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STATE OF WASHINGTON

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NO. 82951-9

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**SUPREME COURT OF THE
STATE OF WASHINGTON**

IN RE: THE PERSONAL RESTRAINT PETITION OF
JOSHUA DEAN SCOTT, PETITIONER

Appeal from the Superior Court of Pierce County
The Honorable Marywave VanDeren

No. 00-1-04425-1

Supplemental Brief of State of Washington

MARK LINDQUIST
Prosecuting Attorney

By
Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a judgment and sentence final and lawful under *State v. Meggyesy*¹, and final before *Blakely*², is invalid on its face?
2. Whether *Blakely* may be applied retroactively in a collateral attack final before *Blakely* was decided?

B. STATEMENT OF THE CASE.

1. Procedure

Joshua Scott³ was charged by amended information with two counts of robbery in the first degree, two counts of unlawful possession of a firearm in the first degree, possession of stolen property in the first degree, two counts of possession of a stolen firearm, and two counts of theft of a firearm. Ct. App. Suppl. Br. of Respondent, Appendix “B.” The defendant was found guilty of all counts except the two counts of theft of a firearm. *Id.*, Appendix “C.” In the amended information charging the robberies, the State alleged, in part, as follows:

... [T]he defendant or an accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon, to wit: a rifle, that being a

¹ 90 Wn. App. 693, 958 P.2d 319 (1998).

² 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004).

³ Although Mr. Scott is the petitioner in the PRP, the State has petitioned for review, so for clarity, he will be referred to as the defendant.

firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310.

Id., Appendix B.

On April 9, 2004, the court imposed three firearm sentencing enhancements, and sentenced the defendant to a total of 213 months confinement. *Id.*, Appendix "A."

The State had alleged firearm enhancements on the two robberies (Counts I and II), and possession of stolen property (Count V). Amended Information, *see* Appendix I to the Personal Restraint Petition. The jury was given special verdict forms and instructed:

For the 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 of robbery in the first degree as charged in Counts I and II and possession of stolen property in the first degree as charge in Count V.

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

If one participant to a crime is armed with a deadly weapon, all accomplices who know the participant is armed are deemed to be so armed, even if only one deadly weapon is involved.

See, Instruction 49, Court's Instructions to the Jury, Ct. App. Suppl. Br. of Respondent, Appendix D. Other instructions defined a "deadly weapon" as "any firearm, whether loaded or not" and "firearm" as being "a weapon or device from which a projectile may be fired by an

explosive such as gunpowder.” Instruction Nos. 22 and 30, Court’s Instructions to the Jury, *Id.*, Appendix D. Under these instructions, the jury was informed that the term “deadly weapon” referred only to various types of firearms. The special verdict forms asked the jury to determine whether the defendant was “armed with a deadly weapon at the time of the commission of the crime” charge in Counts I, II and V. *Id.*, Appendix C. The jury answered “yes” on each of these special verdicts. *Id.*

On direct appeal from his conviction, the defendant challenged the sufficiency of the information in alleging the firearm enhancement pertaining to the possession of the stolen property (Count V). The Court of Appeals found that the language used in the amended information was sufficient to put the defendant on notice that the State was seeking an enhancement based upon him being armed with a firearm. *See* Unpublished Opinion of the Court of Appeals in *State v. James-Anderson and Scott*, 116 Wn. App. 1053, 2003 WL 198 423 (2003)(Case No 27270-9-II) (consolidated). On direct appeal, the Court of Appeals remanded the defendant’s case for re-sentencing without the two reversed convictions. *Id.*

On remand to the superior court, the court re-sentenced the defendant on two counts of robbery, a count of unlawful possession of a firearm, and one count of possessing stolen property in the first degree. Judgment and Sentence, *see* Ct. App. Suppl. Br. of Respondent, Appendix A. The court imposed additional confinement for firearm enhancements

as opposed to deadly weapon enhancements. *Id.* The defendant did not appeal from entry of this judgment, which was entered on April 9, 2004. Thus, the defendant's case became final for the purposes of retroactivity analysis, on May 10, 2004.

Almost two years later, on April 11, 2006, the defendant filed a personal restraint petition with Division II of the Court of Appeals. The defendant asserted that under the decision in *State v. Recuenco*, 154 Wn. 2d 156, 110 P.3d 188 (2005), he was entitled to have his firearm enhancements vacated and be sentenced under the provisions for deadly weapon enhancements. The petition was stayed pending decision of the United States Supreme Court in *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and was again stayed for a decision by the Washington Supreme Court, *State v. Recuenco*, 163 Wn. 2d 428, 180 P.3d 1276 (2008), on remand from the United States Supreme Court. After the last *Recuenco* decision, the Court of Appeals asked for supplemental briefing in the present case.

On March 10, 2009, the Court of Appeals issued a published opinion: *In re Personal Restraint of Scott*, 149 Wn. App. 213, 202 P.3d 985 (2009). The court granted the petition and ordered that the matter be remanded for re-sentencing; the court directed the trial court to enter deadly weapon enhancements as opposed to firearm enhancements. *Id.*, at 222.

2. Facts

The general facts in this case are laid out in the opinions from the direct appeal and the PRP in the Court of Appeals:

On September 16, 2000, Scott and Douglas James-Anderson parked a stolen Chevrolet Blazer in front of Cascade Custom Jewelers, entered the store, threatened to kill two employees with a rifle, and tied the employees' hands behind their backs. Scott and James-Anderson stole about \$80,000 worth of goods, including jewelry, diamonds, cash, three guns, and a wallet from a store employee's pocket. The police arrested Scott and James-Anderson shortly after they left the jewelry store, recovering two rifles and four pistols from the Blazer. Scott confessed.

Scott, 149 Wn. App. at 216.

C. ARGUMENT.

1. THE COURT OF APPEALS ERRONEOUSLY FOUND THE JUDGMENT TO BE FACIALLY INVALID AND CHOSE THE WRONG REMEDY FOR ANY FAILURE TO ENTER NECESSARY FINDINGS.

When filing a collateral attack, the petitioner has the burden to show that the judgment is facially invalid. *In re Personal Restraint of McKiernan*, 165 Wn. 2d 777, 781, 203 P.3d 375 (2009). This Court addressed what makes a judgment facially invalid under RCW 10.73.090:

Under this statute, the “facial invalidity” inquiry is directed to the judgment and sentence itself. “Invalid on its face” means the judgment and sentence evidences the invalidity without further elaboration.

In re Personal Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002); *see also In re Personal Restraint Petition of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002) (court could properly consider petitioner's challenge to offender score (miscalculated upward) because judgment listed washed out juvenile convictions which had been used in the calculation of the offender score, thereby rendering the judgment "facially invalid").

In deciding whether a judgment and sentence arising from a guilty plea is valid "on its face," this Court has considered documents signed as part of the plea agreement or incorporated into the plea agreement or judgment and sentence itself. *In re Personal Restraint of Thompson*, 141 Wn.2d 712, 718, 10 P.3d 380 (2000). Plea documents are "relevant only where they may disclose invalidity in the judgment and sentence." *Hemenway*, 147 Wn.2d at 533, 55 P.3d 615.

The Court of Appeals found that RCW 10.73.090 did not bar petitioner's collateral attack because his judgment was invalid on its face stating it "evidences, without further elaboration, that firearm enhancements were imposed on deadly weapon special verdicts." 149 Wn. App. at 220. Later in the opinion, the Court of Appeals reiterated the fault it found with the judgment was that it "misrepresents the jury's special verdict" and therefore is facially invalid. *Id.*, at 222.

The Court of Appeals decision acknowledged that under the controlling law at the time of sentencing, a trial court was required to impose the time associated with firearm enhancements –despite a jury special verdict finding defendant used a deadly weapon- if all of the evidence at trial showed the weapon was a firearm. *Id.*, at 221, citing *State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319 (1998), *State v Rai*, 97 Wn. App. 307, 983 P.2d 712 (1999), and *State v. Olney*, 97 Wn. App. 913, 987 P.2d 662 (1999).

In his original and supplemental PRP's in the Court of Appeals, the defendant also conceded that *Meggyesy*, *Rai*, and *Olney* were good law at the time of the defendant's sentencing. *See*, PRP at 3, Suppl. Br. for PRP at 1-2. The defendant argued, however, that these cases were abrogated; and that the holding in *State v. Recuenco*, 154 Wn. 2d 156, 110 P.3d 188 (2005)(*Recuenco I*) was retroactive. PRP, at 3. In his Supplemental Brief for PRP, the defendant maintained this argument, then adding the recently decided *State v. Recuenco*, 163 Wn. 2d 428, 180 P.3d 1276 (2008)(*Recuenco III*).

Since Division II issued the decision in the present case, Division I has published two cases regarding similar issues. Both have declined to follow Division II.

In *In re Personal Restraint of Rivera*, 152 Wn. App. 794, 218 P.3d 638 (2009), the Court held that “[a] trial court does not exceed its authority by imposing a firearm enhancement when the jury returns a

special verdict making a deadly weapon finding if the firearm enhancement was properly charged and the fact that a firearm was used is necessarily reflected in the jury's general verdict of guilt." *Id.*, at 796. The defendant had argued that the judgment was facially invalid because the firearm enhancement was not authorized by the jury's special verdict making a deadly weapon finding. There, as in the present case, the defendant contended that, under *Recuenco III*, the sentence was not authorized in law, and was therefore invalid on its face.

The Court observed that the judgment and sentence properly cited the firearm enhancement statute. 152 Wn. App. at 796, 799. The court further found that the firearm enhancement was authorized in law because the information provided notice of the enhancement, and the jury's general verdict that Rivera was guilty of a shooting necessarily supported a finding that he used a firearm. 152 Wn. App. at 797, 800.

In *State v. Hartzell*, 153 Wn. App. 137, 221 P.3d 928 (2009), the Court concluded that although the special verdict returned by the jury found only that the appellants were armed with deadly weapons, the court's imposition of a firearm sentence enhancement is not a reversible error because the State charged a firearm enhancement and there was no evidence of any weapons other than the guns used in the shooting. *Id.*, at 146.

Hartzell's trial and judgment occurred in 2007, so *Blakely* applied. The Court did a *Blakely/Recuenco III* analysis. *Id.*, at 163-165. The Court distinguished *Recuenco III* and concluded that because the State had charged the defendant with being armed with a firearm, the enhancement was authorized by the charges. *Hartzell*, at 169.

In *Hartzell*, as in the present case, the sentencing court checked a box on the judgment and sentence for each defendant indicating a special verdict "for use of firearm". 153 Wn. App. at 169. Division I specifically declined to follow Division II in *Scott*, because Division I did not see the action taken by the trial court as misrepresenting or being contrary to the jury's verdict. 153 Wn. App. at 169.

In *Hartzell*, the Court found that a firearm is a deadly weapon as a matter of law, and the jury was so instructed. The imposition of a firearm enhancement was legally consistent with the jury's express finding that each defendant was armed with a deadly weapon. 153 Wn. App. at 169.

In the present case, the Amended Information alleged a firearm for the enhancement, and cited the correct statute. The jury was instructed as to the definition of a firearm for the enhancement. The evidence supported that only a firearm was used. The Judgment and Sentence refers to a firearm enhancement and cites the correct firearm enhancement statutes. As in *Rivera* and *Hartzell*, the Judgment in the present case is facially valid.

A review of the judgment in the present case reveals that paragraph 2.1 indicates that the defendant was “found guilty on 02/05/01 by [] plea [X] jury-verdict [] bench trial” of four crimes “as charged in the Amended Information[.]” The judgment immediately goes on to indicate:

[X] A special verdict/finding for use of a firearm was returned on Counts I, II, V

See Judgment and Sentence, Appendix A to the State’s Ct. App. Suppl. Brf.

Contrary to the impression created in the *Scott* opinion below, none of these notations were handwritten or interlineated by the sentencing judge. These findings were indicated by typed “X’s” adopting standard language on the judgment form. *Id.* The sentencing court imposed additional confinement of 60 months on each of the robberies, and 36 months on the possession of stolen property count; this time is consistent with firearm enhancements rather than deadly weapon enhancements. *Id.*

In the decision below, the Court of Appeals seemed to find fault with the sentencing court’s failure to enter a written finding on the judgment that it was finding the firearm enhancement was applicable, as opposed to the jury’s finding of a deadly weapon enhancement.

First, the part of the judgment set forth above that indicates a “...finding for use of a firearm was returned on Counts I, II, V” could be

construed as a written notation of the sentencing court's finding that the firearm enhancement should be applied. The sentence is in the passive voice and does not indicate what "entity" has returned a finding; it could be construed as being either the court or the jury. In collateral attacks, inferences, if any are made, are to be drawn in favor of the validity of the judgment and sentence and not against it. *In re Hagler*, 97 Wn.2d 818, 825-26, 650 P.2d 1103 (1982).

Second, this Court has never held that failure to make such a written finding renders the judgment and sentence invalid. In *In re Personal Restraint of Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999), this Court was faced with a collateral attack where the petitioner tried to vacate his exceptional sentence by arguing that his exceptional sentence - based solely on the stipulation of the parties - was not statutorily authorized and was unsupported by entry of required findings of fact and conclusions of law. This Court ultimately rejected both of Breedlove's arguments, but did remand for entry of findings and conclusions. This Court noted the remedy for a trial court's failure to enter findings necessary to support its sentence:

The remedy for a trial court's failure to issue findings of fact and conclusions of law is ordinarily remand for entry of the findings, and we remand here for that purpose. The failure to enter findings does not justify vacation of the sentence in a personal restraint proceeding unless it is a fundamental defect which results in a complete miscarriage of justice.

In re Personal Restraint of Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999). Nothing in *Breedlove* indicates that the failure to enter necessary findings on a sentencing issue renders a judgment facially invalid. It does hold that remand for entry of findings is the proper remedy for failure to enter necessary findings and not remand for re-sentencing. If the Court of Appeals found error with the fact-finding, the proper remedy was remand for entry of findings. The judgment was facially valid.

2. THE COURT OF APPEALS ERRONEOUSLY GRANTED PETITIONER **BLAKELY** RELIEF WHEN HE WAS NOT ENTITLED TO RETROACTIVE APPLICATION OF THAT DECISION ON COLLATERAL REVIEW.

On June 24, 2004, the United States Supreme Court issued *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), which stated 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." 542 U.S. at 301 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000)). While *Blakely* represented a sea change in sentencing law, this Court has determined that it does not apply retroactively to cases that were final when *Blakely* was announced. *State v. Evans*, 154 Wn.2d 438, 448, 114 P.3d 627, cert. denied, 126 S. Ct. 560, 163 L.Ed.2d 472 (2005); *State v. Hagar*, 158 Wn.2d 369, 144 P.3d 298 (2006). "A state conviction and sentence

becomes final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.” *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S. Ct. 948, 127 L.Ed.2d 236 (1994), citing *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6, 107 S. Ct. 708, 93 L.Ed.2d 649 (1987). Washington has adopted this standard. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 327, 823 P.2d 492 (1992) (quoting *Griffith v. Kentucky*, 479 U.S. at 321 n.6)).

Following the decision in *Blakely*, this Court, in a case on direct review, addressed whether *Blakely* error was subject to harmless error analysis; the court held that it was not. *State v. Recuenco*, 154 Wn. 2d 156, 110 P.3d 188 (2005)(“*Recuenco I*”) (holding a trial court could not impose time for firearm enhancements when the jury had returned a verdict for deadly weapon enhancement despite the fact that the only evidence was that defendant was armed with a firearm). The United States Supreme Court took review of this decision and reversed, finding that *Blakely* error was subject to harmless error analysis. *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006)(“*Recuenco II*”). On remand from the United States Supreme Court, the Washington Supreme Court abandoned its prior focus on the *Blakely* error, and held that firearm enhancements could not be imposed because they had not been properly alleged in the information. *State v.*

Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008)(“*Recuenco III*”). All three *Recuenco* decisions were part of Recuenco’s direct review of his convictions.

Nothing in any of the *Recuenco* cases undermined the holding in *Evans* where this Court determined that *Blakely* applies only to convictions or direct appeals that were not final at the time *Blakely* was announced. Thus, the law remains in Washington that *Blakely* cannot be applied retroactively on collateral review. *State v. Evans*, 154 Wn.2d 438, 449, 457, 114 P.3d 627 (2005).

In the case now before the Court, it is beyond question that the defendant’s case was final before the *Blakely* decision issued. After his direct appeal, he was re-sentenced without the two reversed convictions; that judgment was filed on April 9, 2004. Direct review of this sentence was available for thirty days or until May 10, 2004. The defendant did not appeal from his re-sentencing so his case was “final” for the purposes of retroactivity analysis when the decision issued in *Blakely* on June 24, 2004.

When the defendant filed his petition on April 11, 2006, he asked for relief under *Recuenco I*. That decision, however, addressed *Blakely* error in a case on *direct review*. The defendant was not, and is not, in the same procedural posture as Mr. Recuenco. As the defendant’s case was final at the time *Blakely* issued, he was not entitled to relief from *Blakely* error under either *Blakely* or *Recuenco I*. The Court of Appeals should

have dismissed his petition as meritless, as the defendant was seeking relief to which he was not entitled. The opinion below is confusing as it acknowledges that the defendant is not entitled to relief under *Blakely*, as his case was final at the time that decision issued, *Scott*, 149 Wn. App. at 221, n.4, but nevertheless grants petitioner *Blakely* relief by directing re-sentencing on deadly weapon enhancements as opposed to firearm enhancements.

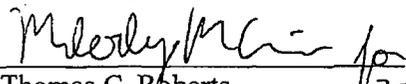
It would appear that the Court of Appeals wrongly focused on whether it could grant relief under the provisions of RCW 10.73.090 and RCW 10.73.100, as it spent considerable time discussing these provisions in the opinion. When a petitioner seeks relief for *Blakely* error, the timeliness of his petition for collateral relief is, generally, irrelevant. *Blakely* relief is not available in any case where the availability for direct review was over at the time that decision issued. This determination of finality for retroactivity analysis is a distinct determination from whether a particular defendant might still be timely in filing a collateral attack. When faced with a petitioner seeking retroactive application of the *Blakely* decision, it does not matter whether his petition is timely or not – he is not entitled to relief.

D. CONCLUSION.

The judgment and sentence in this case is valid on its face. The decision by the Court of Appeals improperly granted retroactive *Blakely* relief. For the reasons argued above, the State respectfully requests that this Court reverse the decision of the Court of Appeals and dismiss the Personal Restraint Petition.

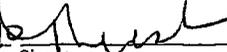
DATED: March 31, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


Thomas C. Roberts 35453
Deputy Prosecuting Attorney
WSB # 17442

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Please see attached Supplemental Brief of State of Washington for the below stated matter:

In Re: the PRP of Joshua Scott
No. 82951-9
Submitted by: T. Roberts
WSB # 17442
Ph: 253/798-4932
e-mail: trobert@co.pierce.wa.us

Please call me at 253/798-7426 if you have any questions.

Therese Kahn
Legal Assistant to Tom Roberts