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SUPREME COURT  
STATE OF WASHINGTON  
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No. 85789-0  
Consolidated with No. 85947-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE GUZMAN NUNEZ,

Petitioner.

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

The Honorable John Hotchkiss

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SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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A. ARGUMENT

1. REGARDLESS OF WHETHER DOUBLE JEOPARDY APPLIES, THE REMEDY FOR A VIOLATION OF *BASHAW* IS TO STRIKE THE ENHANCEMENT AND REMAND FOR RESENTENCING

Mr. Nunez acknowledges that this Court has ruled in prior cases that double jeopardy does not apply to sentence enhancements. See *State v. Aguirre*, 168 Wn.2d 350, 229 P.3d 669 (2010); *State v. Kelley*, 168 Wn.2d 72, 226 P.3d 773 (2010); *State v. Eggleston*, 164 Wn.2d 61, 71, 187 P.3d 233 (2008). Mr. Nunez does note that this Court has yet to address the exact situation as presented here where the underlying conviction is constitutionally proper but the enhancement is violative of the rule established by *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). This presents the unique issue of what is the remedy when the enhancement must be reversed when the underlying conviction is affirmed. Mr. Nunez notes that a similar issue is currently before this Court in *State v. Siers*, 158 Wn.App. 686, 244 P.3d 15 (2010), review granted, 171 Wn.2d 1009 (2011).<sup>1</sup>

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<sup>1</sup> *Siers* was argued before this Court on October 25, 2011. *Siers* involved a second degree assault and a "Good Samaritan" enhancement where the State failed to allege the enhancement in the Information. The issue was the

Yet this fact does not end the discussion. As noted by Mr. Nunez in his initial supplemental brief, the remedy where the resulting sentence is based upon an improper jury verdict is to strike the enhancement, albeit not on double jeopardy grounds. *State v. Recuenco*, 163 Wn.2d 428, 442, 180 P.3d 1276 (2008). In *Recuenco*, the trial court instructed the jury on the deadly weapon verdict, which the jury subsequently found. The court sentenced Mr. Recuenco, not imposing the deadly weapon enhancement as found by the jury, but instead imposing a firearm enhancement. This Court found the error occurred in the improper sentencing of Mr. Recuenco and ordered the firearm enhancement stricken. *Id.*

Here, the trial court also erred in imposing the enhancement as it resulted from an improper jury verdict that itself was the result of an improper jury instruction. As in *Recuenco*, the error here was in imposing an enhancement that was the result of the faulty jury verdict. Thus, the remedy must follow that found in *Recuenco*; strike the enhancement and remand for resentencing.

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remedy for the failure to properly allege the enhancement: strike just the enhancement or the enhancement *and* the underlying conviction.

2. MR. NUNEZ ADOPTS BY REFERENCE THE ARGUMENTS IN MR. RYAN'S SECOND SUPPLEMENTAL BRIEF

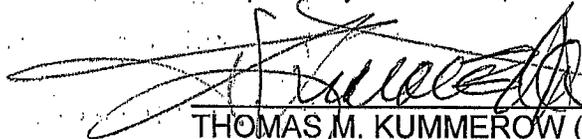
Pursuant to RAP 10.1(g)(2), Mr. Nunez adopts by reference the arguments submitted by George Ryan in his second supplemental brief filed with this Court.

B. CONCLUSION

For the reasons stated in Mr. Nunez's supplemental brief and the instant second supplemental brief, he requests this Court strike the enhancement and remand for resentencing without the enhancement.

DATED this 1st day of February 2012.

Respectfully submitted,



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

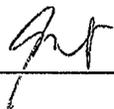
STATE OF WASHINGTON, )  
 )  
RESPONDENT, )  
 )  
v. ) NO. 85789-0  
 )  
ENRIQUE NUNEZ, )  
 )  
PETITIONER. )

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 3<sup>RD</sup> DAY OF FEBRUARY, 2012, I CAUSED THE ORIGINAL **SECOND SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2012.

X \_\_\_\_\_  


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