95374-1

SUPREME COURT NO. _____

NO. 74733-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR THOMAS,

Petitioner.

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

The Honorable Jeffrey M. Ramsdell, Judge
The Honorable Hollis Hill, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Arthur Thomas asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision[1] in State v. Arthur Thomas, filed November 20, 2017 ("Opinion" or "Op."), which is appended to this petition.

C. ISSUE PRESENTED FOR REVIEW

The jury at the appellant's first trial left blank a special verdict form as to a firearm sentence enhancement. Following a second trial addressing only the firearm allegation, the jury found the appellant was armed with a firearm during commission of the crime. The court then sentenced him on the underlying crime as well as the firearm enhancement.

Where, however, the superior court lacked authority to empanel a second jury to retry the appellant solely on the firearm allegation, should the firearm sentence enhancement be vacated?

[1] The State moved to publish the opinion on December 1, 2017. As of the date of filing, the Court of Appeals has not ruled on the motion.

D. STATEMENT OF THE CASE[2]

The State charged Arthur Thomas with the first degree assault of Bruce Golphenee under two alternative theories. CP 35-37; see RCW 9A.36.011(1)(a) (assaults another with a firearm, any deadly weapon, or by any force or means likely to produce great bodily harm or death); RCW 9A.36.011(1)(c) (assaults another and inflicts great bodily harm).

The State also alleged that Thomas was armed with a firearm during the commission of the crime. CP 35; RCW 9.94A.533(3) (providing for additional term of incarceration if accused person was armed with a firearm, as that term is defined in RCW 9.41.010).

The allegation was based on a July 2014 shooting outside a Bank of America located in Seattle's Central District. See 2RP 50-51, 56 (trial on firearm enhancement). Thomas punched Golphenee, a bank security guard, and reached for his gun. 2RP 60-61; 3RP 225. The men then struggled for control of the gun. 2RP 61; 3RP 227. In the process, Golphenee was shot twice, and he also sustained other injuries.[3] 2RP 61-62; 4RP 381. Once

[2] This petition refers to the verbatim reports as follows: 1RP – 12/1 and 12/2/15; 2RP – 12/3/15; 3RP – 12/7/15; 4RP – 12/8/15; 5RP – 12/9/15; 6RP – 12/10/15; 7RP – 1/15/16; and 8RP – 10/29 and 11/6/15 (first trial verdicts and hearing between trials). Volumes 1-7 are consecutively paginated.

[3] For example, Golphenee's ankle was fractured in the struggle. 4RP 278, 280.

Thomas gained control of the gun, however, he shot himself in the face. 2RP 62-63. Both men survived the ordeal. 3RP 248, 250.

A jury could not agree on the first degree assault charge but convicted Thomas of the lesser degree crime of second degree assault. CP 91, 107, 109-10; 8RP 1-20; see RCW 9A.36.021(1)(a) (reckless infliction of substantial bodily harm). The trial court instructed the jury to leave the special verdict form blank if it could not reach a unanimous verdict on the firearm allegation. CP 95. The jury left the form blank. CP 111; 8RP 19.

Rather than proceeding to sentencing on second degree assault, the State moved for the court to hold a second trial on the firearm enhancement alone. 8RP 29-30. Thomas objected on the ground that it was unclear on which basis the jury convicted him of second degree assault—indeed, the jury might have convicted him based on the ankle injury— and therefore retrial on the enactment would violate due process. 8RP 32-33, 38-39. The objection was overruled. See generally 8RP 29-43 (discussion of State's theory, accepted by trial court, that assault was a continuing course of conduct).

Following a seven-day jury trial re-litigating the details of the underlying incident,[4] the jury answered "yes" to the firearm special verdict. CP 123.

The court sentenced Thomas to 42 months of incarceration, including a 36-month firearm sentence enhancement. CP 144-51.

Thomas appealed, arguing that based on this Court's decision in State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) the trial court lacked the authority to empanel a jury to retry Thomas solely on a firearm allegation. The Court of Appeals disagreed, stating in part that, "Thomas has failed to establish that the trial court lacked the authority to empanel a second jury, his claim must be denied." Op. at 6.

Thomas now asks this Court to accept review and reverse the Court of Appeals.

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW OF THE COURT OF APPEALS' DECISION UNDER RAP 13.4(b)(1), (2) AND (b)(4) BECAUSE IT CONFLICTS WITH A DECISION OF THIS COURT, INDICATES A CONFLICT BETWEEN DIVISIONS OF THE COURT OF APPEALS, AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

This Court should accept review under RAP 13.4(b)(1) and (2) because the Court of Appeals' opinion conflicts with this Court's decision

[4] The original trial, in comparison, lasted 10 days. CP 175-97.

in Pillatos, 159 Wn.2d at 469-70, as well as a Division Two decision addressing the reach of "Blakely-fix" legislation. Moreover, this case—which could affect sentencing in any case in which a jury deadlocks on a weapon enhancement—involves a potentially far-reaching issue of substantial public interest warranting review under RAP 13.4(b)(4).

As a preliminary matter, the Court of Appeals correctly determined that the argument was not procedurally barred. Op. at 3. For example, "[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "[A] sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional." In re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (citing State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)).

When a sentence has been imposed for which there is no authority in law, appellate courts have "the power and the duty" to correct the erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). The appropriate remedy is reversal of the erroneous, void portion of the sentence. State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980), overruled by statute on other grounds, State v. Barr, 99 Wn.2d 75, 658 P.2d 1247 (1983).

1. Under this Court's *Pillatos* decision, the trial court lacked authority to empanel a sentencing jury to consider the firearm enhancement, and the sentence must be vacated.

The Court of Appeals held "Thomas has failed to establish that the trial court lacked the authority to empanel a second jury, his claim must be denied." Op. at 6. This curiously-phrased assertion turns the proper analysis upside-down. "'Fixing of penalties or punishments for criminal offenses is a legislative function[.]'" State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986) (quoting State v. Mulcare, 189 Wash. 625, 628, 66 P.2d 360 (1937)), quoted in State v. Nuñez, 174 Wn.2d 707, 285 P.3d 21 (2012). It is the State, not Thomas, who must establish the trial court had authority to empanel a freestanding enhancement jury and sentence him to a firearm enhancement.

"Trial courts lack inherent authority to empanel sentencing juries. Pillatos, 159 Wn.2d at 469-70. Pillatos was issued after the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004). In Blakely, the Court held that Washington's system for imposing exceptional sentences violated the Sixth Amendment, and that aggravating factors justifying such sentences must be proved to the trier of fact beyond a reasonable doubt. Id.

In response to Blakely, the legislature enacted former RCW 9.94A.537 (Laws of 2005, ch. 68, §1), known as the "Blakely fix," to bring

chapter 9.94A RCW, the Sentencing Reform Act (SRA), into compliance with Blakely. The Blakely fix authorized trial courts to empanel juries to consider aggravating factors listed in RCW 9.94A.535(3) supporting exceptional sentences. Thereafter, in Pillatos, 159 Wn.2d 459, this Court upheld the Blakely fix.

But, in doing so, this Court reiterated its previous holdings that trial courts do not have inherent authority to empanel sentencing juries. Pillatos, 159 Wn.2d 469-70 (citing State v. Hughes, 154 Wn.2d 118, 151-52, 110 P.3d 192 (2005), abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); State v. Martin, 94 Wn.2d 1, 8, 614 P.2d 164 (1980)).[5] The Hughes court, for example, had stated that "[t]his court will not create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure . . . . To create such a procedure out of whole cloth would be to usurp the power of the legislature." Hughes, 154 Wn.2d at 515-52. In Martin, this Court refused to imply a "special sentencing provision" that

[5] This Court held that, moreover, the Blakely fix statute applied only to cases pending trial before its effective date. Pillatos, 159 Wn.2d at 470-74. In response to this portion of Pillatos, the legislature again amended the SRA, expressly authorizing courts to empanel juries to decide aggravating factors "in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing." Laws of 2007, ch. 205, §1 (statement of legislative intent).

would allow the death penalty to apply to those who pleaded guilty, in the absence of any statutory provision allowing a jury to be empaneled following such a guilty plea. 94 Wn.2d at 7-8.

Although Pillatos upheld the Blakely fix, that legislation contains no provision related to firearm enhancements under RCW 9.94A.533. Thus, under Pillatos and the authority cited therein, the trial court lacked authority to empanel a sentencing jury in Thomas's case. As a result, the firearm enhancement in this case must be reversed. Pillatos, 159 Wn.2d at 466, 480-81. The Court of Appeals contravened this Court's decision in holding to the contrary. Review is warranted. RAP 13.4(b)(1) and (4).

2. Contrary to the Court of Appeals' decision, subsequent case law does not authorize the trial court to empanel a jury to consider the firearm enhancement.

Contrary to the Court of Appeals' decision, later cases do not authorize a freestanding jury trial on a firearm enhancement. Pillatos has not been overruled in this respect and remains the controlling authority. See Agostini v. Felton, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (if a higher court's precedent has direct application, yet appears to rest on reasoning rejected in some other line of cases, the lower courts should follow the case that directly controls).

The Court of Appeals correctly rejected the State's assertion that RCW 9.94A.825 supplied the authority for empanelment of a second jury. That statute provides:

> In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, *or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.*

RCW 9.94A.825 (emphasis added). As the Court recognized, the statue "arguably can be read as requiring the jury that finds the defendant guilty to also make the special verdict finding." Op. at 3.

But the Court of Appeals then erroneously relied on State v. Reyes-Brooks, 165 Wn. App. 193, 202-07, 267 P.3d 465 (2011), review granted, cause remanded, 175 Wn.2d 1020, 289 P.3d 625 (2012) to conclude that Thomas could, nonetheless, be retried on the firearm enhancement. Op. at 4-5.

The Court of Appeals' reliance on Reyes-Brooks is misplaced for at least two reasons. First, the case was overruled following this Court's overruling of itself in the Bashaw-Nuñez line of cases, discussed below. Second, and more crucially, the statute that Reyes-Brooks relies on to hold

jury empanelment is permitted—the Blakely fix statute itself—is patently inapplicable here. The Court of Appeals erred in relying on it. Indeed, Division Two and another panel of the same division of the Court of the Appeals found to the contrary.

In Reyes-Brooks, the Court of Appeals reversed a firearm enhancement based on a purported error under State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) (holding unanimity not required on special verdict as to sentence enhancement, and that giving jury special verdict instruction stating to the contrary constituted error), overruled by Nuñez, 174 Wn.2d 707.

The Court determined, however, that following vacation of the enhancement on remand, a jury could be empaneled to again consider the enhancement. Reyes-Brooks, 165 Wn. App. at 206. According to the Court, RCW 9.94A.537 supplied the authority to do so. Reyes-Brooks, 165 Wn. App. at 206.

After this Court's Pillatos decision, the Reyes-Brooks Court noted, the legislature amended RCW 9.94A.537 to allow trial courts to impanel juries for resentencing in cases that had previously been decided. The amended statute provides that

> [i]n any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to

> consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

RCW 9.94A.537(2). The Court determined that the broad language of this provision encompassed firearm enhancements under RCW 9.94A.533 as well as the aggravating circumstances listed in RCW 9.94A.535(3). Reyes-Brooks, 165 Wn. App. at 206.[6] But see State v. McNeal, 156 Wn. App. 340, 353, 231 P.3d 1266 (2010) (Division Two case stating that "[t]he plain language of RCW 9.94A.537(2) . . . authorizes a resentencing court to impanel a jury *only* when the alleged aggravating circumstance is listed in RCW 9.94A.535(3)."). Moreover, another panel of Division One considering a Bashaw challenge also held to the contrary, observing that RCW 9.94A.537 explicitly responded to Blakely and "reveal[ed] nothing about the legislature's intent concerning retrial in these circumstances." State v. Ryan, 160 Wn. App. 944, 950, 252 P.3d 895 (2011), rev'd on other grounds sub nom. Nuñez, 174 Wn.2d 701.

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[6] The Court also stated that under RCW 9.94A.537(4) a jury other than the one impaneled for the original trial may consider an aggravating circumstance at resentencing: "Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y) shall be presented to the jury during the trial of the alleged crime, *unless the jury has been impaneled solely for resentencing*[.])." Reyes-Brooks, 165 Wn. App. at 205 (emphasis supplied by Court).

Reyes-Brooks was, however, reversed by this Court following this Court's reversal of Bashaw in Nuñez, 174 Wn.2d 707. On remand from this Court, the Court of Appeals simply affirmed Reyes-Brooks's sentence. State v. Reyes-Brooks, noted at 171 Wn. App. 1028 (2012) (unpublished opinion).

Putting aside that case's checkered procedural history, however, a close reading of the "Blakely-fix" statute reveals that, even under the overly broad reading adopted in Reyes-Brooks, RCW 9.94A.537 still would not permit jury empanelment in this case.

The meaning of a clear and unambiguous statute is derived from its plain language alone. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), cert. denied, 534 U.S. 1130 (2002). Courts must assume the legislature means exactly what it says. State v. Delgado, 148 Wn.2d 723, 727, 63 P. 3d 792 (2003) (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)).

Next, by its plain language, RCW 9.94A.537 simply does not apply to a RCW 9.94A.533 sentence enhancement. Rather, it applies only to aggravating circumstances listed in RCW 9.94A.535(3). McNeal, 156 Wn. App. at 353 (Division Two case).

But even if it did apply to RCW 9.94A.533 enhancements in some circumstances, by its plain language, RCW 9.94A.537 does not apply in this

case. RCW 9.94A.537 applies to cases "where an exceptional sentence above the standard range *was imposed* and where a new sentencing hearing is required." RCW 9.94A.537(2) (emphasis added). The jury deadlocked in this case, so no exceptional sentence was ever imposed. Thus, the statute plainly does not apply. Reyes-Brooks does not provide support for the result reached by the Court of Appeals in this case.

Here, the Court of Appeals also relied on State v. Thomas, 166 Wn.2d 380, 208 P.3d 1107 (2009) (Thomas II) to conclude that a jury could be empaneled to consider the firearm enhancement. Op. at 5. But, as with Reyes-Brooks, Thomas II did not overrule the general rule set forth in Pillatos.

Review of that case's procedural history is necessary. In State v. Thomas (Thomas I), this Court reversed Covell Thomas's death penalty sentence due to instructional error on the RCW 10.95.020[7] aggravating factors. 150 Wn.2d 821, 876, 83 P.3d 970 (2004). This Court remanded for "a new trial on the aggravating factors or resentencing in accordance with this opinion." Id. The trial court empaneled a jury, which found four aggravating factors under RCW 10.95.020. The trial court then sentenced

[7] RCW 10.95.020 lists aggravating factors through which the State may obtain an enhanced sentence for defendants found guilty of first degree murder.

Thomas to life in prison without the possibility of parole. Thomas II, 166 Wn.2d at 385.

He again appealed his sentence, arguing that the trial court had no power to empanel a jury because chapter 10.95 RCW provided no mechanism for empanelment of a jury solely to consider the existence of aggravating factors. Thomas II, 166 Wn.2d at 392. Thomas relied in part on Hughes, 154 Wn.2d 118, a case relied on by Pillatos, to argue the court lacked such authority. This Court disagreed, however, noting that Hughes dealt with aggravating factors under the SRA and not the provisions pertinent to Thomas's case. Thomas II, 166 Wn.2d at 392-93.

Here, the State sought empanelment of the jury to impose a SRA firearm enhancement. As a result, Hughes and Pillatos—not Thomas II—control. For this reason alone, Thomas II is not on point and the Court of Appeals erred in relying on it.

As noted by the Court of Appeals, Op. at 5, in Thomas II, this Court also relied on CrR 6.1(a), which states that "[c]ases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court" to determine that empanelment of a jury was permitted. CrR 6.1(1). But, as the Court of Appeals also stated in this case, RCW 9.94A.825 "can be read as requiring the jury that finds the defendant guilty to also make the special verdict finding." Op. at 3. In this

respect, the Court of Appeals was correct. This Court makes every effort to harmonize conflicts between statutes and court rules. State v. Blilie, 132 Wn.2d 484, 491, 939 P.2d 691 (1997). Harmonizing the two, CrR 6.1 can be read to require a jury to be empaneled where permitted by statute, but not otherwise. The applicable statutes do not permit empanelment of a freestanding enhancement jury in this case.

For these reasons, review is warranted under RAP 13.4(b)(1), (2), and (4).

3. This Court's decision in *Nuñez* does not supply the necessary authority to empanel the second jury.

Concluding its analysis, the Court of Appeals asserts that this Court's Nuñez decision—clarifying that a non-unanimous decision on any sentencing enhancement or aggravator is not tantamount to acquittal—will be rendered meaningless by adherence to this Court's decision in Pillatos. Op. at 5.[8] This line of reasoning should be rejected.

Nuñez does not address the fundamental question of whether a trial court has statutory authority, in the first instance, to empanel a freestanding sentencing jury on remand following jury deadlock. See In re Electric

[8] This Court noted that constitutional double jeopardy principles did not bar, as a constitutional matter, retrial on an aggravating factor. Nunez, 174 Wn.2d at 718 n. 5 (citing federal and state authority holding lack of double jeopardy concerns inherent in retrial of sentencing factors). Thomas did not raise a double jeopardy challenge on appeal.

Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue.").

In summary, the Court of Appeals' decision in this case conflicts with a controlling of decision of this Court on this important and potentially far-reaching issue. The decision also represents a conflict with Division Two on the reach of "Blakely-fix" legislation. McNeal, 156 Wn. App. at 353. This Court should, therefore, grant review under RAP 13.4(b)(1), (2), and (4) and reverse the Court of Appeals.

F. CONCLUSION

For the foregoing reasons, this Court should accept review and reverse the Court of Appeals.

DATED this 13th day of December, 2017.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ARTHUR IDOWU THOMAS, Appellant.	No. 74733-9-I DIVISION ONE UNPUBLISHED OPINION FILED: November 20, 2017

BECKER, J. — The issue in this appeal is whether a trial court lacks authority to empanel a second jury solely for the purpose of considering a firearm sentence enhancement allegation when the first jury convicts the defendant of a crime but is unable to reach a unanimous verdict on the firearm allegation. We conclude the empaneling of a second jury is not unlawful.

On July 24, 2015, appellant Arthur Thomas entered a breezeway outside a Seattle bank. He was unarmed. He struck security guard Bruce Golphenee from behind and attempted to take Golphenee's firearm. Golphenee resisted. In the course of their struggle, several rounds were discharged from Golphenee's firearm. Golphenee suffered substantial bodily harm, including a fractured ankle, an amputated finger, and a gunshot wound to his abdomen, which damaged his intestines and urinary tract. Despite Golphenee's efforts, Thomas was successful in wresting away control of the firearm, at which point he placed the barrel in his own mouth and pulled the trigger. Although Thomas suffered

extensive damage to his face, he survived. The State charged him with first degree assault and an accompanying firearm enhancement.

After a 10-day trial, a jury convicted Thomas of the lesser included charge of second degree assault but was unable to reach a unanimous verdict on the question of whether he was armed with a firearm at the time of the commission of the crime. Thomas asked the court to move immediately to sentencing. Instead, the trial court empaneled a new jury for the sole purpose of retrying the firearm sentence enhancement allegation. The second jury was instructed that Thomas "has previously been found to be guilty of Assault in the Second Degree" and that the previous jury's verdict "establishes the existence of those facts and circumstances which are the elements of the crime." After a 7-day trial in which the details of the incident were presented again, the second jury unanimously found that Thomas was armed with a firearm at the time of the commission of assault in the second degree. He was sentenced to a 42-month prison term, of which 36 months were for the firearm enhancement.

In the trial court, Thomas objected to the empaneling of a second jury on the grounds that there had been an implied acquittal on the firearm allegation and that a retrial would violate due process. He argued that the second jury would not know whether the assault conviction was grounded on the initial punch, the broken ankle, or the gunshot. His only argument on appeal is that the trial court lacked authority to impanel the second jury. The State contends that under RAP 1.5(a), Thomas is precluded from raising that argument for the first time on appeal. If the trial court lacked authority to empanel a second jury to rule

on the sentence enhancements as Thomas alleges, then the court exceeded its authority and the sentence is contrary to law. Illegal sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Thus, we consider the argument.

Trial courts lack inherent authority to empanel sentencing juries. State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007). Thomas reasons that absent a statute directly authorizing the empaneling of a new jury, the trial court exceeded its authority and his sentence must be reversed.

As the State argues, Washington law explicitly permits a jury to consider a firearm enhancement. State v. Nguyen, 134 Wn. App. 863, 870-71, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053 (2008), cert. denied, 555 U.S. 1055 (2008). The issue here, though, is whether Washington law permits the empaneling of a second jury to consider a firearm enhancement on which the first jury was unable to agree. The State suggests that RCW 9.94A.825 provides that authority. That statute, however, does not answer the question and in fact arguably can be read as requiring the jury that finds the defendant guilty to also make the special verdict finding.[1] But appellant does not discuss that statute and

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[1] RCW 9.94A.825 provides:
In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

instead attacks the State's argument that post-Pillatos developments in the law provide the necessary authority.

Of the more recent cases, the most similar is State v. Reyes-Brooks, 165 Wn. App. 193, 202-06, 267 P.3d 465 (2011), modified on remand as noted at 171 Wn. App. 1028 (2012). In that case, this court affirmed a defendant's convictions but vacated a firearm enhancement, finding that the language of the special verdict form was erroneous in light of State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). Bashaw was later overruled by State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012), but that had not yet occurred. Following Bashaw, we instructed the trial court to empanel a new jury to consider the firearm enhancement on remand. Reyes-Brooks, 165 Wn. App. at 206.

To support authorizing the empanelling of a second jury, we relied in part on the legislative statement accompanying RCW 9.94A.537: "The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances *in all* cases that come before the courts for trial or sentencing." LAWS OF 2007, ch. 205 § 1 (emphasis added), cited in Reyes-Brooks, 165 Wn. App. at 206. We held that it is from this guiding public policy that courts derived their authority to empanel a new jury and that this authority applied to all aggravating factors, including those not covered by RCW 9.94A.537(2). Reyes-Brooks, 165 Wn. App. at 206. Reyes-Brooks was ultimately reversed and remanded by the Supreme Court when the court overruled Bashaw, but Thomas offers no persuasive reason why we should

reject the Reyes-Brooks reasoning that trial courts possess the authority to empanel a new jury in these circumstances.

The argument made by Thomas is also incompatible with State v. Thomas, 166 Wn.2d 380, 393, 208 P.3d 1107 (2009) (Thomas II). The defendant was convicted of premeditated first degree murder. His death sentence was overturned on appeal. He then challenged the trial court's authority to impanel a new jury to consider anew the existence of aggravating factors. The Supreme Court rejected this argument and stated that under CrR 6.1(a), "the power to empanel a jury to hear aggravating factors is a court mandated component of the power to hear cases 'required to be tried by jury.'" Thomas II, 166 Wn.2d at 393, quoting CrR 6.1(a). We reject appellant's argument that the holding of Thomas II is limited to consideration of aggravating factors listed in RCW 10.95.020. Thomas II focuses on broad authority provided by court rules rather than tying the holding to a specific statute. As evidenced by this court's reliance on Thomas II in Reyes-Brooks, the applicability of Thomas II extends beyond first degree murder.

Finally, as the State correctly notes, prohibiting trial courts from empaneling a new jury to hear sentence enhancement allegations would effectively transform a nonunanimous verdict into a de facto acquittal and would thereby contravene Nunez, 174 Wn.2d at 719. Nunez overruled Bashaw and held that unanimity was required to reject aggravating circumstances, including deadly weapon sentence enhancements. Nunez, 174 Wn.2d at 715. Implicit in

the unanimous rejection requirement is the authority to empanel a new jury to consider sentence enhancements.

> Both the United States and Washington Constitutions prohibit successive prosecutions for an offense on which the defendant has been acquitted. But proving the elements of an offense is different from proving an aggravating circumstance. The Supreme Court has held that the prosecution's admitted failure to prove an aggravating circumstance beyond a reasonable doubt does not preclude retrial of that allegation at a new sentencing proceeding, except in the context of death penalty cases. Accordingly, whether a jury unanimously rejected an aggravating circumstance has no bearing on whether the factor may be retried outside of the death penalty context. The nonunanimity rule would therefore not preclude retrial of a non-death-penalty aggravator.

Nunez, 174 Wn.2d at 717-18 (footnotes omitted).

Because Thomas has failed to establish that the trial court lacked the authority to empanel a second jury, his claim must be denied.

Thomas asks that no costs be awarded on appeal. The State does not respond. Appellate costs are generally awarded to the substantially prevailing party on review. Thomas was found indigent by the trial court. When a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2. If the State has evidence indicating that Thomas's financial circumstances have significantly improved since the trial court's finding, the State may file a motion for costs with the commissioner.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Appelwick, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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