reading the statute seems somewhat redundant; if a device meets the second prong, if it is designed to and capable of inflicting death upon a human, then it necessarily meets the first prong, which requires it to be designed to inflict injury. The second prong adds a requirement of capability, which the stun gun in the instant case absolutely did not meet. The second prong also means that people who are using guns cannot claim as a defense that they are bad shots, nor can they claim as a defense that they are good shots but were only intending to shoot someone in the leg. The definition of "dangerous weapon" goes to the character of the instrument utilized. *State v. Hemminger*, 308 N.W.2d 17, 20 (Iowa 1981); citing *State v. Nichols*, 276 N.W.2d 416, 417 (Iowa 1979).

The statute, frankly, was written in a time when people had guns and knives, which, assuming they are operable, are capable of and designed to cause death. Some weapons don't work and some people can't use them, or are trying to use them to inflict injury only, but the character of the weapons themselves is one of seeking death. We now live in a world where there are electrical weapons like Tasers and stun guns, which are designed to avoid causing death.

The question raised by this division is, what is a stun gun "designed" to do? Does "designed" in the statute refer to the subjective intent of the devices'

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inflicting death or injury upon a human being or animal." *F.A.B.*, 4-086/03-1638. The juvenile court made no finding regarding the language after the "and."

manufacturers, which is one of avoiding killing? Or, does "designed" refer to the fact that stun guns are designed to deliver shocks, and while some people are being shocked, some of them will die?

The Supreme Court has previously found in *Geier* that stun guns are dangerous weapons that meet the statute's requirements: "Deputy Muir also indicated that the stun gun is capable of causing death if used in the head or neck region." *Geier*, 484 N.W.2d at 171. The problem with this finding is that it conflates capability – or, perhaps more accurately, possibility – with design. The continued factual validity of this finding has also been called into question by the testimony received by the District Associate Court in the instant case.

Howse requests that the Supreme Court retain this case and revisit or overrule *Geier* based on the testimony received in the instant case. Jurgensen testified as follows:

> THE COURT: Okay. Depending on the physiology of the victim and the number of times a stun gun might be administered, would a stun gun be capable of administering serious bodily injury and/or death?[3]
> THE WITNESS: Injury, yes. I'd say death, also, yes. I mean, there would have to be some prior condition to that.
> THE COURT: Such as what?
> THE WITNESS: You know, depends if there's drugs in the system, heart conditions. I mean, you know, environment, everything plays a factor. But

[3] The District Associate Court here again conflates the statutory elements that led to the reversal in *Ortiz*. *See Ortiz*, 789 N.W.2d at 761.

> injury, for sure. Death, there's a maybe. Transcript, Bench Trial, at 15; Appx. 18.

The testimony continued:

> Q: So, if the stun gun is being used in the manner for which it was designed, do you think it's capable of causing death?
> A: No….There has [sic] been documented deaths using Tasers and stun guns, but like I said, there have been other preconditions. I mean, stun guns and Tasers were not put on the market to kill people. They [put on the market] to incapacitate and flee or incapacitate and arrest….[4]
> THE COURT: I think I want to visit your response to the defendant's question. You indicated if a stun gun was used in the manner in which it was designed, it was not capable of causing death, but you previously indicated that if there are prior conditions such as heart conditions or drugs in the system, death can result?
> THE WITNESS: Right. Transcript, Bench Trial, 16-17; Appx. 19-20.

Erie, the second witness, testified that officers are trained to avoid applying the Tasers and stun guns to the head and neck, and to avoid direct shots to the chest. Transcript, Bench Trial, 25-26; Appx. 28-29. But he also said, "But again, it's hard to quantify that unless you test every person on the face of the planet to see – to get some sort of an average, and they can't do

[4] Both witnesses consistently distinguished between incapacitation and immobility. Immobility was consistently described as a full-body lock-up, whereas incapacitation seemed to refer to more generally to a person being in so much pain from the shock that they couldn't do anything else besides react to it.

that." Transcript, Bench Trial, at 25; Appx. 28. Erie wasn't even talking about deaths caused by Tasers; he was responding to the court's question regarding whether someone would be incapacitated if they were shocked in the neck. Id. Erie went on:

> THE WITNESS: But they've done several studies, *and this is on the Tasers* (emphasis added), and it does – there are certain members of the population – I think they listed it as 1 on 275,000 people that could possibly be affected by the stun of a Taser to their – if they have a heart condition.
> THE COURT: But what does that mean?
> THE WITNESS: It means some people are more prone to having problems, if they're stunned, than others. Transcript, Bench Trial, at 27; Appx. 30.

So one witness said there have been reported deaths that have been caused by Tasers and stun guns, and the State's only other witness offered the statistic of one in 275,000 – and that statistic was referring to heart problems, not deaths, and Tasers, not stun guns.

Nobody who intends to kill people is going to grab one of these devices. Nobody is going to do a drive-by with a stun gun. Tasers and stun guns were designed to avoid killing people – and, if the State's witnesses' testimony is to be believed, they have been quite successful. It would be another matter if Howse had tied someone down, a person whom she knew to have a heart condition, and Howse repeatedly shocked that person in the neck in an attempt to induce a lethal heart attack. That behavior could be prosecuted both as an

assault and a use of a weapon under the section of the statute that begins with, "Additionally," the section that refers to normal items being used as weapons. Even then, a prosecution under that statute would require a showing that the stun gun actually could kill someone. It is suggested that less than one in 275,000 does not meet this standard. Yet, under *Geier*, a prosecution under the general definition section stands, with this same evidence.

DIVISION III

In a bench trial, a court's findings of fact have the effect of a special verdict. Iowa R. App. P. 6.907. Preservation of error is no barrier to a challenge to the sufficiency of the evidence following a bench trial. *Anspach*, 627 N.W.2d at 231. The standard of review for challenges to the sufficiency of the evidence is for correction of errors at law. *Lambert*, 612 N.W.2d at 813. No motion for a judgment of acquittal is required in criminal bench trials. *Abbas*, 561 N.W.2d at 73-74.

Both of the previous divisions have discussed legal principles that apply to stun guns generally. This division focuses on the stun gun that Howse was carrying specifically, a broken, inoperable device that she never brandished or displayed to anyone.

Erie testified:

> THE WITNESS: Oh, it doesn't work.
> THE COURT: It's inoperative; is that correct?
> THE WITNESS: Yes, sir….

> Q: So, let's talk about that again, how the device works. Does it emit an electrical current to get that pain compliance?
> A: Yeah, if it functioned properly. I couldn't get it to work. I did plug it into the wall, and the lights did come on, which would indicate that probably it would function, but there's no on-or-off switch, so it does not – it does not function. Transcript, Bench Trial, 19-20; Appx. 22-23.

There is significant and well-established case law, with cases decided both before and after the 1978 effective date of the new criminal code, that states that it is no defense to using a dangerous weapon to state that the weapon at issue was not operable. An unloaded gun that it is being used during a robbery still counts as a gun, not just a bludgeon. The point of view of the victim, not the subjective knowledge of the criminal, is what controls:

> A gun in the hands of a robber and pointed at the victim causes fear of death or injury and is so intended. The law does not contemplate that a victim under such circumstances must inquire if the gun is loaded….[The opposite] conclusion is contrary to the provisions and definitions in our statutes and unsound in the light of all human experience….[We] hold that when the trial court told the jury that a pistol or revolver is a dangerous weapon he stated a fact recognized by the law and the factual experience of mankind. State v. Ashland, 259 Iowa 728, 730-31, 145 N.W.2d 910, 911 (Iowa 1966).

All subsequent Iowa cases confirm this logic. *See Nichols*, 276 N.W.2d at 417; *Hemminger*, 208 N.W.2d at 20-21 ("Thus, working condition should never

be an issue where the instrument employed has the character of a dangerous weapon.") This appeal does not seek to question or revisit this case law; indeed, this appeal seeks its application. Since Howse never displayed her broken stun gun to anyone, it cannot be considered a dangerous weapon.

Every single case subsequent to *Ashland* involved a defendant who was brandishing a weapon, and showing it to other people. *Lawr*, the starter's pistol case, was decided on the basis that a starter's pistol was not a "firearm" by definition. *Lawr*, 263 N.W.2d at 749-50. However, the court in *Lawr* specifically distinguished *Ashland* and all subsequent cases that involved criminals displaying, and victims seeing, the inoperable weapons: "[W]e believe such cases are distinguishable from the present one because they involve the element of fear. Whether a gun is loaded or unloaded, the effect on the victim is the same." *Lawr*, 263 N.W.2d at 749. The instant case has no victims.

Lawr was decided under the law as it was prior to the effective date of the new criminal code, which was Jan. 1, 1978. Id. at 748. However, both *Nichols* and *Hemminger* were post-1978, and they cited the pre-1978 authority of *Ashland*. As stated in *Nichols*, "nothing in the relevant statutes manifests an intent by the legislature to depart from prior law. We have recognized that the criminal law revision which includes these statutes is primarily a restatement of prior law." *Nichols*, 276 N.W.2d at 417. So this distinction should not restrain the present reviewing court from ordering a reversal. The lack of appellate

cases in which broken weapons remain hidden frankly proves the lack of existence of such cases, not their validity.

Allowing the conviction in the instant case to stand also would create an ironic tension with the weapons statute itself. In its ruling, the District Associate Court also references IC § 724.7, the statute allowing nonprofessionals to apply for permits to carry weapons, as an argument that the Legislature has "acknowledged the dangerous nature of a taser and/or stun gun[.]" Order at 2, ¶4; Appx. 46. Howse was charged under IC § 724.4. Subsection 1 of that statute says a person shall be guilty of an aggravated misdemeanor should they go armed with a dangerous weapon concealed, or a pistol or revolver, whether concealed or not. According to both the statute and the Department of Public Safety, then, it technically is legal to carry a stun gun without a permit if it remains unconcealed – as in, openly displayed. Should a person who commits a theft or assault while obeying the carrying weapons statute as it is literally written automatically be charged with robbery, or assault with a weapon?

Accordingly, this division seeks reversal on the basis that Howse never displayed her weapon. Since this does not require statutory interpretation or overruling of previous case law, relief could be given under this division by the Court of Appeals without disturbing or creating any other precedent.

CONCLUSION

Each division of this brief requests that Howse's conviction be reversed and a judgment of acquittal be ordered to be entered. Division I requests that a different method of statutory interpretation be employed for the entire statute, but at least for electrical weapons, and requests a finding that the Legislature's 2008 amendment to IC § 702.7 be deemed a determination by the Legislature that electrical weapons that produce pain, but not immobility, do not qualify as dangerous weapons. Division II requests that the Supreme Court retain this case and revisit and clarify or overrule the precedent set in *Geier* that stun guns qualify as dangerous weapons, on the basis that they are designed to avoid killing and are thus excluded by the statute. Division III requests that either the Supreme Court or the Court of Appeals apply previously settled, and well-settled, case law that finds that broken weapons can qualify as dangerous weapons if they are displayed to victims, and the victims perceive that the weapons are functioning.

REQUEST FOR ORAL ARGUMENT

Appellant requests to be heard in oral argument.

Signature

11/26/14

Date

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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