NO. 102602-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DENNIS RAY GIANCOLI,

Petitioner.

Appeal from Court of Appeals No. 56287-1-II

ANSWER TO PETITION FOR REVIEW

MARY E. ROBNETT
Pierce County Prosecuting Attorney

THEODORE M. CROPLEY
Deputy Prosecuting Attorney
WSB # 27453 / OID #91121
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 355-5585

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I. INTRODUCTION

Petitioner, Dennis Giancoli, along with his cohort, Christopher Conklin, armed themselves and brutally assaulted Arlen Stebbins and John Fryer. While Stebbins and Fryer were sleeping in a trailer on Stebbins' property, Giancoli and Conklin woke them at gunpoint and ordered them outside. When Stebbins and Fryer tried to escape, Giancoli pistol-whipped Stebbins and then Conklin shot him in the legs. Conklin also shot at Fryer as he ran. Giancoli and Conklin were later apprehended after they fled the scene.

Giancoli has filed a motion for discretionary review pursuant to RAP 13.4(a). RAP 13.4(b) sets forth the considerations that this Court will apply in considering whether or not to accept discretionary review of this case. A petition for review will be accepted by this Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Giancoli fails to demonstrate that the decision of the Court of Appeals below conflicts with decisions of this Court or published decisions of the Court of Appeals. The Court of Appeals correctly applied this Court's decisions in *State v. Reynolds, State v. Gregory*, and *State v. Derri* and contains absolutely no discussion of this Court's decision in *State v. Recuenco*. Accordingly, review is not warranted under RAP 13(b)(1) and 13(b)(2).

Giancoli fails to demonstrate that a significant question of law is presented under either the Washington or United States Constitution. Giancoli's claims regarding disparate sentencing for co-defendants after direct appeal, the constitutional status of a statute ruled constitutional by this Court less than six months

ago, the proper application of this Court's case law, and the Court of Appeals' refusal to decide an issue raised for the first time in his Reply Brief cannot be fairly characterized as significant constitutional issues. Accordingly, review is not warranted under RAP 13(b)(3).

All that remains is whether these matters involve issues of substantial public interest that should be determined by this Court pursuant to RAP 13(b)(4). It appears that Giancoli is essentially arguing for another chance at getting the "right result" in this case. The interest in getting the "right result" is present in every case, before every court. It cannot amount to a "substantial" interest without undermining RAP 13.4(b) and the valid judicial economy interests that rule represents.

RAP 13.4(b) implicitly recognizes that for a certain class of cases where error may or may not have been committed, the Court of Appeals is Washington's court of last resort. This case falls within that class. Giancoli has not demonstrated that

discretionary review is warranted. This Court should accordingly deny Giancoli's petition for review in this case.

II. IDENTITY OF RESPONDENT AND DECISION BELOW

Respondent, the State of Washington, asks this Court to deny Giancoli's petition for review of the opinion of the Court of Appeals in *State v. Giancoli*, No. 56287-1-II (Oct. 31, 2023).

III. ISSUES PRESENTED BY PETITION FOR REVIEW

A. Is review by this Court warranted due to the disparate outcomes of the appeals of Giancoli and Conklin when the Court of Appeals properly applied the doctrines of merger and double jeopardy?

B. Is review by this Court warranted due to Giancoli's third-strike sentence of life without the possibility of parole where this Court held in *State v. Gregory*, 192 Wn.2d 1, 427, P.3d 621 (2018), and *State v. Reynolds*, 2 Wn.2d 195, 535 P.3d 427 (2023), that punishment under the three-strikes provision of the Persistent Offender Accountability Act ("POAA") is constitutional?

C. Is review by this Court warranted when the Court of Appeals properly applied this Court's holding in *State v. Derri*, 99 Wn.2d 658, 511 P.3d 1267 (2022)?

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D. Is review by this Court warranted to clarify whether the reversal of firearm enhancements requires reversal of the underlying conviction when the Court of Appeals declined to address this issue as it was raised for the first time in Giancoli's Reply Brief?

E. Is review by this Court warranted to resolve a "split" in the Court of Appeals regarding whether this Court's opinion in *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008), requires the State to prove a firearm is operable when the Court of Appeals in the instant case does not mention or refer to *Recuenco*?

IV. STATEMENT OF THE CASE

Arlen Stebbins owned property located in Lakebay, Washington. Stebbins was not at the property often, as he and his wife resided in Tacoma. 7/19/21 RP 681-700. The property is about five acres and contains an outbuilding, a mobile home/trailer, a pumphouse and an orchard. Stebbins would check on the property intermittently. 7/19/21 RP 681-685.

In November 2019, Stebbins discovered a "keep out" sign at the entrance to his property that he did not put there and several items missing. This led to Stebbins deciding to stay at the

property for several nights. Stebbins' friend, John Fryer, stayed with him. 7/19/21 RP 702-710.

On November 22, 2019, at approximately 4:00 a.m., both Stebbins and Fryer were asleep in the living room of the mobile home and were awakened by a male standing over them holding a revolver. The male demanded to know where "Larry" was. 7/19/21 RP 711-712. Both Stebbins and Fryer told the male that there was no "Larry" and that Stebbins was the owner of the property. Another male holding a rifle came down the hallway of the mobile home stating "it's all clear." The male holding the handgun, later identified as Giancoli, ordered Stebbins and Fryer to get up and to come with them. The male with the rifle was later identified as Christopher Conklin. 7/21/19 RP 711-716; 7/29/21 RP 449-457.

Giancoli and Conklin forced Stebbins and Fryer to leave their wallets and phones behind and directed them at gunpoint out of the mobile home and to a black Escalade parked down the driveway. 7/19/21 RP 718, 730; 7/29/21 RP 464. As they were

walking down the driveway toward the Escalade, Fryer started running. Conklin fired at Fryer with the rifle. 7/19/21 RP 728; 7/29/21 RP 467. Stebbins started yelling and Giancoli hit him in the head with the handgun, ordering him to get in the vehicle while holding the gun to his head. Stebbins refused and Conklin walked over to him and shot him in his legs with the rifle. Stebbins then agreed to get in the car, but instead ran into the surrounding woods. 7/19/21 RP 731-740; 7/29/RP 477-478.

Giancoli and Conklin fled the area in the Escalade. Officers responded to a dispatch call and patrol vehicles gave chase to the Escalade. 7/20/21 RP 51, 54, 55, 82; 7/21/21 RP 18, 26. They followed as the Escalade left the freeway, collided with a median, and came to a stop at the parking lot of an apartment building in Gig Harbor. 7/21/21 RP 44. One deputy observed a white male wearing a reddish-orange beanie, later identified as Giancoli, exit the vehicle from the driver's door. 7/21/21 RP 48-62.

Deputies located Giancoli in the brush and took him into custody. Conklin was later located after a K-9 tracked and found him also lying in the brush a short distance from the vehicle. 7/27/21 RP 31-58.

A jury convicted Giancoli of two counts of assault in the first degree, burglary in the first degree, two counts of kidnapping in the first degree, unlawful possession of a firearm in the first degree, tampering with a witness, and attempting to elude. CP 457-458. The trial court sentenced appellant to life in prison without the possibility of parole as a persistent offender. CP 462-463.

On appeal, both Giancoli and Conklin argued that their assault convictions merged with their kidnapping convictions, and that the kidnapping and burglary convictions violated their constitutional rights to jury unanimity and notice. They argued that if the court did not reverse the convictions for kidnapping in the first degree due to insufficient evidence to support an alternative means, the court should find that the convictions for

kidnapping in the first degree merge with the convictions for assault in the first degree The State conceded that the merger doctrine required that the kidnapping and burglary convictions should be reversed, but that the assault convictions were otherwise valid and should be affirmed.

Conklin's appeal was transferred from Division Two to Division One. *State v. Conklin*, No. 84634-5-II, Order Transferring Cases (Oct. 21, 2022). Although Division One rejected Conklin's argument that his convictions for assault in the first degree should be reversed due to impermissibly suggestive and flawed identification procedures, that court granted Conklin's request that his vacated kidnapping convictions merge with his convictions for assault in the first degree, which had the result of vacating the convictions for assault in the first degree, even though that argument was made (and conceded to) as an alternative argument to the argument that the convictions for kidnapping in the first degree should be dismissed due to insufficient evidence to support both of the

alternative means charged. *See State v. Conklin*, No. 84634-5-I (May 8, 2023) (unpublished).

In a motion for reconsideration, the State argued that Division One erred by vacating the assault convictions on merger grounds as the State's concessions as to the merger of the assault and kidnapping convictions did not warrant the reversing of the assault convictions as the kidnapping convictions were reversed on other grounds. Division One declined to reconsider its opinion and this Court denied review. *State v. Conklin*, No. 84634-5-I, Order Denying Mot. For Reconsideration (June 29, 2023); *State v. Conklin*, No. 102238-7, Order Terminating Review (Nov. 8, 2023).

In the instant appeal, Division Two reversed Giancoli's kidnapping and burglary convictions, as well as all firearm enhancements, but properly declined to follow Division One's lead in vacating the assault convictions. Op. at 17–22. Division Two held that because the State "clarified its position at oral argument," the "reversal of the first degree kidnapping

convictions renders the merger doctrine inapplicable." *Id*. at 22. Division Two also affirmed Giancoli's third-strike sentence of life without the possibility of release, reasoning that such a sentence did not offend "evolving standards of decency." *Id*. at 24.

V. ARGUMENT

A. This Court should decline to review the disparate outcomes of the appeals of Giancoli and Conklin as the Court of Appeals properly applied the doctrines of merger and double jeopardy.

Giancoli claims that review is warranted because the disparate outcomes of Conklin and Giancoli's appeals is a miscarriage of justice that violates equal protection. Pet. For Revw. ("PFR") at 17-21. Review should be denied as the Court of Appeals properly applied the doctrines of merger and double jeopardy.

In the instant case, the Court of Appeals properly found that the merger doctrine only applies at sentencing to correct double jeopardy violations. As the State conceded that Giancoli's kidnapping convictions should be reversed as there was

insufficient evidence to support the extreme mental distress alternative means of kidnapping, the court found that there would be no kidnapping convictions for the assaults to merge with.[1] As Giancoli did not otherwise prevail on any challenge to his assault convictions, the court affirmed Giancoli's convictions for assault in the first degree. Op. at 21-22.

The State acknowledges that Division One of the Court of Appeals came to a different conclusion in Conklin's appeal. In Conklin's appeal, as set forth above, although Division One rejected Conklin's argument that his convictions for assault in the first degree should be reversed due to impermissibly suggestive and flawed identification procedures, it nevertheless found that his vacated kidnapping convictions merged with his convictions for assault in the first degree, which had the result of vacating the convictions for assault in the first degree, even

[1] As support for this holding, the court cited to *State v. Aguilar*, 27 Wn. App. 2d 905, 931-933, 534 P.3d 360 (2023), which declined to reach double jeopardy arguments after reversing the convictions that implicated double jeopardy on other grounds.

though that argument was made (and conceded to) as an alternative argument to the argument that the convictions for kidnapping in the first degree should be dismissed due to insufficient evidence to support both of the alternative means charged. *See State v. Conklin*, No. 84634-5-I (May 8, 2023) (unpublished).[2]

Division One came to the wrong conclusion in *Conklin*. Although this Court denied the State's petition for review of that decision, the reason may very well have been that this Court found it was simply an error that inured to the benefit of the appellant and this Court is primarily a court of policy and not "an error correction court." Benjamin S. Halasz, "Writing Tips from the Bench: To Be Persuasive Keep It Simple," WASH. ST. BAR NEWS, vol. 78, no. 1 at 19 (Dec. 2023/Jan. 2024).

[2] Respondent does not object to Giancoli's motion for this Court to take judicial notice of Conklin's amended judgment and sentence, entered on February 2, 2024, as well as the current Department of Corrections inmate roster.

In any event, Division Two in the instant case properly applied the doctrines of merger and double jeopardy.[3] In *State v. Michielli*, 132 Wn.2d 229, 238–39, 937 P.2d 587 (1997), this Court held that the merger doctrine arises only when a defendant has been found guilty of multiple charges, and the court must then ask if the Legislature intended only one punishment for the multiple convictions. Although courts may not enter multiple convictions for the same offense without offending double jeopardy, merger only becomes an issue at sentencing. *Id*. at 238.

In the instant case, the Court of Appeals agreed with the parties that Giancoli's convictions for kidnapping in the first degree should be dismissed due to insufficient evidence being presented to support all of the alternative means charged.

[3] Although respondent believes that its concessions in both the Giancoli and Conklin appeals were clear, Division Two below acknowledged that respondent was able to "clarify" the scope of its concessions at oral argument. Op. at 21-22. In Conklin's appeal, Division One gave respondent no such opportunity as it declined to hear oral argument prior to the rendering of its opinion.

Accordingly, the merger doctrine was inapplicable here as, with the kidnapping convictions reversed, there remained nothing to "merge" Giancoli's convictions for assault in the first degree with.

In other words, under *Michielli*, the merger issue only arises if both the convictions for assault in the first degree and the convictions for kidnapping in the first degree were valid; in that case, the convictions would merge and Giancoli would be appropriately sentenced for either the kidnappings or the assaults, whichever were the greater offenses. Here, however, as Giancoli's convictions for kidnapping in the first degree were not valid, the Court of Appeals' decision not to merge these convictions with his valid convictions for assault in the first degree is fully in accord with this Court's decision in *Michielli*.

The essential rule underlying the merger doctrine is clear: a defendant must be sentenced on at least one of the merged convictions or else there is no double jeopardy violation and no basis for a defendant to avoid sentencing on the otherwise valid

conviction. The mere fact that the results of the appeals of Giancoli and Conklin ultimately differ does not require that the properly imposed greater sentence must be reduced to comport with the improperly imposed lesser sentence.[4] *See Ahmad v. Town of Springdale*, 178 Wn. App. 333, 345, 314 P.3d 729 (2013) (discretion assumes that two decision makers may reach a different outcome). This Court should decline Giancoli's petition for review on this issue.

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[4] Giancoli's reference to *State v. Oeung*, 2021 WL 1550310, 17 Wn. App. 2d 1021 (Apr. 20, 2021) (unpublished) is unpersuasive. The court in *Oeung* based its holding on the fact that the trial court stated that it would have granted Oeung an exceptional downward sentence if it could have, whereas it would not have do so for her co-defendant. The court found that it would be a gross miscarriage of justice for the co-defendant to receive an opportunity to argue again for an exceptional downward sentence on all counts based on recent case law, but to deprive Oeung of that same opportunity. *Id*. at *7. In the instant case, the trial court made no such comment and there has been no "recent case law" supporting Giancoli's claim.

B. This Court should decline to review the constitutionality of Giancoli's third-strike sentence of life without the possibility of parole as this Court held in *State v. Gregory*, 192 Wn.2d 1, and *State v. Reynolds*, 2 Wn.2d 195, that punishment under the three-strikes provision of the POAA is constitutional.

Giancoli claims that review is required because his "death in-prison sentence is cruel punishment under article I, section 14 as it is imposed in a racially disparate manner and does not comport with evolving standards of decency." PFR at 21-31. Review should be denied as to this issue as this Court held in *State v. Gregory*, 192 Wn.2d 1, and *State v. Reynolds*, 2 Wn.2d 195, that punishment under the three-strikes provision of the POAA is constitutional.

In the instant case, the Court of Appeals held that, based on this Court's holdings in *State v. Gregory*, 192 Wn.2d 1, and *State v. Reynolds*, 2 Wn.2d 195, punishment under the three-strikes provision of the POAA of the SRA is constitutional:

> *Gregory* held that the death penalty was unconstitutional largely because the penalty was "unequally applied—sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in

> time, or the race of the defendant," and failed to serve "any legitimate penological goal." 192 Wn.2d at 5. In contrast, the Supreme Court held in *Reynolds* that life without the possibility of release sentences for serious offenders satisfy the penological goals of retribution, deterrence, and incapacitation. *Reynolds*, 535 P.3d at 436. And the Supreme Court's remedy in *Gregory* was to convert all death sentences to life without the possibility of release. 192 Wn.2d at 35-36. As a result, we cannot conclude that life sentences without the possibility of release offend our evolving standards of decency in the same way that death sentences do without contradicting the Supreme Court's resolution of *Gregory*. *Id*.; *Reynolds*, 535 P.3d at 437-38.

Op. at 25.

As he did in the Court of Appeals, Giancoli here, too, offers an array of statistics to support his claim that his third-strike life without parole sentence was imposed in a racially disparate manner and does not comport with evolving standards of decency.[5] However, these statistics have long been available and as recently as six months ago, this Court found that the three-

[5] Racial discrimination, as a constitutional matter, occurs only when a public official intends to hold a person's race against him, not from a racially disparate effect. *Luft v. Evers*, 963 F.3d 665, 670 (7th Cir. 2020). Giancoli offers nothing but these one-sided statistical studies in support of review.

strikes provision of the POAA was constitutional. *See State v. Reynolds*, 2 Wn.2d 195.

The POAA sentencing procedure is distinguishable from death penalty proportionality review. The death penalty scheme required multiple discretionary decisions that permitted the possible introduction of racial or other suspect bias. *State v. Cross*, 156 Wn.2d 580, 623-24, 132 P.3d 80 (2006), as corrected (Apr. 13, 2006). The majority of these sentencing procedures rested on discretionary acts: the prosecutor must seek a special sentencing session; the prosecutor must judge whether sufficient mitigating circumstances exist to preclude the penalty; jurors must unanimously agree that the penalty is warranted; and jurors must also agree that sufficient mitigating factors do not exist. At each individual exercise of decision-making, the danger of introducing implicit or overt racial biases existed.

The number of discretionary decisions involved in the POAA sentencing is quite minimal, compared to a death penalty case. Although some amount of discretion is involved in an

individual prosecutor's charging decisions, the sentencing of persistent offender affords no discretion. A "persistent offender shall be sentenced to a term of total confinement for life." RCW 9.94A.570. There is no special sentencing procedure, the trial court cannot impose a different sentence, and every persistent offender receives an identical sentence. Neither the prosecutor nor the trier of fact need consider any mitigating factors. Implicit or overt racial biases cannot affect the sentencing of a persistent offender because every defendant who qualifies as a persistent offender at sentencing is treated identically. It is precisely this lack of discretionary judgment that renders sentencing under the POAA immune from arbitrary imposition.

Whenever a sentencing court concludes an offender is a "persistent offender," the court must impose a life sentence, and the offender is not eligible for parole or any form of early release. RCW 9.94A.570. A "persistent offender" is an offender currently being sentenced for a "most serious offense" who also has two or more prior convictions for "most serious offenses." RCW

9.94A.030(37). RCW 9.94A.030(32) lists Washington's "most serious offenses," and the Legislature recently removed second degree robbery. The only classification the POAA creates is a category of convicted defendants who are considered persistent offenders, and who must receive a term of life imprisonment. Offenders who do not meet the definition of persistent offenders are sentenced according to the other provisions of the SRA.

Moreover, the POAA statutory scheme does not stratify different classes of persistent offenders based on race or any other factor. The statute requires all persistent offenders to be sentenced to life imprisonment. Offenders meet the definition based on their criminal history, not their race. Consequently, a POAA sentence is not, and cannot be, imposed by a court in an arbitrary and racially biased manner.

Much needs to be done by our communities to address socioeconomic inequalities that contribute to higher rates of certain violent crimes committed by people of color. But the existence of these conditions and their impact on

disproportionality of POAA sentences by race does not render the POAA unconstitutional. This Court should decline Giancoli's petition for review on this issue.

C. The Court of Appeals below properly applied this Court's holding in *State v. Derri*, 99 Wn.2d 658.

Giancoli claims this Could should accept review because the Court of Appeals misapplied this Court's holding in *State v. Derri*, 99 Wn.2d 658. PFR at 31-35. Review should be denied as to this issue as the Court of Appeals properly applied this Court's holding in *Derri*.

The Court of Appeals in the instant case analyzed the eyewitness identification procedures employed by law enforcement under this Court's decision in *Derri*. Op. at 12 ("we consider Giancoli's arguments that are based on the analysis in *Derri*.") In *Derri*, this Court held that a court examining whether an identification procedure was impermissibly suggestive "must apply relevant, widely accepted modern science on eyewitness identification at each step of the test." 199 Wn.2d at 675, 677. However, although these factors are each "potentially

suggestive," including that identification procedures should be administered in double-blind fashion, they are not automatically dispositive. *See id*. at 679, 682. In *Derri*, this Court held that "each identification procedure" in that case was impermissibly suggestive, but the identifications were nevertheless reliable under the totality of the circumstances. *Id*. at 685.

In analyzing the instant case under *Derri*, the Court of Appeals found that the identification procedures used by law enforcement were not impermissibly suggestive, even though the photo montage procedure was not administered in a double-blind fashion, and therefore did not reach the issue of reliability. Op. at 14-15. *See State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002); *see also State v. Brown*, 128 Wn. App. at 307, 312–13, 116 P.3d 400 (2005) ("If the defendant fails to meet this initial burden, the inquiry ends").

The court below reasoned that the only *Derri* factor that Giancoli identified as weighing in favor of impermissible suggestiveness was the lack of the double-blind procedure. As

this Court in *Derri* found *multiple* factors contributed to suggestiveness and did not say that *one* factor is or should be dispositive (*see* 199 Wn.2d at 679), the Court of Appeals reasonably found that the procedure used was not impermissibly suggestive despite the lack of double-blind presentation as there was no evidence that the lack of such a presentation made any difference in this case.[6] This Court should decline Giancoli's petition for review on this issue.

D. This Court should decline to review the issue of whether the reversal of firearm enhancements requires reversal of the underlying conviction because the Court of Appeals properly declined to address this issue as it was raised for the first time in Giancoli's Reply Brief.

Giancoli claims that review is needed to clarify that reversal of firearm enhancements requires reversal of the

[6] DNA evidence tied Giancoli to both the property where the attacks took place and the vehicle in which the suspects fled the scene. 7/27/2021 RP 126; 7/28/2021 RP 291-292; 7/29/2021 RP 462; 8/2/2021 RP 514–15; 8/4/2021 RP 690. This evidence, coupled with Giancoli being found hiding in the woods near where the vehicle crashed (7/20/21 RP 51, 54, 55, 82; 7/21/21 RP 18, 26, 44, 48-62, 146-147; 7/27/21 RP 31-58), renders any error in the identification procedure harmless.

underlying conviction. PFR at 35-41. However, as Giancoli raised this claim on appeal only in his Reply Brief, the Court of Appeals properly declined to address this issue. *See Ainsworth v. Progressive Cas. Ins. Co*., 180 Wn .App. 52, 322 P.3d 6 (2014) (An appellate court will not consider issues argued for the first time in the reply brief).

In the instant case, Giancoli raised his claim that the reversal of firearm enhancements requires reversal of the underlying conviction for the first time in his Reply Brief. The Court of Appeals declined to address this issue:

> Giancoli's assertion that we must also reverse the underlying assault convictions is a novel argument raised for the first time in his reply brief. "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *see* RAP 10.3(c).

Op. at 21.

Under RAP 13.4(b), petitions for review are limited to issues resolved in the Court of Appeals. Here, the Court of Appeals never reached the merits of Giancoli's claim because the

issue was not properly before the court. Accordingly, the only question for this Court is whether the Court of Appeals' application of the rule prohibiting new issues from being asserted for the first time in a reply brief merits consideration under RAP 13.4(b). As Giancoli makes no argument that the Court of Appeals erred in the application of this rule, this Court should decline Giancoli's petition for review on this issue.[7]

E. This Court should decline to take review to resolve a "split" in the Court of Appeals regarding whether this Court's opinion in *State v. Recuenco*, 163 Wn.2d 428, requires the State to prove a firearm is operable when the Court of Appeals in the instant case does not reference or even mention *Recuenco*.

Giancoli claims that review is required under RAP 13.4(b)(1) and (2) because there is a Court of Appeals "split" as to whether this Court's opinion in *State v. Recuenco*, 163 Wn.2d

[7] In *State v. Dhaliwal*, 150 Wn.2d 559, 575, 79 P.3d 432 (2003), this Court indicated that review may be granted of an issue raised for the first time in a Court of Appeals reply brief where there has been an intervening change in the law between the opening brief and the reply. In the instant case, however, Giancoli makes no assertion that an intervening change in law prevented him from timely raising his claim.

428, requires the State to prove a firearm is operable. PFR at 41-43. However, review is not warranted here as the Court of Appeals below does not discuss or even mention *Recuenco*.

Decisions of a Court of Appeals may warrant review from this Court under RAP 13.4(b)(1) and (2) if such a decision is either in conflict with a decision of this Court or with a published decision of the Court of Appeals. Although *State v. Recuenco*, 163 Wn.2d 428, is a decision of this Court, the Court of Appeals below does not discuss this case. Rather, Giancoli appears to ask this Court to accept review to resolve a "split" in *other* cases as to how *those* cases interpret *Recuenco*. As the Court of Appeals below does not mention *Recuenco*, it cannot by definition be in *conflict* with such an opinion, even if it may follow one path of this supposed "split." *See State v. Raleigh*, 157 Wn. App. 728, 735, 238 P.3d 1211 (2010) (the language at issue in *Recuenco* that may have led to a "split" was "cited merely to point out that differences exist between a deadly weapon sentencing enhancement and a firearm sentencing enhancement" and was

"nonbinding dicta."). This Court should accordingly decline Giancoli's petition for review on this issue.

VI. CONCLUSION

For the reasons stated above, this Court should deny Giancoli's petition for review.

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Respectfully submitted this 18th day of March, 2024

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Theodore M Cropley
THEODORE M. CROPLEY
Deputy Prosecuting Attorney
WSB # 27453 / OID #91121
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 355-5585
Theodore.Cropley@piercecountywa.gov

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3/18/2024	*s/ Kimberly Hale*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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