

No. 33790-1-III

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

STATE OF WASHINGTON,

Respondent-Cross-Appellant,

v.

RIGOBERTO IVAN VAZQUEZ,

Appellant-Cross-Respondent.

BRIEF OF RESPONDENT-CROSS-APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Appellant/Cross Respondent's Assignment of Error.

The firearm enhancements added to the defendant's assault in the second degree conviction violate the Sixth Amendment right to trial by jury.

B. Respondent/Cross Appellant's Assignment of Error.

The trial court erred in striking the firearm enhancement from the defendant's riot while armed conviction.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Issues related to Appellant/Cross Respondent's Assignment of Error.

1. Did the jury instructions adequately inform the jury they were to decide whether or not the defendant was armed with a firearm?

2. Assuming the jury instructions were inadequate, was the error harmless?

3. Assuming the jury instructions were inadequate and the error was not harmless, what is the proper remedy?

B. Issues related to Respondent/Cross Appellant's Assignment of Error.

1. Did the court err in striking the firearm enhancement related to the riot while armed conviction in its totality, when RCW 9.94A.030 clearly applies to any felony?

2. Should *State v. Soto* be overruled and the case be remanded back for full imposition of the firearm enhancement on the riot while armed charge?

III. STATEMENT OF THE CASE

A. *Factual History.*

The Marianos gang and the Munoz family had a long running feud. This included a homicide where Marianos members killed a member of the Munoz family approximately two years before the events in question. 1RP 176, 402¹. On June 22, 2013 Alex Munoz² went to a store in Quincy with his dad to get barbeque supplies. 1RP 190. He ran into a gangster named Froggy, who began acting aggressively. 1RP 191. Alex punched Froggy, knocking him out. 1RP 192.

About 10 minutes later Alex Munoz and his dad had returned home. Froggy came walking by, yelling at the Munoz family members and having an argument. 1RP 193. Froggy threatened the Munozes, telling them they would not survive the night. 1RP 194. Officers arrived

¹ 1 RP refers to the trial transcript prepared by Tom Bartunek.

² Because the Munoz family uses the same last name the State will reference them by first name for clarity's sake.

to deescalate the situation and sort everything out. *Id.* The Officers did not hear the threat, and sent Froggy on his way. Alex Munoz took the treat seriously and went and retrieved his firearm. 1RP 194. Mr. Vazquez also heard about this confrontation and armed himself in anticipation of a fight later. 1RP 402. Later on in the evening people came out of the Davalos house, which was diagonal across an intersection from the Munoz house. 1RP 336-37.

The Davalos house had a home security system that recorded the Marianos side of the confrontation with the Munoz family. Ex. P2, 1RP 331-32. In the video Rigoberto Vazquez can be seen going out and confronting someone. Ex. P2 27:30³. Mr. Vazquez can be seen lifting up his shirt to display his waist band. Ex. P2 28:04. Humberto Davalos, one of Mr. Vazquez's companions, arms himself and takes cover behind a car. Ex. P2 28:50. Another one of Mr. Vazquez's companions gets a gun from Mr. Davalos and points it down the street while Mr. Vazquez returns to the yard still making aggressive gestures. Ex. P2 29:11. After making several aggressive gestures Mr. Vazquez pulled out a gun and starts firing. Muzzle flashes can be seen. Ex. P2 29:38.

Mr. Vazquez testified at trial. He stated that he had picked up a handgun at the house because he was afraid that something was going to

³ All video times will be referenced as mm:ss. The hour shown on the video is 2200.

happen. 1RP 395. He acknowledged he pulled out his gun at the beginning of the altercation and fired it during the fight. 1RP 398-400.

At the time of this incident the City of Quincy had a system called Shot Spotter. Ex. P3. This system acoustically detects gunfire and provides a location of where the shots came from. *Id.* The system showed that someone from the Munoz side fired first, and that Mr. Vazquez returned fire. *Id.* Detective Lafferty synced the audio file from the Shot Spotter to the video. Ex. P3, 1RP 378-79. This showed that Mr. Vazquez returned fire, and also fired several shots after all the other gunfire had stopped. *Id.*

B. Procedural History.

The State charged Mr. Vazquez with two counts of assault in the first degree, riot while armed (since renamed criminal mischief while armed) and reckless endangerment. CP 282-283. In addition on each of the felonies (Cts 1, 2 and 3) the State charged “and furthermore, at the time of the commission of the crime, the defendant or an accomplice was armed with a firearm.”

During the trial the State offered, and the court gave, a jury instruction based on WPIC 2.07.02 (Deadly Weapon—Definition for Sentence Enhancement—Special Verdict—Firearm), which read:

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) (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.

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

CP 313-15. There was no objection to this instruction. The only deadly weapon definitions in the instructions declare a firearm to be a deadly weapon. There are no other definitions of deadly weapon provided. The jury verdict forms asked: "Was the defendant, Rigoberto Ivan Vazquez, armed with a firearm at the time of the commission of the crime" in count (1, 2 and 3)? CP 332-34.

The jury was unable to agree on the assault in the first degree charges. They entered guilty verdicts on the lesser included crimes of assault in the second degree, the riot while armed and the reckless endangerment charges.

CP 326-31. The jury found that Mr. Vazquez was armed with a firearm at the time of the commission of the felonies. CP 332-34.

At sentencing the State acknowledged that under *State v. Soto*, 177 Wn. App. 706, 309 P.3d 596 (2013), the court could not impose any time under RCW 9.94A.533 for the firearm enhancement on the unranked crime of riot while armed⁴. However, the State argued that the firearm enhancement should remain in the judgment and sentence because the firearm enhancement still made the crime a “most serious offense” under RCW 9.94A.030. CP 342, 350-51. The trial court rejected this argument and ordered the firearm enhancement stricken from the judgment and sentence. 1RP 527, CP 381.

IV. ARGUMENT

A. *Appellant/Cross Respondent’s Assignment of Error.*

1. **The jury instructions adequately required the jury to find the defendant was armed with a firearm.**

“We consider challenges to jury instructions in the context of the jury instructions as a whole.” *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). “Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” *Id.* When read as a

⁴ The State objected to the application of *Soto*, but recognized the trial court was bound by it.

whole the jury instructions required the jury to find the defendant was armed with a firearm.

The State offered a jury instruction based on WPIC 2.07.02⁵. The better WPIC would have been 2.10.01⁶. The primary difference between

⁵ 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]*.

[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][the type of weapon]* [(fill in other relevant circumstances)].]

[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.]

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

⁶ For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime [in Count].

[A person is armed with a firearm if, at the time of the commission of the crime, the firearm 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 firearm and the defendant [or an accomplice]. The State must also prove beyond a reasonable doubt that

the two is that WPIC 2.07.02 refers to a deadly weapon, and then defines a firearm as a deadly weapon, while WPIC 2.10.01 refers to a firearm directly. In this case that is a distinction without a difference. There were no deadly weapons involved in this case except for firearms. The jury was never given a definition of deadly weapon beyond that a firearm was a deadly weapon. CP 307, 313-15. There was never any argument or discussion about a deadly weapon other than a firearm. The verdict form specifically asked if the defendant was armed with a firearm at the time of the crime. The jury instructions, when read as a whole in the context of the case, adequately conveyed that the jury was to decide whether the defendant was armed with a firearm, not some other type of deadly weapon.

These exact issues were addressed by Division II in *In re Pers. Restraint of Pender*, noted at 185 Wn. App. 1049, 2015 Wash. App.

there was a connection between the firearm 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][the type of weapon] [(fill in other relevant circumstances)].

[If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.]

A “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

LEXIS 268 (2015) (unpublished) (slip op. at 13-17). In that case the court found there was no error and affirmed the firearm enhancements.

2. Any errors in the jury instructions were harmless.

Mr. Vazquez cited *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) (*Recuenco III*), for the proposition there was no harmless error available in this case. This is incorrect. The alleged error here was the use of the wrong jury instruction. In *Rucuenco III* the Court held that it was error because the information only alleged a deadly weapon enhancement, and the defendant had no notice that he was facing a firearm enhancement until sentencing. “We conclude it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury. In this situation, harmless error analysis does not apply.” *Id.* at 441. This case is not that situation. In this case the crime was clearly charged, clearly sought at trial, and the only dispute is whether it was found by a jury.

The error, if any, in this case, was error in the jury instructions pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). If the jury instructions, read as a whole, only asked the jury about a deadly weapon, the court can conclude that the error was harmless, because the undisputed evidence clearly showed the defendant

was armed with a firearm and nothing else. The Washington State Supreme Court held that *Blakely* error was not subject to harmless error analysis. *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005) (*Recuenco I*). However, *Recuenco I* was overruled by *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (*Recuenco II*). *Recuenco II* was based on application of *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). *Neder* was adopted as Washington law by *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). (We find no compelling reason why this Court should not follow the United States Supreme Court's holding in *Neder*.) Therefore this error, if it exists, can be harmless.

In this case any error was harmless. When a “to convict instruction” omits an essential element of a charged crime, it is constitutionally defective and the remedy is a new trial unless the State can demonstrate that the omission was harmless beyond a reasonable doubt. *State v. Kirwin*, 166 Wn. App. 659, 669, 271 P.3d 310 (2012). A misstatement of the law in a jury instruction is harmless if the element is supported by uncontroverted evidence. *State v. Peters*, 163 Wn. App. 836, 850, 261 P.3d 199 (2011).

The defendant was properly informed in the information that he was being charged with being armed with a firearm. He testified to having

a firearm and firing it. His use of the firearm can be seen on the video. Bullets from his firearm were found in the Munozes' wall. Other witnesses testified they saw him with a firearm. Shot Spotter identified the shots Vazquez fired as gun shots, and they matched up with his actions on the video. There is uncontroverted proof beyond a shadow of a doubt that Vazquez was armed with a firearm. If there was instructional error, it was harmless beyond a reasonable doubt under *Recuenco II*. *Recuenco III* is about informational error. This case is clearly distinguishable from *Recuenco III* because the information alleged a firearm enhancement, not a deadly weapon enhancement. Assuming the Court finds the jury instructions as a whole did not properly instruct the jury, the Court should find the error was harmless and still uphold the firearm enhancement.

3. The proper remedy for inadequate jury instructions is remand for a new trial on the enhancement.

The instruction complained about is essentially the “to convict” for the firearm enhancement. When a “to convict instruction” omits an essential element of a charged crime, it is constitutionally defective and the remedy is a new trial unless the State can demonstrate that the omission was harmless beyond a reasonable doubt. *State v. Kirwin*, 166 Wn. App. 659, 669, 271 P.3d 310 (2012). Assuming the jury instruction was defective and the defect was not harmless the proper remedy for a

faulty jury instruction is not to remand for entry of an uncharged enhancement, in this case a deadly weapon enhancement, but instead for a new trial on the charged enhancement with a proper “to convict” instruction.

B. Respondent/Cross Appellant’s Assignment of Error.

1. Structure of deadly weapon (including firearm) enhancements under the SRA. (RCW Ch. 9.94A).

The fundamental goal of statutory interpretation is to discern and implement the legislature's intent. *State v. JP.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When interpreting a statute, courts look first to the statute's plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). "If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *Id.*

The court construes the meaning of a statute by reading it in its entirety and considering its relation with other statutes. *Dep 't of*

Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). Statutes relating to the same subject matter must be construed together. *Hallauer v. Spectrum Prop., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (quoting *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 592, 989 P.2d 512 (1999)). Statutes relating to the same subject matter "are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes." *Id.* (quoting *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974)). Statutory interpretation is a question of law the court reviews de novo. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010).

There are several sections of the SRA that touch upon firearm enhancements. The first is RCW 9.94A.825 (previously codified at RCW 9.94A.602)⁷. This statute provides authority to submit a firearm/deadly weapon enhancement to a jury and provides a definition of deadly weapon. *See State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007). Several consequences flow from a jury finding of being armed with a deadly weapon. (1) Any felony that was not already a most serious offense (strike) becomes a strike offense. RCW 9.94A.030(33)(t). (2) If the

⁷ If a statute refers to another statute of this state, the reference includes any amendments to the referenced statute unless a contrary intent is clearly expressed. RCW 1.12.028.

offense is a drug offense, it becomes a seriousness level III offense. RCW 9.94A.518. (3) Additional time is added to the sentence under RCW 9.94A.533. (4) If additional time is added under §.533, the offender loses his or her eligibility for a drug offender sentencing alternative. RCW 9.94A.660(1)(a).

In *State v. Soto*, 177 Wn. App. 706, 309 P.3d 596 (2013), the Court of Appeals analyzed RCW 9.94A.533 and concluded that deadly weapon enhancements did not apply to unranked offenses, and ordered a deadly weapon enhancement on an unranked offense struck from the defendant's judgment and sentence. In analyzing §.533 the appellate court found that the additional time to be added onto a sentence for a deadly weapon enhancement only applied to ranked offenses. It did not address RCW 9.94A.030(33)(t), which expressly applies to "any felony." Nor did it address any of the other deadly weapon enhancement statutes. Relying on *Soto* the trial court in this case struck the sentencing enhancement from the judgment and sentence.

2. The firearm enhancement should have remained on the unranked criminal mischief while armed conviction, even if no time was imposed.

The trial court incorrectly interpreted the *Soto* precedent. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised."

Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 220, 995 P.2d 63 (2000) (quoting *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (if a case fails to specifically raise or decide an issue, it cannot be controlling precedent for the issue)).

Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.”

In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014). *Soto* never discussed RCW 9.94A.030(33)(t), which by its terms applies to “any other felony.” Thus while *Soto* remanded to strike the deadly weapon enhancement in that case, it is not precedential on that point. Instead the trial court should have kept the deadly weapon enhancement on the criminal mischief while armed charge, even if it did not impose any time on the enhancement, in order to provide a record that the criminal mischief while armed was a most serious offense. The case should be remanded to add the firearm enhancement to the criminal mischief while armed charge.

3. *State v. Soto* is incorrect and harmful, and should be overruled.

a. Legal standard to overrule a case.

Courts are reluctant to overrule cases. However, some cases are so problematic they must be overruled. *Soto* is such a case.

Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change. In order to effectuate the purposes of stare decisis, this court will reject its prior holdings only upon a clear showing that an established rule is incorrect and harmful.

When a party asks this court to reject its prior decision, it is an invitation we do not take lightly. The question is not whether we would make the same decision if the issue presented were a matter of first impression. Instead, the question is whether the prior decision is so problematic that it must be rejected, despite the many benefits of adhering to precedent—promoting the evenhanded, predictable, and consistent development of legal principles, fostering reliance on judicial decisions, and contributing to the actual and perceived integrity of the judicial process.

State v. Otton, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (Internal citations omitted). A decision may be considered incorrect based on inconstancy with statutes or with public policy considerations. *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011). Whether a prior precedent adequately considered all arguments is a factor to be considered as to whether it should be overruled. *Id.* “I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.”

Massachusetts v. United States, 333 U.S. 611, 639-40, 68 S. Ct. 747, 92 L. Ed. 968 (1948) (Jackson, J. Dissenting). *See also State v. Rangel-Reyes*, 119 Wn. App. 494, 499 n. 1, 81 P.3d 157 (2003) (one court of appeals decision overruling another).

b. *State v. Soto is incorrect.*

i. *Soto* is incorrect when deadly weapon enhancements are considered in the context of the SRA.

State v. Soto analyzed RCW 9.94A.533 as to whether the additional time imposed for a deadly weapon enhancement should apply to unranked offenses. The parties in that case fully briefed, and the Appellate Court fully analyzed, §.533 in isolation. The State has nothing to add to those arguments. However, the parties and court missed the larger picture of the Sentencing Reform Act (SRA) RCW Ch. 9.94A, and the legislative history and intent of the statute. In its analysis the court acknowledged there was language in §.533 that could lead a reasonable person in either direction, but eventually found that the weight of the authority was that the additional time did not apply to unranked offenses. Specifically the ambiguity with subsection one of the statute appears to make it apply to only ranked offenses. However, subsection three and four, the deadly weapon subsections, appear by their plain language to

apply to all felony crimes except those expressly excluded. Within the limits of its analysis the *Soto* Court's decision was supportable, although reasonable people could disagree. The problem with the decision is that *Soto* limited its analysis to §.533, did not consider how the statute fit into the larger scheme of the SRA, and ignored the legislative intent statement in Laws of 1995 Ch. 129 §1, as well as legislative history, the titles of Laws of 1995 Ch. 129 and Laws of 2002 Ch. 290, and the doctrine of constitutional avoidance.

Part of the *Soto* court's reasoning was that unranked offenses are relatively less serious, and thus it was reasonable to not allow deadly weapon enhancements to apply to them. *Id.* at 715. However, deadly weapon enhancements apply to *all felonies* and they become, by definition, "most serious offenses" under RCW 9.94A.030(33)(t). In addition certain unranked offenses, such as attempts to commit certain drug crimes, become ranked at seriousness level III upon conviction with a deadly weapon enhancement. RCW 9.94A.518; Washington State Adult Sentencing Guidelines Manual 29 (2015). These have sentencing ranges of at least 51 months for a first time offender, plus a minimum of six months for the deadly weapon enhancement, hardly a minor offense. Because the other consequences of a deadly weapon enhancement do not depend on the ranked or unranked nature of the underlying crime, and the SRA is to

be applied as a complete statutory scheme, it is clear that the legislature did not intend that the time imposed depend on whether the underlying offense was ranked, but whether it was an category A, B or C felony. Indeed, if they had wanted the time to depend on the ranked nature of the offense, they would have used the seriousness level of the crime to determine the extra time imposed, not the letter category.

ii. *Soto* is incorrect under Wash Cons't Art II §19.

The firearm enhancements were first codified in Laws of 1995 Ch. 129 (An act relating to increasing penalties for armed crime)⁸. The intent statement in §1 of that statute is clear:

(1) The people of the state of Washington find and declare that:

(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.⁹

(d) Current law also fails to distinguish between gun-carrying criminals and criminals carrying knives or clubs.

⁸ The "Hard time for armed crimes act", initiative 159

⁹ An unranked crime.

(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.... (emphasis added).

There was no language referring to RCW 9.94A.510 or 517. In other words, when originally passed the deadly weapon enhancements clearly applied to all felonies, including unranked ones.

Soto created one of the very loopholes Laws of 1995 Ch. 129 intended to close. The problematic language that the *Soto* court concluded required deadly weapon enhancements to only apply to ranked offenses originally appeared in Laws of 2002 Ch. 290 §11. The title of Laws of 2002 Ch. 290 is “An act relating to the recommendation of the sentencing guidelines commissions regarding drug offenses.” The title and intent statement in Laws of 2002 Ch. 290 §1 clearly indicates it is to deal with drug offenses. There is simply no way to conclude that Laws of 2002 Ch. 290 dealt with unranked non drug offenses¹⁰ under this title, even under the broadest of interpretations.

¹⁰ It should be noted that the statute clearly did not remove deadly weapon enhancements from unranked drug offenses, because drug offenses become ranked with the addition of a deadly weapon enhancement. LAWS of 2002 Ch. 290 §9.

This inescapably leads to one of two conclusions. The first is that *State v. Soto* incorrectly resolved the ambiguity in §.533, and the peoples' intent that deadly weapon enhancements apply to unranked offenses was not overruled *sub silentio* by the legislature in Laws of 2002 Ch. 290. The second possibility is that the legislature did intend to overrule Laws of 1995 Ch. 129 as it relates to unranked offenses, and *State v. Soto* correctly interpreted the statute. If this is the case then that portion of Laws of 2002 Ch. 290 §11 which removed deadly weapon enhancements from non-drug unranked offenses is unconstitutional under Wash. Const. Art. II §19 as the change is not fairly reflected in the title of the bill.

Nor did any of the subsequent legislative titles modifying RCW 9.94A.533 give fair notice that deadly weapons enhancements are to be removed from unranked offenses. *See Morin v. Harrell*, 161 Wn.2d 226, 164 P.3d 495 (2007); Laws of 2016 Ch. 203 (An act relating to impaired driving); Laws of 2015 Ch. 134 (An Act relating to technical corrections to processes for persons sentenced for offenses committed prior to reaching eighteen years of age); Laws of 2013 Ch. 270 (An act relating to crimes against pharmacies); Laws of 2012 Ch. 42 (An act relating to being under the influence with a child in the vehicle); Laws of 2011 Ch. 293 (An act relating to accountability for persons driving under the influence of alcohol or drugs); Laws of 2009 Ch. 141 (An act relating to assault of a

law enforcement officer or other employee of a law enforcement agency); Laws of 2008 Ch. 276 (An act relating to criminal street gangs); Laws of 2008 Ch. 219 (An act relating to the penalty for attempting to elude a police vehicle); Laws of 2007 Ch. 368 (An act relating to penalties for engaging in the commercial sexual abuse of minors); Laws of 2006 Ch. 339 (An act relating to the impact of controlled substances, primarily methamphetamine); Laws of 2006 Ch. 123 (An act relating to penalties for crimes committed with sexual motivation); Laws of 2003 Ch. 53 (An act relating to technical reorganization of criminal statutes to simplify citation to offenses). None of these titles can be reasonably construed to deal with the removal of deadly weapon enhancements from unranked offenses.

The purpose of Art II §19 is “to protect and enlighten the members of the legislature; to apprise the people generally concerning the subjects of the legislation being considered, and to prevent hodge-podge or logrolling legislation.” *Wash. State Sch. Dirs. Assn. v. Dep't of Labor & Indus.*, 82 Wn.2d 367, 371, 510 P.2d 818 (1973). Given the fact that the statutory language of §.533 states that deadly weapon enhancements relate to all felonies, and the statute also clearly restricts a different enhancement to ranked felonies §.533(6), it is clear that some notice in the title was necessary to protect the legislature from an unintended amendment that the *Soto* court found occurred in Laws of 2002 Ch. 290 §11.

The most reasonable conclusion, and the conclusion that the doctrine of constitutional avoidance compels, is that *State v. Soto* was incorrectly decided. In the alternative, the amendment the *Soto* court concluded removed deadly weapon enhancements from unranked offenses was an unconstitutional violation of Article II §19. Either way deadly weapon enhancements apply to unranked offenses.

c. State v. Soto is harmful.

The entire point of the “three strikes law” passed as Initiative 593 (1993) was to permanently remove from society those who failed to respond to the rehabilitation and specific deterrence provided by the criminal justice system and continued their dangerous criminal activities. Under the *Soto* court’s interpretation of RCW §.533, an offender could be facing his third strike and life imprisonment having never been sentenced to a day of incarceration, assuming that offender was convicted of two unranked offenses with deadly weapon enhancements.

On the other hand if §.533 applied to unranked offenses an offender would be subject to sentences totaling at least 18 months of incarceration for two class C felonies with deadly weapon (non-firearm) enhancements. RCW 9.94A.533(4)(c),(d). This is comparable to the 15 months total (3 months plus 12+ months) low-end sentences for two

ranked strikes, such as assault 2, which is one of the least serious “most serious offenses” RCW 9.94A.515, 525.

The *Soto* decision leads to the absurd result that an offender may face a life sentence under the ‘three strikes’ law, without ever having been sentenced to a day in jail. The *Soto* court arrived at an incorrect and harmful answer because both the court and parties failed to consider the SRA as a whole or legislative history and Wash. Cons’t Art II §19. The court should take this opportunity to correct a mistake and overrule *Soto*. This case should be remanded for full imposition of the firearm enhancement on the riot while armed charge.

V. CONCLUSION

The jury instructions adequately informed the jury they were to decide whether Mr. Vazquez was armed with a firearm. Based on undisputed evidence they decided he was. In any event the less than perfect jury instructions were harmless. Even if they were not, the case should be remanded for a new trial on the enhancement.

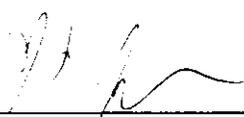
At a minimum the case should be remanded for imposition of a firearm enhancement on the riot while armed charge, even if no time is imposed. However, the court should find that *State v. Soto* is incorrect and harmful, overrule the case and remand for full imposition of the firearm

enhancement in accordance with legislative intent and the State
Constitution.

Dated this 25th day of September 2016.

Respectfully submitted,

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Deputy Prosecuting Attorney

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

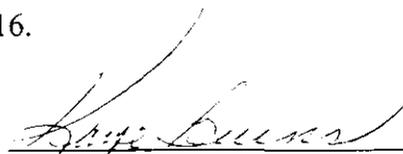
STATE OF WASHINGTON,)	
)	
Respondent –)	COA No. 33790-1-III
Cross-Appellant,)	
)	
vs.)	
)	
RIGOBERTO IVAN VAZQUEZ,)	DECLARATION OF SERVICE
)	
Appellant-)	
Cross-Respondent.)	
)	

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 Brief of Respondent-Cross-Appellant 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 20, 2016.



Kaye Burns