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Oct 07, 2011, 4:33 pm
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF:

RONNIE JACKSON, JR.,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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ORIGINAL

A. INTRODUCTION

Ronnie Jackson, Jr. (hereinafter “Jackson”) was charged with three crimes, each with a “deadly weapon” enhancement. His jury returned verdicts finding that he was armed with a “deadly weapon” during his crimes. Nevertheless, the sentencing court imposed three “firearm” enhancements.

There are several reasons why this petition is timely and Jackson is entitled to relief. Jackson’s judgment is facially invalid. Jackson was convicted of an uncharged enhancement. Jackson was sentenced for an enhancement different than the one returned by his jury.

This case does not depend on a new, non-retroactive rule announced after his conviction was final. Since its inception, the SRA has required a jury determination for deadly weapon and firearms, at least where the underlying crime was tried to a jury. In addition, long before *Apprendi*, this Court recognized that weapon enhancements are no different than any other element of a crime. Even if this Court determines that resolution of this issue requires application of the federal constitutional, it does not require application of a new rule announced after Jackson’s conviction was final. Mr. Jackson’s conviction became final after *Apprendi v. New Jersey*, 560 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), were decided. Those cases prevent a judge from imposing a sentence higher than

authorized by the jury verdict alone. A firearm finding increases the maximum sentence authorized by a jury finding that a crime was committed, even with a deadly weapon. As a result, this Court can decide the issue in this case without relying on *Blakely v. Washington*, 542 U.S. 496 (2004). Alternatively, *Blakely* announced a watershed rule of criminal procedure which applies retroactively.

B. BRIEF RESTATEMENT OF FACTS

In 1996, the State charged Ronnie Jackson by Amended Information with attempted murder, assault, and robbery. The attempted murder charge alleged that during the commission of the crime Jackson was armed with a “deadly weapon, to wit: a handgun...”. The assault charge, an alternative to a second attempted murder charge, alleged that Jackson committed a first-degree assault (the jury returned a guilty verdict on the second-degree lesser) by assaulting the victim with a “firearm or deadly weapon or by any force or means likely to produce great bodily harm or death,” adding “that being a firearm.” The robbery charge alleged that during the course of the robbery, Jackson or an accomplice “was armed with a deadly weapon, to wit: semi-automatic handgun,” “that being a firearm.” All three charges referenced former RCW 9.94A.310 and .370, as well as RCW 9.41.010.

At trial, jurors were asked whether they found beyond a reasonable doubt “that the defendant or an accomplice was armed with a deadly weapon.” The special verdict forms also asked jurors to answer whether

the defendant was “armed with a deadly weapon.” On each of the three special verdict forms (one for each count), the jury answered, “yes.”

Jackson’s jury found him guilty on November 3, 1997.

The amended Judgment and Sentence entered on October 4, 2002, notes that Jackson was convicted of a “deadly weapon” enhancement on Count I (specified as “DWSE” on the judgment), but also states that Counts II and III involved a “firearm” enhancement (“FASE”). *See Judgment*, § 2.1. In the boxes below the named crimes, the section reading “(a) special verdict/finding for use of a firearm was returned on Counts I, II, and III,” was checked. In section 2.3, the *Judgment* repeats the “firearm” enhancement finding (this time using the initials “FA”).

Jackson was sentenced to 264 months on the attempted murder, plus 60 months for a “firearm” enhancement on that count. Jackson received a 60 month enhancement on the robbery count and a 36 month additional term on the assault count. The three enhancements were ordered to run concurrently with each other pursuant to *In re Charles*, 135 Wn.2d 239, 955 P.2d 758 (1998). In addition, each of the counts was ordered to run concurrently with each other. As a result, the 60 month enhancement on the attempted murder (the crime with the longest sentence) is the only enhancement that increases Mr. Jackson’s total sentence.

C. ARGUMENT

1. THE STATE CHARGED JACKSON WITH DEADLY WEAPON ENHANCEMENTS.

This Court can decide this case by simply comparing the charging document in this case with the one in *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) (*Recuenco III*). Just like *Recuenco*, Jackson was charged with a deadly weapon enhancement. The first count in his charging document is virtually identical to the charging document in *Recuenco*:

Recuenco: defendant was “armed with a deadly weapon, to wit: a handgun.”

Jackson: defendant was “armed with a deadly weapon, to wit: a handgun.”

The only apparent difference between the two charging documents is fact that Jackson’s information references RCW 9.41.010, a statute that provides a definition of a firearm. RCW 9.41.010 does not authorize a firearm verdict. The mere reference to a definitional statute does not distinguish this case from *Recuenco*. Instead, like in *Recuenco*, the charging document in this case referenced former RCW 9.94A.310, but did not specify either the deadly weapon or firearm provision.

This Court reversed holding that *Recuenco* could not be convicted and sentenced for a firearm enhancement when he was charged only with a deadly weapon. “*Recuenco* was charged with second degree assault with a

deadly weapon, a special verdict form was submitted regarding a deadly weapon finding, and the jury found guilty as to the properly submitted sentencing enhancement of ‘deadly weapon.’ We recognize here that the harmless error doctrine simply does not apply because no error occurred in the jury's determination of guilt.” *Id.* at 441.

It is important to note that the *Recuenco* court rejected the argument the “information, liberally construed, was sufficient to pass the test for postverdict challenges to information because it includes the necessary fact of being armed with a handgun.” *Id.* at 449 (Fairhurst, J. dissenting).

In the end, it is the language of the charging document that controls. In this case, that language charged Jackson with being armed with a deadly weapon. That deadly weapon was factually alleged to be a firearm. But, the charge was that Jackson was armed with a “deadly weapon.”

This Court would need to overrule *Recuenco* in order to rule in the State’s favor. The State does not ask this Court to do so. Likewise, the State does not attempt to carry the heavy burden necessary to disturb settled precedent. At least with respect to Count I, this Court need only cite to *Recuenco* and hold that Jackson was charged with a deadly weapon count and could not be convicted of a firearm enhancement.

The charging document for Counts II and III is less clear. Those counts alleged use of a deadly weapon or a firearm as necessary elements of the underlying crimes. For example, the State charged Jackson with first-

degree robbery by alleging that he was armed with a “deadly weapon, to wit: semi-automatic handgun.” The information never sets out specific additional language for the enhancement. Instead, the information references RCW 9.41.010, and two SRA statutes that cover both deadly weapon and firearm enhancements.

Jackson contends that the State charged only deadly weapon enhancements. This Court can reach this conclusion not only by looking to the language of the charging document, but also by looking to the jury instructions requested by the State and given by the court, which the Court did in *Recuenco*.

2. THE JURY RETURNED “DEADLY WEAPON” VERDICTS

Consistent with the charges brought, Jackson’s jury was instructed on the deadly weapon enhancement and specifically found Jackson guilty of committing the crimes of conviction while armed with a deadly weapon. There is nothing erroneous about those findings.

However, also just like in *Recuenco*, Jackson’s judge imposed “firearm” enhancements, in place of the jury findings.

Just like in *Recuenco*, Jackson is entitled to relief. *Id.* at 440 (“Without a jury determination that he was armed with a ‘firearm,’ the trial court lacked authority to sentence Recuenco for the additional two years that correspond with the greater enhancement.”).

This Court reaffirmed that holding in *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010). In the consolidated *Williams-Walker* cases, “five-year firearm enhancement sentences were imposed on the defendants, where the juries were instructed and asked to find by special verdict whether the defendants were armed with a deadly weapon.” *Id.* This Court held “that this sentence is an error to which the harmless error doctrine does not apply.” *Id.* at 893.

In one of the *Williams-Walker* cases the jury was instructed “[f]or purposes of the 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 [c]ount I [and count II]. A ‘firearm’ is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” *Id.* at 908. Because the special verdict form asked whether jurors found that the defendant was armed with a “deadly weapon,” this Court held that only the deadly weapon enhancement was authorized. *Id.*

In this case, each special verdict form asked whether jurors found that Jackson was armed with a deadly weapon. The word “firearm” does not appear on any of the special verdict forms.

Thus, if *Recuenco* and *Williams-Walker* apply to this case, reversal is required.

3. MR. JACKSON DOES NOT SEEK RETROACTIVE APPLICATION OF A NEW RULE. IF HE DOES, THE NEW RULE IS A “WATERSHED RULE.”

Introduction

The State’s argument in this case is, notwithstanding the jury verdict, the judge properly found firearm enhancements by virtue of the language on the judgment and sentence imposed. This argument only applies if this Court finds: (1) Jackson was charged with a firearm enhancement and; (2) the trial judge was authorized to make such a finding despite the jury verdict.

Jackson has already demonstrated that he was charged only with deadly weapon enhancements. Consequently, there is no need for the Court to reach the second issue. However, if this Court disagrees, the State’s argument fails because the rule in this state has always been that a jury, not a judge, must find the facts justifying the enhancement.

The Statute Required a Jury Verdict

When Jackson was charged and tried, the SRA plainly provided that where a jury decides the underlying charge, they also decide the weapon enhancement. See RCW 9.94A.825 (first codified as .125; then re-codified at .602). The statute provides, in pertinent part: “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.” *Id.* Thus, there is no

need to determine what the state or federal constitution required at the time. The statute required a jury trial in a case tried to a jury.

The State argues that the firearm enhancement, which was part of the Hard Time for Armed Crime Act (HTACA), permitted a judge to make the required factual finding either in derogation of this statutory provision or because the above-cited statute pre-dates and therefore does not apply to firearm enhancements. The State cites several lower appellate court decisions in support. *State v. Meggysey*, 90 Wn.App. 693, 958 P.3d 319 (1998); *State v. Rai*, 97 Wn.App. 307, 983 P.2d 712 (1999).

This Court has since expressly rejected the conclusion that no statutory provisions governed the procedures necessary to find a firearm enhancement. In *Recuenco (III)*, this Court held that the firearm enhancements created by HTACA were governed by the broader deadly weapon enhancement procedure; RCW 9.94A.825 (formerly .125). In *Recuenco*, the defendant argued that the law did not authorize jury verdicts for firearms. This Court disagreed:

However, *Recuenco* is not correct; a procedure does in fact exist. Under former RCW 9.94A.125 and former RCW 9.94A.310, the jury could have been instructed to make a firearm finding, as an examination of these statutes makes clear.

Id. at 438. This Court continued:

Former RCW 9.94A.125 expressly directs that the jury be asked by special verdict whether a defendant was armed with a deadly weapon and includes firearms within the definition of “deadly weapon.” *Washington Practice* recognizes former RCW 9.94A.125

to authorize putting the firearm enhancement question to the jury in the form of a special verdict. 11 WPIC 2.10.01. The WPIC expressly provides a firearm sentence enhancement instruction for use 'when there is a special allegation that the defendant was armed with a firearm at the time of the commission of the crime pursuant to RCW 9.94A.533(3).'

Id. at 439. This Court concluded:

We hold that a procedure did and does exist whereby the jury can be asked to make a firearm finding.

Id. As a result, the cases relied on by the State have been overruled.

Because the statute required jury findings, a trial judge did not possess the authority to make the firearm finding.

This really ought to end the matter. This Court should resolve this case based on the statute, rather than resort to constitutional law.

Washington Law Has Long Regarded Weapon Enhancements as Elements of a Crime Subject to the Full Protections of the Law

Historically speaking, Washington law has always treated deadly weapon and/or firearm enhancements the same as any other element of a charged crime. See *e.g.*, *State v. Theroff*, 95 Wash.2d 385, 622 P.2d 1240 (1980) (weapon enhancements subject to same pleading requirement as any other element); *State v. McKim*, 98 Wash.2d 111, 653 P.2d 1040 (1982) (Our cases involving enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish the facts which, if proved, will increase a defendant's penalty). Thus, even if the statute did not exist state common and constitutional law required a jury trial.

At the Time Mr. Jackson's Conviction Became Final, the Federal Constitution Did Not Permit a Defendant to be Sentenced to a Penalty Exceeding the Maximum Authorized by the Jury Verdict Alone. In the Alternative, Blakely is a Watershed Rule.

The State has previously conceded that Mr. Jackson's conviction became final when he was resentenced on October 4, 2002. As a result, he is entitled to application of any rule in effect at that time. *Blakely* had not been decided by that date. However, both *Apprendi* and *Ring* had been announced. Those cases required a jury trial in this instance. Further, if this Court's retroactivity analysis remains tied to the federal rule, and this Court concludes that Mr. Jackson seeks application of a new rule, he is entitled to application of a watershed rule. *Blakely* was a watershed rule.

Of course, this Court does not need to wade into those deep constitutional waters, if it agrees with Jackson that the answer can be found in the shallow waters of statutory interpretation. But, Jackson now dives in.

A decision that merely applies a rule enunciated in a prior Supreme Court case does not announce a new rule. In *Teague v. Lane*, 489 U.S. 288 (1989), the plurality opinion explained when a case announces a "new" rule: In general ... a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Teague itself provided an example of a decision that simply applied

the rule that governed a prior case and, therefore, did not announce a new rule: *Francis v. Franklin*, 471 U.S. 307 (1985), *cited in Teague*, 489 U.S. at 307. In *Francis*, the Supreme Court held that a jury instruction that allowed the jury to presume malice unconstitutionally relieved the state of its burden of proof beyond a reasonable doubt. It explained its decision this way: *Sandstrom v. Montana* [442 U.S. 510 (1979)] made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in [*In re Winship*, 397 U.S. 358 (1970)] on the critical question of intent in a criminal prosecution. 442 U.S. at 521. Today, we reaffirm the rule of *Sandstrom* and the wellspring due process principle from which it was drawn. The Court of Appeals faithfully and correctly applied this rule, and the court's judgment is therefore affirmed. *Francis*, 471 U.S. at 326-27.

Notwithstanding the dissent's complaint that *Francis* “needlessly extend[ed] our holding in [*Sandstrom*] to cases where the jury was not required to presume *conclusively* an element of a crime under state law,” *id.* at 332 (emphasis added) (Rehnquist, J., dissenting), the Supreme Court held unanimously three years later that *Francis* did not announce a new rule because it “was merely an application of the principle that governed our decision in *Sandstrom v. Montana*.” *Yates v. Aiken*, 484 U.S. 211, 216-17 (1988), *quoted in Teague*, 489 U.S. at 307.

Post-*Teague* decisions from the Supreme Court reinforce that merely applying a rule announced in a prior Supreme Court case does not announce a new rule. In *Stringer v. Black*, 503 U.S. 222 (1992), the Supreme Court held that its decision in *Maynard v. Cartright*, 486 U.S. 356 (1988), did not announce a new rule because it “applied the same analysis and reasoning” found in a prior case. *Stringer*, 503 U.S. at 228. That prior case, *Godfrey v. Georgia*, 446 U.S. 420 (1980), had held that the aggravating factor of an “outrageously or wantonly vile, horrible or inhuman” offense was unconstitutionally vague for purposes of determining eligibility for the death penalty. Although *Maynard* involved an aggravator with slightly different language - whether the offense was “especially heinous, atrocious, or cruel” - this Court explained in *Stringer* that “it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case.” 503 U.S. at 228-29. The key, the Court explained, was that “[i]n applying *Godfrey* to the language before us in *Maynard*, we did not ‘brea[k] new ground.’ ” *Stringer*, 503 U.S. at 229 (quoting *Butler v. McKellar*, 494 U.S. 407, 412 (1990)).

With that framework in mind, Jackson now explains why (at least for purposes of this case) *Blakley* was not a new rule.

In *Apprendi*, the Court considered the legality of New Jersey's system for imposing a certain “sentence enhancement.” Under that system,

a defendant convicted of a given crime was subject to a statutorily established maximum sentence (in *Apprendi*'s case, 10 years). A second statute, however, provided that a sentencing court could impose "an extended term" of imprisonment - up to 20 years - if it found by a preponderance of the evidence that the defendant acted with a purpose to intimidate an individual or group on the basis of race or a similar characteristic. 530 U.S. at 468-69.

The Court in *Apprendi* ruled that New Jersey's sentence-enhancement system ran afoul of the Sixth and Fourteenth Amendments, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

But the Court did not stop there. The Court explained that the "statutory maximum" in a given sentencing scheme is the statute setting "the maximum [a defendant] would receive *if punished according to the facts reflected in the jury verdict alone.*" *Id.* at 483 (emphasis added); *see also id.* at 483 n.10 (the statutory maximum is the statutory "outer limit[]" based on "the facts alleged in the indictment and found by the jury"). *Apprendi* explained, in other words, that "the relevant inquiry is one not of form, but of effect - does the required finding expose the defendant to a greater punishment *than that authorized by the jury's guilty verdict?*" *Id.* at

494 (emphasis added). Because the hate-crime enhancement at issue there “increased ... the maximum range within which the judge could exercise his discretion,” the Court held that the trial court erred in imposing the enhancement based on a fact that it found by a mere preponderance of the evidence. *Id.* at 474; *see also id.* at 491-92.

The State implicitly argues that *Apprendi* did not make it clear what was meant by the “maximum” punishment—that perhaps *Apprendi* applied only where the class of crime maximum was raised, not where a sentence below the statutory maximum was increased based on a factual finding.

The Supreme Court’s decision in *Ring v. Arizona, supra*, destroyed that distinction.

Under Arizona law, the death penalty was the statutory maximum for the crime of first-degree murder. However, Ring could not be sentenced to death unless further findings were made at a separate sentencing hearing. The fact that the additional finding necessary to authorize a death sentence did not increase the maximum statutory sentence was of no moment. Instead, the Sixth Amendment right to a jury trial applied because, based solely on the jury’s verdict finding Ring guilty of first-degree felony murder, the highest punishment authorized by the jury verdict was life imprisonment. This was so because, in Arizona, a death sentence may not legally be imposed unless at least one aggravating factor is found to exist beyond a reasonable doubt.

Like in this case, the State in *Ring* pointed to the class of crime maximum and argued that Ring was sentenced within the range of punishment authorized by the jury verdict. The Court rejected this argument, noting that it overlooks *Apprendi's* instruction that “the relevant inquiry is one not of form, but of effect.” 530 U.S., at 494. In effect, “the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.” *Id.* The Arizona first-degree murder statute “authorizes a maximum penalty of death only in a formal sense,” *Apprendi*, 530 U.S., at 541 (O'Connor, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty.

In Mr. Jackson's case, the jury's verdict only authorized a 36-month increase, not a 60-month increase to Jackson's sentence. It makes no difference that the increase to Jackson's sentence did not result in an increase to the class of crime maximum. Otherwise, a judge could have found the aggravator in *Ring*.

This Court can also look to the language in *Blakely* itself to understand that *Blakely* did nothing more than apply the rule of *Apprendi* and *Ring*. At the outset of its analysis, the Supreme Court explained that:

This case requires us to *apply the rule we expressed in Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

542 U.S. at 301 (emphasis added). The State argued that the “statutory maximum” in Washington's system was not the statute setting the maximum sentence based solely on the guilty verdict (in Blakely's case, 53 months), but instead was the statute establishing the maximum possible exceptional sentence (10 years). *Id.* at 303.

The Court, however, rejected the State's argument, holding in no uncertain terms:

Our precedents *make clear* ... that the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*

542 U.S. at 303 (first emphasis added); *compare Yates*, 484 U.S. at 216-17 (*Francis* did not announce new rule in part because it explained that prior precedent “made clear” that state's argument lacked merit). For this proposition, the Court cited and quoted *Apprendi*'s statement that the statutory maximum is the statute setting “the maximum [a defendant] would receive if punished according to the facts reflected in the jury verdict alone.” *Blakely*, 542 U.S. at 303 (quoting and citing *Apprendi*, 530 U.S. at 483).

Lest there be any doubt that *Blakely* broke no new legal ground, the Court further explained that “[t]he ‘maximum sentence’ is *no more* 10 years here than it was 20 years in *Apprendi* (because that is what the judge

could have imposed upon finding a hate crime).” *Blakely*, 542 U.S. at 304 (emphasis added). The Court’s “commitment to *Apprendi* in this context” reflected nothing more than “respect for longstanding precedent” and a continuing need to give “intelligible content to the right of jury trial.” *Blakely*, 542 U.S. at 305; compare *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) (*Apprendi* rule is necessary to give “intelligible content” to jury trial right).

As a result, at the time that Jackson’s conviction became final in October 2002, the federal constitution required a jury trial for a fact like a firearm that serves to increase the maximum authorized punishment.

Blakely Established a Watershed Rule

If this Court were to hold that *Blakely* did somehow announce a “new rule,” its rule would apply retroactively under *Teague*’s exception for “watershed rules of criminal procedure.” To fall within this exception, a new rule must meet two requirements: “[1] infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and [2] the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (quotations and citations omitted). The *Blakely* rule that facts that expose criminal defendants to punishment exceeding otherwise binding statutory limits must be proven to juries beyond a reasonable doubt satisfies each of these tests.

First, infringing the reasonable doubt component of the *Blakely* rule seriously diminishes the likelihood of obtaining an accurate conviction. Applying this same test in two pre-*Teague* cases, this Court has held that applying the preponderance-of-the-evidence standard instead of the reasonable doubt standard - even, as functionally is at issue here, with respect to a single element of a crime - “substantially impairs [a criminal trial’s] truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.” *Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972); *see also Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977). These holdings make eminent sense. Whereas the reasonable doubt standard requires a fact-finder to “reach[] a subjective state of certitude of the facts in issue,” the preponderance standard “calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.” *In re Winship*, 397 U.S. 358, 364, 368 (1970) (quotations and citations omitted). It is obvious that using the latter inquiry to punish someone for something that the jury verdict itself does not otherwise allow creates an impermissibly large risk of punishing someone for something they did not really do.

Second, both the reasonable doubt and jury trial components of the *Blakely* rule implicate our understanding of the bedrock procedural

elements essential to the fairness of a proceeding. The Supreme Court has described both the reasonable doubt standard and the jury trial right as ancient guarantees “of surpassing importance.” *Apprendi*, 530 U.S. at 476. And the Court's decision in *Blakely* makes clear that these protections are just as essential to fundamental fairness in the context of finding facts that expose criminal defendants to punishment exceeding otherwise binding statutory limits as they are in the rest of trials. Without these protections, legislatures could relegate juries simply to determining “that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.” *Blakely*, 542 U.S. at 306-07. Such a regime would flout our most basic conceptions of liberty.

Thus, if this Court determines that Jackson's claim depends on application of a new rule established in *Blakely*, it should hold that the holding in *Blakely* is a watershed rule that applies retroactively.

4. JACKSON CANNOT BE CONVICTED OF A DEADLY WEAPON ENHANCEMENT WHERE THE ALLEGED DEADLY WEAPON IS A FIREARM.

In this case, the State charged Jackson with a deadly weapon enhancement for the use of a firearm. Since the passage of I-159, deadly weapon enhancements no longer include firearms. As a result, this Court should order that Jackson be resentenced without the deadly weapon enhancement.

In *Pers. Restraint Petition of Cruze*, 169 Wn.2d 422, 237 P.3d 274 (2010), this Court held that the “Hard Time for Armed Crime Act” (“HTACA”), took what was formerly a single sentence enhancement for offenders armed with a deadly weapon and replaced it with two sentence enhancements: one for offenders armed with a firearm and one for offenders armed with a “deadly weapon as defined by this chapter *other than a firearm*.” The Court noted that “whereas the former ‘deadly weapon’ sentence enhancement provided for up to two additional years of imprisonment regardless of the deadly weapon used, the new scheme authorized up to five years for those armed with firearms and up to two years for those armed with a deadly weapon *other than a firearm*.” *Id.* (emphasis in original).

Put another way, the Court held that the HTACA amendments do not distinguish between enhancements for use of a “firearm” and for use of a “deadly weapon”; they distinguish between enhancements for use of a “firearm” and for use of a “deadly weapon *other than a firearm*.” *Id.* at 430 (emphasis in the opinion).

The *Cruze* court makes it clear that the “deadly weapon” charge has been broken into two *mutually exclusive* sub-parts: firearms and deadly weapons other than firearms. As a result, Jackson cannot be convicted for a “deadly weapon” enhancement based on the use of a firearm—the only weapon alleged in this case.

D. CONCLUSION

Based on the above, this Court should vacate Jackson's judgment for firearm enhancements and remand this case to Pierce County Superior Court for resentencing.

DATED this 11th day of October, 2011.

Respectfully Submitted:

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Rec. 10-7-11

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Subject: No. 82363-4; PRP of Ronnie Jackson

Attached for filing is my reply brief in this case. I have served it on the prosecutor by sending this email at its attachment to the Pierce County Pros Appellate unit.

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