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DIVISION II

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NO. 39204-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

AARON GERMAN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John A. McCarthy, Judge

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BRIEF OF APPELLANT

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1 The legal analysis for this argument was originally drafted by Elaine Winters, Appellate Attorney. It has been modified in part for this case.

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A. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective for failing to provide the court with legal authority to grant Aaron credit for time served on electronic home monitoring.
2. was entitled to credit for time served on electronic home monitoring.
3. There was insufficient evidence to prove robbery in the first degree.
4. Aaron's right to be free from double jeopardy was violated when he was sentenced to a crime with an essential element of a firearm and given a firearm enhancement for the same weapon.
5. Aaron's right to equal protection was violated when he was sentenced to a crime with an essential element of a firearm and given a firearm enhancement for the same weapon.
6. There was insufficient evidence to establish beyond a reasonable doubt that Aaron possessed a firearm.
7. was denied a fair trial by juror misconduct.
8. Defense counsel was ineffective for failing to move for a mistrial following prejudicial juror misconduct.

### Issues Presented on Appeal

1. Was defense counsel ineffective for failing to provide the court with legal authority to grant Aaron credit for time served on electronic home monitoring?
2. Was Aaron entitled to credit for time served on electronic home monitoring?
3. Did the state fail to prove the identity of the robbers beyond a reasonable doubt?
4. Was 's right to be free from double jeopardy violated when he was sentenced to a crime with an essential element of a firearm and given a firearm enhancement for the same weapon?
5. Was 's right to equal protection violated when he was sentenced to a crime with an essential element of a firearm and given a firearm enhancement for the same weapon and other crimes with weapons as essential elements precluded the firearm enhancement on equal protection grounds?
6. Was the limited evidence presented sufficient to establish possession of a firearm?
7. Was Aaron denied a fair trial by juror misconduct?

8. Was defense counsel ineffective for failing to move for a mistrial following prejudicial juror misconduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Aaron German was charged and convicted of Robbery in the First Degree and illegal Possession of a Firearm, and a weapons enhancement. CP 22-23, 32-33, Supp CP (Special Verdict April 13, 2009).

During deliberations, the presiding juror decided to conduct independent research and went on line to ascertain how other robbery cases were handled and to determine what the prosecutors and defense attorneys had done. RP 483, 487. The presiding juror # 7 discussed her research findings with all of the other jurors, specifically that “[d]efense has the responsibility of discovery, you know, the discovery, and then they get to rebut the prosecutor’s case” and the prosecutor gets to decide how to present his case. RP 488, 490. The trial judge questioned juror #7 in detail about her research and what she told the other jurors. RP 487-490.

The court then questioned each juror individually in great detail eliciting that each juror heard juror #7 discuss her research findings. Juror #1 told the court that juror #1 researched and discussed “Alternate schools” and the roles of the prosecutor and defense. RP 496-97. When asked what that

meant, juror # 1 indicated that that was a deliberative process the court should not hear. RP 496. Juror # 3 indicated that juror # 7 informed the jury that the defense job was to “rebut [the prosecutor], prove him wrong” . RP 502. Juror #4 indicated that juror # 7 told them “why certain thing did not come up.” RP 504. Juror # 4 believed that juror #7’s explanation was derived from both her research and her opinion. RP 505.

Juror # 6 indicated that juror # 7 discussed from her research, “like witnesses we didn’t hear from, whose job it was to bring these in, to bring these people to out attention. . . . for defense witnesses, it would be their responsibility to bring them in, like financial wise, you know, as –yeah.” RP 510. Juror #6 was the only juror who admitted that she was influenced by juror #7 because everyone wondered why certain witnesses were not presented during the trial. RP 511-12. Juror #10 informed the court that juror #7 discussed her research in terms of the prosecutor’s and defense responsibilities in a robbery case. RP 517. Each juror confirmed that they each believed that notwithstanding the research information they could follow the law. RP 483-518.

The defense asked that juror #6 and #7 be removed because #6 stated that she could not put the extraneous information out of her mind. RP 524-25. The defense did not ask for a mistrial. RP 528. The court determined that

juror #7 committed misconduct and removed her but not juror # 6. RP 526. After the verdicts were returned and during the middle of the sentencing hearing, after the prosecutor explained Aaron's offender score, the defense moved for a mistrial without offering any argument. The court denied the motion. RP1 8, 23-24. 2

Later during the sentencing hearing, the defense requested that Aaron receive credit for time served on electronic home monitoring. The court agreed to consider it if the defense provided authority. The defense did not provide authority and the court did not give Aaron credit for time served while on EHM. RP 911.

This timely appeal follows. 122-138, 243.

## 2. SUBSTANTIVE FACTS

Aaron German was sixteen on October 19, 2007. RP 367. On that day he decided to spend the day with his friends and possibly work for his friend Elliott's father. RP 368. Aaron's friend Gino DePaul picked him up and took him to Jacob's house where he played video games with Elliott, Tristen, Jennifer, Teddy and Gino. RP 375-367. Gino picked Aaron up at home and Aaron put extra clothes in Gino's car in case he got dirty working for Elliott's father. RP 368, 373. At about 9:00 in the evening, Gino drove Aaron to his

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2 RP 1 refers to the sentencing transcript.

friend Kelsey's house where he, Kelsey and another friend Anisa watched a movie until about 11:00 or 11:30 p.m. RP 3351-353, 370-71. Gino returned to pick up Aaron a little after 11:30. Id.

While Aaron was at Kelsey's house, Elliott came up an idea to rob Bob's Grocery store, a local store in the neighborhood. RP 39. Before going to the store, Gino went home to get a shot gun and some shotgun shells and then to Teddy's house. RP 40, 43. At home he had an upsetting fight with his sister. RP 40. Elliott, Jennifer and Aaron were in the car with Gino. Id.

After picking up the gun, Gino drove back to Jacob's house where he consumed a large quantity of alcohol. RP 51, 280. Gino could not remember to whom he gave the shotgun shells, but the gun was never loaded. RP 50-51. Gino believed that Jennifer, Aaron, and Elliott drove to Bob's and parked in the alley behind the store. RP 53-56. Tristen was not sure if Aaron was in the car. RP 183-84.

According to Gino, Elliott and Aaron left the car wearing gloves and beanies. RP 59-60. Gino could not see where Aaron and Elliott went. RP 60. When Gino next saw Elliott's face it was covered and Aaron might have had a blue bandana on his face. RP 61-62. When Elliott and Aaron returned to the car they told Gino to drive. RP 65. Gino took Aaron home and Elliott to Jacob's house. RP 65-66.

Gino gave the police a statement that did not indicate that Jennifer was in the car with him at Bob's Grocery, but he did testify to this fact. RP 84. Gino got a pack of cigarettes from the \$50-60 taken from Bob's but no cash. RP 86-87. The police found ski masks and gloves in the glove compartment which belonged to Elliott. RP 135.

Jim Campbell, the clerk at Bob's grocery was working during the robbery. He testified that someone came in near closing wearing dark clothes with their face covered up and carrying a shotgun followed by another person. Mr. Campbell could not see either person's face. RP 139-142, 1164-65. Mr. Campbell thought he could determine that the people in masks were male because of their body type. RP 167. Mr. Campbell did not see Aaron on the day of the robbery and determined that Aaron was not in the grocery store or holding a gun during the robbery RP 170.

Detective Andren followed up from the initial police contact from Bob's Grocery. RP 186-87, 238. After talking to a caller who left information about the robbery, Andren met with Elliott and Gino and arrested both of them. RP 241-245. After obtaining a warrant and searching the car, Andren discovered Aaron's jeans and wallet in the trunk of the car along with a shotgun, some shells, and a soft pellet gun hidden under the driver's seat. RP 195-197.

C. ARGUMENT

1. MR GERMAN WAS ENTITLED TO CREDIT FOR TIME SERVED WHILE ON ELECTRONIC HOME MONITORING.

Aaron spent four months on EHM before and during trial. RP1 11-12. During sentencing defense counsel could not cite to any legal authority in support of his request that Aaron receive credit for time served (CFTS). The court denied his request for CFTS while on EHM. RP 11-12.

The issue of whether is entitled to credit for time served (CFTS) while on EHM is a question of law reviewed de novo. State v. Watson, 155 Wn.2d 574, 578, 122 P.3d 903 (2005).

The Courts of Appeal review sentences that a trial court imposes that is outside the statutory confines of the Sentencing Reform Act. State v. Parker, 132 Wn.2d 182, 188, 939 P.2d 575 (1997). In Aaron's case, the trial court exceeded its statutory authority under RCW 9.94A.030(11) RCW 9.94A.030(32) and RCW 9.94A.505(6) when it refused to grant CFTS. A trial court commits reversible error when it exceeds its sentencing authority. In re Pers. Rest. of West, 154 Wn.2d 204, 211, 110 P.3d 1122 (1995).

The Sentencing Reform Act (SRA) requires the sentencing court to "give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender

is being sentenced.” RCW 9.94A.505(6)(emphasis added). There is no dispute that Aaron served time on EHM exclusively for the current offenses. “Confinement” is defined as “total or partial confinement.” RCW 9.94A.030(11)(emphasis added).

“Partial confinement” is in turn defined as “confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, . . . [and] includes work release, home detention, work crew, and a combination of work crew and home .

“Home detention” is defined in RCW 9.94A.030(32).

‘Home detention’ ” is a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance.

RCW 9.94A.030(27).

Electronic home monitoring constitutes home detention. State v. Speaks, 119 Wash.2d 204, 208-09, 829 P.2d 1096 (1992). In Speaks, the Court held that the defendant was entitled to credit for time served prior to sentencing in electronically monitored home detention. Id.

Moreover, regardless of statutory authority “[u]nder both federal case law and the case law of this state, presentence detention time is required to be credited against the sentence ultimately imposed.” State v. Speaks, 119 Wn.2d at 206, citing, Reanier v. Smith, 83 Wn.2d 342, 347, 517 P.2d 949 (1974).

In Aaron's case, he was unequivocally confined and pursuant to the constitution and statutory authority he was entitled to CFTS.

The state is likely to argue in its reply brief that is not entitled to CFTS on EHM because the trial court should not have granted release under EHM because robbery in the first degree is considered a violent crime. RP 1 10. The state presented this argument during sentencing citing to RCW 9.94A.680. CFTS. RP1 10. This is incorrect. The Supreme Court addressed this issue in State v. Anderson, 132 Wash.2d 203, 212-13, 937 P.2d 581 (1997) and held that under both state and federal constitutional provisions, a defendant is entitled to CFTS on EHM. Anderson, 132 Wn.2d at 213.

In Anderson, the trial court released the defendant on electronic home detention pending appeal of his attempted second degree murder conviction. Anderson, 132 Wn.2d at 205. The Court of Appeals in Anderson affirmed his conviction and the trial court refused his request for credit for time served. The Court of Appeals granted the defendant credit for time served and dismissed the State's argument that the defendant should not receive credit because the SRA does not allow home detention for violent offenders.

While it is true that under the SRA, a trial court may not impose home detention if an offender has been convicted of a violent offense, this provision does not appear to apply not pretrial detention. RCW 9.94A.734(1)(a). Second,

as in Anderson ,(release pending appeal) in the instant case, the State acquiesced in the trial court's releasing Mr. Aaron to home detention pending conclusion of his trial. Third, the Court in Anderson held that the fact that the defendant spent three years on electronic home detention, entitled him to credit under the Equal Protection Clause, regardless of the propriety of originally placing him on home detention. Anderson, 132 Wn.2d at 213.

For these same reasons, 's sentence should recalculated to include credit for all time served.

2. JUROR MISCONDUCT DENIED MR.  
GERMAN HIS RIGHT TO A FAIR TRIAL.

A criminal defendant's constitutional right to an impartial jury is denied where the jury considers extrinsic evidence in its deliberations. Turner v. Louisiana, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). Extrinsic evidence is 'information that is outside all the evidence admitted at trial, either orally or by document.' Richards v. Overlake Hosp. Med. Ctr., 59 Wn.App. 266, 270, 796 P.2d 737 (1990); see also, State v. Pete, 152 Wn.2d 546, 552-53, 98 P.3d 803 (2004) (holding that two unadmitted documents that inadvertently went to the jury room were improper extrinsic evidence).

When the jury considers extrinsic evidence in its deliberations, this constitutes misconduct and can be grounds for a new trial. State v. Balisok,

123 Wn.2d 114, 118, 866 P.2d 631 (1994). But before a new trial will be granted on this basis, ‘there must be a showing of reasonable grounds to believe that a defendant has been prejudiced.’ State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). The federal courts use a similar “reasonable possibility that the extrinsic material *could* have affected the verdict.” Marino v. Vasquez, 812 F.2d 499, 504 (9th Cir.1987) (emphasis in original), quoting United States v. Vasquez, 597 F.2d 192, 193 (9th Cir.1979). Any reasonable doubt that the misconduct affected the verdict must be resolved against the verdict. State v. Briggs, 55 Wn.App. 44, 55-56, 776 P.2d 1347 (1989).

The inquiry into prejudicial misconduct requires asking whether the evidence could have affected the jury's decision, not whether the evidence did in fact affect the decision. Richards, 59 Wn.App. at 273. This is because the actual effect of the extraneous evidence on the jury's decision inheres in the verdict. *Id.*

A court cannot review matters of the jury deliberation process that inhere in the verdict. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962). The mental processes by which jurors reach their conclusion are all factors inhering in the verdict. State v. Jackman, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989), citing, Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, \_\_\_\_\_ 179-80, 422 P.2d 515 (1967). A juror's statements inhere in the verdict

if the alleged facts of misconduct are linked to the juror's motive, intent, or belief, or describe the effect upon him or her. Gardner, 60 Wn.2d at 841. The court's inquiry into whether extraneous evidence affected the verdict is an objective inquiry. State v. Briggs, 55 Wn.App. at 55.

The "reasonable possibility" test is used in state and federal cases and is applicable to federal collateral review of state court judgments, as well as to federal cases directly appealed to the federal courts. Marino, 812 F.2d at 504. However, "[t]he ultimate question is 'whether it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict,' " Bayramoglu v. Estelle, 806 F.2d 880, 886-87 (9th Cir.1986). The state bears the burden of proving that constitutional errors are harmless beyond a reasonable doubt. Id. Lemieux, 75 Wn.2d at 91.

In Dickson, the trial court found that the two jurors who overheard a deputy's statement regarding the defendant's prior criminal history during their deliberations but had not discussed this with the panel. The Court held that the fact that the two jurors had not discussed the deputy's statements with the other jurors was irrelevant to determining constitutional error because criminal defendants are "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." Dickson, 849 F.2d at 407-408; quoting, Parker v. Gladden, 385 U.S. 363, 366, 87 S.Ct. 468, 471, 17 L.Ed.2d 420 (1966) " If

only one juror was unduly biased or improperly influenced, Dickson was deprived of his sixth amendment right to an impartial panel.” Dickson, 849 F.2d at 408, quoting, United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir.), cert. denied, 434 U.S. 818, 98 S.Ct. 58, 54 L.Ed.2d 74 (1977).

An unauthorized jury view of the scene of the accident in question, combined with statements made about other possible lawsuits against the defendant, constituted misconduct which was sufficient to raise a reasonable doubt that the plaintiff was given a fair trial and to justify the granting of a new trial. Gardner, 60 Wn.2d 836.

Similarly, in a condemnation case, tried to a jury which had heard the evidence in a companion case, the plaintiff was granted a new trial. After the verdict was returned, affidavits were obtained from jurors which showed that, in arriving at the amount of the award, they had considered evidence presented in the previous trial. State v. Gobin, 73 Wn.2d 206, 210-11, 437 P.2d 389 (1968).

In Lyberg v. Holz, 145 Wash. 316, 259 P. 1087 (1927), one of the jurors stated to the others that the plaintiff had refused an offer of settlement for an ulterior purpose, and the injection of this ‘evidence’ was held to be misconduct warranting a new trial. In State v. Burke, 124 Wash. 632, 215 P. 31 (1923), Woodruff v. Ewald, 127 Wash. 61, 219 P. 851 (1923), and Bouton-

Perkins Lbr. Co. v. Huston, 81 Wash. 678, 143 P. 146 (1914), in each of which a new trial was found justified on a showing that jurors had taken evidence outside the record.

In this case, all of the jurors heard and discussed the extrinsic evidence, and the trial court agreed that the presiding juror committed misconduct when she went on line and investigated how other robbery cases were handled and investigated the responsibilities of the defense and prosecutor in terms of proving their cases and in producing evidence and which party had the burden of proof. RP 483-522, 526. The trial court erroneously concluded that it could resolve the issue by simply removing juror # 7.

In the instant case, the extrinsic evidence affected the verdict. Juror #3 testified that juror #7 informed the panel that it was the defense job to “rebut [the prosecutor], prove him wrong”. RP 502. Notwithstanding each juror’s promise to disregard the extrinsic evidence, this information alone was so prejudicial that it is impossible to determine beyond a reasonable doubt that the verdict was not impacted by the extrinsic evidence. Because Aaron was entitled to an unbiased jury of 12, a new trial must be granted.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROVIDE THE COURT WITH LEGAL AUTHORITY FOR GRANTING CREDIT FOR TIME SERVED WHILE ON ELECTRONIC HOME.

a. Failure to Provide Legal Authority at Sentencing

The Washington and United States Constitutions guarantee criminal defendants effective assistance of counsel. United States Constitution, Sixth and Fourteenth Amendments; Article 1. To prove ineffective assistance of counsel, a defendant must show based on the record that (1) his counsel's performance was deficient, and (2) prejudice resulted from the deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To meet the second prong, a defendant must show that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 335; accord, State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

If an appellant fails to establish either element of the ineffective assistance of counsel claim, the reviewing court need not address the other element. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). The appellate courts review the defendant's claim of ineffective assistance of counsel de novo. State v. Mannering, 150 Wn.2d 277, 286, 75 P.3d 961 (2003). Moreover, legitimate tactical decisions cannot form the basis of an

ineffective assistance of counsel claim. State v. Soonalole, 99 Wn.App. 207, 215-16, 992 P.2d 541, review denied, 141 Wn.2d 1028 (2000).

In the instant case, the failure to provide easily ascertainable legal authority under RCW 9.94A.030(11) RCW 9.94A.030(32); and RCW 9.94A.505(6) to establish the was entitled to CFTS while on EHM was prejudicial to Aaron and deprived him of his right to a fair sentencing. Had trial counsel provided the court with easily ascertainable legal authority, the court would have been granted CFTS. For this reason, the sentencing should be reversed and remanded for CFTS while on EHM.

a. Juror Misconduct

Trial counsel did not move for a mistrial until after the verdict in spite of the fact that he articulated concerns that juror # 6 and juror #7 could not disregard the extrinsic evidence introduced by juror #7 and in spite of the fact that the other jurors described the introduction of extrinsic evidence that certainly played a role in their deliberative process.

The United States Supreme Court has found counsel ineffective for failing to file a notice of appeal; Lozada v. Deeds, 498 U.S. 430, 432, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991); for failing to provide meaningful cross examination of state's witnesses; U.S. v. Cronin, 466 U.S. 648, 659-60, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984) (prejudice presumed when counsel fails to

subject prosecution's case to meaningful adversarial testing) Prejudice is also presumed when counsel conceded no reasonable doubt as to elements of crime. Kotteakos v. United States, 328 U.S. 750, 764-65, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946; United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir.1991).

When “nothing the trial court could have said or done would have remedied the harm done to the defendant[]”, a mistrial should be to insure that the defendant will be tried fairly. State v. Gilchrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) (police loss of evidence not sufficiently prejudicial to warrant moving for a mistrial). In Aaron’s case, a new trial was the only remedy to insure a fair trial by an impartial jury of 12. Counsel’s failure to move for a new trial was prejudicial. Aaron should be granted a new trial on this basis.

4. THE ADDITION OF FIREARM ENHANCEMENT TO 'S SENTENCE VIOLATED HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION UNDER THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THE USE OF A FIREARM WAS AN ESSENTIAL ELEMENT OF THE UNDERLYING OFFENSES AND THE STATUTE IRRATIONALLY AND UNFAIRLY EXCLUDES OTHER OFFENSES FROM THE ENHANCEMENT WHERE THE USE OR POSSESSION OF A FIREARM IS AN ESSENTIAL ELEMENT.<sup>3</sup>

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<sup>3</sup> The legal analysis for this argument was originally drafted by Elaine Winters, Appellate

The right to equal protection of the laws is guaranteed by state and federal constitutions: U.S. Const. amend. 14; Wash Const. art, 1, § 12. Article 1, section 12 provides greater protection than the equal protection clause of the Fourteenth Amendment and is therefore interpreted independently. Grant County Fire Protection District No. 5 v. City of Moses Lake, 150 Wn.2d 791, 811, 83 P.3d 419 (2004) (Grant County II). 's sentence was increased based upon a firearm enhancement even though use of a firearm or deadly weapon was an essential element of his underlying crime. The enhancement statute, however, excluded other felonies where the possession or use of a firearm was an essential element. The firearm and deadly weapon enhancement statute, former RCW 9.94A.310(3), (4), violates 's right to equal protection under the federal and state constitutions.

Although Division One of the Court of Appeals rejected this argument, Division Two of the Court of Appeals has not issued an opinion on this issue. State v. Pedro, 148 Wn. App. 932, 201 P.3d 398 (2009).

- a. Aaron's sentence was increased by five years based upon a firearm enhancement even though the use of a firearm was an essential element of his first degree robbery conviction.

Aaron was convicted of robbery in the first degree while armed with a

deadly weapon (RCW 9A.56.200(1)(a)(ii) and unlawful possession of a firearm. RCW 9.41.040(2)(a)(iii). The Court imposed a firearm enhancement pursuant to RCW 9.94A.310/9.94A.510; RCW 9.94A.370/9.94A.530. The elements of first degree robbery as charged are that (1) or an accomplice took personal property of another, (2) or an accomplice intended to commit theft, (3) the taking was against the person's will by force or threatened force, (4) the force or threatened force was used to obtain or retain the property, (5) "that in the commission of these acts the defendant, or an accomplice, was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon". Supp CP(Court's Instructions to Jury 4-18-09(#15)). Under RCW 9A.56.200 second degree robbery can be elevated to first degree robbery in one of three ways: if the defendant is armed with a deadly weapon, if he displays a firearm or other deadly weapon, if he inflicts bodily injury, or robbery in or against a financial institution. RCW 9A.56.200(1)(a), (2), RCW 9A.56.210.

In Aaron's case the jury found him guilty of one count of first degree robbery because he or his accomplice was armed with a deadly weapon or displayed what appeared to be a deadly weapon. CP 32-33. If the jury had not found beyond a reasonable doubt that Aaron or an accomplice was armed with a deadly weapon or displayed a firearm, he would only have been

convicted of second degree robbery. The jury was also asked on special verdict forms if Aaron was armed with a deadly weapon or with a firearm for the robbery, and they returned special verdict forms finding a deadly weapon was used. Supp CP Special Verdict 4-18-09).

The information in 's case did not cite to the correct RCW 9.94A.533, but rather cited to RCW 9.41.040(2)(a)(iii); RCW 9.94A.310; RCW 9.94A.510; RCW 9.94A.370 and RCW9.94A.530.

The court imposed 102 months, which included a 60-month firearm enhancement. Id.. He was thus sentenced for robbery in the first degree with the essential element of a firearm and a firearm enhancement for being armed with a firearm. CP 22-33. The 60-month addition to 's sentence was based upon RCW 9.94A.530 and RCW 9.94A.533.4 These statutes provide in relevant part:

RCW 9. 94A. 530. Standard sentence range

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for other adjustments as specified in RCW 9.94A.533 shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

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4 The information did not cite to RCW 9.94A.533, but rather RCW 9.41.040(2)(a)(iii); RCW 9.94A.310; RCW 9.94A.510; RCW 9.94A.370 and RCW9.94A.530.

RCW 9.94A.533. Adjustments to standard sentences

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

....

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. The following additional times shall be added to the presumptive sentence for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. . . .

(a) Five years for any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection. . . .

(f) *The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, reckless endangerment in the first degree, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony. . . .*

(Emphasis added). RCW 9.94A.533 expressly excludes from the firearm enhancement provisions several crimes where a firearm is used or possessed. Robbery in the first degree is not one of the excluded offenses.

- b. Aaron's sentence violates the Fourteenth Amendment of the United States Constitution because the firearm and deadly weapon enhancement statute irrationally exempts some crimes from the enhancement and not others.

The Fourteenth Amendment of the United States Constitution prohibits both laws that abridge citizens' privileges and immunities and laws that deny equal protection of the laws. U.S. Const. amend. 14, § 1. Equal protection of the law requires that persons similarly situated as to the legitimate purposes of a law receive like treatment. State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). Courts are especially careful in addressing a statute penalizing the carrying of a weapon in light of the constitutional right to bear arms under both the federal and state constitutions. U.S. Const. amend. 2; Wash; Const. art. I, § 24; State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007).

The first step in analyzing an equal protection claim is to determine which test applies. This Court has applied the rational relationship test where

an individual's physical liberty is at stake but no suspect classification is involved. Coria, 120 Wn.2d at 170-71. Under this test, the challenged law must (1) serve a legitimate government interest and (2) employ means rationally related to the objective. State v. Manussier, 129 Wn.2d 652, 673, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997). Thus, a legislative classification violates equal protection when it "rests on grounds wholly irrelevant to the achievement of legitimate state objectives." Coria, 120 Wn.2d at 171, quoting Omega Nat'l Ins. Co. v. Marquardt, 115 Wn.2d 416, 431, 799 P.2d 235 (1990). The Legislature has broad discretion to determine what the public interest demands and what means are needed to protect that interest. Manussier, 129 Wn.2d at 673.

In 1995, the Hard Time for Armed Crime Act created separate enhancements from firearms and other deadly weapons. State v. Recuenco, 163 Wn.2d 428, 438, 180 P.3d 1276 (2008); Laws of 1995, ch. 129, § 2. In support of the law, the Legislature found armed criminals are a threat to public safety. Laws of 1995, ch. 129 §1(1)(a); Eckenrode, 159 Wn.2d at 492. By increasing the punishment for crimes committed with firearms, the law sought to (1) stigmatize the carrying and use of deadly weapons, (2) discourage the use of deadly weapons, (3) distinguish between "gun predators" and criminals carrying other deadly weapons, and (4) hold judges accountable when

sentencing offenders for serious crimes. Laws of 1995, ch. 129, § 1(2). In short, “the purpose of the initiative was to punish armed offenders more harshly to discourage the use of firearms.” State v. Berrier, 110 Wn.App. 639, 649, 41 P.3d 1198 (2002).

The law applies to all felonies with a limited number of exceptions: drive-by shooting, possession of a machine gun, possessing of a stolen firearm, unlawful possession of a firearm in the first or second degree, theft of a firearm, and use of a machine gun in a felony.<sup>5</sup> Former RCW 9.94A.310(3)(f), (4)(f). The Court of Appeals addressed these exceptions in a case where the defendant received a firearm enhancement in addition to his standard range sentence for unlawful possession of a short-barreled shotgun. Berrier, 110 Wn.App. at 642. “The trial court enhanced the sentence on this conviction under former RCW 9.94A.310(3)(2000) because Berrier committed the crime of possessing a short-barreled shotgun while armed with a firearm – the short-barreled shotgun.” Id. at 647-48.

The Court of Appeals noted the statute exempted certain crimes from the firearm enhancement where “possession of use of a firearm is a necessary

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<sup>5</sup> In 1997, the reckless endangerment in the first degree statute was amended to replace the term “reckless endangerment in the first degree” with the term “drive-by shooting.” Laws of 1997, ch. 338 § 44. At the time of Mr. Jones’ offense, former RCW 9.94A.310 therefore refers to reckless endangerment in the first degree, but the version in effect at the time of Mr. Cardenas’ offense refers to drive-by shooting.

element of the underlying crime itself.” Berrier, 110 Wn.App. at 650. The court found the purpose of the legislation -- to discourage the use of firearms by punishing armed offenders more harshly than others -- was not served by the portion of the statutory exemption distinguishing between people who possess a short-barreled shotgun and those who possess a machine gun. Id. Given the most plausible explanation for the distinction was legislative oversight, the court found the firearm enhancement statute violated Berrier’s right to equal protection and vacated his sentence. Id. at 651.

The Berrier Court’s holding that the Legislature intended to exclude crimes from the enhancement where the use or possession of a weapon is already an element of the offense is supported by the Sentencing Guidelines Commissioner. The State Supreme Court relies upon the comments of the Sentencing Guidelines Commission in interpreting the SRA. In re Postsentence Review of Charles, 135 Wn.2d 239, 250-51, 955 P.2d 798 (1998). In 1996, the Commission described the purpose of Initiative 159 as broadening the application of firearm and deadly weapon enhancements “to all felonies except those in which using a firearm is an element of the offense.” State of Washington Sentencing Guidelines Commission, 1996 Adult Sentencing Guidelines Manual cmt. at II-70 (1996). The list of exempt crimes includes crimes where the possession or use of a firearm is included in the

offense title.

For example, use of a machine gun in a felony, RCW 9A.02.025, is excluded from a firearm or deadly weapon enhancement. Former RCW 9A.02.025(3)(f), (4)(f). A person is guilty of use of a machine gun in a felony, for example, if he discharges or threatens to discharge a machine gun in the commission or furtherance of a felony. RCW 9A.02.025. Also excluded is drive-by shooting, which is committed when a person recklessly discharges a firearm from a car and creates a substantial risk of death or serious bodily injury. RCW 9A.36.045. The Legislature excluded these and other offenses from the enhancements in recognition that use of a weapon was already an element of the crimes.

There is no rational distinction between people who, like Aaron, are convicted of first degree robbery for using a firearm and receive a firearm enhancement, and people who use a firearm in a drive-by shooting or use or threaten to use a machine gun in committing a felony and do not receive a firearm enhancement. In both cases, use of a firearm is an element of the offense. The Legislature's goal of punishing people who use or carry weapons when committing crimes more harshly than other people is not met by excluding some crimes where an essential element is the use of a firearm and including other crimes where use of possession of a weapon is an essential

element. 's rights to equal protection of the law were thus violated.

- c. The firearm and deadly weapon enhancements violate the state constitution's prohibition against special privileges and immunities because the statute excludes from the reach of the enhancement some but not all offenses that include the use or possession of a firearm as an element of the crime.

Article 1, section 12 of the Washington Constitution prohibits laws that grant privileges or immunities to one class of citizens and not all. Privileges and immunities "pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship." Grant County II, 150 Wn.2d at 812. One of those fundamental rights is the right to bear arms.<sup>6</sup> U.S. Const. amend. 2; Wash. Const. art. 1 § 24; District of Columbia v. Heller, 128 S.Ct. 1695, 170 L.Ed.2d 351, 76 USLW 3496 (2008); State v. Rupe, 101 Wn.2d 664, 706-07, 683 P.2d 571 (1984), cert. denied, 486 U.S. 1061 (1985). This right, however, may be regulated as necessary to protect the public. State v. Krantz, 24 Wn.2d 350, 353, 164 P.2d 453 (1945).

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<sup>6</sup> Art. 1, § 24 of the Washington Constitution provides:

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.

The Second Amendment to the United States Constitution reads:

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

In determining if a provision of the Washington Constitution should be interpreted independently from a similar provision of the federal constitution, this Court looks to the six non-exclusive Gunwall factors. Grant County II, 150 Wn.2d at 806, citing State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). Once this Court establishes that a specific state constitutional provision requires an independent analysis from a comparable federal constitutional provision, the parties need not engage in further Gunwall analysis except as it is helpful in determining the scope of the state constitutional provision. State v. White, 135 Wn.2d 761, 811, 958 P.2d 982 (1998).

In Grant County II, the State Supreme Court held that article 1, section 12 provides greater protection to Washington citizens than does the Fourteenth Amendment and should be given an independent interpretation. Grant County II, 150 Wn.2d at 811. The members of the Court, however, appear to be divided as to whether article 1, section 12 should only be interpreted independently from the federal constitution when the statute at issue grants a privilege or immunity to a minority class. See Madison v. State, 161 Wn.2d 85, 94-95, 111, 118, 127-28, 163 P.3d 757 (2007). The State Supreme Court has not recently utilized an independent analysis to equal protection challenges to criminal statutes as this one, and the petitioners therefore addresses the

Gunwall factors.

- i. A review of the Gunwall factors calls for the independent interpretation of article 1, section 12 of the Washington Constitution.

The six non-exclusive factors are: (1) the textual language of the state constitution, (2) differences in the texts of parallel provisions of the federal and state constitutions, (3) state constitutional and common law history, (4) preexisting state law, (5) structural differences between the federal and state constitutions, and (6) matters of particular state or local concern. Gunwall, 106 Wn.2d at 58.

A. Gunwall Factors 1 and 2.

Article 1, section 12 of the Washington Constitution provides that the government may not enact laws that do not apply equally to all citizens:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Wash. Const. art. 1, § 12. The Fourteenth Amendment has similar language concerning privileges and immunities, but also forbids states from denying the equal protection of the laws. U.S. Const. amend. 14.

The significant differences between the language of article 1, section

12 and the Fourteenth Amendment favor an independent interpretation Washington's privileges and immunities clause. Grant County II, 150 Wn.2d at 806-07; State v. Smith, 117 Wn.2d 263, 284-85, 814 P.2d 652 (1991) (Utter, J., concurring). This language, including the use of different verbs, suggests the drafters meant something different. Smith, 117 Wn.2d at 285 (Utter, J., concurring); Jonathan Thompson, "The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for 'Equal Protection' Review of Regulatory Legislation?" 69 Temp. L. Rev. 1247, 1250-51 (1996). The Grant County II Court agreed, finding the federal constitution is concerned with discrimination by majority groups against minorities, whereas the federal constitution protects against laws serving a special class of citizens to the detriment of others. Grant County II, 150 Wn.2d at 425-26.

#### B. Gunwall Factor 3.

Washington's Constitution was adopted after the Fourteenth Amendment, but Article 1, section 12 was modeled after a similar provision in the constitution of our neighboring state of Oregon.<sup>7</sup> Smith, 117 Wn.2d at 285 (Utter, J., concurring), citing Journal of the Washington State Constitutional Convention, 1889, at 501 n.20 (B. Rosenow ed. 1962).

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<sup>7</sup> Ore. Cont. art. 1, § 20 reads:

No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same term, shall not equally belong to all citizens.

Oregon's Constitution, adopted in 1859, was in turn modeled after an even early state constitution. State v. Clark, 291 Ore. 231, 236, 630 P.2d 810 (1981).

Oregon has given its privileges and immunities clause an independent interpretation. Clark, 291 Ore. at 236-37, 630 P.2d 810 (1981) (and cases cited therein). Although the language of Oregon's constitutional provision reflects a concern for monopolies and special privileges for the few, the clause was also utilized by citizens concerned with the adverse effects of discrimination or unequal adverse treatment. Id. at 237-39, citing inter alia In re Oberg, 21 Ore. 406, 28 Pac. 130 (1891) (law prohibiting arrest of sailors on sea-going vessel for debts did not violate state constitution because all sailors equally; granting immunity to all sailors serves legitimate public purpose).

Washington common law also demonstrates our privileges and immunities clause has also been interpreted independently from the federal constitution. Grant County II, 150 Wn.2d at 809 n.12; City of Spokane v. Macho, 51 Wash. 322, 98 Pac. 755 (1909) (city ordinance criminalizing misrepresentation by employment agent but not other those engaging in other businesses).

#### C. Gunwall factor 4.

The fourth Gunwall factor calls for review of any pre-existing state

law. In Grant County II, this Court noted even before the adoption of the constitution, Washington recognized government may not grant special privileges or immunities. Grant County II, 150 Wn.2d at 809-11. This Court looked to the Organic Act, the Territorial Court's opinion in Hayes, and cases from early statehood to concluded pre-existing law seems to favor a separate analysis. Id. at 811. See Hayes v. Territory, 2 Wash.Terr. 286, 288, 5 Pac. 927 (1884) (state hunting restrictions do not create special privilege because apply equally to all citizens).

D. Gunwall Factor 5.

The structural differences between the federal and state constitutions necessarily favor an independent interpretation of the Washington Constitution. Grant County II, 150 Wn.2d at 811. The federal constitution is a grant of limited power to the federal government, whereas the state constitution imposes limits on the "otherwise plenary power of the state governments." Robert Utter, "Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights," 7 U. Puget Sound L. Rev. 491, 494-95 (1984). Moreover, state constitutions were originally intended to create the primary protection for individual rights, with the federal constitution providing a second layer of protection. Id. at 497.

E. Gunwall factor Six.

Finally, the last Gunwall factor calls for a review of whether the matter at issue is of particular state or local concern. Each state has its own criminal laws and sentencing formulas; state sentencing statutes are a matter of state or local concern. This Court, for example, utilized the state constitution's prohibition against cruel punishment in striking down a defendant's sentence under the former habitual criminal statute for three nonviolent offenses. State v. Fain, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980). This State's sentencing statutes and whether they operate fairly is a matter of state concern.

- ii. The Washington Constitution's goal of fairness will be served if this Court gives Article 1, section 12 an independent interpretation from the Fourteenth Amendment.

When interpreting a state constitutional provision, this Court first looks to the plain language of the text. Larson v. Seattle Popular Monorail Authority, 156 Wn.2d 752, 757-58, 131 P.2d 892 (2006). The words of the text are given their common and ordinary meaning, as of the time of the drafting. Washington Water Jet Workers Assn. v. Yarbrough, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). The State Supreme Court may also examine the

historical context of the provision for guidance. Id.

The language of article 1, section 12 forbids the enactment of a law that grants privileges or immunities to citizens, classes or citizens, or corporations unequally. Wash. Const. art. 1, § 12. The term privileges and immunities refer to fundamental rights. Grant County II, 150 Wn.2d at 812-13. These include the right to own and defend property, operate a business, access to the courts, and to be free from discriminatory taxation. State v. Vance, 29 Wash. 435, 458, 70 Pac. 34 (1902).

A 1909 Washington case shows the privileges and immunities clause is also concerned that laws treat people fairly and not operate against one class to the exclusion of another. In Macho, the defendant was convicted of a municipal ordinance making it illegal for an employment agent to willfully deceive a person seeking employment. Macho, 51 Wash. at 322-23. The court noted the employment agent was engaged in a lawful business, and the act would not be criminal if performed by someone engaged in a different lawful business. Id. at 325. The court therefore concluded the ordinance went beyond the city's reasonable and constitutional police power. Id. at 325-26. Importantly, the court stated, "It is a fundamental proposition that an ordinance must be fair in its terms, impartial in its operation." Id. at 324.

Oregon has not limited its privileges and immunities clause to grants of

special privileges to minority groups, but has applied it in a variety of areas, including criminal prosecutions and punishment. State v. Freeland, 295 Ore. 367, 667 P.2d 509 (1983) (unconstitutional for prosecutor to exercise discretion to charge defendant without preliminary hearing in absence of consistent standards) State v. Day, 84 Ore.App. 291, 733 P.2d 937 (1987) (legitimate government interest in suspending driver's licenses of those under 18 found guilty of minor in possession of alcohol). "Because the clause would ordinarily be invoked by persons who wanted a privilege or immunity for themselves rather than to withdraw it from others, its protective effect was soon held to extend to rights against adverse discrimination as well as against favoritism, and its use against discriminatory or otherwise 'unequal' adverse treatment is long recognized." Clark, 291 Ore. at 237. (citations omitted).

Favoritism and discrimination are two sides of the same coin: both prevent discrimination. Jeffrey M. Shaman, "The Evolution of Equality in State Constitutional Law," 34 Rutgers L. J. 1013, 1047-48 (2003); Thompson, supra, 69 Temp. L. Rev. at 1251. As Macho demonstrates, the privileges and immunities clause applies when a statute unfairly discriminates, and the Court should give the Washington Constitution an independent construction when evaluating whether statutes and ordinances create unfair classifications.

- iii. This Court should adopt a more stringent rational basis test when evaluating statutes under article 1, section 12.

Minnesota has applied a more stringent rational basis test to equal protection claims under its state constitutional provision providing for equal protection of the law since early 1980's.<sup>8</sup> State v. Russell, 477 N.W.2d 886, 888 (1991). Minnesota evaluates equal protection challenges to statutes by requiring

(1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Id. The court is “unwilling to hypothesize a rational basis to justify a classification,” and requires “a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals.” Id. at 889.

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<sup>8</sup> Article 1, section 2 of the Minnesota Constitution reads:

No member of this state shall be disenfranchised or deprived of any of the rights or privileges to any citizen thereof, unless by the law of the land or the judgment of his peers. There shall be neither slavery nor involuntary servitude in this state otherwise than as punishment for a crime of which the party has been convicted.

Using this standard, the Minnesota Supreme Court struck down a sentencing statute that proscribed significantly higher penalties for the possession of crack cocaine than cocaine powder. The Court noted the absence of any evidence that users of crack cocaine were more dangerous than those of powder cocaine or that one form of cocaine was more addictive or dangerous than the other. Russell, 477 N.W.2d at 889-91. The legislation punished possession of crack cocaine at the same level as dealing powder cocaine, in effect punishing a person for possession of crack cocaine with intent to sell without requiring proof of such intent. Id. at 891. The Minnesota Supreme Court was unable to uphold the statute because the classification was not relevant to the statutory purpose and was also arbitrary and unreasonable. Id.

Here, the SRA requires that everyone who uses or possesses a firearm or other deadly weapon while committing a felony should be given a longer sentence, but the statute specifically excludes a small group of felonies from penalty. The law grants immunity from the firearm enhancement to several crimes where possession of use of a firearm is an element of the crime. The SRA creates standard range sentences based upon the seriousness of the current offense and the offender's prior record. Former RCW 9.94A.310,

.320, .350, .360. In setting the seriousness level for crimes like first degree assault and first degree robbery, the Legislature already factored in the possibility that a deadly was involved in the offense. Aaron, however, was not excluded even though use of a firearm or deadly was an essential element of his offense.

The firearm and deadly weapon enhancement statute does not meet Minnesota's rational basis test, which should be used to protect Washington's citizens from unequal and irrational laws. Any distinction between robbery in the first degree with a firearm and the exempted crimes is not genuine and substantial, as all include the use of possession of a weapon as an essential element. The classification found in the exemption provision is irrelevant to the purposes of the firearm and deadly weapon enhancement statute and does not further the overall legislative goals. This Court should find the enhancement statute is unconstitutional as applied to Aaron .

5. THE TRIAL COURT VIOLATED MR. GERMAN'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY UNDER WASHINGTON CONSTITUTION ARTICLE 1 SECTION 9, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ADDED A FIREARM SENTENCING ENHANCEMENT THAT WAS ALSO AN ELEMENT OF THE UNDERLYING CRIMES CHARGED.

The trial court erred by imposing a deadly weapons enhancement for robbery in the first degree, in which a deadly weapon is an essential element of the crime charged: robbery in the first degree.

The Washington State Constitution prohibits the State from punishing a defendant twice for the same crime: "No person shall ... be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9. A defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. State v. Womac, 160 Wn.2d 643, 652, 160 P.3d 40 (2007) (quoting State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)). "[O]ffenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other." Womac, 160 Wn.2d at 652, 160 P.3d 40 (quoting State v. Trujillo, 112 Wn.App. 390, 410, 49 P.3d 935 (2002)).

This Court rejected double jeopardy challenges to weapons enhancement as applied to crimes in which, use, possession or display of a weapon is an element of the crime charged. State v. Kelley, 146 Wn. App. 370, 189 P.3d 853 (2008), review granted, 165 Wash.2d 1027, 203 P.3d 379 (Wash. Mar 03, 2009) (Table, NO. 82111-9) State v. Aguirre, 146 Wn. App. 1048 (2008) (unpublished), review granted, 165 Wash.2d 1036, 205 P.3d

131 (Wash. Mar 31, 2009) (Table, NO. 82226-3).

Specifically, this court relied on the decision in State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), review denied, 163 Wn. 2d 1053, cert. denied, 129 S.Ct. 644 (2008), which reasoned that the logic of Apprendi,<sup>9</sup> Blakely<sup>10</sup> and their progeny did not apply to the Fifth Amendment Double Jeopardy Clause protections and did not apply to sentencing enhancements. argues that the Court's decisions in these cases are contrary to provisions of the constitution. To preserve this issue for continuing review, adopts the briefing and argument of petitioner Aguirre. ) State v. Aguirre, 146 Wn. App. 1048 (2008) (unpublished), review granted, 165 Wash.2d 1036, 205 P.3d 131 (Wash. Mar 31, 2009) (Table, NO. 82226-3).

The U.S. Supreme Court has applied the reasoning of Apprendi to Fifth Amendment protections, and it has also applied the protections of Apprendi, Ring,<sup>11</sup> and Blakely to sentence enhancements. The finding of evidence beyond reasonable doubt in RCW 9.94A.602, the deadly weapon enhancement, like any other element of an offense is decided by the jury. As such it is treated like an element of an offense rather than an enhancement. The Court of Appeals decisions that interpret the Double Jeopardy Clause as

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<sup>9</sup> Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

<sup>10</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2351, 159 L.Ed.2d 403 (2004).

<sup>11</sup> Ring v. Arizona, 536 U.S. 594, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

permitting consecutive punishments for matching elements should be reconsidered and reversed.

Contrary to this Court's decision in Kelley, Blakely mandates courts to characterize firearm enhancements as an additional element of the crime for double jeopardy purposes because sentence enhancements for offenses committed with weapons violate double jeopardy where the use of a weapon is an element of the crime. Kelley, 146 Wn.App. at 374; Nguyen, 134 Wn. App. at 866.

For these reasons, this Court should stay decision in this matter pending the Supreme Court decisions in both Kelley, and Aguirre.

6. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE IDENTITY OF THE ROBBER.

The standard of review for determining the sufficiency of the evidence is "whether after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S. Ct. 2781 (1979); accord, State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

To prove robbery in the first degree, the state must establish beyond a reasonable doubt that: (1) or an accomplice took personal property of another;

(2) or an accomplice intended to commit theft; (3) the taking was against the person's will by force or threatened force; (4) the force or threatened force was used to obtain or retain the property' (5) "that in the commission of these acts the defendant, or an accomplice, was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon". RCW 9A.200(1)(a)(ii).

One of the essential elements of every crime is the identity of the perpetrator. "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974) (citing, 1 H. Underhill, Criminal Evidence § 125 (5<sup>th</sup> Ed. P. Herrico 1956, Supp. 1970); 1 Wharton's Criminal Evidence § 16 (13<sup>th</sup> ed. C. Torica 1972)). "[T]he identity of a defendant and his presence at the scene of the crime must be proven beyond a reasonable doubt" and are never presumed. State v. Johnson, 19 Wn. App. 200, 204, 574 P.2d 741 (1978); see also State v. Rich, 63 Wn.App. 743, 748, 821 P.2d 1269 (1992).

In the instant case, there was no eyewitness or identification of as one of the robbers. The only evidence presented indicated that Aaron was in a car with Gino and Elliott and Jennifer and that after Gino parked behind Bob's Grocery Store, Aaron left the car with Elliott and returned with his face covered. The

store clerk could not identify Aaron and no one saw him actually enter or exit the store. While this amounts to some evidence, it is not enough to sustain a conviction.

The Supreme Court of the United States has emphasized that the standard for reviewing the sufficiency of the evidence requires that the conviction must be supported by more than some evidence. A conviction based on some evidence is “inadequate to protect against misapplication of the constitutional standard of reasonable doubt.” Jackson v. Virginia, 99 S. Ct. at 2789.

State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995) is illustrative of this principle. In this case, there was conflicting evidence regarding whether a substance contained cocaine. A state Toxicologist testified to the jury that he performed two different tests on the substance and one revealed the presence of cocaine. A well-qualified defense expert performed the same tests on the same substance and his results did not detect the presence of any cocaine. The State advanced a theory in support of the conviction under a lesser standard that was rejected by the State Supreme Court.

While this could be true, “could” is not the relevant standard. Proof beyond a reasonable doubt is the standard, and this explanation of the possibility of inconsistent results using the same methods and procedures does not itself prove anything beyond a reasonable doubt.

Hundley, 126 Wn.2d at 421.

Similarly in this case, the robber could have been Aaron but that is not the standard of proof. Under the evidence presented in this case, it is not possible for any rational trier of fact to find Aaron guilty beyond a reasonable doubt of the robbery. His convictions should be vacated and the charges dismissed with prejudice.

7. THERE WAS INSUFFICIENT EVIDENCE TO PROVE APPELLANT POSSESSED A FIREARM.

To convict Aaron of unlawful possession of a firearm as charged, the State had to prove beyond a reasonable doubt that he knowingly had a firearm in his possession or his control and that he had previously been convicted of a felony. RCW 9.41.040(1)(b). State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000). The sole issue is whether he possessed a firearm.

Possession may be actual or constructive. State v. Echeverria, 85 Wn.App. 777, 783, 934 P.2d 1214 (1997).

If a defendant has dominion and control over the contraband or over the premises where the firearm was found, a jury can find that he constructively possessed a firearm. Echeverria, 85 Wn.App. at 783, 934 P.2d 1214. For this argument, a vehicle is a "premises". State v. Mathews, 4

Wn.App. 653, 656, 484 P.2d 942 (1971). Two people can have simultaneous constructive possession of the same item. State v. Morgan, 78 Wn.App. 208, 212, 896 P.2d 731, review denied, 127 Wash.2d 1026, 904 P.2d 1158 (1995).

Close proximity alone is not enough to establish constructive possession; other facts are required to infer dominion and control. State v. Spruell, 57 Wn.App. 383, 388-89, 788 P.2d 21 (1990); State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969). In Callahan, the Court held that close proximity to illegal drugs where the accused does not have dominion and control over the premises was not sufficient to establish constructive possession. Another person claiming ownership is a significant factor in evaluating whether the defendant has constructive possession. See Collins, 76 Wn.App. at 501, 886 P.2d 243.

The ability to reduce an object to actual possession is an aspect of dominion and control, however, no single factor is dispositive in determining dominion and control. Echeverria, 85 Wn.App. at 783, 934 P.2d 1214; State v. Collins, 76 Wn.App. 496, 501, 886 P.2d 243, review denied, 126 Wash.2d 1016, 894 P.2d 565 (1995). The determination of constructive possession requires consideration of the totality of the circumstances. Collins, 76 Wn.App. at 501, 886 P.2d 243.

In Echeverria, the court found that a rational trier of fact could

reasonably infer that the defendant possessed or controlled a gun that was within his reach. The gun was in plain sight, sticking out from underneath the defendant's driver's seat. Echeverria, 85 Wn.App. at 783.

In State v. Turner, 103 Wn. App. 515, 13 P.3d 234 (2009), the defendant admitted that he was driving his truck with a friend and that he knew a rifle was in the back seat. Even though, the friend claimed ownership of the rifle, Turner was in close proximity to the rifle, knew of its presence, was able to reduce it to his possession, and had been driving the truck in which the rifle was found. The rifle was also in plain view behind the driver's seat. Turner, 103 Wn. App. at 521-22. Under those facts, the Court held that as in Echeverria, Turner had constructive possession of the rifle.

The instant case is distinguishable from both Echeverria and Turner. In Aaron's case, he was a passenger in Gino's car. No one testified to the seating arrangement in Gino's car and Gino did not know who was in the back seat. RP 55. Gino claimed ownership of the shotgun and testified that he placed it in the trunk of his car. RP 40, 82, 220. Gino did not know who had the shotgun during or after the robbery. RP 62. The clerk could not identify either robber, but saw a shotgun. RP 140-42. While very intoxicated, Elliott evidently told police that both he, Gino and Aaron were involved in the robbery and that Aaron had the shotgun in the store. RP 282. Elliott could not

remember making this statement to the police. RP 287-88. Elliott first told the police he was the driver and then changed his story. RP 295, 298.

Aaron testified that he went to watch a movie at a friend's house when the robbery took place. RP 370-71. Anisa with whom he watched the movie also testified that Aaron was watching a movie with her during the time of the robbery. RP349- 353. The police also found an airsoft replica pellet BB gun under the driver's seat that belonged to Elliott. RP 280. RP 197. The car was described as having a split back seat that could be accessed from the back seat. RP 55.

Unlike Echeverria and Turner, there was no testimony that Aaron had access to the gun except from Elliott who was also implicated in the robbery. Based on the limited evidence presented, a rational trier of fact could not have found that Aaron possessed or controlled the shotgun found in the trunk of the car. For these reasons the conviction of possession of a firearm should be reversed and dismissed with prejudice.

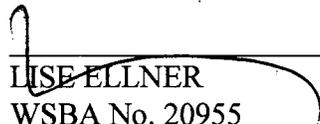
#### D. CONCLUSION

Aaron German respectfully requests this Court reverse his convictions for robbery in the first degree and illegal possession of a firearm in the second degree for failing to prove the essential elements beyond a reasonable doubt. Alternatively, Mr. German request s new trial based on juror misconduct and

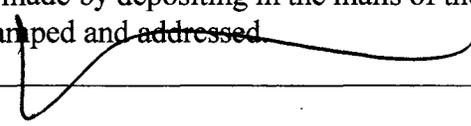
the ineffective assistance of counsel, Finally, MR. German requests remand for resentencing for credit for time served while on electronic home monitoring. of due process violations of his right to present a defense, to confrontation and due to prosecutorial misconduct.

DATED this 4th day of November 2009.

Respectfully submitted,

  
LISE ELLNER  
WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Aaron German Pierce County Jail 910 Tacoma Ave S Tacoma, WA 98402 a true copy of the document to which this certificate is affixed, on November 5, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

  
Signature

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