

71204-7

71204-7

STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

STATE OF WASHINGTON )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 MILORD GELIN )  
 (your name) )  
 )  
 Appellant. )

No. 71204-7-I  
STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

I, Milord Gelin, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

PROCEDURAL ERROR WITH THE ORIGINAL JUDGMENT AND SENTENCE:  
The original J&S Sentenced me to 300 months on Count II, Attempted Murder, of which I was acquitted of and zero time for Count III, I° Assault. The second J&S reshuffled these months to the opposite counts. Is this proper procedure? The Court sentenced me to zero months on the Assault and that should hold true. The only change that should have been made at resentencing was to drop the 300 months for count II that I was acquitted off.

Additional Grounds 2-5

Grounds 2-5 are attached as a separate brief in two sections.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If there are additional grounds, a brief summary is attached to this statement.

Date: January 5, 2015

Signature: 

STATE OF WASHINGTON  
2015 JAN 7 AM 11:06

NO. 71204-7-I

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

VS.

MILORD GELIN,

Appellant.

2015 JAN -7 AM 11:06  
STATE OF WASHINGTON  
COURT OF APPEALS DIVISION ONE

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ON APPEAL FROM THE SUPERIOR COURT FOR  
THE COUNTY OF KING

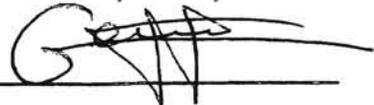
The Honorable Superior Judge

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STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

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MILORD GELIN  
Appellant, pro-se  
Washington Corrections Center  
PO Box 900  
Shelton, WA 98584



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A. ISSUES

1. Whether the trial court failed to determine whether the petitioner's current offenses encompass the same criminal conduct?
2. Whether the trial court miscalculated his offender score?
3. Whether the petitioner's convictions for both first degree burglary and first degree assault violate double jeopardy principles?

B. STATEMENT OF THE CASE

1. Pertinent Facts

Mr. Milord Gelin appeals his convictions for first degree burglary, and first degree assault.<sup>3</sup> He contends that the trial court (1) failed to determine whether the burglary and assault convictions encompass the same criminal conduct, (2) miscalculated his offender score, and (3) that the burglary and assault convictions violate double jeopardy.

C. ARGUMENT - GROUND TWO

1. THE TRIAL COURT FAILED TO DETERMINE WHETHER THE PETITIONER'S CURRENT OFFENSES ENCOMPASS SAME CRIMINAL CONDUCT, IN VIOLATION OF DUE PROCESS OF LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT

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<sup>3</sup> Mr. Gelin's conviction for theft of a motor vehicle is challenged on appeal.

Mr. Gelin argues that the superior court failed to calculate properly his offender score because it did not determine whether his current convictions of first degree burglary and first degree assault were part of the "same criminal conduct" under RCW 9.94A.589(1)(a).

These two convictions should be treated as one crime for sentencing purposes.

Former RCW 9.94A.400(1)(a), [recodified as RCW 9.94A.589(1)(a), provides in part: "[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current ... convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters findings that some or all of the current offenses encompass the same criminal conduct, then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions...."

"Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

The resulting offender score is used to determine-

the sentence range applicable for each conviction. Under this subsection, a sentence is then imposed for each current conviction, which are served concurrently unless an exceptional sentence is imposed. See DAVID-BOERNER, "Sentencing In Washington," §§ 5.8(a), 5.16 - (1985).

In this regard, a superior court must correctly determine whether the crimes encompass the "same criminal conduct," before correctly calculating the offender score. Clearly, the sentencing court abused its discretion. State v. Collicott, 112 Wn.2d 399, 404, 771 P.2d 1137 (1989). Crimes are of the same criminal conduct if they arise from the same course of conduct and are intimately related or if "one crime furthered the other and if the time and place of the two crimes remained the same. See State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

## 2. Reviewability

Courts have a general duty and power to correct an erroneous sentence upon its discovery. In re Personal Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001).

Here, Mr. Gelin collaterally attacks his sentences pursuant to RAP 16.3, and RAP 16.4. He has thus established a prima facie showing of actual prejudice arising from constitutional error that entitles him to-

"a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.2." In re Personal Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

Illegal or erroneous sentences may be challenged for the first time on appeal.<sup>2</sup> State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Further, a defendant cannot waive a miscalculated offender score. State v. Ross, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004).

Accordingly, this court should grant Gelin's request for a full hearing on the merits or a reference hearing.

C. ARGUMENT - GROUND THREE

2. THE PETITIONER'S CONVICTIONS VIOLATE DOUBLE JEOPARDY PRINCIPLES, IN DEPRIVATION OF ARTICLE 1, §9 of the WASHINGTON CONSTITUTION, AND THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The double jeopardy clauses of our state and federal constitutions protect against multiple prosecutions for the same offense. U.S. Const. amend. V; art. 1, §9; Blockburger v. United States, 284 U.S. 289, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995).

The double jeopardy clauses of both constitutions provide the same protection. In re Personal Restraint -

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<sup>2</sup> The one year time limit under RCW 10.73.090 does not apply to this appeal.

of Borrero, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007).

The claims of double jeopardy are questions of law reviewed de novo. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

Generally, convicting a defendant of multiple crimes based on a single course of conduct does not violate double jeopardy if the state legislature intended to authorize multiple punishments for the act committed. Borrero, 161 Wn.2d at 536.

However, absent clear legislative intent, Washington courts apply the "Same evidence rule" to determine if multiple convictions stemming from a single act violate double jeopardy. "In order to be the "same offense" for purposes of double jeopardy, the offense must be the same in law and in fact." State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). Offenses are "the same in law and in fact" unless two conditions are satisfied:

If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

State v. Vladovic, 99 Wn.2d at 423 (emphasis added).

Washington courts apply a 'case by case' approach to determine if multiple offenses violate double jeopardy.

State v. Freeman, 153 Wn.2d 765, 780, 108 P.3d 753 (2005).

Mr. Glein contends that his convictions for first degree burglary <sup>3</sup> and first degree assault <sup>3</sup> fail the-

"same evidence rule" and therefore, violate double jeopardy.

First, Burglary in the First Degree, states in pertinent:

"A person is guilty of committing Burglary in the First Degree if he assaults any person while in the building or dwelling.."

RCW 9A.52.020(1)(b). [emphasis added].

The Assault in the First Degree, as charged in COUNT-III of the Information, states in pertinent part:

"A person is guilty of Assault in the First Degree if he, with intent to in to inflict great bodily harm: (a) assaults another with a deadly weapon.."

RCW 9A.36.011(1)(a). [emphasis added].

Petitioner argues that under this "same evidence" test, his double jeopardy rights are violated because he was convicted of these offenses that are identical both in fact and in law. Cf. State v. Freeman, 153 Wn.2d at 778 (where convictions of both first degree robbery and second degree assault charges violated double jeopardy). See also State v. Johnson, 96 Wn.2d 926, 932, 639 P.2d 1332 (1983). Courts must therefore, apply a complete Vladovic <sup>2</sup> test to avoid a contrary result.

Under this test, the first degree burglary and first degree assault charges, violate the petitioner's double jeopardy. The elements of burglary include the assault, and one offense necessarily proves the other in this case. Vladovic, 99 Wn.2d at 423; State v. Freeman, 153 Wn.2d-

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<sup>2</sup>Mr. Gelin does not abandon his contention that Vladovic is contrary to the U.S. Supreme Court case law. Hence, the opinion in Vladovic respectfully controls.

In this regard, Mr. Gelin's first degree burglary charge may only be satisfied if he assaulted a person during the commission of the offense. However, the appellant was also charged with first degree assault-the bedroom incident. In its essentials, his first degree burglary conviction necessarily proves the first degree assault charge. Accordingly, under Vladovic, this violates double jeopardy.

D. CONCLUSION

The appellant, Mr. Milord Gelin, respectfully request that this court reverse, and remand for resentencing.

Respectfully submitted,



S/MILORD GELIN  
Appellant, pro-se

Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

1 GROUND FOUR\_ - SAG of Milord Gelin

2 It should be undebatable that the United States Constitution  
3 and the United States Supreme Court interpreting the constitution  
4 are the supreme law of the land. See Washington State Constitution  
5 article 1, §2; State v. Hairston, 133 Wn.2d 504, 509, 945 P.2d  
6 397 (1997); Heen v. Arlandson, 80 Wn.2d 755, 757, 493 P.2d 343  
7 (1972).

8 The Double Jeopardy Clause of the Fifth Amendment guarantees  
9 that no person shall be subject for the same offense to be  
10 twice put in jeopardy of life or limb. See Washington State  
11 Constitution article 1, §9; United States Constitution Fifth  
12 Amendment; Jeffers v. U.S., 432 U.S. 137, 155 (1977); Seaton v.  
13 Maryland, 395 U.S. 754, 774 (1969); Crist v. Bretz, 437 U.S. 28,  
14 37-38 (1978).

15 The Double Jeopardy Clause also protects a defendant from  
16 even the risk of being punished twice for the same offense. See  
17 Abney v. U.S., 431 U.S. 651, 660-62 (1977). The complexity of  
18 modern criminal law often results in many charges arising from  
19 the same act or series of acts. See Ashe v. Swenson, 397 U.S. 436,  
20 445 n.10 (1970). Consequently, double jeopardy protection depends  
21 on whether two offenses are considered the same offense.

22 The court in Blockburger v. United States, 284 U.S. 297  
23 (1932) test determines whether multiple prosecutions for a single  
24 act constitute prosecutions for the same offense. Under Blockburger  
25 double jeopardy bar subsequent prosecutions for a single act unless  
26 the act can be prosecuted and punished under different statutory

1 provisions that require proof of different elements. id. at 304.

2 The petitioner herein claims and the issue is clear of that  
3 his state constitutional right from double jeopardy located at  
4 article 1, §2 and the United States Constitution of the Fifth  
5 Amendment has been violated. The reason for the claim is that  
6 the offenses the petitioner was charged with and convicted of by  
7 a jury renders him being punished twice for the same offense.  
8 First Degree Burglary and First Degree Assault has the language  
9 of the defendant must be or had a firearm or deadly weapon in  
10 order for the offenses to be at a first degree nature. See  
11 RCW 9A.52.020 and 9A.36.011(1)(a).

12 Now, the petitioner was found guilty of these offenses and  
13 then the State went back again to those exact same offenses and  
14 re-convicted the petitioner again because he possessed a deadly  
15 weapon. The petitioner has been twice placed in jeopardy for the  
16 same exact crime. Now, the petitioner contends that if he was  
17 found guilty of an offense which has no statutory language that  
18 a firearm or deadly weapon is involved, yet, he possessed and used  
19 it in the commission of his crime that yes, the separate statute  
20 for a firearm or deadly weapon enhancement can be rightfully  
21 imposed, but not when the offense requires it.

22 The petitioners Fifth and Fourteenth Amendment to the U.S.  
23 Constitution has been violated as well as his state constitutional  
24 rights underneath art. 1, §2 and 9. This matter ought to be  
25 reversed and remanded back to the trial court for retrial,  
26 to remove the circumstances.  
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GROUND FIVE \_ SAG of Milord Gelin

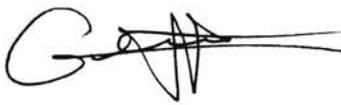
The prosecutor in this matter at the point of sentencing requested an exceptional sentence of 240 months, however, the trial court imposed a sentence to 300 months an extra 60 more months than the prosecutor sought.

Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range.

The trial court in this matter failed to enter its findings of fact and conclusions of law in this case and the appropriate remedy for a trial court's failure to issue findings of fact and conclusions of law is ordinarily remand for entry of the findings. State v. Haml, 136 Va.2d 519, 524, 964 P.2d 1157 (1998); Templeton v. Hurtado, 92 Va. App. 347, 965 P.2d 1131 (1998).

The failure to enter findings does not justify vacation of the sentence in a personal restraint petition proceeding unless it is a fundamental defect which results in a complete miscarriage of justice.

The petitioner herein respectfully ask that this matter be reversed and remanded back to the trial court for the trial court to enter its findings of fact and conclusion of law in this case.

  
Milord Gelin

See Exhibit "B" Prosecutors Exceptional Sentence Recommendation.

\*Note: See T&S FORIN

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
AT DIVISION I

MILORD GELIN,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent,

No. 71204-7-I

DECLARATION OF SERVICE  
BY MAIL

I, Milord Gelin, the petitioner in the above entitled cause, do hereby declare that I have served the following documents:

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Parties Served:

Court of Appeals, Div I  
600 University Sreet  
One Union Square  
Seattle, WA 98101

King County Prosecutor Attorney  
King County Courthouse W554  
516 Third Ave.  
Seattle, 98104

I deposited the aforementioned documents with the booth officer as **Legal Mail** at my present institution, the Washington Corrections Center, by way of the "Mail Box Rule"

Dated this 5th day of January 2015.

I declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.



Milord Gelin, 343765 C-D02  
Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

2015 JAN -7 AM 11:05

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I