

FILED
COURT CLERK

08/21/97 PM 02

BY *Kre*

NO. 34240-5-II
Cowlitz Co. Cause NO. 97-1-00159-2

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

VAN VETH,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
G. TIM GOJIO/WSBA #11370
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

90-02-1 wd

TABLE OF CONTENTS

Page

I. IDENTITY OF RESPONDENT 1

II. SHORT ANSWER..... 1

III. STATEMENT OF THE CASE..... 1

 A. Factual Background..... 1

 B. Procedural Background 1

 1. At Trial..... 1

 2. Direct Appeal..... 2

 3. 2005 Personal Restraint Petition 3

IV. ARGUMENT..... 3

 A. Offender Score Properly Calculated..... 3

 B. Firearm Enhancement Properly Calculated 4

 C. Firearm Enhancement Properly Imposed 4

 1. Statutes Establish Procedure for Firearm Special Verdict... 5

 2. *Recuenco* and *Hughes* Do Not Support that Firearm
 Enhancements Cannot be Submitted to Jury..... 6

 3. Division One Held that a Jury Finding that Accused was
 Armed with Firearm Does Not Violate Blakely or Recuenco..... 11

 4. U.S. Supreme Court’s Decision in *Recuenco* Does Not
 Impact Veth. 12

D. This ‘Appeal’ Constitutes a Second Collateral Attack Restricted under RCW 10.73.140.	14
1. ‘Appellant’ has not shown good cause why the appellant did not raise this issue in his prior petition.	14
E. No Entitlement to Attorney on Appeal – Request for Attorney Fees and Costs	17
V. CONCLUSION	17

TABLE OF AUTHORITIES

Page

Cases

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)..... 7, 14, 15, 16

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)..... i, 1, 14, 15, 16

City of Richland v. Kiehl, 87 Wn.App. 418, 942 P.2d 988 (1997) 17

In re Pers. Restraint of Jeffries, 114 Wn.2d 485, 789 P.2d 731 (1990) 15, 16

In re Turay, 153 Wn.2d 44, 101 P.3d 854 (2004)..... 15

Neder v. United States, 527 U.S. 1 (1999)..... 14

State v. Blunt, 118 Wn.App. 1, 71 P.3d 657 (Div. 2, 2003)..... 17

State v. Crawford, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).3

State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).....6, 8, 9, 10

State v. Pharr, 131 Wn.App. 119, 126 P.3d 66 (Div. 1, 2006)..... 11, 12, 13

State v. Trujillo, 112 Wn.App. 390, 49 P.3d 935 (2002)..... 1, 3

Washington v. Recuenco, 126 S.Ct. 478, 163 L.Ed.2d 362, 74 USLW 3050, 74 USLW 3242, 74 USLW 3246, 05 Cal. Daily Op. Serv. 9041 (U.S.Wash. Oct 17, 2005) (No. 05-83) i, 1, 6, 7, 8, 9, 10, 11, 12, 13, 14

Statutes

Former RCW 9.94A.125..... 5, 6, 9, 17

Former RCW 9.94A.310(1)	4
Former RCW 9.94A.310(2)	4
Former RCW 9.94A.310(3)	5, 6
Former RCW 9.94A.310(3)(a).....	4
FormerRCW 9.94A.310(4)	5
Former RCW 9A.32.030(2).	4
RCW 10.73.140	ii, 14, 15, 16
RCW 10.73.160	17
RCW 9.94A.533(3)(4)	5
RCW 9.94A.602.....	5, 6

Other Authorities

RAP 14.2.....	17
RAP 14.3.....	17
RAP 18.1.....	17

I. IDENTITY OF RESPONDENT

The State of Washington is the respondent.

II. SHORT ANSWER

The *Blakely v. Washington* and *State v. Recuenco* decisions are not implicated here since the jury, and not the judge, specifically answered “yes” on the special verdict form to the question “Was the defendant, Van Veth, or one with whom he acted as an accomplice, armed with a firearm at the time of the commission of the crime of Attempted Murder in the First Degree?”

III. STATEMENT OF THE CASE

A. Factual Background

The factual background is outlined in *State v. Trujillo*, 112 Wn.App. 390, 394-99, 49 P.3d 935 (2002).

B. Procedural Background

1. At Trial

Jury Instruction No. 31 provided that:

“For purpose of a special verdict the State must prove beyond a reasonable doubt that the defendant, or one with whom the defendant acted as an accomplice, was armed with a firearm at the time of the commission of the crime.” CP at 34.

Jury Instruction No. 32 provides that:

“Firearm means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” CP at 35.

On June 27, 1997, the jury returned a verdict finding Van Veth guilty of Attempted Murder in the First Degree. J&S at 1, Supp CP at _____. The jury returned a special verdict answering “yes” to the question “Was the defendant, Van Veth, or one with whom he acted as an accomplice, armed with a firearm at the time of the commission of the crime of Attempted Murder in the First Degree?” CP at 38.

On July 10, 1997, the court conducted a sentencing hearing. J&S at 1, Supp CP at _____. The judgment and sentence indicated that the standard range for Veth for the seriousness level XIV crime, with an offender score of zero, was between 180 and 240. J&S at 2, Supp. CP at _____.

2. Direct Appeal

On Direct appeal Veth raised eight assignments of error covering six issues:

1. Speedy trial violations, Br. of App. (1999) at 12-14;
2. Lack of timely discovery, Br. of App. (1999) at 14-15;
3. Improper admission of hearsay, Br. of App. (1999) at 15-16;
4. Conspiracy no supported by substantial evidence, Br. of App. (1999) at 16-18;

5. Improper admission of gang affiliation, Br. of App. (1999) at 18-20;
6. Cumulative error, Br. of App. (1999) at 20.

On July 2, 2002, Division II of the Court of Appeals affirmed the judgment. *Trujillo*, 112 Wn.App. at 412. On April 29, 2003, the Washington Supreme Court, Dept. 1, denied the petition for review. *State v. Trujillo*, 149 Wn.2d 1002, 70 P.3d 964 (April 29, 2003, Table, No. 72957-3).

3. 2005 Personal Restraint Petition

On June 20, 2005, Van Veth filed a personal restraint petition with the Washington State Supreme Court, No. 77222-3. In his PRP Veth raised the following issues:

(1) That *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct 1354, 158 L.3d.2d 177 (2004), should apply retroactively even to cases that have been deemed final for purposes of direct review. PRP (2005) at 16-21.

(2) That his speedy trial rights were violated. PRP (2005) at 22-28.

IV. ARGUMENT

A. Offender Score Properly Calculated

For an offender with a score of zero, the standard range for First-Degree Murder is 240 to 320 months. Former RCW 9.94A.310(1). As Veth's was convicted of attempted first-degree murder, an anticipatory

offense, Veth's standard range was 75 percent of the 240 to 320 months, or 180 to 240 months. Former RCW 9.94A.310(2). That 180 to 240 months is the range listed on Veth's Judgment and Sentence. J&S at 2, Supp. CP at ____.

B. Firearm Enhancement Properly Calculated

The Judgment and Sentence lists the firearm enhancement as 60 months. J&S at 2. Murder in the first degree, including attempted murder in the first degree, is a class A felony. Former RCW 9A.32.030(2), former RCW 9.94A.310(3)(a). Veth's 60 month firearm enhancement is properly calculated under those laws.

C. Firearm Enhancement Properly Imposed

The appellant claims that the trial court "exceeded its authority at sentencing when it imposed a firearm enhancement in the absence of statutory authority." Br. of App. At 1. The appellant claims that "no statutory authority exists to permit a jury to return a special verdict on such an enhancement." Br. of App. At 1. The appellant claims that the legislature's "failure to create a statutory procedure by which a jury could find a firearm special verdict precludes the imposition of the firearm

enhancements prescribed in RCW 9.94A.533(3). See RCW 9.94A.602 (outlining procedure for deadly weapon special verdict).”¹

1. Statutes Establish Procedure for Firearm Special Verdict

The appellant claims that the “legislature’s failure to create a statutory procedure by which a jury could find a firearm special verdict precludes the imposition of the firearm enhancements prescribed in RCW 9.94A.533(3).” Br. of App. at 5. The appellant’s argument is, apparently, that since former RCW 9.94A.125 establishes a ‘statutory procedure’ by which the jury could make a finding that the accused was armed with a deadly weapon, per RCW 9.94A.310(4), then there needs to be a similar statutory provision by which a jury could make a finding that the accused was armed with a firearm under RCW 9.94A.310(3).

Former RCW 9.94A.125 read as follows:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall,

¹ The appellant statutory citations are to the current RCWs, and are not to the statutes in effect in 1997 when Van Veth was tried and sentenced. The following table lists the citations provided by the appellant along with a citation to the statutes in effect in 1997:

Appellant’s Citation	Statutes in Effect in 1997
RCW 9.94A.602	Former RCW 9.94A.125
RCW 9.94A.533(4)	Former RCW 9.94A.310(4)
RCW 9.94A.533(3)	Former RCW 9.94A.310(3)

if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, ***pistol, revolver, or any other firearm***, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

(Emphasis added).

The appellant's argument fails to take into consideration the plain language of the statute which includes 'firearm' under the definition of 'deadly weapon' in former RCW 9.94A.125. The language in former RCW 9.94A.125 and current RCW 9.94A.602 are the same. The appellant's contention that there is no 'statutory procedure' for finding a firearm enhancement completely ignores the plain language of former RCW 9.94A.125 which includes firearms in the definition of deadly weapons, and the appellant's argument is on its face without merit.

2. *Recuenco and Hughes Do Not Support that Firearm Enhancements Cannot be Submitted to Jury*

The appellant contends that the court in *Recuenco* "concluded the question [concerning firearm enhancement] could never be submitted to

the jury”, Br. of App. at 6-7. That contention is not supported by a reading of the *Recuenco* decision.

Recuenco involved a jury finding there was a deadly weapon involved, but the judge imposed a firearm enhancement. *Recuenco*, 154 Wn.2d at 158-59. “At trial, the jury returned a guilty verdict on the assault charge and a special verdict that Recuenco was armed with a deadly weapon. But the trial court imposed a sentence enhancement based on Recuenco’s being armed with a firearm which was greater than that for a deadly weapon. This court granted review to consider whether imposition of a firearm enhancement without a jury finding that Recuenco was armed with a firearm beyond a reasonable doubt violated Recuenco’s Sixth Amendment right to a jury trial as defined in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and its progeny.” *Recuenco*, 154 Wn.2d at 158-59.

The court in *Recuenco* never held that the question of firearm enhancement “could never be submitted to the jury” as claimed by the appellant. Br. of App. at 6-7. The appellant’s citation to the *Recuenco* decision is to the portion of the decision dealing with the remedy upon remand. *Recuenco*, 154 Wn.2d at 164. The appellant’s claim that *Recuenco* “recognized” that there is no statutory authority to submit a firearm enhancement to a jury, Br. of App. at 7, is apparently based on the

Recuenco court's reference to the *Hughes* decision issued that same day. *Recuenco*, 154 Wn.2d at 164. The appellant fails to provide a pinpoint citation to the portion of the *Hughes* decision which supports the claim that there is "no statutory authority to submit a firearm enhancement to a jury". Br. of App at 7.

None of the cases consolidated in *Hughes* involved firearm enhancement. *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005) *reconsideration denied* (2005). Rather, all the cases dealt with judges and not juries finding aggravating factors under the SRA. *State v. Michael Ray Anderson*, involved sexual molestation, where the trial court judge, and not the jury, found there were aggravating factors. *Hughes*, 154 Wn.2d at 126, 136. *State v. George Leonard Selvidge* also involved sexual molestation, where the trial court judge and not the jury found there were aggravating factors. *Hughes*, 154 Wn.2d at 128, 137-38. *State v. Daniel D. Hughes* involved first degree theft involving old growth cedar trees where the trial court judge, and not a jury, found there were aggravating factors. *Hughes*, 154 Wn.2d at 129, 140. The appellant's failure to provide a pinpoint citation to *Hughes*, and failure to cite directly to the *Hughes* decision to support his claim that there is "no statutory authority to submit a firearm enhancement to a jury", is understandable since that proposition is simply not to be found in the *Hughes* decision.

In discussing the aggravating factors used by the courts in the *Anderson*, *Selvidge* and *Hughes* cases, the court noted that “In each case at hand, there was no jury finding beyond a reasonable doubt of aggravating factors warranting an enhanced sentence.” *Hughes*, 154 Wn.2d at 145.

Hughes further stated that the court was **not** deciding “whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial.” *Hughes*, 154 Wn.2d at 149. “We are presented only with the question of the appropriate remedy on *remand* – we do not decide here whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial.” *Hughes*, 154 Wn.2d at 149 (Italics in the original). The court further clarified that the discussion was focused on remedies upon remand: “This court will not create a procedure to empanel juries *on remand* to find aggravating factors because the legislature did not provide such a procedure and instead, explicitly assigned such findings to the trial court.” *Hughes*, 154 Wn.2d at 151 (emphasis added).

The appellant’s contention that *Recuenco* and *Hughes* somehow struck down the procedure whereby a jury could find a firearm enhancement is simply not found in those decisions. Here with Van Veth, a jury, pursuant to the procedures outlined in former RCW 9.94A.125, found that Veth – ‘or one with whom he acted as an accomplice’ -- was

armed with a firearm (statutorily defined as a deadly weapon in former RCW 9.94A.125) “at the time of the commission of the crime of Attempted Murder in the First Degree.” CP at 38 (Special Verdict E-1). Unlike *Recuenco*, here the jury, and not the judge, found beyond a reasonable doubt that Veth was armed with a firearm at the time of the commission of the crime. Compare Instruction 31, Special Verdict E-1, with *Recuenco*, 154 Wn.2d at 158-59.

The U.S. Supreme Court, in its opinion in *Washington v. Recuenco*, June 26, 2006, impliedly rejected the appellant’s interpretation that Washington law “provided no procedure by which a jury could decide at trial whether a defendant was armed with a firearm, as opposed to a deadly weapon.” *Washington v. Recuenco*, ___ U.S. ___ (June 26, 2006) at the end of first paragraph in section II). The U.S. Supreme Court rejected the contention that the U.S. Supreme Court was without power to decide the *Recuenco* case since the judgment rested on ‘adequate and independent state-law grounds.’ “It is far from clear that respondent’s interpretation of Washington law is correct. . . . In *Hughes*, the Supreme Court of Washington carefully avoided reaching the conclusion the respondent now advocates, instead expressly recognizing that “[w]e are presented only with the question of the appropriate remedy on remand – we do not decide here whether juries may be given special verdict forms or interrogatories

to determine aggravating factors at trial.” *Washington v. Recuenco*, ___ U.S. ___ (June 26, 2006), Section II.

3. Division One Held that a Jury Finding that Accused was Armed with Firearm Does Not Violate Blakely or Recuenco.

The facts here closely follow those in *State v. Pharr*, 131 Wn.App. 119, 126 P.3d 66 (Div. 1, 2006). Pharr was convicted of first degree manslaughter and unlawful possession of a firearm, and contended that there was a violation of his Sixth Amendment rights as the “jury found only that he was armed with a deadly weapon” whereas the court imposed a five-year firearm enhancement. *Pharr*, 131 Wn.App. at 121. In *Pharr* the jury “also returned a special verdict, answering ‘yes’ to the question of whether Pharr was armed with a deadly weapon during the commission of the crime. The instructions required that for an affirmative answer on the special verdict form, the jury had to find that Pharr was armed with a firearm.” *Pharr*, 131 Wn.App. at 122.

Pharr contended that the failure of the verdict form to include the word ‘firearm’ made the jury’s finding “constitutionally inadequate to support the [firearm] enhancement.” *Pharr*, 131 Wn.App. at 124. Division One held that while the language was imprecise “the instruction applicable to the special verdict leaves no room for debate: the jury found that Pharr was armed with a firearm.” *Pharr*, 131 Wn.App. at 124. The

court found that “The jury’s special verdict, read in light of the instructions, constitutes a specific finding that the State met its burden to show beyond a reasonable doubt that Pharr was armed with a firearm. No *Blakely* violation occurred.” *Pharr*, 131 Wn.App. at 125.

The situation here with Veth is even clearer than the situation in *Pharr*. Unlike *Pharr*, the special verdict for Veth specifically has the jury answer the question of whether Veth – or one with whom he acted as an accomplice – was armed with a *firearm* at the time of the commission of the crime of Attempted Murder in the First Degree. CP at 38, Special Verdict Form E-1. *Pharr* supports that here -- with the jury answering ‘yes’ that Veth was armed with a firearm at the time of the commission of the crime -- that the firearm enhancement was properly imposed. *Pharr*, 131 Wn.App. at 124-25.

4. U.S. Supreme Court’s Decision in *Recuenco* Does Not Impact Veth.

On June 26, 2006, the U.S. Supreme Court issued its decision in *Washington v. Recuenco*. The appellant did not mention in its brief that in October 2005 the U.S. Supreme Court granted certiorari in the *Recuenco* decision. *Washington v. Recuenco*, 126 S.Ct. 478, 163 L.Ed.2d 362, 74 USLW 3050, 74 USLW 3242, 74 USLW 3246, 05 Cal. Daily Op. Serv. 9041 (U.S.Wash. Oct 17, 2005) (No. 05-83).

The U.S. Supreme Court decision in *Washington v. Recuenco* does not impact this appeal since *Recuenco* is not implicated here with Veth. See *Pharr*, 131 Wn.App. at 124-25.

In *State v. Recuenco*, the Washington Supreme court held that the imposition of a firearm enhancement not supported by a jury's special verdict was not harmless error, and vacated *Recuenco*'s sentence. The court remanded the case for re-sentencing 'based solely on the deadly weapon enhancement which is supported by the jury's special verdict.' *Recuenco*, 154 Wn.2d at 164.

In *Washington v. Recuenco*, the U.S. Supreme Court reversed the Washington State Supreme court decision in *State v. Recuenco*. The U.S. Supreme Court held that "failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Washington v. Recuenco*, ___ U.S. ____ (June 26, 2006). The U.S. Supreme Court reversed and remanded the decision of the Washington State Supreme Court in *State v. Recuenco*.

In the wake of *Washington v. Recuenco*, "failure to submit a sentencing factor to the jury . . . is not structural error" and thus a court on appeal may determine if the constitutional error was harmless. *Washington v. Recuenco*, ___ U.S. _____. The court followed *Neder v. United States*, "The State and the United States urge that this case is

indistinguishable from *Neder*. We agree.” *Washington v. Recuenco*, ___ U.S. ___, citing *Neder v. United States*, 527 U.S. 1, 9 (1999).

The harmless error analysis is critical in the *Recuenco* decision in light of the court of appeals decision in that case. The Washington State Supreme Court noted that the Court of Appeals, in an unpublished decision, found the error to be harmless: “In an unpublished opinion, the Court of Appeals found against Recuenco on each issue and held that even if the failure of the jury’s finding deprived Recuenco of his right to a jury trial as defined by *Apprendi* (which it assumed without deciding), any error was harmless.” *State v. Recuenco*, 154 Wn.2d at 161.

With Veth, in 1997 the jury, and not the judge, entered a special verdict finding that Veth (or an accomplice) was armed with a firearm at the time of commission of the crime of attempted murder in the first degree. CP at 38, Special Verdict form E-1. That special verdict from the jury satisfies the jury fact-finding requirements of the *Apprendi* and *Blakely* line of cases.

D. This ‘Appeal’ Constitutes a Second Collateral Attack Restricted under RCW 10.73.140.

- 1. ‘Appellant’ has not shown good cause why the appellant did not raise this issue in his prior petition.**

In 2005 the appellant Van Veth filed a personal restraint petition with the Washington Supreme Court. In April, 2006, the Supreme Court denied Veth's petition.

The U.S. Supreme Court decided *Apprendi* in 2000, and decided *Blakely* on June 24, 2004. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The appellant has failed to argue why the *Apprendi/Blakely* issues were not previously addressed in the appellant's 2005 PRP. A prisoner's second or subsequent personal restraint petition that raises a new issue for the first time will not be considered if raising that issue constitutes an abuse of the writ. *In re Turay*, 153 Wn.2d 44, 48, 101 P.3d 854 (2004), citing *In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 487-88, 789 P.2d 731 (1990). While abuse of writ may apparently not apply here where the appellant was not "represented by counsel throughout postconviction proceedings", *In re Turay*, 153 Wn.2d at 48, nonetheless the statutory requirements concerning second collateral attacks in RCW 10.73.140 should have been addressed in the appellant's brief.

Veth's claim may be that *Recuenco* constitutes an intervening change in case (which the State is not conceding), but there is no showing that such a claim was not available when Veth filed his PRP in 2005.

Indeed, by the time Veth filed his 2005 PRP, the Supreme Court had issued the *Apprendi* and *Blakely* decisions. Thus *Apprendi* and *Blakely* may have been an intervening change in case law in 2005, but does not constitute an intervening change in case law as it involves Veth's current collateral attack in 2006.

It appears to the State that the filing of Veth's 2005 PRP and this 2006 'appeal' may constitute "needless piecemeal litigation and, therefore, an abuse of writ." *In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 487-88, 789 P.2d 731 (1990).

10.73.140. Collateral attack--Subsequent petitions

If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the court of appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition. Upon receipt of a first or subsequent petition, the court of appeals shall, whenever possible, review the petition and determine if the petition is based on frivolous grounds. If frivolous, the court of appeals shall dismiss the petition on its own motion without first requiring the state to respond to the petition.

[1989 c 395 § 9.]

E. No Entitlement to Attorney on Appeal – Request for Attorney Fees and Costs

The appellant is not entitled to publicly funded counsel for this appeal from the trial court's denial of his motion to vacate judgment. The appellant is entitled to the appointment of counsel only for his first appeal. *City of Richland v. Kiehl*, 87 Wn.App. 418, 422-23, 942 P.2d 988 (1997), RCW 10.73.150. The State requests that attorney fees and costs be granted to the State. RAP 14.2, RAP 14.3, RAP 18.1, RCW 10.73.160, *State v. Blunt*, 118 Wn.App. 1, 11, 71 P.3d 657 (Div. 2, 2003).

V. CONCLUSION

The trial court here did not error since the jury, and not the judge, found that Van Veth -- or one with whom Veth acted as an accomplice -- was armed with a firearm at the time of the commission of the crime of attempted murder in the first degree. CP at 38, Special Verdict. In 1997 there was a statutory procedure for a jury to find that the accused Van Veth was armed with a deadly weapon at the time of the commission of the crime, and the statutory procedure specifically included firearms in the definition of deadly weapon. Former RCW 9.94A.125. *Recuenco* is not implicated here since the jury, and not the judge, found beyond a reasonable doubt that Veth -- or one with whom Veth acted as an

accomplice – was armed with a firearm at the time of the commission of the crime.

As such, the appellant's claims should be denied, and the trial court's ruling should be affirmed.

Respectfully submitted this 19 day of July, 2006.

SUSAN I. BAUR
Prosecuting Attorney

By 
G. TIM GOJIO/WSBA #11370
Deputy Prosecuting Attorney
Representing Respondent

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
 v.) NO. 34240-5-II
) 97-1-00159-2
 VAN VETH,) AFFIDAVIT OF MAILING
)
 Appellant.)

AUDREY J. GILLIAM, being first duly sworn, on oath deposes and says: That on July 18, 2006, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

GREGORY C. LINK
ATTORNEY AT LAW
WASHINGTON APPELLATE PROJECT
1511 THIRD AVE., SUITE 701
SEATTLE, WA 98101

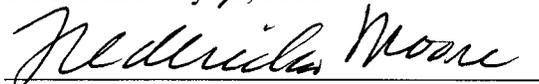
CLERK, COURT OF APPEALS
949 MARKET STREET
TACOMA, WA 98402

each envelope containing a copy of the following documents:

- 1. BRIEF OF RESPONDENT
- 2. Affidavit of Mailing.



SUBSCRIBED AND SWORN to before me this July 18, 2006.



Notary Public in and for the State
of Washington residing in Cowlitz
Co. My commission expires: 02/09/10