

SUPREME COURT NO. 85789-0

SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE NUNEZ,

Petitioner.

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2011 OCT 12 AM 8:06  
BY JUDITH R. CARPENTER  
CLERK  
E  
Gh

---

STATE OF WASHINGTON,

Petitioner,

v.

GEORGE RYAN,

Respondent.

---

**STATE'S CONSOLIDATED SUPPLEMENTAL BRIEF**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

STEVEN M. CLEM  
Douglas County Prosecuting Attorney

BRIAN M. McDONALD  
Senior Deputy Prosecuting Attorney  
Attorneys for Petitioner (Ryan)

ERIC C. BIGGAR  
Deputy Prosecuting Attorney  
Attorneys for Respondent (Nunez)

W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

P. O. Box 360  
Waterville, WA 98858  
(509) 745-8535

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	3
1. A CRIMINAL DEFENDANT DOES NOT HAVE A RIGHT TO COMPEL A DEADLOCKED JURY TO ANSWER "NO" ON A SPECIAL VERDICT .....	5
a. Washington Law Does Not Support Treating Special Verdicts Differently From General Verdicts .....	5
b. The Policy Interests Cited By The Court In <u>Bashaw</u> Do Not Justify The Rule .....	13
2. THE RULE IN <u>BASHAW</u> DOES NOT APPLY TO EXCEPTIONAL SENTENCE AGGRAVATING CIRCUMSTANCES .....	19
3. A <u>BASHAW</u> CLAIM MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL .....	21
D. <u>CONCLUSION</u> .....	29

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Arizona v. Washington, 434 U.S. 497,  
98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)..... 13

Blakely v. Washington, 542 U.S. 296,  
124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) ..... 7

California v. Greenwood, 486 U.S. 35,  
108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988)..... 24

Catches v. United States, 582 F.2d 453  
(8th Cir.1978) ..... 26

United States v. Pineda-Doval, 614 F.3d 1019  
(9<sup>th</sup> Cir. 2010) ..... 26

Washington State:

State v. Ammons, 105 Wn.2d 175,  
713 P.2d 719, 718 P.2d 796 (1986)..... 6

State v. Barber, 170 Wn.2d 854,  
248 P.3d 494 (2011)..... 18

State v. Bashaw, 169 Wn.2d 133,  
234 P.3d 195 (2010).....*passim*

State v. Bradley, 20 Wn. App. 340,  
581 P.2d 1053 (1978)..... 6

State v. Burnett, 144 Wash. 598,  
258 P. 484 (1927)..... 6

State v. Campbell, 2011 WL 3903428  
(Wash. Ct. App., filed Sept. 6, 2011) ..... 12

<u>State v. Cronin</u> , 142 Wn.2d 568, 14 P.3d 752 (2000).....	12
<u>State v. Depaz</u> , 165 Wn.2d 842, 204 P.3d 217 (2009).....	5
<u>State v. Eggleston</u> , 164 Wn.2d 61, 187 P.3d 233, <u>cert. denied</u> , ___ U.S. ___, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008).....	23
<u>State v. Goldberg</u> , 149 Wn.2d 888, 72 P.3d 1083 (2003).....	3, 5, 8, 10-13, 19, 23, 24
<u>State v. Gordon</u> , 2011 WL 4089893 (filed September 15, 2011).....	22
<u>State v. Hirschfelder</u> , 170 Wn.2d 536, 242 P.3d 876 (2010).....	21
<u>State v. Jones</u> , 102 Wn. App. 89, 6 P.3d 58 (2000).....	14
<u>State v. Kelley</u> , 168 Wn.2d 72, 226 P.3d 773 (2010).....	16
<u>State v. Labanowski</u> , 117 Wn.2d 405, 816 P.2d 26 (1991).....	13, 25, 26, 27
<u>State v. Mak</u> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	23
<u>State v. Martin</u> , 94 Wn.2d 1, 614 P.2d 164 (1980).....	6
<u>State v. Morgan</u> , 2011 WL 3802782 (No. 67130-8-I, filed August 29, 2011).....	22, 25
<u>State v. Noyes</u> , 69 Wn.2d 441, 418 P.2d 471 (1966).....	5
<u>State v. Nunez</u> , 160 Wn. App. 150, 248 P.3d 103, <u>rev. granted</u> , 172 Wn.2d 1004 (2011).....	2-4, 17, 18, 22, 25, 29

<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	22
<u>State v. Ortega-Martinez</u> , 124 Wn.2d 702, 881 P.2d 231 (1994).....	5
<u>State v. Pillatos</u> , 159 Wn.2d 459, 150 P.3d 1130 (2007).....	6
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008).....	27, 28
<u>State v. Redden</u> , 71 Wn.2d 147, 426 P.2d 854 (1967).....	6
<u>State v. Ryan</u> , 160 Wn. App. 944, 252 P.3d 895, <u>rev. granted</u> , 172 Wn.2d 1004 (2011).....	2, 3, 17, 18, 20, 22-24, 27, 29
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	22
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	5
<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	12
<u>State v. Thomas</u> , 166 Wn.2d 380, 208 P.3d 1107 (2009).....	15
<u>State v. Williams-Walker</u> , 167 Wn.2d 889, 225 P.3d 913 (2010).....	27, 28
<u>State v. Woods</u> , 143 Wn.2d 561, 23 P.3d 1046 (2001).....	8
<u>State v. Wright</u> , 165 Wn.2d 783, 203 P.3d 1027 (2009).....	13

Other Jurisdictions:

State v. Davis, 266 S.W.3d 896  
(Tenn. 2008)..... 26

State v. Goodwin, 278 Neb. 945,  
774 N.W.2d 733 (2009) ..... 26

State v. LeBlanc, 186 Ariz. 437,  
924 P.2d 441 (1996)..... 26

Constitutional Provisions

Federal:

U.S. Const. amend. XIV ..... 24

Washington State:

Const. art. I, § 3..... 24

Const. art. I, § 21..... 5

Const. art. I, § 22..... 5

Statutes

Washington State:

RCW 9.94A.507 ..... 15

RCW 9.94A.510 ..... 15

RCW 9.94A.515 ..... 15

RCW 9.94A.533 ..... 7, 15

RCW 9.94A.537 ..... 4, 7, 19, 20, 21

RCW 9.94A.835 ..... 16

RCW 9.94A.836 .....	16
RCW 9.94A.837 .....	16
RCW 9.94A.838 .....	16
RCW 10.95.020.....	15, 19
RCW 69.50.435.....	19

### Rules and Regulations

#### Washington State:

CrR 6.16.....	9, 10, 11
RAP 2.5.....	22

### Other Authorities

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 30.03 (2d ed. 1994) .....	8
11 Washington Practice: Washington Pattern Jury Instructions: Criminal 30.03 (3d ed. 2008) .....	8
11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00 (2d ed. 1994) .....	7
11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00 (3d ed. 2008) .....	2
11A Washington Practice: Washington Pattern Jury Instructions: Criminal 300.07 (3d ed. 2008) .....	7
4A Karl B. Tegland, Washington Practice: Rules Practice CrR 6.16. at 484-85 (2008) and at 63-65 (2010 Pocket Part) .....	11
Sentencing Reform Act .....	6, 16, 19

WPIC 151.00.....	7
WPIC 160.00.....	11

**A. ISSUES PRESENTED**

1. Whether this Court should reconsider its holding in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) that the trial court must instruct the jury to answer "no" to a special verdict if they are deadlocked.

2. Whether jury unanimity is required for a "no" finding on an exceptional sentence aggravating circumstance.

3. Whether a Bashaw challenge to a jury instruction is not an issue of manifest constitutional error that may be raised for the first time on appeal.

**B. STATEMENT OF THE CASE**

Detailed facts of the cases are set forth in the Briefs of Respondent filed in the Court of Appeals.

In the Douglas County case, a jury convicted Enrique Nunez of possession and delivery of a controlled substance. Nunez CP 40-49. The jury also found by special verdict that the crimes took place within 1,000 feet of a school bus zone or a school. Nunez CP 35-36. The trial court imposed 20 months on the delivery conviction and 24 additional months for the sentence enhancement. Nunez CP 44.

In the King County case, a jury convicted George Ryan of second-degree assault and felony harassment. Ryan CP 84-90. On the felony harassment count, the jury found that Ryan was armed with a deadly weapon, and on both counts the jury found the "history of domestic violence" exceptional sentence aggravating circumstance. Id. The high end of the standard range on both counts was 14 months. Ryan CP 92. The trial court imposed exceptional sentences of 70 months on the assault conviction and 60 months on the felony harassment conviction. Ryan CP 94.

On appeal, both Nunez and Ryan challenged, for the first time, the instruction for the special verdicts. Their complaint, based upon State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), was that the instruction told the jury that it must be unanimous to answer "no." The challenged language in the instructions comes from the pattern instruction for penalty enhancements. Ryan CP 79; Nunez CP 30; 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00 (3d ed. 2008).

In State v. Nunez, 160 Wn. App. 150, 157-63, 248 P.3d 103, rev. granted, 172 Wn.2d 1004 (2011), Division III held that a claim based upon Bashaw is not of constitutional dimension and may not be raised for the first time on appeal. In State v. Ryan, 160

Wn. App. 944, 252 P.3d 895, rev. granted, 172 Wn.2d 1004 (2011), Division I affirmed Ryan's convictions, but vacated his sentences based upon Bashaw. Disagreeing with Nunez, the court held that a Bashaw claim was an issue of constitutional magnitude and could be raised for the first time on appeal. Id. at 948-49. This Court granted review and consolidated both cases.

**C. ARGUMENT**

In Bashaw, this Court vacated a sentence enhancement because the jury was instructed that it had to be unanimous to answer "no" on the special verdict form. The Court stated that it was applying the rule set forth in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003) that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." Bashaw, 169 Wn.2d at 146. Prior to Bashaw, the pattern jury instructions did not tell the jury to answer "no" if it was deadlocked on a special verdict, and, therefore, Bashaw has prompted numerous appeals and personal restraint petitions challenging the jury instructions for special verdicts.

These consolidated cases provide this Court with the opportunity to reexamine the foundations of the rule applied in Bashaw. The rule applied in Bashaw has no support in any constitutional provision, Washington statute, or caselaw, and the State has found no authority nationwide for such a rule. This Court should overrule Bashaw and hold that a jury should be instructed it must be unanimous when answering a special verdict, whether that answer is "yes" or "no."

Should the Court decline to reconsider the rule in Bashaw, it must resolve two additional issues. First, the Court should hold that Bashaw does not apply to exceptional sentence aggravating circumstances. Unlike the school bus stop enhancement at issue in Bashaw, the statute governing exceptional sentence aggravating circumstances, RCW 9.94A.537(3), expressly requires jury unanimity for any verdict. Second, this Court should affirm the Court of Appeals' decision in Nunez and hold that a Bashaw claim does not present a manifest error affecting a constitutional right, and, therefore, may not be raised for the first time on appeal.

**1. A CRIMINAL DEFENDANT DOES NOT HAVE A RIGHT TO COMPEL A DEADLOCKED JURY TO ANSWER "NO" ON A SPECIAL VERDICT.**

- a. Washington Law Does Not Support Treating Special Verdicts Differently From General Verdicts.

"Washington requires unanimous jury verdicts in criminal cases." State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). The requirement for jury unanimity derives from the state constitutional right to jury trial in criminal matters set forth in Const. art. I, § § 21 and 22. State v. Depaz, 165 Wn.2d 842, 853, 204 P.3d 217 (2009); State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This Court has previously rejected the claim that a defendant can obtain an acquittal by waiving the unanimity requirement. In State v. Noyes, 69 Wn.2d 441, 418 P.2d 471 (1966), the defendant's first trial resulted in a hung jury that stood 11 to 1 for acquittal. On appeal, the Court characterized as "without merit" the notion that the defendant could waive his right to a unanimous verdict and accept the vote of 11 jurors as a valid verdict of acquittal. Id. at 446.

Other than Bashaw and Goldberg, the State is unaware of any authority, nationwide, supporting a rule that the court can require a deadlocked jury to answer "no" on a special verdict for a

sentence enhancement. Sentence enhancements and aggravating circumstances were created by the legislature, and there is no suggestion anywhere in the Sentencing Reform Act ("SRA") that anything other than a unanimous verdict is required. Given that the fixing of legal punishments for criminal offenses is a legislative function,<sup>1</sup> it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury. While the court may recommend or identify needed changes, it must wait for the legislature to act.<sup>2</sup>

The lack of any authority supporting Bashaw's rule of unanimity for special verdicts is striking, given that special verdicts have been presented to jurors in criminal cases for nearly a century. Well before the enactment of the SRA, juries rendered special verdicts in criminal cases.<sup>3</sup> Since the SRA was enacted,

---

<sup>1</sup> State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986).

<sup>2</sup> See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); State v. Martin, 94 Wn.2d 1, 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether a defendant who pled guilty should receive the death sentence).

<sup>3</sup> See State v. Burnett, 144 Wash. 598, 599, 258 P. 484 (1927) (special finding that defendant had been previously convicted of the crime of unlawful possession of intoxicating liquor); State v. Redden, 71 Wn.2d 147, 151, 426 P.2d 854 (1967) (special verdict on whether defendant was armed with a deadly weapon); State v. Bradley, 20 Wn. App. 340, 346, 581 P.2d 1053 (1978) (special verdict on whether defendant was armed with a firearm).

the legislature has created numerous sentencing enhancements, all requiring special verdicts by the jury.<sup>4</sup> More recently, as a result of the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the legislature revised the SRA to provide for jury verdicts on numerous aggravating circumstances. In fact, RCW 9.94A.537(3) expressly provides that the jury's decision on an aggravating circumstance must be unanimous and does not condition the need for unanimity on whether the answer is "yes" or "no."

The pattern jury instructions used for the past several decades did not instruct the jury to answer "no" if they were deadlocked on a special verdict. At best, the instructions were silent as to whether the jury had to be unanimous to answer "no."<sup>5</sup> Given that the standard concluding instruction given in every criminal case, WPIC 151.00, states that "[b]ecause this is a criminal case, each of you must agree for you to render a verdict," a

---

<sup>4</sup> See, e.g., RCW 9.94A.533(3) (firearm enhancement); RCW 9.94A.533(4) (deadly weapon enhancement); RCW 9.94A.533(8) (sexual motivation enhancement).

<sup>5</sup> See, e.g., 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 300.07 (3d ed. 2008) (exceptional sentence aggravating circumstances); 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00 (2d ed. 1994) (general special verdict instruction).

reasonable juror could, reading the instructions together, believe that unanimity was required for any answer to a special verdict.

For several decades, the pattern instruction for aggravated first-degree murder simply instructed the jury to answer "yes" if the jurors unanimously agreed that a specific aggravating circumstance had been proved and said nothing about when to answer "no."<sup>6</sup> In State v. Woods, 143 Wn.2d 561, 593, 23 P.3d 1046 (2001), this Court rejected a claim that additional language was necessary in order to instruct the jury as to when it should answer "no" on the special verdict. It is difficult to reconcile Woods with the holding in Bashaw.

The rule applied in Bashaw rested on one case, Goldberg. In Goldberg, the defendant was charged with first-degree murder.

The jury was instructed as follows:

In order to answer the special verdict form 'yes', you must unanimously be satisfied beyond a reasonable doubt that 'yes' is the correct answer. If you have a reasonable doubt as to the question, you must answer 'no'.

149 Wn.2d at 893. The jury found Goldberg guilty of first-degree murder and answered "no" to the special verdict for the aggravating

---

<sup>6</sup> 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 30.03 (3d ed. 2008); 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 30.03 (2d ed. 1994).

circumstance. Id. at 891. However, when the trial court polled the jury by a show of hands on how many had voted "no" on the aggravating factor, only one juror raised a hand. Id. The trial court then ordered the jury to keep deliberating and, after an additional three hours of deliberation, the jury returned a new special verdict answering "yes." Id. at 891-92.

On appeal, Goldberg argued that the trial court had improperly coerced the jury. Id. at 893. This Court rejected this characterization of the issue, and, instead, framed the question presented as whether unanimity was required to answer "no" to the special verdict. In a short discussion, the Court held it was not:

[W]hen the jury returned its verdict and answered "no" on the special verdict form, the trial judge acted as if the jury were deadlocked on this issue and ordered continued deliberations. This was error. When a jury is deadlocked on a general verdict, the trial court has the authority, within limits, to instruct the jury to continue deliberations. CrR 6.16(a)(3). That authority does not exist with respect to a jury's answer to a special finding as given in this case.

Here, the jury performed as it was instructed. It returned a verdict of guilty as to the crime, for which unanimity was required, and it answered "no" to the special verdict form, where under instruction 16, unanimity is not required in order for the verdict to be final. We find no error in the jury's initial verdict in this case which would require continued deliberations. As instructed in this case, when the verdict was returned, the jury's responsibilities were completed and the

jury's judgment should have been accepted. We hold that it was error for the trial court to order continued deliberations and we vacate the finding on the aggravating factor.

Id. at 894.

Thus, the only authorities cited in Goldberg for the proposition that jury unanimity was not required for a "no" answer were (i) a court rule, and (ii) the jury instruction given in that case. However, neither provides support for the notion that a defendant has a right to a non-unanimous "no" decision on a special verdict.

With respect to the court rule, CrR 6.16(a)(3), the Court in Goldberg placed significance on the fact that "[w]hen a jury is deadlocked on a general verdict, the trial court has the authority, within limits, to instruct the jury to continue deliberations," but "[t]hat authority does not exist with respect to a jury's answer to a special finding...." 149 Wn.2d at 894. In fact, that interpretation of the rule is inconsistent with the plain language of the rule. CrR 6.16(a)(3) allows the trial court to poll the jury and then direct continued deliberations on a special finding. That rule provides:

*(3) Poll of Jurors.* When a verdict or special finding is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If at the conclusion of the poll, all of the jurors do not concur, the jury may be directed to retire

for further deliberations or may be discharged by the court.

CrR 6.16(a)(3) (emphasis added).<sup>7</sup> Indeed, elsewhere, the rule authorizes the court to order further deliberations "[w]hen a special finding is inconsistent with another special finding or with the general verdict." CrR 6.16(b). Accordingly, CrR 6.16 cannot be read as establishing a rule that a jury must answer a special verdict "no" when they are deadlocked.

Similarly, the jury instruction used in Goldberg is not authority that a defendant is entitled to a non-unanimous "no" on a special verdict. The instruction did not tell the jury that they must answer "no" if they are not unanimous. Instead, it simply stated, "If you have a reasonable doubt as to the question, you must answer 'no'." 149 Wn.2d at 893. This language comes from WPIC 160.00, the pattern concluding instruction used for special verdicts, and the WPIC committee has recognized that this language in this instruction has to be changed in light of Bashaw. WPIC 160.00, note on use at 92 (2010 pocket part). Recently, the Court of

---

<sup>7</sup> CrR 6.16 has been amended twice after Goldberg was decided. However, the amendments did not change the language cited above, which has been in the rule since it was enacted. 4A Karl B. Tegland, *Washington Practice: Rules Practice CrR 6.16*, at 484-85 (2008) and at 63-65 (2010 Pocket Part).

Appeals reversed a sentence based upon Bashaw, holding that this instruction failed to accurately inform the jurors that they should answer "no" on the special verdict if they were not unanimous. State v. Campbell, 2011 WL 3903428 (Wash. Ct. App., filed Sept. 6, 2011).

Even if the instruction in Goldberg could be read as supporting the proposition that the jury must answer a special verdict "no" when they are deadlocked 11-1 in favor of finding the sentence enhancement, a jury instruction does not establish or create law.<sup>8</sup> Rather, it is meant to reflect the current law, and is only as valid as the existing caselaw and statutes that support it. In this case, there is no such authority for the rule applied in Bashaw.

In sum, Goldberg cited no authority for the proposition that the jury must be instructed to answer "no" when the jurors are deadlocked on a special verdict for a sentence enhancement. Subsequently, in Bashaw, this Court cited no additional authority supporting the rule, but simply cited to Goldberg. This Court should revisit Bashaw and Goldberg and acknowledge that there is no

---

<sup>8</sup> See, e.g., State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (holding that the pattern jury instruction defining accomplice liability was incorrect); State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (holding that the pattern jury instruction defining the law of self-defense was erroneous).

legal basis to treat the unanimity requirement for special verdicts any differently than general verdicts.

b. The Policy Interests Cited By The Court In Bashaw Do Not Justify The Rule.

In Bashaw, this Court explained that the underlying policy reason for its decision was to prevent the State from pursuing second trials in cases where the jury is deadlocked on the sentence enhancement. The Court explained:

The rule we adopted in Goldberg and reaffirm today serves several important policies. First, we have previously noted that “[a] second trial exacts a heavy toll on both society and defendants by helping to drain state treasuries, crowding court dockets, and delaying other cases while also jeopardizing the interests of defendants due to the emotional and financial strain of successive defenses.” State v. Labanowski, 117 Wn.2d 405, 420, 816 P.2d 26 (1991). The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. We have also recognized a defendant’s “valued right” to have the charges resolved by a particular tribunal.” State v. Wright, 165 Wn.2d 783, 792-93, 203 P.3d 1027 (2009) (internal quotation marks omitted) (quoting Arizona v. Washington, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional

penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

169 Wn.2d at 146-47.

However, the reasons offered by the Court do not stand up to scrutiny and are inconsistent with legislative priorities. The Court stated that second trials on sentence enhancements impose "a heavy toll on both society and defendants by helping to drain state treasuries, crowding court dockets, and delaying other cases." Id. at 146. However, the State is unaware of any evidence that, due to deadlocked juries on sentence enhancements, second trials occur in any significant number. One is hard-pressed to find a *single* case where a second trial has occurred on only a sentence enhancement due to a deadlocked jury.<sup>9</sup>

In Bashaw, the Court appeared to place slight value on the sentence enhancement, which was described as simply "an additional penalty" where "a defendant is already subject to a penalty for the underlying substantive offense." Id. at 146. The

---

<sup>9</sup> In fact, the evidence indicates that prosecutors abandon pursuing the sentence enhancement when the jury is deadlocked. For example, in State v. Jones, 102 Wn. App. 89, 6 P.3d 58 (2000), the jury convicted on the underlying offenses but was deadlocked on the sentence enhancements. The State *did not* seek a second trial on the enhancements, but proceeded to sentencing. Id. at 94. After the defendant successfully appealed his underlying convictions, the State re-alleged the enhancements, which the jury found on several counts. Id. at 95.

notion that all sentence enhancements or aggravated circumstances are simply "additional penalties" is inconsistent with Washington law. The aggravated circumstances in RCW 10.95.020 expose a defendant to either life in prison or the death penalty; they are not simply an "additional penalty."<sup>10</sup> When a "sexual motivation" sentence enhancement is proven, a defendant who might otherwise face a determinate sentence is subject to an indeterminate sentence and community custody for life. RCW 9.94A.507. In other cases, the "additional penalty" imposed by the enhancements can significantly exceed the penalty for the underlying crime. For example, a defendant convicted of second-degree assault with a firearm enhancement may face only three *months* for the assault conviction and an additional three *years* for the enhancement. RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.533(3)(b). In Ryan's case, he faced a high-end sentence range of 14 months for his assault conviction, and the "additional penalty" he received due to the findings of the exceptional sentence aggravating circumstance was 56 months. CP 92-94.

---

<sup>10</sup> In contrast with the statements in Bashaw expressing disfavor with second trials on enhancements, this Court recently has held that the trial court had authority to conduct a retrial solely on the aggravating circumstances. State v. Thomas, 166 Wn.2d 380, 394, 208 P.3d 1107 (2009).

Moreover, there can be no doubt that the legislature and the people of the State of Washington have placed a high priority on many of these sentence enhancements. The SRA mandates that the prosecuting attorney "shall" file a special allegation of sexual motivation in every criminal case when sufficient admissible evidence exists to support it. RCW 9.94A.835(1). The prosecutor may not withdraw the sexual motivation allegation without approval of the court. RCW 9.94A.835(3).<sup>11</sup> With respect to firearm and deadly weapon enhancements, this Court has recognized that the legislature intends harsh punishment for crimes committed with such weapons and has authorized multiple punishments in such cases. State v. Kelley, 168 Wn.2d 72, 78, 226 P.3d 773 (2010). As a matter of policy, there is no basis to treat special verdicts for sentence enhancements differently from general verdicts with respect to the need for jury unanimity.

Even if one agrees with the Court's stated objective in Bashaw -- preventing second trials when the jury is deadlocked on a sentence enhancement -- the rule applied in Bashaw is broader than necessary and needlessly jeopardizes properly imposed

---

<sup>11</sup> There are identical provisions governing several other sentence enhancements. See RCW 9.94A.836-.838.

criminal sentences. The rule in Bashaw would bar the State from ever pursuing a sentence enhancement after a non-unanimous verdict, even in cases where a second trial must occur on the underlying charged crime. When a Bashaw instruction is given, the jury must answer "no" even if they are split 11 to 1 in favor of the special verdict. If, after a defendant's successful appeal, a second trial must be held on the underlying conviction, the State cannot pursue the sentence enhancement because the jury will have answered "no" under Bashaw, rather than indicated that they were deadlocked. Such a result does not serve any of the policy interests identified in Bashaw.

By using the jury instructions as a vehicle to achieve the policy objective, Bashaw also unnecessarily implicates many cases, such as Nunez and Ryan, where the jury unanimously found the sentence enhancement and where there is no need of a second trial on the sentence enhancement. If the Court wishes to prohibit second trials on sentence enhancements, it should simply hold, in an appropriate case, that the State may not conduct a second trial solely on a sentence enhancement, absent legislative authority to the contrary.

The State appreciates that this Court does not lightly reconsider its decision in a prior case. However, the holding in Bashaw, that a jury must be instructed to answer "no" to a special verdict if it is deadlocked, is both incorrect and harmful. See State v. Barber, 170 Wn.2d 854, 863, 248 P.3d 494 (2011). Bashaw is incorrect because, as shown above, it is inconsistent with this Court's precedent, the state constitution, relevant statutes, and public policy considerations.

Bashaw is also harmful. As noted in the preceding section, before Bashaw, there was no pattern jury instruction requiring the jury to answer "no" when they were deadlocked. Bashaw's holding is inconsistent with the standard pattern jury instruction that was given in Ryan, Nunez and many other criminal cases. Not surprisingly, Bashaw has prompted numerous appeals and personal restraint petitions challenging the jury instructions for sentence enhancements. The cases impacted include, among others, aggravated first-degree murder cases, all cases where the jury found a firearm or deadly weapon enhancement, and all cases where the jury found exceptional sentence aggravating circumstances. These are the very worst criminal cases, and now, due to Bashaw, these defendants may be entitled to significant

reductions in their sentences. Given that the legislature has given these enhancements and aggravators a very high priority, Bashaw detrimentally impacts the public interest, and this Court should overrule it.

**2. THE RULE IN BASHAW DOES NOT APPLY TO EXCEPTIONAL SENTENCE AGGRAVATING CIRCUMSTANCES.**

Regardless of whether the Court reconsiders the rule in Bashaw, it should not extend it to exceptional sentence aggravating circumstances because the SRA expressly provides that the jury's verdict on an aggravating circumstance must be unanimous.

Bashaw involved a school bus stop sentencing enhancement,<sup>12</sup> and the relevant statute is silent as to jury unanimity. See RCW 69.50.435. However, the statute governing exceptional sentence aggravating circumstances requires jury unanimity for any verdict. RCW 9.94A.537(3) states in pertinent part: "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on

---

<sup>12</sup> Goldberg, the case cited in Bashaw, also did not involve an exceptional sentence aggravating circumstance; rather, it was an aggravated first-degree murder case and involved aggravating circumstances under RCW 10.95.020. 149 Wn.2d at 894-95.

the aggravating factor must be unanimous, and by special interrogatory." By its plain language, RCW 9.94A.537(3) does not condition the need for unanimity on whether the answer is "yes" or "no." Rather, the statute requires jury unanimity for any special verdict.

Division I rejected this interpretation of the statutory language and cited another subsection of RCW 9.94A.537 for the proposition that unanimity was not required for a "no" finding on an aggravating circumstance:

Reading the quoted section together with other provisions of the statute, as we must, convinces us that unanimity is required only for an affirmative finding. Subsection 6 empowers the court to sentence a defendant to the maximum term of confinement "[i]f the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence." This language plainly contemplates the possibility that the jury will not be unanimous, in which case the court may not impose the aggravated sentence.

Ryan, 160 Wn. App. at 949-50 (footnotes omitted).

It is a stretch to hold that the statutory language quoted above establishes that a defendant is entitled to a "no" finding on an aggravating circumstance when the jury is deadlocked. This statute simply states that a judge may impose an exceptional sentence if the jury found an aggravating circumstance

unanimously and beyond a reasonable doubt. RCW 9.94A.537(6). In other words, the statute addresses the trial court's authority to impose an exceptional sentence; it says nothing about a deadlocked jury or whether a defendant is entitled to an acquittal based upon a non-unanimous jury. This statute cannot be read to contradict the plain language of Subsection 3 requiring a unanimous verdict. See State v. Hirschfelder, 170 Wn.2d 536, 543, 242 P.3d 876 (2010) (recognizing the settled tenet of statutory construction that statutory provisions should be harmonized whenever possible). This Court should hold that the rule announced in Bashaw does not apply to exceptional sentence aggravating circumstances.

**3. A BASHAW CLAIM MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL.**

Should this Court decline to reconsider Bashaw, it must resolve the split between and within the Divisions of the Court of Appeals on the issue of whether a Bashaw claim can be raised for the first time on appeal. In Bashaw, this Court held that the rule came from the common law, rather than from any constitutional principle. Consistent with that holding, Division III and a two-judge

panel of Division I have held that a Bashaw claim cannot be raised for the first time on appeal. State v. Morgan, 2011 WL 3802782 (No. 67130-8-I, filed August 29, 2011); Nunez, 160 Wn. App. at 157-63. However, in Ryan, Division I held that a Bashaw claim could be raised for the first time on appeal because it involved an issue of constitutional magnitude. 160 Wn. App. at 948-49. The Ryan decision is clearly wrong and should be reversed.

Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

Not all alleged errors in jury instructions are errors of constitutional magnitude that may be raised for the first time on appeal. For example, this Court recently reaffirmed that "any error in further defining terms used in the elements is not of constitutional magnitude." State v. Gordon, 2011 WL 4089893, at \*2 (filed September 15, 2011); State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Similarly, a defendant may not complain of

the failure to give a lesser-included instruction when one was not requested at trial. State v. Mak, 105 Wn.2d 692, 745-49, 718 P.2d 407 (1986).

In Bashaw, this Court stated that the right to a non-unanimous "no" special verdict was not of constitutional dimension, but came from common law precedent. The Court explained:

This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg.

169 Wn.2d at 146 n.7.

Despite this clear language, the Court's decision has caused confusion because of the harmless error analysis applied in Bashaw. With no explanation, the Court applied the test for constitutional error and examined whether the instructional error was harmless beyond a reasonable doubt. 169 Wn.2d at 147. The Court's citation to the constitutional harmless error test was in error.<sup>13</sup> It led the Court of Appeals in Ryan to search for some

---

<sup>13</sup> A review of the briefing in Bashaw reveals that none of the parties briefed the standard for harmless error.

constitutional principle underlying Bashaw and to speculate that the decision was "grounded in due process." 160 Wn. App. at 949.

The notion that a constitutional due process principle underlies Bashaw is simply wrong and not supported by any authority cited in Goldberg or Bashaw. Recently, a different Division I panel pointed out the flaw in the Ryan court's assumption that a due process right was involved in Bashaw:

The Supreme Court made clear in Bashaw that the right at issue is based in Washington common law. 169 Wn.2d at 146 n. 7, 234 P.3d 195. The due process clause of the Fourteenth Amendment to the United States Constitution does not serve to protect state-law rights. California v. Greenwood, 486 U.S. 35, 43, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). Thus, that due process clause cannot be the source of constitutional protection of the right described in Bashaw. Similarly, our state constitution's due process clause, article I, section 3, has never been held to incorporate common law rights within its protections. To the contrary, constitutional rights and common law protections are distinct, and, when in conflict, constitutional rights prevail over common law rights. [Citations omitted].

Additionally, we note that Washington's due process clause is coextensive with that of the Fourteenth Amendment, providing no greater protection. [Citations omitted]. Thus, if Washington's due process clause protects the right described in Bashaw, so must the federal due process clause. We see no indication, however, that such a right is

observed to exist in federal courts or in those of all other states.

Morgan, 2011 WL 3802782, at \*5 (footnotes omitted).

Similarly, in Nunez, Division III thoroughly reviewed the possible constitutional sources for Bashaw and found none. Nunez, 160 Wn. App. at 159-60. As Division III recognized, the rule applied in Bashaw is similar to that at issue in State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991). Labanowski, which also addressed a jury unanimity issue, was cited in Bashaw in that portion of the opinion discussing the policy behind the rule. Bashaw, 169 Wn.2d at 146. An examination of Labanowski leaves no doubt that the rule in Bashaw is not of constitutional dimension.

In Labanowski, the Court addressed the issue of how to instruct the jury about a lesser-included offense. 117 Wn.2d at 417. In some jurisdictions, courts gave an "acquittal first" instruction, which told the jury that it could proceed to the lesser included offense only if it unanimously acquitted on the greater offense. Id. at 418. Alternatively, other jurisdictions used an "unable to agree" instruction, which instructed the jury that it could proceed to the lesser offense if it was deadlocked on the greater offense. Id. at 419.

This Court was persuaded by the rationale underlying the "unable to agree" instruction and held that it should be given in the future. Id. at 420-23. This rationale is the same as that cited by this Court in Bashaw: that it promoted the efficient use of resources by avoiding retrials. Id. at 420. However, the Court held that the giving of the "acquittal first" instruction was not reversible error and concluded that "[t]he defendants' arguments that the 'acquittal first' instruction violates a constitutional right does not withstand scrutiny." Id. The Court held that reversal was not warranted where an "acquittal first" instruction was given.<sup>14</sup> Id. at 425.

---

<sup>14</sup> The court's holding in Labanowski that there was no constitutional issue right to an "unable to agree" instruction is consistent with holdings in other jurisdictions. Catches v. United States, 582 F.2d 453, 458-59 (8th Cir.1978); State v. LeBlanc, 186 Ariz. 437, 924 P.2d 441 (1996); State v. Goodwin, 278 Neb. 945, 774 N.W.2d 733, 749 (2009); State v. Davis, 266 S.W.3d 896, 901-08 (Tenn. 2008); see also United States v. Pineda-Doval, 614 F.3d 1019, 1030-31 (9<sup>th</sup> Cir. 2010) (holding that a defendant may not challenge an "acquittal first" instruction if he did not object to it at trial).

Given the similarity in the rules and the policy interests underlying them, it is difficult to reconcile Labanowski's holding with the conclusion in Ryan that a constitutional interest was implicated. This Court should hold that a challenge to a jury instruction under Bashaw does not raise an issue of constitutional magnitude that can be raised for the first time on appeal.

Finally, in his petition for review, Nunez offers a new argument. Rather than suggest any constitutional basis for the rule in Bashaw, he attempts to characterize the issue as a sentencing error that can be challenged for the first time on appeal. Citing State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010) and State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008), he argues that "[t]he error here occurred not in the use of the invalid instruction... but when the trial court imposed the sentence enhancement based upon an invalid special verdict." Nunez Petition for Review at 4.

Nunez's attempt to reframe the issue on appeal as a sentencing issue should be rejected. In Recuenco and Williams-Walker, there was no error in the jury instructions. Instead, the

error occurred at sentencing when the trial court imposed an enhancement for a firearm, though the jury found only a deadly weapon. Williams-Walker, 167 Wn.2d at 893-95; Recuenco, 163 Wn.2d at 431-32. In both cases, this Court held that the defendant's *constitutional* right to a jury trial was violated at sentencing when the trial court imposed a greater enhancement than was found by the jury. Williams-Walker, 167 Wn.2d at 895-900; Recuenco, 163 Wn.2d at 440-42.

In Nunez's case, the jury's special verdict authorized the sentence imposed; the alleged error did not occur at sentencing. Instead, Nunez's claim of error concerns the jury instruction given at trial. His assignment of error was "The trial court erred by instructing the jury it had to be unanimous to answer 'no' to the special verdicts forms." Nunez Supplemental Brief of Appellant at 1. To accept Nunez's logic would mean that an alleged error in the jury instructions could be characterized as a sentencing error. Neither Recuenco nor Williams-Walker supports such an argument.

D. CONCLUSION

For all the foregoing reasons, this Court should reverse the Court of Appeals' opinion in Ryan and affirm the Court of Appeals' decision in Nunez.

DATED this 10<sup>th</sup> day of October, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
BRIAN M. McDONALD, WSBA #19986  
Senior Deputy Prosecuting Attorney

STEVEN M. CLEM  
Douglas County Prosecuting Attorney

By:   
ERIC C. BIGGAR, WSBA #17475  
Deputy Prosecuting Attorney

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to:

Christopher Gibson, the attorney for the respondent George Ryan, at Nielsen Broman & Koch, 1908 E. Madison Street, Seattle, WA 98122,

Thomas Kummerow and Jan Trasen, the attorneys for the petitioner Enrique Nunez, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, and

Eric Biggar, the attorney for the State of Washington in State v. Nunez at P.O. Box 360, Waterville, WA 98858,

containing a copy of the STATE'S CONSOLIDATED SUPPLEMENTAL BRIEF, in STATE V. NUNEZ AND RYAN, Cause No. 85789-0, in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame  
Name  
Done in Seattle, Washington

10/10/11  
Date

CLERK  
D. CARPENTER  
2011 OCT 12 AM 8:06  
STATE OF WASHINGTON  
SUPREME COURT