No. _____

Court of Appeals No. 337901

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent-Cross-Appellant,

v.

RIGOBERTO IVAN VAZQUEZ,

Appellant-Cross-Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington asks this court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

The State requests review of that part of the Court of Appeals decision pertaining to firearm/deadly weapon enhancements on unranked felonies. A copy of the decision and order amending opinion is in the appendix at pages A1 through A13.

C. ISSUES PRESENTED FOR REVIEW

A. Do deadly weapon enhancements under RCW 9.94A.825 and RCW 9.94A.533 attach to unranked felony offenses?

B. Is a firearm enhancement a deadly weapon enhancement under RCW 9.94A.825 and RCW 9.94A.030(33)(t)?

D. STATEMENT OF THE CASE

1. Factual and procedural history

The detailed facts of the case are not relevant to these particular issues, which revolve around statutory construction. In summary Rigoberto Vasquez provoked and engaged in a gun fight in the middle of Quincy, Washington. He was found guilty by the jury of two counts of

assault in the second degree with firearm enhancements, as well as riot while armed (since renamed criminal mischief while armed) with a firearm enhancement and reckless endangerment.

At sentencing the State agreed, that based on *State v. Soto*, 177 Wn. App. 706, 309 P.3d 596 (2013), that no time could be imposed on the firearm enhancement for the riot while armed statute, but argued that the court should leave the enhancement in because a firearm enhancement makes any felony a most serious offense (strike) under RCW 9.94A.030 and .825. The State noted an objection to *Soto*, but recognized it was a controlling case on the imposition of time issue and the trial court had no power to change it. The trial court, relying on *Soto*, struck the entire firearm enhancement from the judgment and sentence.

The State cross appealed, arguing that *Soto* was incorrect and harmful, and should be overruled. It also argued that the Soto decision did not address the most serious offense aspect of the firearm enhancement. In a published decision the Court of Appeals affirmed the trial court.

2. Legislative history

In 1995 the people passed the Hard Times For Armed Crimes Act through the initiative process. Laws of 1995 Ch 129. In the findings and intent section the drafters stated:

> (a) Armed criminals pose an increasing and major threat to public safety and can turn ***any*** crime into serious injury or death...
>
> (c) Current law does not sufficiently stigmatize the carrying and use of deadly weapons by criminals, and far too often there are no deadly weapon enhancements provided for many felonies, including murder, arson, manslaughter, and child molestation and many other sex offenses including child luring.[1]
>
> (d) Current law also fails to distinguish between gun-carrying criminals and criminals carrying knives or clubs.
>
> (2) By increasing the penalties for carrying and using deadly weapons by criminals ***and closing loopholes involving armed criminals***, the people intend to:
>
> (a) Stigmatize the carrying and use of any deadly weapons for ***all felonies*** with proper deadly weapon enhancements.
>
> (b) Reduce the number of armed offenders by making the carrying and use of the deadly weapon not worth the sentence received upon conviction....

Laws of 1995 Ch 129 §1 (emphasis added). The act amended RCW 9.94A.310 (since recodifed to RCW 9.94A.515) to provide that additional time shall be added to the presumptive sentence for any felony except for certain enumerated ones. Laws of 1995 Ch 129 §2. RCW 9.94A.310 contained a sentencing grid for determining the sentence for ranked offenses. It contained a note that said "numbers in the first horizontal row of each seriousness category represent sentencing midpoints in years and

[1] An unranked crime.

months. Numbers in the second and third rows represent the presumptive sentencing range in months, or in days if so designated."

In Laws of 2000 Ch 28 the legislature changed the term presumptive sentence to the term standard range. However, with one exception not relevant here, the legislature stated this was just a reorganization and technical correction, and was not intended to make a substantive change to the SRA. *Id.* at §1.

In the Laws of 2002 Ch 290 the legislature, in an act entitled "An act relating to the recommendation of the sentencing guidelines commissions regarding drug offenses" the legislature split the firearm enhancements from §.310 into a new section, and added subsection one to the statute, which read "The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517." (Currently codified at RCW 9.94A.533(1)).

3. State v. Soto, 177 Wn. App. 706, 309 P.3d 596 (2013).

In 2013 the Court of Appeals Division III decided Soto based on RCW 9.94A.533(1). In doing so it noted inconsistencies in the statute, but ultimately decided deadly weapon enhancements did not apply to unranked offenses because subsection one referred to the sentencing charts for ranked offenses. It did not analyze the statutory history or legislative intent of the statute.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In deciding whether to grant review the Supreme Court looks to four factors; whether the Court of Appeals decision is in conflict with decisions of the Supreme Court or other Courts of Appeals decisions, whether the issue involves a significant question of law under the Constitution of the State of Washington or the United States, or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). This petition meets all four of the criteria.

1. The Court of Appeals decision conflicts with multiple cases of the Court of Appeals and Supreme Court.

It is part of the standard recitation of law at the beginning of any statutory interpretation case that the goal of statutory interpretation is to discern and implement the legislature's intent. *E.g. State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007); *In re Pers. Restraint of France*, 199 Wn. App. 822, 833, __ P.3d__(2017); *State v. Gray*, __ Wn.2d__, __P.3d __ (2017) (Slip op. at 5). This is not a case where legislative intent was hard to determine. The intent statement of the HTACA is plain that deadly weapon enhancements were to apply to all felonies, with a few expressly listed exceptions. In case there was any

confusion, the drafters specifically listed an unranked felony as an example of a crime they specifically wished deadly weapons enhancements to apply. "The clearest indication of legislative intent is the language enacted by the legislature itself." *Gray*, Slip Op. at 5. Thus the Court of Appeals opinion conflicts with virtually every statutory interpretation case.

In determining that the clear language of the intent statement should not be followed the Court of Appeals held:

> [T]he statement of purpose accompanying Initiative 159 did not provide that increased penalties applied to "all felonies." It stated that increased penalties applied to all felonies "with proper deadly weapon enhancements." This limitation was important since our Supreme Court held, long before, that weapons enhancements are not constitutionally available for all felonies. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). The qualified language contained in Initiative 159's statement of purpose reflects an awareness that firearm or deadly weapons enhancements would not, in fact, apply to each and every felony offense. Thus, the statement of purpose is not at odds with *Soto*.

App. A9. This holding conflicts with both *Workman* and its progeny, as well as *State v. Kelley*, 168 Wn.2d 72, 226 P.3d 773 (2010), and other cases regarding deadly weapon enhancements and double jeopardy, as the Supreme Court has never held weapons enhancements are constitutionally unavailable to the legislature for all felonies. What the drafters meant by the term 'proper deadly weapon enhancements' was the fact that for the

first time there was a distinction between enhancements for firearms and for other deadly weapons.

At its core the *Workman* test is a test of statutory interpretation, not a constitutional command. *Workman*, 90 Wn.2d at 454. While the Double Jeopardy Clause is implicated when the State attempts to impose multiple punishments for the same event when the legislature does not allow it, the legislature may allow it. The court will presume the legislature did not intend to impose double punishment, but that presumption can be overcome. "**In the absence of clear legislative intent to the contrary**, sound statutory construction leads to the conclusion RCW 9.41.025 cannot be applied so as to impose an additional penalty" *Id.* (emphasis added). "A legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Kelley*, 168 Wn.2d at 77. "Both the Legislature and the courts have sanctioned the use of the deadly weapon statute, RCW 9.95.040, and the firearm statute, RCW 9.41.025, in a conviction for first degree robbery." *State v. Mathe*, 35 Wn. App. 572, 668

P.2d 599 (1983) (Citing *Workman*). Thus nothing is constitutionally off limits to the legislature pursuant to *Workman*. Instead *Workman* and its federal counterpart, the *Blockburger* test, help determine whether the legislature has decided whether cumulative punishments should be imposed for the same event. *Kelley*, 168 Wn. 2d at 77. In *Kelley* the court upheld previous cases applying deadly weapon enhancements to crimes that included a deadly weapon as an element. Thus there is no constitutional restriction on the legislature pursuant to *Workman*.

Even if the *Workman* test applied in this instance, deadly weapons as elements and deadly weapons as enhancements would not meet it because they are different at law. *See* Reply Brief of Cross-Appellant at 7-9. Because the Court of Appeals misstates the holding in *Workman*, and applies it in a way that directly conflicts with it and other cases, including *Kelley*, review should be granted to clarify the import of the *Workman* test on deadly weapon enhancement.

The Court of Appeals also held that because the legislature used the term presumptive sentence, and another part of the statute explained how to calculate the presumptive sentence for ranked offenses, the term presumptive sentence must not apply to

unranked offenses. This is at best a questionable interpretation standing alone.

> Plain meaning is determined from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole. If, however, the statutory language is susceptible to more than one reasonable interpretation, it is ambiguous and we resolve the ambiguity by resort to other indicia of legislative intent, including legislative history, and, if necessary, we then apply principles of statutory construction to resolve any remaining ambiguity.

Bostain v. Food Express, Inc., 159 Wn.2d 700, 708-09, 153 P.3d 846 (2007). It is at least as reasonable to interpret the use of the term presumptive sentence in the chart as applying to the presumptive range for ranked offenses, but not reserving that term exclusively to ranked offenses. When compared to ordinary meaning, the rest of the SRA, case law and the intent statement the Court of Appeals interpretation necessarily fails.

In 2000 the legislature changed the term presumptive sentence to standard range sentence. Normally when the legislature uses different terms it is presumed to mean different things. However, that presumption is overcome in this case because the legislature said that no substantive changes were intended when it changes the term. Laws of 2000 Ch 28 §1.

Therefore the terms standard range and presumptive sentence are equivalent.

Black's Law Dictionary defines a presumptive sentence as "an average sentence for a particular crime (esp. provided under sentencing guidelines) that can be raised or lowered based on the presence of mitigating or aggravating circumstances." *Black's Law Dictionary*, 9th ed. 1485 (9th ed. 2009). Notably the legislature did not define the term presumptive sentence in the definitional section of the statute, RCW 9.94A.030, that defines terms as they are to be used throughout the SRA. Instead it described presumptive sentence in a note in a chart describing the presumptive sentence for ranked offenses that said absolutely nothing about the presumptive range for an unranked felony. By the plain language definition an unranked felony has a presumptive sentence/standard range of a year or less. RCW 9.94A.505. A ranked felony has a presumptive range as determined in the chart.

Both the courts and the legislature have used the term standard range to apply to unranked offense. RCW 9.94A.505(2) states that the sentence for an unranked felony may be increased under RCW 9.94A.535. §.535 states "The court may impose a sentence outside the standard sentence range for an offense." If unranked offenses did not have a

standard range the reference in §.505(2) to §.535 would make no sense. Courts have also stated unranked offenses have a standard range. "Goodwin's statement on plea of guilty shows that the standard range for the conspiracy charge (an unranked offense) was 0 to 12 months" *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 864, 50 P.3d 618 (2002) "It concluded that conspiracy under RCW 69.50.407 was an unranked offense with a standard range of not more than a year of confinement." *State v. Hebert*, 67 Wn. App. 836, 837-38, 841 P.2d 54 (1992). "Felonies for which the legislature has assigned no seriousness level ranking have a standard sentencing range of 0 to 12 months." *In re Pers. Restraint of Acron*, 122 Wn. App. 886, 887, 95 P.3d 1272 (2004).

Given the ordinary meaning of the term presumptive range as defined in Black's Law Dictionary, the structure of the SRA, related statutory provisions and the statutory scheme as a whole, the Court of Appeals interpretation reserving the term presumptive sentence to ranked offenses is unreasonable. The State's interpretation that unranked offenses had a presumptive range is reasonable. Assuming, for the sake of argument, both interpretations are reasonable the statute is ambiguous and the court turns to statutory intent. Again the statutory intent could not be clearer. Deadly weapon enhancements apply to all felonies except those

expressly listed. The drafters expressly included an unranked felony as an example of those it applies to.

In *Soto* the Court of Appeals relied on 9.94A.533(1) to conclude that unranked felonies applied. The Court of Appeals held in *Vasquez* that *Soto* did not find the statute ambiguous. However, in order to find that the statute did not apply the *Soto* Court had to apply a canon of statutory construction, the expressio unius est exclusio alterius principle. *Soto*, 177 Wn. App. at 706. But under the rules of statutory interpretation, if the language is plain, the court does not apply rules of statutory construction. *Bostain*, 159 Wn.2d at 708-09. Thus the *Soto* Court necessarily found the statute ambiguous. Indeed, the *Soto* Court had to disregard the expressio unius principle at another point in the statute as well as the rule against statutory surplus age in order to reach the conclusion it did. Thus the Court of Appeals decision conflicts with more cases regarding statutory construction.

It is also clear that the legislature did not apply deadly weapon enhancements to unranked felonies in the HTACA and then remove them when it added §.533(1). The statute that added §.533(1) was entitled "An act relating to the recommendation of the sentencing guidelines commissions regarding drug offenses." Under Wash. Cons't Art II § 19 (subject in title) this act could reasonably apply to unranked drug offenses

and deadly weapons, and indeed it did by making them ranked, *see* RCW 9.94A.518, but it could not constitutionally remove deadly weapon enhancements from non-drug unranked offenses, because the title would not indicate to a reasonable person that was in the statute. *See* Brief of Respondent/Cross-Appellant at 19-23.

The drafters of the HTACA were clear in their intent. Deadly weapons enhancements apply to any felony not expressly listed as excluded. If they wanted unraked offenses excluded they would have listed them in the exclusion list. It is only by misapplying rules of statutory interpretation in conflict with many cases of the Supreme Court and Courts of Appeals, including *Workman, Kelly, Mathe, Bostain, Gray, Armendariz* and many others, does Division III come to their conclusion.

2. The issue involves a significant question of law under the Constitution of the State of Washington.

This Court in *State v. Barber*, 170 Wn.2d 854, 872, 248 P.3d 494 (2011), recognized that enforcing a sentence outside the parameters of the sentencing reform act threatens the separation of powers doctrine by invading the legislature's prerogatives. Here the legislature has set two relevant consequences for use of a firearm/deadly weapon in an unranked, non-drug crime, specifically that prison time will be imposed and that the offense will become a most serious

offense.[2] Division III's opinion negates the legislature's clearly expressed intent based on an inaccurate interpretation of a precedent and a very narrow reading of a term that conflicts with the normal definition of the word.

The Court of Appeals also held that the Supreme Court in *Workman* restricted the legislature in the penalties it could authorize. This is contrary to *Workman* and every case interpreting this particular application of the Double Jeopardy clause. This is clearly a significant question of law under the Constitution of the State and the Federal Constitution.

In addition the question of whether a felony with a firearm enactment becomes a most serious offense is a significant question of law. RCW 9.94A.030(33)(t) states that any felony with a deadly weapon verdict under RCW 9.94A.825 becomes a most serious offense. The trial court struck this portion of the Judgment and Sentence, relying on a portion of *Soto* that did not analyze this issue. The Court of Appeals held "[T]he State never sought a deadly weapon verdict that would have been governed by RCW 9.94A.825. It instead sought a firearm enhancement under RCW 9.94A.533(3)."

However, any deadly weapon finding necessarily is a verdict under RCW 9.94A.825. If it is not then the court would have no authority to submit the deadly weapon verdict to the jury. *State v. Hughes*, 154 Wn.2d 118, 151-52, 110 P.3d 192 (2005); *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007). *Hughes* and *Pillatos* held that the courts do not have authority absent an

[2] There are also consequences regarding Drug Offender Sentencing Alternatives and drug crimes that are not relevant to this case.

authorizing statute to empanel juries to hear aggravating circumstances. RCW 9.94A.825 is the statute that authorizes the court to empanel a jury for a deadly weapon verdict. Therefore any deadly weapon verdict is necessarily a verdict under §.825.

Also any firearm enhancement is necessarily a deadly weapon enhancement. §.825 lists firearms as a per se deadly weapon. Therefor any firearm enhancement under §.533 is necessarily a deadly weapon enhancement under §.825. It is clear the legislature intended to have felonies with deadly weapon enhancements become most serious offenses. The trial court erred in determining the enhancement should be struck in its entirety. This is a significant question of law under the State Constitution, and review should be granted.

*3. **The petition involves an issue of substantial public interest that should be determined by the Supreme Court.***

The Hard Time for Armed Crime Act was passed via initiative to the legislature in 1995. The drafters of the initiative clearly intended that all felonies except those expressly listed be subject to deadly weapon enhancements. The drafters even included an unranked felony, child luring, as a specific example of a crime they wanted to be subject to a deadly weapon enhancement. The Court of Appeals effectively overruled the initiative. By definition an initiative involves an issue of substantial public interest. Judicially limiting an initiative in direct contravention of its intent statement is an issue of substantial public interest that should be determined by the Supreme Court.

In addition the Court of Appeals announced a new limit on the legislature's power under *Workman*. *Workman* and its progeny make clear that it is meant to create a presumption of what the legislature intended that the legislature can override by clear legislation, as has been done in the case of deadly weapon enhancements. The Court of Appeals has turned this presumption into a constitutional command that the legislature may not violate. This new restriction is a serious issue of public importance that should be determined by the Supreme Court.

F. CONCLUSION

The legislature made clear what crimes it did not want firearms enhancements to apply to. The Court of Appeals misinterpreted a constitutional standard in order to interpret a statute in contravention of its clear intent statement. It also used an extremely nuanced definition that is contrary to the plain language definition of the term where the legislature used express language to say what crimes it did not want deadly weapon enhancements to apply to. In doing this it created a new constitutional restriction on the legislative authority where none existed. The Court

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should grant review, reverse the Court of Appeals and remand for resentencing on the firearm enhancement on the riot while armed charge.

Dated this 26th day of September 2017.

Respectfully submitted,

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APPENDIX A1-A13

FILED
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In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent / Cross Appellant, v. RIGOBERTO IVAN VAZQUEZ, Appellant / Cross Respondent.	)	No. 33790-1-III ORDER AMENDING OPINION

IT IS ORDERED the sentence that begins on page seven, line four, of our opinion filed August 22, 2017, is amended as follows: "Instead, the sentencing range is set forth by RCW 9.94A.505(2)(b), which generally recommends a determinate sentence of no more than one year of confinement."

PANEL: Judges Lawrence-Berrey, Korsmo and Pennell

FOR THE COURT:

GEORGE FEARING
Chief Judge

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent / Cross Appellant, v. RIGOBERTO IVAN VAZQUEZ, Appellant / Cross Respondent.	)	No. 33790-1-III PUBLISHED OPINION

PENNELL, J. —The parties cross appeal the trial court's split decision on whether to impose firearm enhancements related to Rigoberto Vazquez's three felony convictions. We agree with the trial court that there was no constitutional impediment to imposing the enhancements on Mr. Vazquez's two assault convictions and, as a matter of statutory interpretation, the enhancement does not apply to Mr. Vazquez's unranked riot while armed conviction. We therefore affirm.

BACKGROUND

Mr. Vazquez was charged with three felonies:[1] two counts of first degree assault, and one count of riot while armed.[2] A firearm enhancement, RCW 9.94A.533(3), was included on each of these counts.

Although charged with firearm enhancements, the jury was not instructed on such. Instead, the jury was provided the following deadly weapon instruction:[3]

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in count [one, two, or three].
>
> A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime.
>
> If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.

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[1] Mr. Vazquez was also charged with one misdemeanor count of reckless endangerment. That count is not relevant to this appeal. The jury's verdict reduced the assault charges to assault in the second degree.

[2] The crime of riot is now referred to as criminal mischief. RCW 9A.84.010; *see also* LAWS OF 2013, ch. 20, § 1. For consistency, we will refer to riot while armed.

[3] Identical instructions were given for each of Mr. Vazquez's three felony counts.

> A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

Clerk's Papers (CP) at 313-15. None of the jury instructions defined the meaning of a firearm under RCW 9.41.010(9). The jury was only instructed that a firearm is considered a deadly weapon.

Unlike the instructions, the special verdict forms conformed to the charging document and inquired as to whether Mr. Vazquez was armed with a "firearm" at the time of his offense conduct. CP at 332-34. The jury found he was. It returned special firearm verdicts related to each of Mr. Vazquez's three felony convictions.

At sentencing, Mr. Vazquez raised two issues regarding his firearm enhancements. First, Mr. Vazquez argued the firearm enhancements could not be imposed on any of his three felony convictions. Because the instructions referred to a deadly weapon and the special verdict forms referred to a firearm, Mr. Vazquez argued no firearm enhancement could be imposed. The State did not concede error, but argued that if there was error it was harmless. The trial court agreed with the State, found that any error was harmless, and imposed the firearm enhancements on the second degree assault charges. Mr. Vazquez's second argument was specific to his riot while armed conviction. Citing *State v. Soto*, 177 Wn. App. 706, 309 P.3d 596 (2013), Mr. Vazquez argued that because

riot while armed is an unranked felony, it cannot be assessed an enhancement. The trial court agreed and struck the associated firearm enhancement.

ANALYSIS

In cross appeals to this court, the parties each raise the sentencing arguments they lost in the trial court. The arguments are legal in nature and involve de novo review. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014) (statutory interpretation); *State v. Bainard*, 148 Wn. App. 93, 101, 199 P.3d 460 (2009) (constitutional law).

Mr. Vazquez's appeal: the lack of a firearm enhancement instruction

As the parties agree, the court's instructions failed to inform the jurors of the elements required for a firearm enhancement under RCW 9.94A.533(3). Instead, the jury was instructed on the elements of a deadly weapon enhancement under RCW 9.94A.533(4). This was a significant error. Under RCW 9.94A.533(3)(b), a consecutive three-year sentence must be imposed whenever a jury authorizes a firearm enhancement in connection with a qualifying felony offense. In contrast, a deadly weapon enhancement under RCW 9.94A.533(4)(b) carries only a one-year consecutive term. Although a firearm is considered a deadly weapon in some contexts, RCW 9.94A.825, in order to impose a firearm enhancement the jury must be given sufficient evidence to find the defendant was armed with a firearm as defined in RCW 9.41.010(9).

RCW 9.94A.533(3); *see also State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) ("jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement").

Mr. Vazquez claims the court's erroneous instructions prohibited imposition of any firearm enhancements. We disagree. Although the failure to instruct on firearms, as opposed to deadly weapons, was significant, it is not the kind of error that automatically requires reversal. Mr. Vazquez's arguments to the contrary conflate instructional error with imposition of an unauthorized sentence. While an unauthorized sentence requires correction, *Recuenco*, 163 Wn.2d at 442, instructional error does not. *Id.* at 441. Instead, we apply a constitutional harmless error analysis. Under this approach, an error will not require reversal if it is harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Application of the harmless error test to Mr. Vazquez's case reveals reversal is unwarranted. Uncontroverted evidence supported the jury's firearm finding. Not only did Mr. Vazquez admit discharging a gun, the State's video evidence depicted muzzle flashes coming from the weapon. This evidence left no doubt that the firearm involved in Mr. Vazquez's offense was not only one from which "a projectile or projectiles may be fired," but that the device utilized "an explosive such as gunpowder" to do so. RCW 9.41.010(9).

Contrary to Mr. Vazquez's assertions, this case is distinguishable from *State v. Recuenco*. *Recuenco* did not involve instructional error. It involved a sentencing error, whereby the trial court imposed an enhancement that had neither been charged by the State nor authorized by the jury. 163 Wn.2d at 441. Because our prejudice analysis for instructional errors is different than that for sentencing errors, *Recuenco* is unhelpful to Mr. Vazquez's arguments on appeal.

The State's cross appeal: application of a firearm enhancement or deadly weapon verdict to Mr. Vazquez's riot while armed conviction

Challenge to State v. Soto

The State asks us to part company with our prior decision in *State v. Soto*, which held that a statutory firearm enhancement under RCW 9.94A.533(3) does not apply to unranked felony offenses, such as Mr. Vazquez's riot while armed conviction. We decline this invitation as the State's arguments do not undermine our analysis in *Soto*.

In *Soto*, the State urged us to interpret RCW 9.94A.533(3) as applying to all felonies—ranked or unranked—unless expressly excluded. It pointed to statutory language stating the enhancement would apply to "any felony" classified as A, B, or C. *Soto*, 177 Wn. App. at 712; RCW 9.94A.533(3)(a)-(c). We disagreed with this analysis, explaining the prefatory language, set forth at RCW 9.94A.533(1), limits application of

the statute to ranked offenses, punishable under either the standard sentencing grid (RCW 9.94A.510) or the drug offense sentencing grid (RCW 9.94A.517). *Soto*, 177 Wn. App. at 714. The punishment for an unranked offense, such as Mr. Soto's, is not governed by the sentencing tables. Instead, the sentencing range is set forth by RCW 9.94A.702, which generally recommends a determinate sentence of no more than one-year confinement.

The State now asks us to delve deeper into *Soto*'s statutory analysis. It claims that even if *Soto*'s reasoning is sound, the outcome is invalid because it fails to account for the legislative history of RCW 9.94A.533.

The State's invitation to reopen *Soto* rests on questionable grounds. Apart from stare decisis,[4] rules governing statutory interpretation would appear to limit our ability to address the State's complaints. We will not look outside of statutory language to aids of construction, such as legislative history, unless we first determine the text is ambiguous. *State v. Evans*, 177 Wn.2d 186, 192-93, 298 P.3d 724 (2013).[5] Although *Soto* wrestled

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[4] Our precedents do not provide an agreed stare decisis analysis that governs requests to revisit prior appellate court decisions. *See In re Pers. Restraint of Arnold*, 198 Wn. App. 842, 396 P.3d 375 (2017), *motion for discretionary review filed*, No. 94544-6 (Wash. May 23, 2017)

[5] Statutory language is ambiguous if it is subject to more than one reasonable interpretation.

with the wording of RCW 9.94A.533, we did not ultimately find the statute ambiguous. *Soto*, 177 Wn. App. at 714. The State does not challenge the accuracy of this textual analysis in this appeal. Amended Br. of Resp't-Cross-Appellant at 17-18. Given these circumstances, it is doubtful we would depart from *Soto* even if we were to find the State's legislative history analysis persuasive. Nevertheless, we do not find the State's analysis persuasive.

The State makes two arguments regarding legislative history. First, the State references the statement of purpose that was issued along with the initial enactment of the enhancement provisions of Initiative 159, the Hard Time for Armed Crime Act, LAWS OF 1995, chapter 129. The statement, provided, in pertinent part:

> (2) By increasing the penalties for carrying and using deadly weapons by criminals and closing loopholes involving armed criminals, the people intend to:
> (a) Stigmatize the carrying and use of any deadly weapons for *all felonies with proper deadly weapon enhancements*.

LAWS OF 1995, ch. 129, § 1(2) (emphasis added). According to the State, this statement makes clear Initiative 159 was intended to apply to "all felonies," not just ranked felonies. Second, the State points out that the prefatory language relied on in *Soto* for limiting the scope of RCW 9.94A.533(3) was not added until 2002. Thus, according to the State, the statute could not have been originally intended to limit its application to felonies covered

by the sentencing grid. We are unconvinced by either argument.

As an initial matter, the statement of purpose accompanying Initiative 159 did not provide that increased penalties applied to "all felonies." It stated that increased penalties applied to all felonies "with proper deadly weapon enhancements." This limitation was important since our Supreme Court held, long before, that weapons enhancements are not constitutionally available for all felonies. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). The qualified language contained in Initiative 159's statement of purpose reflects an awareness that firearm or deadly weapons enhancements would not, in fact, apply to each and every felony offense. Thus, the statement of purpose is not at odds with *Soto*.

With respect to the 2002 amendment, the change in language was not significant to any of our analysis in *Soto*. In 1995, when the firearm enhancement was first enacted, the governing statute read as follows:

> (3) The following additional times shall be added to the *presumptive sentence* for felony crimes committed after the effective date of this section if the offender or an accomplice was armed with a firearm . . . 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.

Former RCW 9.94A.310(3) (LAWS OF 1995, ch. 129, § 2(3)) (emphasis added). A "presumptive sentence" was delineated as "[t]he intersection of the column defined by the

offender score and the row defined by the offense seriousness score." Former RCW 9.94A.370 (LAWS OF 1983, ch. 115, § 8). Accordingly, although the language used was different,[6] the firearm enhancement provision, as originally written, was clearly limited to ranked offenses covered by the sentencing grid.

Based on the foregoing, nothing in the legislative history indicates *Soto*'s interpretation of RCW 9.94A.533 was incorrect. Thus, even if it were appropriate to engage in statutory construction through an analysis of legislative history, our prior decision would still stand. The trial court properly declined to impose an enhancement for Mr. Vazquez's riot conviction.

Viability of the firearm verdict for strike purposes

The State argues, based on RCW 9.94A.030(33)(t), that the firearm verdict should not have been stricken in its entirety, even if no enhancement could be applied under *Soto*. According to the State, the verdict should stay in place so Mr. Vazquez's riot while

[6] Rather than containing a prefatory statement, limiting application to former RCW 9.94A.310, *recodified as* RCW 9.94A.510 (LAWS OF 2001, ch. 10, § 6) (i.e. the statute governing the sentencing grid), the original statute in 1995 was written as limited to presumptive sentences, which were defined as sentences determined by the sentencing grid. LAWS OF 1995, ch. 129, § 2(3).

armed conviction can be designated a "[m]ost serious offense" or strike offense under RCW 9.94A.030(33)(t). We disagree.

RCW 9.94A.030(33)(t) provides that any felony offense with a "deadly weapon verdict" is a most serious offense But the State never sought a deadly weapon verdict that would have been governed by RCW 9.94A.825. It instead sought a firearm enhancement under RCW 9.94A.533(3). We are not, therefore, confronted with the question of whether *Soto* would prevent entry of a deadly weapon verdict for an unranked offense.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In his statement of additional grounds, Mr. Vazquez asserts: (1) trial counsel was ineffective, (2) the jury selection process was unfair because most of the jurors were elderly and Caucasian, and the one Hispanic juror "profiled" him before trial, and (3) the police investigation was biased against him. Full consideration of these arguments requires knowledge of facts and evidence that are not part of the appellate record. The proper avenue for presenting such facts and evidence is through a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This is an option Mr. Vazquez should consider if he wants full review of these arguments. As such, we decline to review them here.

CONCLUSION

We affirm the judgment and sentence imposed by the superior court. Mr. Vazquez's requests to (1) enlarge time to file his report as to continued indigency and (2) deny costs are granted.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Korsmo, J.

DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Respondent-Cross Appellant's Petition for Review in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Susan M. Gasch
gaschlaw@msn.com

Dated: September 26, 2017.

Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

September 26, 2017 - 2:46 PM

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