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STATE OF WASHINGTON

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No. 83923-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF RIVERA

STATE OF WASHINGTON,

Respondent,

v.

SALVADOR RIVERA,

Petitioner.

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

MOTION FOR DISCRETIONARY REVIEW
REPLY TO STATE'S ANSWER

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TABLE OF CONTENTS

A. ARGUMENT 1

THE FACIALLY INSUFFICIENT JUDGMENT AND
SENTENCE DID NOT PROVIDE THE TRIAL COURT
WITH AUTHORITY TO IMPOSE A FIREARM
ENHANCEMENT 1

B. CONCLUSION.....4

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 55 P.3d 615
(2002) 1

In re Personal Restraint of Clark, _ Wn.2d __, 2010 WL 1380165,
Supreme Ct. No. 81522-4 (April 8, 2010) 1, 2

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989)... 3

State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010) 2, 3

Washington Constitution

Article I, section 21 3

A. ARGUMENT.

THE FACIALLY INSUFFICIENT JUDGMENT AND
SENTENCE DID NOT PROVIDE THE TRIAL COURT
WITH AUTHORITY TO IMPOSE A FIREARM
ENHANCEMENT

As this Court recently explained in In re Personal Restraint of Clark, _ Wn.2d _, 2010 WL 1380165, Supreme Ct. No. 81522-4, Slip op. at 5 (April 8, 2010), “[a] judgment and sentence is not valid on its face when the judgment and sentence, without further elaboration, evidences an error.” Even if a reviewing court may consult other documents, such as the plea agreement discussed in Clark, “[t]he question is not, however, whether [other] documents are facially invalid, but rather whether the judgment and sentence is invalid on its face.” Id. (quoting In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 533, 55 P.3d 615 (2002), internal citation omitted)).

Rivera’s judgment and sentence repeatedly states that the court is imposing a sentencing enhancement for a “deadly weapon,” but it ordered he serve 60-months, which is an amount only allowed for a firearm enhancement (copy attached to Petitioner’s Supplemental Brief as App. A). The only morsel of evidence that the prosecution points to in support of its contention

that the trial court was entering a purportedly unambiguous finding that Rivera was to receive a "firearm enhancement" is that it cited the nonexistent statute, "RCW 9.94A.310(3)(a)a," on a single occasion, when simultaneously referencing the deadly weapon punishment it was imposing. State's Answer, at 2, 7-8.

Examining the judgment and sentence on its face as directed by Clark, it shows the court imposed deadly weapon punishment, and thus, the 60-month sentence imposed was unauthorized by law and renders the judgment and sentence facially invalid.

Furthermore, the jury did not enter a finding that Rivera was armed with a firearm. The special verdict form asked only whether Rivera was armed with "**a deadly weapon**" and the jury answered "yes." Petitioner's Supp. Brief, App. C (emphasis added). Thus, the limited amount of information a reviewing court may consult when inquiring into the facial validity of a judgment and sentence demonstrates the jury only authorized a deadly weapon punishment. See Clark, 2010 WL 1380165, *2.

The State argues that State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010) does not apply to Rivera's case because it was decided after his direct appeal ended. Answer, at 12. In

Williams-Walker, the Court held that “a sentencing court violates a defendant’s right to a jury trial if it imposes a firearm enhancement without a jury authorizing the enhancement” by the explicit determination required for a firearm enhancement. 225 P.3d at 918. The decision in Williams-Walker rested on Washington’s “inviolable” and broadly protected right to a jury trial under Article I, section 21. Id. at 916-17. This Court recognized that the jury’s verdict controls the punishment a court may impose, and when the jury’s verdict reflects a finding of lesser punishment, the sentencing judge is bound by the jury’s finding. Id. at 918-19.

Williams-Walker appropriately illustrates the overriding importance of a jury finding on an essential factual element underlying punishment. However, this Court need not rely on Williams-Walker’s explanation of the critical importance of according an accused person his fundamental constitutional right to a jury trial under article I, section 21, or engage in “retroactivity” analysis. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711 (1989) (“Our basic rule in interpreting article 1, section 21 is to look to the right as it existed at the time of the constitution’s adoption in 1889.”). Rivera was entitled to the protection of article I, section 21 at the time of his trial, and the scope of that

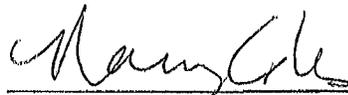
constitutional provision has not changed. The facially invalid judgment and sentence imposed a term of punishment unauthorized by the court's stated intent to impose a "deadly weapon" enhancement and unsupported by the jury's verdict finding only that Rivera possessed a "deadly weapon."

B. CONCLUSION.

Based on the foregoing, Petitioner Salvador Rivera respectfully requests that review be granted and his unauthorized term of punishment be vacated.

DATED this 21st day of April 2010.

Respectfully submitted,



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MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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No. 83923-9

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REPLY TO STATE'S ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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