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No. 67909-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

PAUL DOUGLAS LOISELLE,

Appellant/Cross-Respondent.

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

The Honorable Sharon S. Armstrong

CROSS-RESPONDENT'S RESPONSE BRIEF

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WASHINGTON CASES

A. ISSUE ON CROSS-APPEAL

Whether Mr. Loiselle's sentence should be affirmed where the Supreme Court's decision in *Nunez* is fatally flawed for failing to establish a valid basis for ignoring *stare decisis*?

B. STATEMENT OF THE CASE

Mr. Loiselle accepts the State's statement of the case for the purposes of this issue.

C. ARGUMENT

THIS COURT SHOULD REFUSE TO FOLLOW THE DECISION IN *NUNEZ* AS THE DECISION IS FATALLY FLAWED AS IT FAILED TO MEET THE CRITERIA FOR OVERTURNING THE ESTABLISHED RULE ANNOUNCED IN *BASHAW*

In its Brief of Cross-Appellant, the State asks this Court to follow the decision in *State v. Nunez,* 174 Wn.2d 707, 285 P.3d 21 (2012), and reverse Mr. Loiselle's sentence. Brief of Cross-Appellant at 14-15. Mr. Loiselle contends the decision in *Nunez* is fatally flawed as it failed to establish a valid basis for abandoning *stare decisis* in reversing the decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). Mr. Loiselle urges this Court to follow the decision in *Bashaw* and affirm Mr. Loiselle's sentence.

In *Bashaw,* the Supreme Court held that a jury may reject a special finding on an aggravating circumstance even if the jurors are not unanimous. 169 Wn.2d at 145-48. Subsequently, in *Nunez,* the Court reconsidered its holding in *Bashaw* and concluded that its decision was incorrect and harmful in that (1) it caused confusion, (2) did "not serve the policies for which it was adopted," and (3) "subverted the jury's obligation to deliberate carefully and consider one another's opinions." 174 Wn.2d at 716-19. This Court should refuse to follow the decision in *Nunez* as it is flawed for its failure to establish the criteria for ignoring *stare decisis* and overruling an established rule.

As the Supreme Court noted in *Nunez,* the Court normally requires "'a clear showing that an established rule is incorrect and harmful before it is abandoned.'" *Nunez*, 174 Wn.2d at 713, *citing Riehl v. Foodmaker, Inc.,* 152 Wn.2d 138, 147, 94 P.3d 930 (2004), *quoting In re Rights to Waters of Stranger Creek,* 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

Contrary to the Court's conclusion in *Nunez*, to require juries to be unanimous to answer "no" to a special verdict question would result in retrials merely for the jury to again determine enhancements, even where the jury has returned a guilty verdict on the underlying

substantive offense. Essentially, the "tail wagging the dog." This would clog the trial courts with unwarranted and unneeded trials merely to allow the State to seek an enhanced sentence where it did not carry its burden of proof with the first jury. In today's times of budgetary constraints on the courts, State and counties, and calls for fiscal restraint, such needless expenditures appear to be a waste of scarce judicial resources and of the taxpayers' money. This cannot be a result either the Legislature or the Supreme Court contemplated.

Compelling public policy regarding the expenditure of the scarce public and judicial resources and supports the Court's decision in *Bashaw*, ruling that a jury's "no" answer to a special verdict need not be unanimous. As a result, this Court should refuse to follow the flawed decision in *Nunez,* adhere to the well established rule in *Bashaw*, and affirm Mr. Loiselle's sentence.

D. CONCLUSION

For the reasons stated, Mr. Loiselle requests this Court, either reverse his convictions and remand for a new and fair trial, or affirm his sentence.

DATED this 26th day of December 2012.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent/Cross-appellant,	)	
v.	)	NO. 67909-1-I
PAUL LOISELLE, Appellant/Cross-respondent.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **RESPONSE BRIEF** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JAMES WHISMAN, DPA GRETCHEN HOLMGREN, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] PAUL LOISELLE 13711 32ND AVE NE APT 205 SEATTLE, WA 98125	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF DECEMBER, 2012.

X_____

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