

NO. 63040-7-I

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

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In re Personal Restraint Petition of

MANSOUR HEIDARI,

Petitioner,

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

The Honorable Robert H. Alsdorf, Judge

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PETITIONER'S SUPPLEMENTAL BRIEF

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DEC 31 2009

KING COUNTY COURTS  
Appellate Unit

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 DEC 31 PM 4:23

**TABLE OF CONTENTS**

	Page
A. <u>SUPPLEMENTAL ISSUE STATEMENT</u> .....	1
B. <u>SUPPLEMENTAL ARGUMENT</u> .....	1
1. <u>Statutory Language</u> .....	1
2. <u>Right to Jury Trial/Due Process</u> .....	3
3. <u>Double Jeopardy</u> .....	11
C. <u>CONCLUSION</u> .....	19

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<u>State v. Anderson</u> 96 Wn.2d 739, 638 P.2d 1205 <u>cert. denied</u> , 459 U.S. 842 (1982) .....	7
<u>State v. Atterton</u> 81 Wn. App. 470, 915 P.2d 535 (1996).....	8
<u>State v. Aumick</u> 126 Wn.2d 422, 894 P.2d 1325 (1995).....	4
<u>State v. Bucknell</u> 144 Wn. App. 524, 183 P.3d 1078 (2008).....	7
<u>State v. Charley</u> 48 Wn.2d 126, 291 P.2d 673 (1955).....	8
<u>State v. Cobelli</u> 56 Wn. App. 921, 788 P.2d 1081 (1989).....	8
<u>State v. Corrado</u> 81 Wn. App. 640, 915 P.2d 1121 (1996).....	14
<u>State v. Ervin</u> 158 Wn.2d 746, 147 P.3d 567 (2006).....	12
<u>State v. Friedrich</u> 4 Wash. 204, 29 P. 1055 (1892) .....	4, 5
<u>State v. Gallegos</u> 65 Wn. App. 230, 828 P.2d 3 <u>review denied</u> , 119 Wn.2d 1024 (1992) .....	15
<u>State v. Garcia</u> 146 Wn. App. 821, 193 P.3d 181 (2008) <u>review denied</u> , 166 Wn.2d 1009 (2009) .....	9, 10

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Gilbert</u> 68 Wn. App. 379, 842 P.2d 1029 (1993).....	7, 9
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980).....	6, 7, 8, 18
<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998).....	12
<u>State v. Maganai</u> 83 Wn. App. 735, 923 P.2d 718 (1996).....	8
<u>State v. Swane</u> 21 Wn.2d 772, 153 P.2d 311 (1944).....	9
<u>State v. Symes</u> 17 Wash. 596, 50 P. 487 (1897).....	4
<u>State v. Thompson</u> 35 Wn. App. 766, 669 P.2d 1270 (1983).....	8
<u>State v. Walker</u> 143 Wn. App. 880, 181 P.3d 31 (2008).....	14
 <b><u>FEDERAL CASES</u></b>	
<u>Arizona v. Washington</u> 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978).....	12
<u>Blockburger v. United States</u> 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).....	14
<u>Brown v. Ohio</u> 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).....	14
<u>Burks v. United States</u> 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).....	12

## TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Ex Parte Frederich</u> 149 U.S. 70, 13 S. Ct. 793, 37 L. Ed. 653 (1893).....	6
<u>In re Friedrich</u> 51 F. 747 (C.C.D. Wash. 1892).....	5
<u>In re Nielsen</u> 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 2d 118 (1889).....	17
<u>Keeble v. United States</u> 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973).....	9
<u>Morris v. Matthews</u> 475 U.S. 237, 106 S. Ct. 1032, 89 L. Ed. 2d 187 (1986).....	18
<u>Rutledge v. United States</u> 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996).....	14
<u>Smalis v. Pennsylvania</u> 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).....	15
<u>Sullivan v. Louisiana</u> 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).....	3
<u>Tibbs v. Florida</u> 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982).....	13
<u>United States v. Dinkane</u> 17 F.3d 1192 (9th Cir. 1994) .....	17
<u>United States v. Gooday</u> 714 F.2d 80 (9th Cir. 1983) <u>cert. denied</u> , 468 U.S. 1217 (1984) .....	18
<u>United States v. Martin Linen Supply Co.</u> 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977).....	4, 16

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>United States v. Scott</u> 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978).....	15
<u>United States v. Vasquez-Chan</u> 978 F.2d 546 (9th Cir. 1992) .....	17, 18
<u>Washington v. Recuenco</u> 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).....	6

**OTHER JURISDICTIONS**

<u>Haynes v. State</u> 273 S.W.3d 183 (Tex. Crim. App. 2008) .....	16
<u>State v. Myers</u> 158 Wis.2d 356, 461 N.W.2d 777 (1990).....	10, 11
<u>Stephens v. State</u> 806 S.W.2d 812 (Tex. Crim. App. 1990) <u>cert. denied</u> , 502 U.S. 929 (1991) .....	16

**RULES, STATUTES AND OTHER AUTHORITIES**

Former § 1429 of Hill's Code.....	6, 9
RCW 9A.28.020 .....	4
RCW 9A.44.086 .....	4
RCW 10.61.003.....	2
RCW 10.61.010.....	2, 15
U.S. Const. Amend. V .....	14

**TABLE OF AUTHORITIES (CONT'D)**

	Page
U.S. Const. Amend. VI .....	3
Wash. Const. art. 1, § 9 .....	14
Wash. Const. art. 1, § 21 .....	3

A. SUPPLEMENTAL ISSUE STATEMENT

Petitioner was convicted of Child Molestation in the Second Degree. The State concedes the evidence was insufficient to support the conviction and it must be vacated. Although the State never asked jurors to consider whether petitioner was guilty of Attempted Child Molestation in the Second Degree, the State asks this Court to direct the trial court to enter judgment for that crime. Should this Court decline the State's request where there is no statutory authority for the request and it would violate constitutional prohibitions?

B. SUPPLEMENTAL ARGUMENT

In Petitioner's Supplemental Reply, he makes a number of valid arguments against an appellate court's authority to order a defendant's conviction for a crime the jury never considered. Undersigned counsel submits this brief to support those arguments and add one more.

1. Statutory Language

The Legislature has defined the circumstances in which a defendant, tried by jury for a completed crime, may be found guilty of attempt:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.003. Similarly:

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

RCW 10.61.010.

Notably, when a defendant has been charged solely with a completed crime and tried by a jury, both statutes contemplate a jury determination on an attempt to commit that crime. RCW 10.61.003 (“the jury may find” the defendant guilty of an attempt); RCW 10.61.009 (“[w]henever the jury shall find” the defendant guilty, it shall specify when the defendant is guilty of an attempt). There is no statutory authority permitting an appellate court to make a finding on an attempted crime, or order the trial court to make such a finding, where the defendant exercised his right to jury trial and jurors were never asked to consider attempt.

## 2. Right to Jury Trial/Due Process

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .” Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). On this same subject, article 1, section 21 of the Washington Constitution provides, “The right of trial by jury shall remain inviolate.” This right includes, as its most important element, the right to have the jury, rather than a judge, reach the requisite finding of guilty. Sullivan, 508 U.S. at 277. In combination with the Fifth Amendment Due Process Clause, these provisions require the prosecution to prove all essential elements of a criminal offense to a jury beyond a reasonable doubt. Id. at 277-78.

A person is guilty of Child Molestation in the Second Degree “when the person has . . . sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.086(1). A person is guilty of Attempted Child Molestation in the Second Degree if, with the intent to commit Child Molestation in the Second Degree, he

does any act that is a substantial step toward the commission of that crime. See RCW 9A.28.020(1). “A ‘substantial step’ is conduct strongly corroborative of the actor’s criminal purpose.” State v. Aumick, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995).

Although Heidari’s jury was never instructed on the elements of attempt, the State asks this Court to order the trial court to direct a verdict for attempted molestation. But where a defendant exercises his right to have all elements of an offense proved to a jury beyond a reasonable doubt, “a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors’ independent judgment in a manner contrary to the interests of the accused.” United States v. Martin Linen Supply Co., 430 U.S. 564, 572-573, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977) (citations omitted); see also State v. Symes, 17 Wash. 596, 598-599, 50 P. 487 (1897) (where evidence insufficient to support jury’s verdict on Murder in the First Degree, trial court may not enter judgment for Murder in the Second Degree).

In an early Washington case, State v. Friedrich, 4 Wash. 204, 29 P. 1055 (1892), the Supreme Court found the evidence insufficient to support the jury's guilty verdict on Murder in the First Degree. Instead of simply vacating that conviction, however, the Court ordered the trial judge to enter judgment on Murder in the Second Degree. The Supreme Court believed it possessed this authority under former § 1429 of Hill's Code, which provided, "the supreme court may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." Friedrich, 4 Wash. at 222-225.

Friedrich sought a Writ of Habeas Corpus, arguing that the Washington Supreme Court's failure to vacate his conviction, and decision to impose conviction for Murder in the Second Degree, violated his due process rights. The Federal Circuit Court agreed that the Supreme Court could not – consistent with due process – simply order entry of a judgment for a crime Friedrich's jury never considered. In re Friedrich, 51 F. 747, 748-749 (C.C.D. Wash. 1892). But the writ was denied on a procedural ground. Id. at 750-751. The United States Supreme Court affirmed, declining to address whether the Supreme Court of Washington had violated

Friedrich's due process rights by ordering entry of judgment on a lesser offense. Ex Parte Frederick, 149 U.S. 70, 74-78, 13 S. Ct. 793, 37 L. Ed. 653 (1893).

A more modern statement of Washington law is found in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The Supreme Court reversed Green's conviction for Aggravated Murder in the First Degree due to insufficient evidence of one of the aggravating factors (kidnapping). The State argued that remand for a new trial was unnecessary because the Supreme Court could simply remand for sentencing on "the lesser included offense of murder in the first degree[.]" Id. at 234.

In rejecting the argument, the Supreme Court held:

In the case at hand the jury was not instructed on the subject of a "lesser included offense". In general, a remand for simple resentencing on a "lesser included offense" is only permissible when the jury has been explicitly instructed thereon. Based upon the giving of such an instruction it has been held that the jury necessarily had to have disposed of the elements of the lesser included offense to have reached the verdict on the greater offense. . . . In addition, it is clear a case may be remanded for resentencing on a "lesser included offense" only if the record discloses that the trier of fact expressly found each of the elements of the lesser offense.

Id. (citations omitted); see also State v. Anderson, 96 Wn.2d 739, 743-744, 638 P.2d 1205 (indicating that had Court reversed murder conviction for insufficient evidence, rather than inapplicability of the charged statute, it would have remanded with directions to dismiss the case with prejudice, precluding prosecution for any lesser-included offenses), cert. denied, 459 U.S. 842 (1982).

Several years after Green, in State v. Gilbert, 68 Wn. App. 379, 381, 384, 388, 842 P.2d 1029 (1993), a panel of Division One judges labeled the above discussion in Green “dictum” and concluded there was no prohibition against remanding for judgment on a lesser crime regardless whether that crime had been considered at trial. As authority, the Gilbert Court cited RAP 12.2 (the modern version of former § 1429 of Hill’s Code), which provides, “The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.” Gilbert, 68 Wn. App. at 384.

Gilbert marked a continuation of this Court’s practice of remanding for imposition of judgment on a lesser offense despite Green. See, e.g., State v. Bucknell, 144 Wn. App. 524, 530, 183

P.3d 1078 (2008) (Rape in the Second Degree converted to Rape in the Third Degree); State v. Maganai, 83 Wn. App. 735, 740, 923 P.2d 718 (1996) (Attempted Rape in the First Degree converted to Attempted Rape in the Second Degree); State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996) (Theft in the First Degree converted to Theft in the Second Degree); State v. Cobelli, 56 Wn. App. 921, 925-926, 788 P.2d 1081 (1989) (Possession with Intent to Deliver converted to Possession); State v. Thompson, 35 Wn. App. 766, 772, 669 P.2d 1270 (1983) (Escape in the First Degree converted to Escape in the Second Degree).

The Supreme Court of Washington has not retreated from Green. And there do not appear to be any cases in which an appellate court reversed a conviction for a completed crime and ordered a conviction for an attempt to commit that crime. Rather, where the trial evidence merely proved an attempt, but jurors did not consider that crime, our Supreme Court has simply vacated the defendant's conviction for the completed crime. See State v. Charley, 48 Wn.2d 126, 291 P.2d 673 (1955) (evidence of Sodomy insufficient where State failed to prove penetration; where crime committed was merely an Attempted Sodomy, conviction reversed and dismissed); State v. Swane, 21 Wn.2d 772, 153 P.2d 311

(1944) (trial evidence of Carnal Knowledge revealed only an attempt to commit that crime; conviction reversed and dismissed).

Judge Schultheis recently questioned the continuing validity of Gilbert and the practice of remanding for conviction on a charge the trier of fact was never asked to consider. See State v. Garcia, 146 Wn. App. 821, 193 P.3d 181, 186 (2008) (Schultheis, C.J., dissenting), review denied, 166 Wn.2d 1009 (2009). Garcia's conviction for Assault in the Third Degree was reversed for insufficient evidence and, citing Gilbert, a majority of the court remanded for conviction on Assault in the Fourth Degree. Id. at 185. Judge Schultheis was highly critical of the practice:

a sentencing remand effectively rescues the State from a failed trial strategy. At trial, the State chose to proceed on the sole charge of third degree assault, declining to give the judge the option of convicting Mr. Garcia of fourth degree assault. In doing so, it hoped that the judge would convict on the greater offense. However, its failure to give the court the option of convicting Mr. Garcia of the lesser offense increased the risk of an unwarranted conviction. *See Keeble v. United States*, 412 U.S. 205, 212-213, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973) ("Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." (emphasis added)). Indeed, on appeal, we concluded that the State did not prove all the elements of third degree assault.

Id. at 187-188.

Judge Schultheis pointed out that appellate judges do not sit as finders of fact and cannot substitute their judgment for that of a jury, noting the “crucial distinction between an appellate court finding evidence in the record sufficient to support a jury verdict and a jury finding the evidence sufficient to prove guilt beyond a reasonable doubt.” Id. at 188 (quoting State v. Myers, 158 Wis.2d 356, 366-367, 461 N.W.2d 777 (1990)). He also noted that where jurors are not asked to decide guilt on a lesser offense, the defendant never defends against that charge, possibly forgoing strategies, evidence, and arguments relevant to the charge. Id.

Judge Schultheis is correct. As with the lesser-degree crime in Garcia, Heidari’s jury was never instructed on the elements of an attempted crime and never asked to consider them. It is impossible to know what strategies, evidence, or arguments defense counsel would have made had the State asked for instructions on an attempted crime. By not requesting instructions on attempt, the State chose an all or nothing strategy, thereby increasing the chance of Heidari’s conviction. It should not be rescued from that strategy – certainly not when it means a violation of Heidari’s due process rights.

While it may be tempting to find, for example, that because Heidari's jury found that he had sexual contact with B.Z., jurors would have found (had they been asked) that he attempted sexual contact, this Court is not a fact finder. Moreover, the foundation for this analysis (the jury's finding of guilt on the completed crime) is being reversed because it is incorrect. As the Supreme Court of Wisconsin has recognized:

a jury's verdict reversed for insufficient evidence is too suspect a determination of guilt for an appellate court to use as the basis for ordering conviction on the lesser-included offense for which no instruction had been submitted to the jury.

Myers, 461 N.W.2d at 780 (declining to order conviction for attempted crime where evidence of completed crime insufficient).

Ordering conviction for a crime never expressly considered by Heidari's jury, and never defended against, would violate due process.

### 3. Double Jeopardy

Double jeopardy prohibitions also prevent this Court from finding Heidari guilty of an attempted crime where jurors were not instructed on that offense.

"The fifth amendment to the United States Constitution and article 1, section 9 of the Washington Constitution prohibit the State

from twice putting a person in jeopardy for the same offense.”<sup>1</sup> State v. Ervin, 158 Wn.2d 746, 752, 147 P.3d 567 (2006). “Conviction of the crime charged unequivocally terminates jeopardy.” Id. at 757 (citing Arizona v. Washington, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)). Generally, a successful appeal in which a conviction is vacated for trial error continues jeopardy, allowing for retrial of that offense. Id. The double jeopardy clause bars retrial, however, where a court has vacated a conviction due to insufficient evidence. Id. at 758 (citing Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)); see also State v. Hickman, 135 Wn.2d 97, 104 n.4, 954 P.2d 900 (1998) (remedy for insufficient evidence is reversal and dismissal).

In Burks, the United States Supreme Court reasoned that whether the trial court, the jury, or an appellate court finds the evidence supporting a conviction insufficient, the finding is the same – “criminal culpability had not been established.” Burks, 437 U.S. at 10. A finding of evidentiary insufficiency in the trial court

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<sup>1</sup> The Fifth Amendment provides that no person shall “be subject for the same offense to be put twice in jeopardy of life or limb.” U.S. Const. Amend. V. Article 1, section 9 provides, “No

would clearly prohibit retrial for that offense, and the Court found no logical reason to treat a similar decision by a reviewing court differently:

an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal – no matter how erroneous its decision – it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Id. at 16. “To hold otherwise would create a purely arbitrary distinction[.]” Id. at 11; see also Tibbs v. Florida, 457 U.S. 31, 41, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982) (a reversal based on insufficiency of the evidence has the same effect as an acquittal at trial).

Therefore, once this Court finds (as the State has conceded) that Heidari's conviction for Child Molestation in the Second Degree must be vacated for a failure of proof, Heidari's jeopardy for that offense terminates. Not only does this bar another conviction for that crime, it bars conviction for any offense that is considered “the same offense” for double jeopardy purposes. State v. Corrado, 81

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person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.”

Wn. App. 640, 645, 915 P.2d 1121 (1996). “[T]he ‘same elements test,’ also known as the *Blockburger* test, determines whether a defendant presently faces jeopardy ‘for the same offense’ as before. According to that test, two offenses are not the same if each contains an element not contained in the other.” Corrado, 81 Wn. App. at 648-649 (footnotes omitted); see also Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) (formulating test). Restated, two crimes are the same if the evidence sufficient to prove one would also completely prove the second. State v. Walker, 143 Wn. App. 880, 886, 181 P.3d 31 (2008).

The United States Supreme Court has “often concluded that two different statutes define the ‘same offense,’ typically because one is a lesser included offense of the other.” Rutledge v. United States, 517 U.S. 292, 297, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996) (citing examples); see also Brown v. Ohio, 432 U.S. 161, 168, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (greater and lesser offenses are the “same offense” for double jeopardy purposes; a lesser offense “invariably . . . requires no proof beyond that which is required for conviction of the greater”). Once jeopardy has

terminated on the greater offense, there can be no prosecution for a lesser included offense. Brown v. Ohio, 432 U.S. at 168-169.

That is the situation here. An attempted crime is a lesser included offense of the completed crime. State v. Gallegos, 65 Wn. App. 230, 234, 828 P.2d 37 (citing RCW 10.61.010), review denied, 119 Wn.2d 1024 (1992). Attempted Child Molestation does not contain any element in addition to those found in the completed offense; sufficient evidence of the completed crime would also prove an attempt. Therefore, where a trial judge or jury finds the evidence insufficient for the completed crime and jurors were only instructed on that crime, that finding bars any new effort to convict the defendant of an attempt.

Moreover, where a trial judge or jury finds the evidence insufficient, there is no State's appeal and therefore no opportunity for this Court to order a conviction on a lesser offense. See United States v. Scott, 437 U.S. 82, 91, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) (acquittal based on insufficiency of evidence, by jury or trial court, may not be appealed); Smalis v. Pennsylvania, 476 U.S. 140, 145-146, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986) (“[T]he Double Jeopardy Clause bars a postacquittal appeal by the prosecution not only when it might result in a second trial, but also

if reversal would translate into ‘further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.’” (quoting United States v. Martin Linen Supply Co., 430 U.S. at 570)).

There is no logical reason for a different rule where an appellate court finds the evidence insufficient. See Stephens v. State, 806 S.W.2d 812 (Tex. Crim. App. 1990) (where prosecution did not request lesser included instruction at trial and conviction reversed on appeal for insufficient evidence, double jeopardy bars prosecution for any lesser included offense), cert. denied, 502 U.S. 929 (1991). Since the defendant cannot even face the prospect of a new trial on a lesser offense (where at least he might be acquitted), he certainly cannot simply be ordered convicted of a lesser offense by an appellate court. See Haynes v. State, 273 S.W.3d 183 (Tex. Crim. App. 2008) (nor can an appellate court “reform a trial court’s judgment to reflect a conviction for an unrequested lesser-included offense not submitted to the jury”). Either way, double jeopardy prevents the conviction. To hold otherwise creates a purely arbitrary distinction where only those whose convictions were reversed on appeal for insufficient

evidence are subject to conviction for a lesser offense. Those properly acquitted at trial would never face this prospect.

Where a conviction is reversed on appeal for insufficient evidence, but the evidence is sufficient to prove a lesser offense, the Ninth Circuit Court of Appeals has identified three circumstances that must be present to remand for entry of conviction on the lesser offense:

“(1) the lesser offense [is] a lesser-included offense – a “subset” of the greater one; (2) the jury [was] explicitly instructed that it could find the defendant guilty of the lesser-included offense and [was] properly instructed on the elements of that offense; and (3) the government [requested] on appeal that judgment be entered against the defendant on a lesser offense.”

United States v. Dinkane, 17 F.3d 1192 (9th Cir. 1994) (quoting United States v. Vasquez-Chan, 978 F.2d 546, 554 (9th Cir. 1992)).

This test – in particular, requirements (1) and (2) – are based on double jeopardy principles:

If no instructions are given on lesser included offenses, the jury’s verdict is limited to whether the defendant committed the crime explicitly charged in the indictment. In such cases, an acquittal on the crime explicitly charged necessarily implies an acquittal on all lesser offenses included within that charge. In re Nielsen, 131 U.S. 176, 189-190, 9 S. Ct. 672, 676-677, 33 L. Ed. 2d 118 (1889). An

acquittal on the explicit charge therefore bars subsequent indictment on the implicit lesser included offenses. Id.

United States v. Gooday, 714 F.2d 80, 82 (9th Cir. 1983), cert. denied, 468 U.S. 1217 (1984) (cited in Vasquez-Chan, 978 F.2d at 554 n.5). There is no similar constitutional prohibition where jurors were instructed on the lesser offenses at trial. Gooday, 714 F.2d at 82-83; compare Morris v. Matthews, 475 U.S. 237, 242, 244, 246-247, 106 S. Ct. 1032, 89 L. Ed. 2d 187 (1986) (where conviction for greater offense violates double jeopardy, no prohibition against entering conviction for lesser included offense that is not jeopardy barred where jurors instructed on lesser and no dispute they found elements of lesser).

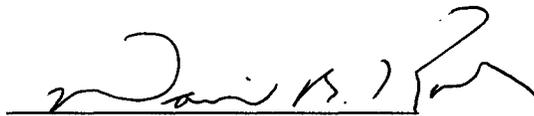
In the end, the Washington Supreme Court's decision in Green (that a remand for resentencing on a lesser included offense is only permissible when the jury has been explicitly instructed on the lesser *and* the record discloses that the trier of fact expressly found each of the elements of the lesser), whether considered dicta or not, is the required rule for double jeopardy purposes.

C. CONCLUSION

The statutory authority to convict a defendant of an attempted offense has been given to properly instructed juries, not appellate courts. Moreover, an appellate court's decision that a defendant is guilty of an attempted offense (where jurors never considered that offense ) violates due process and double jeopardy protections. This Court must simply reverse and dismiss Heidari's conviction on count 4.

DATED this 31<sup>st</sup> day of December, 2009.

Respectfully submitted,



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Attorneys for Petitioner

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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In re the Personal Restraint Petition of:	)	
	)	
MANSOUR HEIDARI,	)	COA NO. 63040-7-1
	)	
Petitioner.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF DECEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S SUPPLEMENTAL BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MANSOUR HEIDARI  
DOC NO. 847716  
MONROE CORRECTIONAL COMPLEX/TRU  
P.O. BOX 888  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF DECEMBER, 2009.

x *Patrick Mayovsky*