

62696-5

62696-5

NO. 62696-5-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RELFE,

Appellant,

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW BRIEF
PURSUANT TO RAP 10.10

Michael Relfe
#860059, SCCC, H4-A-15
191 Constantine Way
Aberdeen, WA. 98520

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1 | I. Introduction

2 | Appellant argues First, there was insufficient evidence to prove First
3 | Degree Assault in violation of RCW 9A.36.011, when there was no permanent
4 | disfigurement to the victim which is the definition of "great bodily harm",
5 | the essential element of First Degree Assault.

6 | Second, appellant argues impermissible double counting of the firearm when
7 | it was already counted as a element of the underlying offense that elevated
8 | his charge from second to first degree assault. The firearm cannot be double
9 | counted and used to further give the appellant an additional 60-month firearm
10 | enhancement when that element of the crime has already been counted in RCW
11 | 9A.36.011(1)(a).

11 | II. Assignments of Error

12 | 1. The trial Court erred when it allowed the appellant to be prosecuted on
13 | the charge of First Degree Assault when there was insufficient evidence to
14 | meet the corpus delicti of the crime.

15 | 2. The State erred in charging appellant with First Degree Assault when
16 | they could not prove it beyond a reasonable doubt.

17 | 3. The trial court erred in allowing a jury instruction allowing the jury
18 | to find special circumstances allowing for further enhancement of the
19 | appellant's sentence with a firearm enhancement when the firearm was already
20 | an underlying and essential element of the crime charged in RCW 9A.36.011(1)
21 | (a).

22 | 4. The trial court impermissibly double counted the firearm twice to give
23 | the appellant both the underlying offense of First Degree Assault, as well as
24 | the firearm enhancement when they both encompassed the same conduct of the
25 | firearm.

26 | 5. The trial court violated the theory of impermissible double counting

1 when they allowed the jury to determine the firearm enhancement as well as
2 the elevated degree of the crime from second to first degree, when both
3 were premised on the same conduct of the firearm.

4 III. Issues Pertaining to Assignments of Error

5 1. Did the trial court err in allowing the State to charge the appellant
6 with First Degree Assault when they could not prove the corpus delicti of
7 the crime? (Assignment of Error 1)

8 2. Did the trial court err in allowing the State to charge the appellant
9 with First Degree Assault when they could not prove the essential element of
10 the crime charged which was "great bodily harm"? (Assignment of Error 1)

11 3. Could the State prove their case of First Degree Assault beyond a
12 reasonable doubt when the appellant was defending himself? (Assignment of
13 Error 2)

14 4. Did the trial court err in allowing a special verdict form to be
15 submitted to the jury for an additional 60-month firearm enhancement when
16 the firearm was already an underlying element of the crime violating the
17 theory of impermissible double counting?

18 5. Does double counting of the firearm element constitute a reversible
19 error requiring resentencing without the firearm enhancement? (Assignment
20 of Error 3)

21 6. Did the trial court violate the appellant's constitutional rights to
22 due process, right to a fair trial/sentencing, cruel and unusual punishment,
23 equal protection, and double jeopardy under the Fifth, Sixth, Eighth, and
24 Fourteenth Amendments of the United States Constitution, and Wash. Const.
25 Art. I §§ 3, 9, and 22 in finding him guilty and sentencing him to both the
26 firearm enhancement and the First Degree Assault charge requiring reversal?

1 (Assignment of Errors 3-5)

2 7. The Double Jeopardy Clause protects against multiple punishments for
3 the same offense, thus, would it also then protect against multiple
4 punishments for the same element of the offense of the firearm? (Assignment
5 of Errors 3-5)

6 8. Is appelalnt's case a case of first impression since it is
7 materially distinguishable from Nguyen, and other cases that have argued
8 the firearm enhancement as an element of the crime, and as Double Jeopardy
9 when none of the other cases except DeSantiago have raised the argument of
10 "impermissible double counting" of the firearm as applied to Washington law
11 where the firearm cannot be double counted when the conduct has already been
12 punished in the underlying offense's essential element? (Assignment of
13 Errors 3-5)

14 IV. Statement of the Case

15 Appellant herein incorporates by reference his Appellant's Opening Brief
16 Statement of the Case and Facts to save the Court time. Appellant requests
17 that the Court take judicial notice of the Ninth Circuit case of
18 Insyxiengmay V. Morgan, 403 F.3d 657, 668-69 (9th CIR 2005)(quoted in Hyde
19 V. Paskett, 383 F.Supp.2d 1256, 1263 (D.Idaho 2005). See also Farmer V.
20 Baldwin, 497 F.3d 1050 at n.30 (9th CIR 2007).

21 Relfe remained at the scene after the incident to provide assistance to
22 Lee and await the arrival of medics. EX 41 at 7-8. And innocent men do not
23 run, as Relfe did not run. At trial, Relfe asserted self-defense. CP 84-87.
24 Appellant pointed the gun at Lee with the intention of scaring him, but
25 pulled the trigger. EX 41 at 7-8.

26 STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW-3-

1 **V. Argument**

2 **1. Insufficient Evidence**

3 **THE EVIDENCE PRESENTED BY THE STATE IS INSUFFICIENT TO FIND GUILT BEYOND**
4 **A REASONABLE DOUBT BECAUSE THE VICTIM HAD NO PERMANENT DISFIGUREMENT TO**
5 **PROVE GREAT BODILY HARM, THE ESSENTIAL ELEMENT OF FIRST DEGREE ASSAULT**
6 **REQUIRING REVERSAL AND ACQUITTAL FOR THE FIRST DEGREE ASSAULT CONVICTION**
7 **SINCE IT VIOLATED APPELLANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT**
8 **RIGHTS, AND WASH. CONST. ART. I § 3, 9, AND 22 RIGHTS.**

9 **STANDARD OF REVIEW**

10 The State has the burden of proving each element of the crime charged
11 beyond a reasonable doubt. U.S. Const. Amend. 14; Wash.Const. Art.I § 3; In re
12 Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The
13 prosecution failed to find and prove all essential elements, reversal is
14 required, and double jeopardy prevents retrial. Due Process requires that
15 the prosecution in a criminal case prove beyond a reasonable doubt every
16 element of the crime charged. Winship, supra. State V. Bland, 71 Wn.App. 345,
17 359, 860 P.2d 1046 (1993); citing State V. Baeza, 100 Wn.2d 487, 670 P.2d 646
18 (1983); State V. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

19 Our standard of review for addressing the sufficiency to support a
20 conviction is the same on direct appeal. See Mikes V. Borg, 947 F.2d 353,
21 356 n. 5 (9th CIR 1991), cert. denied, 505 U.S. 1229 (1992); see also
22 Jackson V. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2789, 61 L.Ed.2d 560 (1978).

23 **LEGAL STANDARDS**

24 **When Properly Reviewed, The Evidence Is Insufficient To Support A**
25 **Conviction For First Degree Assault.**

26 Green outlines the test for determining whether there is sufficient
evidence to support a conviction. In essence, the Green rule is that the
reviewing Court must determine after reviewing the evidence in the light most
favorable to the prosecution, whether any rational trier of the fact could
have found all the essential elements of the crime beyond a reasonable doubt.
State V. Randhawa, 133 Wn.2d 67, 73, 941 P.2d 661 (1997); Bland, Id. at 359;

1 Jackson, Id. at 319.

2 The Jackson test replaced the earlier "any evidence" test. Id. at 317
3 n. 10. Insufficient evidence requires reversal. Burks V. U.S., 437 U.S. 1, 98
4 S.Ct. 2141, 57 L.Ed.2d 1 (1979). The State needs independent evidence, State
5 V. Aten, 79 Wn.App. 79, 900 P.2d 579 (1995), which it had none. The State
6 cannot prove "great bodily harm" which has been defined as "permanent
7 disfigurement." State V. Marquez, 131 Wn.App. 566, 127 P.3d 786 (DIV 2, 2006).

8 Acquittal must be granted on insufficient evidence. U.S. V. Bahe, 40
9 F.Supp.2d 1302 (D.N.M. 1998). So this Court is required to make an independent
10 determination of the cases sufficiency based upon the record under the
11 Jackson standard. Jackson clearly imposes on the Court reviewing a
12 sufficiency claim the duty to make an independent determination of the
13 evidences sufficiency. A sufficiency of the evidence question is a legal
14 question; the presumption of correctness has no place in it. In fact,
15 Jackson's standard would be meaningless if the presumption of correctness
16 were applied. Spalla V. Foltz, 615 F.Supp. 224, 227 n.3 (D.C. Mich. 1985),
17 aff'd, 788 F.2d 400 (6th CIR), cert. denied, 479 U.S. 935, 107 S.Ct. 410,
93 L.Ed.2d 362 (1986).

18 Appellant was in fear for his life when the alleged victim James Dixon Lee
19 approached his vehicle. While the appellant is approximately 30 years older
20 than the victim, and the victim was professionally trained in fighting the
21 appellant had reason to be fearful. Mr. Lee approached appellant's vehicle
22 and grabbed the appellant through the open driver's door window, slapped and
23 manhandled the appellant repeatedly. **SRP 11-12; EX at 5-6.**

24 Appellant was defending himself in the most basic sense of the legal
25 definition. And the State is violating appellant's constitutional liberties
26 in overcharging him, and for even charging appellant in the first place with

1 a crime. The State overcharged appellant with First Degree Assault, when even
2 if this Court determines that it wasn't self-defense, the appellant's conduct
3 barely rose to the elements of Second Degree Assault since the appellant did
4 not intentionally, knowingly, or wilfully inflict great bodily harm on James
5 Dixon Lee, who was bigger, taller, and weighed more than the appellant who
6 was in fear for his life.

7 Nevertheless, "mere suspicion or speculation cannot be the basis for
8 creation of logical inferences." Walters V. Maass, 45 F.3d 1355, 1358 (9th CIR
9 1995). When the Green standard is applied to the conviction, the State's proof
10 must fail. Taken in the light most favorable to the State there was
11 insufficient evidence to rise to the level of First Degree Assault. RCW 9A.
12 36.011(1)(c). It is reversible error to relieve the State from its burden of
13 proof of any elements of the crime charged. State V. Bowen, 125 Wn.App. 1015,
14 887 P.2d 396 (1995). Likewise, if a conviction is reversed for lack of
15 sufficient evidence, the Double Jeopardy Clause both the Fifth Amendment of
16 the United States Constitution, and of Art. I § 9 of the Wash.Const. bars
17 retrial of the defendant for the charges. State V. Hardesty, 129 Wn.App. 303,
18 915 P.2d 1080 (1996); State V. Pascal, 108 Wn.2d 125, 736 P.2d 1065 (1987);
19 North Carolina V. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

20 Because insufficiency of the evidence cases are so fact specific, it is
21 difficult to find controlling precedent. Certain cases, however, are
22 instructive.

23 The Fifth Circuit has reversed convictions where the proof was at least as
24 strong as that here. See Isham V. Collins, 905 F.2d 67 (5th CIR 1990). Proof
25 or opportunity **does not** satisfy the Jackson standard. Thus, when this Court,
26 it must find that appellant's conviction was based on insufficient evidence
because the State failed to prove its case beyond a reasonable doubt. And

1 reversal with dismissal is appropriate as to not offend the Double Jeopardy
2 Clause of the Fifth Amendment, and Wash.Const. Art. I § 9.

3 The critical inquiry on review of the sufficiency of the evidence to
4 support a criminal conviction is "whether the record evidence could
5 reasonably support a finding of guilt beyond a reasonable doubt." Jackson,
6 Id. at 318. And appellant argues the State cannot meet its burden herein to
7 prove "great bodily harm" as defined in RCW 9A.36.011(1)(c).

8 This "standard must be applied with explicit reference to the substantive
9 elements of the criminal offense as defined by state law." Wolfe V. Bock,
10 412 F.Supp.2d 657, 681 (E.D.Mich. 2006). This Court must reasonably apply
11 the Supreme Court precedent of Jackson.

12 There was insufficient corroborative evidence of great bodily harm to
13 prove permanent disfigurement of First Degree Assault, to satisfy the
14 corpus delicti rule. State V. Whalen, 131 Wn.App. 58, 63, 126 P.3d 55, 58
15 (DIV 2, 2005). The State has the burden of producing evidence sufficient to
16 satisfy the corpus delicti rule. State V. Riley, 121 Wn.2d 22, 32, 846 P.2d
17 1365 (1993). See also State V. DuBois, 79 Wn.App. 605, 610, 904 P.2d 308,
18 311 (DIV I, 1995)(King County-Reversed on insufficiency of the evidence to
19 establish the corpus delicti rule).

20 Appellant seeks Equal Protection as being "similarly situated" as DuBois
21 being out of the same county, and the proof that there is also insufficient
22 evidence in appellant's case to prove beyond a reasonable doubt that the
23 corpus delicti rule can be satisfied, requiring reversal and dismissal on
24 the Count of First Degree Assault pursuant to RCW 9A.36.011(1)(c).

1 **2. Impermissible Double Counting Of The Firearm Enhancement**

2 PETITIONER'S SENTENCE ENHANCEMENT OF THE FIREARM RENDERS HIS SENTENCE
3 STATUTORILY, AND CONSTITUTIONALLY INVALID DUE TO IMPERMISSIBLE DOUBLE
4 COUNTING OF THE FIREARMS INCE IT WAS ALREADY AN ESSENTIAL, AND
5 UNDERLYING ELEMENT OF THE OFFENSE OF FIRST DEGREE ASSAULT VIOLATING THE
6 FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND WASH. CONST. ART. I
7 § 3, 9, 22 OF DUE PROCESS, DOUBLE JEOPARDY, CRUEL AND UNUSUAL PUNISHMENT,
8 AND EQUAL PROTECTION. TO BE PUNISHED TWICE FOR THE SAME CONDUCT, AND
9 ELEMENT IS REVERSIBLE ERROR REQUIRING REVERSAL AND REMAND FOR
10 RESENTENCING WITHIN THE STANDARD SENTENCING RANGE WITHOUT THE FIREARM
11 ENHANCEMENT.

12 Appellant received a sentence of 120 months, which includes a 60 month
13 firearm enhancement for his conviction for First Degree Assault. RCW 9A.36.
14 011(1)(c); 9.94A.310; 9.94A.510. CP 60-61.

15 The firearm enhancement was already "counted" as an underlying, and
16 essential statutory element of the crime of First Degree Assault, which has
17 already doubled the standard sentencing range between second and first
18 degree due to the only element of the firearm. The firearm was
19 "impermissibly double counted" when the petitioner received a multiple
20 punishment of the 60 month firearm enhancement in addition to the already
21 elevated degree of the crime due only to the element of the firearm, which
22 violates the theory of double counting, requiring reversal and dismissal of
23 the firearm enhancement and resentencing.

24 **Standard of Review**

25 Impermissible double counting in sentencing occurs when one part of the
26 Sentencing Guidelines is applied to increase [appellant's] punishment...that
has already been fully accounted for by the application of another part of
the Guidelines. U.S. V. Willett, 90 F.3d 404, 407 (9th CIR 1996); see also
U.S. V. Reese, 2 F.3d 870, 895 (9th CIR 1993). True, a sentencing court may
not enhance a sentence based on a defendant's possession of a firearm if the

1 defendant is "also" convicted for the possession of that same firearm. U.S.
2 V. Washington, 44 F.3d 1271, 1280-81 (5th CIR 1995)(quoting U.S. V. Rodgers,
3 981 F.2d 497, 500 (11th CIR 1993)(per curiam)(It is improper to convict...
4 and enhance sentence based on the possession or use of the same weapon);
5 U.S. V. Harris, 959 F.2d 246, 266 (D.C.CIR 1992). Cf. U.S. V. Cabral-
6 Castillo, 35 F.3d 182, 188 (5th CIR 1994).

7 "[T]he prohibition against Double Jeopardy is a cornerstone of our
8 system of constitutional criminal procedure." U.S. V. Davenport, 519 F.3d
9 940, 947-48 (9th CIR 2008). The Fifth Amendment's Double Jeopardy Clause
10 provides:

11 "[N]or shall any person be subject for the same offense to be twice put
12 in jeopardy of life or limb."

13 U.S. Const. Amend. V. This fundamental right has been interpreted to
14 protect persons "against successive prosecutions for the same offense after
15 acquittal or conviction and," as relevant here "against multiple criminal
16 punishments for the same offense." Monge V. California, 524 U.S. 721, 727-28
17 (1998); accord, U.S. V. Elliot, 463 F.3d 858, 864 (9th CIR 2006). Generally
18 stated, "[w]hen a defendant has violated two different criminal statutes,
19 the double jeopardy prohibition is implicated when both statutes prohibit
20 the same offense as the other." Davenport, 519 F.3d at 943 (citing Rutledge,
21 V. U.S., 517 U.S. 292, 297 (1996)).

22 "Where we conclude that a defendant has suffered a double jeopardy
23 violation because he was erroneously convicted for the same offense under
24 two separate counts [and/or statutes]... 'the only remedy consistent with
25 the Congressional intent is for the [c]ourt, where the sentencing
26 responsibility resides, to exercise its discretion to vacate one of the

1 underlying convictions [and/or counts].'" U.S. V. Schales, 546 F.3d 965, 980
2 (9th CIR 2008)(citing Ball V. U.S., 470 U.S. 856, 864-65 (1985)).

3 **Double Counting**

4 U.S. V. Hernandez-Sandoval, 211 F.3d 1115, 1117 (9th CIR 2000), concluded
5 that separate conduct must be shown to give a separate enhancement in
6 addition to the sentence already given under the Guidelines for the firearm.
7 Especially when the firearm enhancement is already an essential element of
8 the underlying crime. As it is here for the petitioner which requires
9 reversal and dismissal of the 60 month firearm enhancement, and resentencing
10 within the standard sentencing range.

11 Petitioner further argues that in the State of Washington the aggravating
12 factor that raises a sentence from Second Degree Assault to First Degree
13 Assault, is only the essential element of the firearm, or deadly weapon.
14 Thus, the firearm is petitioner's base offense level of first degree
15 assault, and thus, cannot be double counted, as they did, to give him the
16 additional 60 month firearm enhancement for the same firearm, and conduct
17 since he was already punished for that element in the underlying base
18 offense level of first degree assault.

19 Thus, under the theory of impermissible double counting it is automatic
20 reversible error for the State to "double count" the firearm in punishing
21 the appellant further with the 60 month firearm enhancement in addition to
22 the sentence which already punishes for the firearm in the essential
23 underlying statutory elements in RCW 9A.36.011(1)(c). U.S. V. Gonzalez, 262
24 F.3d 867, 870-71 (9th CIR 2001)(quoting U.S. V. Parker, 136 F.3d 653, 654
25 (9th CIR 1998)(per curiam)(citing Reese, 2 F.3d at 895)).

1 In U.S. V. Knobloch, 131 F.3d 366, 372 (3d CIR 1997), the Third Circuit
2 states that it is error to apply a guideline enhancement in addition to
3 statutory penalty "even if it si for a different weapon." Knobloch, Id. at
4 372. If a certain characteristic of an offense was not accounted for in
5 computing the base offense level, "double counting" is not permissible, but
6 necessary. U.S. V. Narte, 197 F.3d 959 (9th CIR 1999)(citing Reese, 2 F.3d
7 at 894-95). Appellant's case is distinguishable due to the fact that the
8 firearm was used in computing the base offense level when the State
9 increased the base offense level from second degree to first degree assault
10 based on the element of the firearm.

11 The principle if very clearly explained in Reese:

12 "[T]he use of a single aspect of conduct both to determine the applicable
13 offense guideline and to increase the base level offense mandated
14 thereby will constitute impermissible double counting where, absent such
15 conduct, it is impossible to come within that guideline. If on the other
16 hand, it is possible to be sentenced under a particular offense guideline
17 without having engaged in a certain sort of behavior, such behavior may
18 be used to enhance the offense level.

19 Reese, Id.; see also Narte, 197 F.3d at 865; Archdale, 229 F.3d at 869.

20 The Sentencing Guidelines only permit double-counting of a factor "when
21 each invocation of the behavior serves a unique purpose under the
22 Guidelines." U.S. V. Nagra, 147 F.3d 875, 883 (9th CIR 1998). Appellant
23 argues that the firearm enhancements purpose is to already increase the
24 base offense level from second to first degree, and to double count it to
25 sentence him as was done violates his statutory, and constitutional rights,
26 and further violates the theory of impermissible double counting, requiring
reversal, and dismissal of the firearm enhancement and resentencing without
the firearm enhancement.

1 The fundamental distinction between facts that are elements of a criminal
2 offense and facts that go only to the sentence provides the foundation for
3 our entire double jeopardy jurisprudence—including the "same elements" test
4 for determining whether two "offense[s] are "the same," see Blockburger V.
5 U.S., 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Monge, 524 U.S. at
6 738.

7 In a dissenting opinion in Monge, Justice Scalia states:

8 California has used the gimmick of counting a sentencing enhancement
9 that is set up to look like a separate crime but charges the same
10 element, and has used this to eviscerate the Double Jeopardy Clause; it
11 still provides a right to notice, jury trial, and proof beyond a
reasonable doubt on "enhancement" allegations as a matter of state law.
But if the Court is right today these protections could be withdrawn
tomorrow.

12 Scalia, J., dissenting in Monge, 524 U.S. at 739, 141 L.Ed.2d at 631.

13 Earlier this term, in Almendarez-Torres V. U.S., 523 U.S. 224, 118 S.Ct.
14 1219, 140 L.Ed.2d 350 (1998), I discussed our precedents bearing on this
15 issue and concluded that it was a grave and doubtful question whether
16 the Constitution permits a fact that increases the maximum sentence to
17 which a defendant is exposed to be treated as a sentencing enhancement
18 rather than an element of a criminal offense. See *id.*, at 260 (dissenting
19 opinion). I stopped short of answering that question, because I thought
20 the doctrine of constitutional doubt required us to interpret the federal
21 statute at issue as setting forth an element rather than an enhancement,
22 thereby avoiding the problem. *Ibid.* Since the present case involves a
23 state statute already authoritatively construed as an enhancement by the
24 California Supreme Court, I must now answer the constitutional question
25 He was later sentenced to eleven years in prison, however, on the basis
26 of several additional facts that California and the Court have chosen to
label "sentence enhancement allegations." However, California chooses to
divide and label it's criminal code, I believe that for federal
constitutional purposes those extra four years are attributable to
conviction for a new crime. The Court contends that this issue "was
neither considered by the state courts nor discussed in petitioner's
brief before this Court." *Ante*, at 728, 141 L.Ed.2d, at 624. But Monge
has argued consistently that reconsideration of the enhancement issue
would violate the Double Jeopardy Clause. He did not explicitly contend
that the enhancement was in reality an element of the offense with which
he was charged, but I believe that was fairly included within this
argument he did make. "When an issue or claim is properly before this
Court, the court is not limited to the particular legal authorities

1 advanced by the parties, but rather retains the independent power to
2 identify and apply construction of governing laws." Kamen V. Kemper
3 Financial Services, Inc., 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d
4 152 (1991). See also U.S. National Bank of Ore. V. Independent Ins.
5 Agents of America, Inc., 508 U.S. 439, 446, 113 S.Ct. 2173, 124 L.Ed.2d
6 402 (1993).

7 Almendarez-Torrez left open the question whether "enhancements" that
8 increase their sentence and that do not involve the defendant's prior
9 criminal history are valid. That qualification is an implicit limitation
10 on the court's holding today.

11 Scalia, J., dissenting in Monge V. California. With whom Justice Souter, and
12 Justice Ginsberg join, dissenting.

13 Appellant herein argues that since his firearm "enhancement" was a
14 statutory element of the offense of First Degree Assault, RCW 9A.36.011(1)
15 (c), thus, it cannot be counted twice in his sentence to further increase
16 his punishment by 60 months for a statutory element, the firearm, that was
17 already "counted" in the underlying offense. If it does not substantiate
18 a meritorious argument for the theory of impermissible double counting the
19 appellant does not know what does.

20 Double counting occurs when an element is counted twice in computing the
21 total offense level. U.S. V. Smith, 196 F.3d 1034, 1037 (9th CIR 1999)
22 (citing Nagra, 147 F.3d at 883); U.S. V. Haggard, 41 F.3d 1320, 1327 (9th
23 CIR 1994)('There is no double counting if the extra punishment is
24 attributable to different aspects of the defendant's conduct.'). Appellant
25 herein argues that the firearm is already an element of the offense charged,
26 and thus, elevating his base offense level from second to first degree
because of the firearm. That element has already been punished and cannot be
"double counted" in order to further enhance his sentence by 60 months.

Additionally enhancing his sentence was an abuse of discretion, and
amounted to impermissible double counting, requiring reversal. The Superior

1 Court erred because the element of the firearm was already an element of the
2 underlying offense. See in general, U.S. V. Calozza, 125 F.3d 687, 690-91
3 (9th CIR 1997).

4 The test set forth in Blockburger, is often used to determine whether the
5 Legislature intended to allow punishment under multiple provisions. U.S. V.
6 Dixon, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

7 "Double counting" occurs when the Guidelines use the same conduct more
8 than once to increase the severity of the sentence. U.S. V. Parker, 136 F.3d
9 653, 654 (9th CIR 1998). Double counting is permissible...where each
10 enhancement of the defendant's sentence served a unique purpose under the
11 guidelines. See Calozza, 125 F.3d at 691; Reese, 2 F.3d at 895. But herein
12 where appellant's firearm enhancement served the same purpose under the
13 guidelines of punishing him for the firearm, it is impermissible double
14 counting to apply the firearm enhancement as it is already an underlying,
15 essential element of the crime charged of First Degree Assault under RCW
16 9A.36.011(1)(c), and it cannot be found without the firearm element, thus,
17 requiring reversal.

18 Herein appellant's case it is "double counting" because the same act that
19 raised the base offense level from second to first degree, the firearm, was
20 the basis for the enhancement also. U.S. V. Farrow, 198 F.3d 179, 192 (6th
21 CIR 1999). Finally, Reese, 2 F.3d at 895, the Ninth Circuit declined to
22 follow Hudson. Reese held that:

23 "the use of a single aspect of conduct both to determine the applicable
24 offense guideline and to increase the base level mandated thereby will
25 constitute impermissible double counting only where absent such conduct,
it is impossible to come within that guideline."

26 Id., 2 F.3d at 895.

1 Absent the firearm in appellant's case the State would have only been
2 able to charge him with second degree assault which carries half the
3 sentence as the firearm is the essential underlying element of first degree
4 assault. See RCW 9A.36.011(1)(c).

5 This Court **MUST** adhere to the well established rule that impermissible
6 double counting occurs when precisely the same aspect [or element] of the
7 appellant's conduct factors into his sentence in two separate ways. See
8 Perkins, 89 F.3d at 310. If the single aspect [herein appellant's firearm]
9 of his conduct both determines his offense level and triggers an enhancement
10 it undermines the Sentencing Guidelines' goal of proportionality in
11 sentencing, and is considered impermissible double counting. Farrow, Id. at
12 194.

13 The Ninth Circuit has addressed the issue and determined that enhancement
14 of a defendant's sentence based on the possession of a firearm is permitted
15 as long as the enhancement and sentences are based on different weapons.
16 Willett, 90 F.3d at 408. In appellant's case there was only one firearm, and
17 it was already counted as an element of the underlying offense.

18 Thus, it is clear that under the Sentencing Guidelines provision cited
19 herein, the Washington statute for First Degree Assault, RCW 9A.36.011(1)(c)
20 the sentence may not be enhanced for the use of the firearm if the appellant
21 has also been convicted for using that firearm during the assault which
22 carries a mandatory sentence. U.S. V. Franks, 230 F.3d 811, 814 (5th CIR
23 2000); U.S. V. Rodriguez, 65 F.3d 932, 933 (11th CIR 1995). Meaning that
24 since the petitioner's base level offense included the statutory element of
25 the firearm, the State Court committed a violation under the theory of
26 impermissible double counting when they further enhanced his sentence with

1 the 60 month firearm enhancement.

2 Franks argues the enhancement may not be applied where a defendant is
3 also convicted for the use of the firearm in connection with that crime.
4 Franks, 230 F.3d at 814. As was the appellant herein since the charging
5 statute, RCW 9A.36.011(1)(c), has the statutory element of the firearm. The
6 added 60 month enhancement constitutes impermissible double counting since
7 the firearm has already been accounted for in the charging statute. This
8 requires reversal and remand for the removal of the firearm enhancement, and
9 resentencing within the standard sentencing range without the firearm
10 enhancement.

11 The Ninth Circuit has adopted the Franks view. U.S. V. Duran, 4 F.3d 800
12 804 (9th CIR 1993). All the circuit courts that have considered this
13 question seek to avoid "double counting" if a defendant was sentenced for
14 the use of a firearm during the commission of a [crime] with a firearm.
15 Franks, 230 F.3d at 814. The Ninth Circuit therefore held that an express
16 threat of death may not be used to enhance a defendant's sentence.

17 Appellant recognizes that the majority of his authorities are citing
18 federal statutes, 18 U.S.C.A. § 924(c), or a sentence under § 2K2.4 but
19 appellant herein attempts to draw bright line between the similarities of
20 them and the Washington State statutes. This Court is bound by federal
21 precedent since the appellant's case is "similarly situated" under the Equal
22 Protection Clause of the Fourteenth Amendment. Which requires this Court to
23 apply the enclosed authorities to appellant's sentence since they apply
24 through the appellant's impermissible double counting argument, requiring
25 reversal for resentencing without the enhancement.

26 Once a sentence has been imposed for carrying, using, or possessing a

1 firearm in relation to a crime of violence, a sentencing court cannot add a
2 Sentencing Guidelines enhancement for conduct that has already been punished
3 by statutory penalty. U.S. V. White, 222 F.3d 363, 374 (7th CIR 2000).
4 Sentencing in this fashion violates the Double Jeopardy Clause of the Fifth
5 Amendment. Cf. Albernaz V. U.S., 450 U.S. 333, 334 (1981)("[T]he question of
6 what punishments are constitutionally permissible [under the Double Jeopardy
7 Clause] is not different from the question of what punishments the
8 Legislative Branch intended to be imposed.")).

9 Therefore, because the statute for First Degree Assault accounts for the
10 firearm used by the appellant in relation to the underlying offense, a
11 Guidelines enhancement cannot be imposed. See Knobloch, 131 F.3d at 372.
12 "[D]ouble counting occurs when the court assesses more than one enhancement
13 to the offense level for a single offense based on the same underlying
14 conduct." White, 222 F.3d at 375-76 (citing U.S. V. Haines, 32 F.3d 290, 293
15 (7th CIR 1994)(stating that impermissible double counting occurs when
16 identical conduct is described in two ways so that two different adjustments
17 apply.")). See also State V. DeSantiago, 108 Wn.App. 855, 33 P.3d 394 (DIV 3,
18 2001).

19 As happened in appellant's case when his underlying offense level was
20 raised from second to first degree assault based on the conduct of the
21 firearm. Then he was punished a second time for the same conduct when the
22 State "double counted" the firearm to add on the 60 month firearm
23 enhancement when it encompasses the same conduct. And it accounts for the
24 same firearm as is punished in the statutory elements of both the underlying
25 offense, RCW 9A.36.011(1)(c), and the firearm enhancement, RCW 9.94A.310,

1 and 9.94A.510.

2 In using the same element [and conduct, the firearm] in both the
3 underlying offense, and the firearm enhancement, the State has penalized him
4 twice for the same conduct, and the same firearm, when it was an underlying
5 statutory element of the underlying offense violating the Fifth, Sixth,
6 Eighth, and Fourteenth Amendments, and Wash. Const. Art. I § 3, 9, and 22.

7 The enhancement must respond to a separate [element] of [the crime]. U.S.
8 V. Swoapex, 31 F.3d 482, 483 (7th CIR 1994). The Blockburger test applies
9 to claims of successive punishments as well as successive prosecutions.
10 Hudson V. U.S., 522 U.S. 93, 107 (1997)(citing Dixon, 509 U.S. at 745-46
11 (Souter, J., concurring in part and dissenting in part)(explaining why the
12 Blockburger test applies in the multiple punishment context). The Double
13 Jeopardy Clause also "protects against multiple punishments for the same
14 offense." Missouri V. Hunter, 459 U.S. 359, 366 (1983)(citing North Carolina
15 V. Pearce, 395 U.S. 711, 717 (1969)). "[W]here the offenses are the same...
16 cumulative sentences are not permitted." Whalen V. U.S., 445 U.S. 693 (1980).
17 Cf. Blockburger, Id.

18 Appellant argues that the multiple punishments for the firearm violates
19 the ruling in Blockburger, 284 U.S. at 304, requiring reversal of the 60
20 month firearm enhancement, and resentencing without the 60 month enhancement
21 sentenced within his standard sentencing range. The Blockburger test applies
22 to double punishments when "the same act or transaction constitutes a
23 violation of two distinct statutory provisions." U.S. V. Overton, No. 08-
24 30075 (9th CIR 2009)(decision filed July 14, 2009)(citing Davenport, 519
25 F.3d at 943 (citing Rutledge, 517 U.S. at 297)).

26 Appellant argues that this Court must find that there's a violation of

1 impermissible double counting and double jeopardy for multiple punishments
2 for the same element in both the underlying offense, and the firearm
3 enhancement. And if either violation is proven to this Court's standards
4 then the only available remedy is reversal and remand for resentencing
5 without the firearm enhancement.

6 The Ninth Circuit has held that it was not Congresses intent to impose
7 multiple punishments for possessing a single firearm even if that firearm
8 violates multiple statutes. U.S. V. Zalapa, 509 F.3d 1060, 1062 (9th CIR
9 2007); see U.S. V. Edick, 603 F.2d 772, 773-75 (9th CIR 1979). Accordingly,
10 convicting and sentencing appellant for both the firearm enhancement and
11 first degree assault whose underlying essential element is the firearm
12 resulted in multiplicitous sentences and convictions and violated the Double
13 Jeopardy Clause of the Fifth Amendment, requiring reversal. U.S. Const.
14 Amend. 5.

15 Review was granted at the Washington State Supreme Court on this issue in
16 State V. DeSantiago, 146 Wn.2d 1007, 51 P.3d 86 (2002). Appellant's case is
17 distinguishable from DeSantiago, even though DeSantiago raises the argument
18 of "impermissible double counting", the appellant herein argues it in a case
19 of First Impression as applying it to First Degree Assault with a firearm
20 when the firearm is already being used to elevate the base offense level
21 from second to first degree and to sentence for the firearm enhancement.

22 Appellant argues that this Court must hear this issue since it has never
23 been heard before.

24 VI. Conclusion

25 Appellant argues that his first ground requires reversal and dismissal
26 with prejudice. And his second ground requires reversal of the firearm

