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STATE OF WASHINGTON
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

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STATE OF WASHINGTON,
Respondent,

NO. 83826-7

v.

ANSWER TO
MOTION

DANIEL J. SIMMS
Petitioner

This Court's order granting review in this case provides

... the Petition for Review is granted only on the issue of whether the State, in seeking a double firearm enhancement based on the prior imposition of a firearm enhancement, is required to allege in the information that the defendant has previously been sentence to a firearm enhancement.

Mr. Simms filed a supplemental brief which addresses this issue, and this issue only. Specifically, Mr. Simms argues the State must allege the prior enhancement in the Information, in the same manner it alleged the same recidivist fact with respect to the unlawful possession of a firearm charge in this case.

Despite the fact that his brief is limited to the precise issue on which this Court has granted review, the State has filed a motion which it has stylized as a "Motion to Strike Issue Never Raised Below or Accepted By This Court." That motion asks this Court to

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to ignore the question of whether the State is required to allege the defendant has previously been sentenced to a firearm enhancement. But there is no basis to strike an argument that was previously presented by Mr. Simms and which pertains directly to the issue on which the Court granted review.

The subheading of the relevant portion of argument in the supplemental brief provides:

There is no rational basis upon which to except recidivist facts from the essential-elements rule for enhancements while including the very same fact within the rule where it is deemed an "element" of the crime.

As the subheading suggests, the argument which follows addresses the constitutional problems which arise from the Court of Appeals's creation of an exception to the essential-elements rule for prior enhancements. That argument is plainly relevant to the question on which this Court granted review. The State's motion does not contend otherwise.

Instead, the State conflates the terms issue and argument. But even assuming there was merit to the State's effort to merge terms, Mr. Simms did raise the argument in question in the Court of Appeals and in his Petition for Review. In his initial brief to the Court of Appeals Mr. Simms argued:

The State cannot contend the fact that Mr. Simms had a prior conviction with a firearm enhancement was not an element of the aggravated offenses, as it pleaded and proved the existence of the prior substantive offense for purposes of the unlawful possession of a firearm charge. . . . The State can offer no rational explanation as to why it should be vested with the choice of when prior offenses will be considered an element and when it will not. There is certainly no rational explanation as to why in a single case the State should be permitted to make two divergent decisions on the very same prior offense.

Mr. Simms included and expanded upon this argument in his Petition for Review. Petition for Review at 14-19. The subheading of the portion of the supplemental brief which the State seeks to strike provides:

There is no rational basis upon which to except recidivist facts from the essential-elements rule for enhancements while including the very same fact within the rule where it is deemed an "element" of the crime.

Supplemental Brief at 11. Despite the obvious similarities, the State contends this argument was not previously presented. The State is wrong.

This Court's order granting review did not limit the arguments the parties could raise, rather, it limited only the issues which the Court would address. The argument the State wishes this Court to ignore pertains directly to the question of whether the

State is required to allege the defendant has previously been sentenced to a firearm enhancement. That is the question on which the Court granted review. There is no basis to strike that argument, and the court should deny the State's motion.

III. CONCLUSION

There is no basis to strike an argument that was previously presented by Mr. Simms and which pertains directly to the issue on which the Court granted review. The State's contention that this is a new issue is wholly without merit, and its motion should be denied.

Respectfully submitted this 21st day of July, 2010.



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Attorney for Petitioner

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MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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No. 83826-7

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ANSWER TO MOTION

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