

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
1/8/2018 2:15 PM  
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SUPREME COURT NO. 95374-1  
COURT OF APPEALS NO. 74733-9-1

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ARTHUR THOMAS,

Petitioner.

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**ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION**

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**ORIGINAL**

filed via  
**PORTAL**

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**A. IDENTITY OF RESPONDENT**

The State of Washington is the Respondent in this case.

**B. COURT OF APPEALS OPINION**

The Court of Appeals decision at issue is State v. Thomas, No. 74733-9-1, filed November 20, 2017 (unpublished).

**C. ISSUE PRESENTED FOR REVIEW**

The State asks this Court to deny the petition for review. If this Court accepts review, the State seeks cross-review of the court of appeals' conclusion that RCW 9.94A.825 does not explicitly authorize a trial court to empanel a second jury solely to consider a firearm enhancement after the first jury fails to reach a unanimous decision.

**D. INTRODUCTION AND STATEMENT OF THE CASE**

The relevant substantive facts of the crime are set forth in the State's briefing before the court of appeals. Brief of Respondent at 2-3. A jury found Thomas guilty of second-degree assault, but was unable to agree on the firearm enhancement and left the special verdict form blank. CP 109-11; 10/29/15 RP 3-20. The trial court empaneled a second jury solely to determine whether Thomas was armed with a firearm at the time of the second-degree assault.

CP 132; 11/6/15 RP 42-43; 12/1/15 RP 11, 13. The second jury unanimously determined that he was. CP 123.

Thomas argued on appeal that the trial court lacked statutory authority to empanel a second jury to consider the firearm enhancement after the first jury was unable to agree unanimously. The court of appeals affirmed in an unpublished opinion. State v. Thomas, No. 74733-9-1 (Wash. Ct. App. Nov. 20, 2017).

**E. ARGUMENT**

For the reasons outlined below, this Court should reject the petition for review. If the court accepts review, the State requests that this Court also accept review of the court of appeals' erroneous conclusion that RCW 9.94A.825 does not provide the trial court with the authority to empanel a second jury solely to consider a firearm enhancement after the original jury is unable to agree unanimously. RAP 13.4(d).

**1. THE COURT SHOULD DENY THE PETITION FOR REVIEW.**

RAP 13.4(b) governs consideration of a petition for review. It provides that a petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the

decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Thomas relies on subsection (b)(1), arguing that the court of appeals decision conflicts with this Court's decision in State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). However, unlike the exceptional sentencing scheme at issue in Pillatos, this case does not involve a situation where a legislatively-created procedure directing the judge to make factual findings is found unconstitutional, and the court is later asked to imply a jury procedure "from whole cloth." See State v. Davis, 163 Wn.2d 606, 613, 184 P.3d 639 (2008) (contrasting statutes that are silent or ambiguous as to procedure with the exceptional sentencing statute's explicit directive of judicial fact-finding). Instead, the deadly weapon enhancement statute has always authorized a jury finding. State v. Recuenco, 163 Wn.2d 428, 439, 180 P.3d 1276 (2008). Because Pillatos does not limit a trial court's ability to empanel a jury to determine a firearm enhancement, the court of appeals decision in this case does not conflict with it.

Thomas also points to RAP 13.4(b)(2), arguing that the opinion here "indicates" there is a conflict between the court of appeals'

decision in State v. Reyes-Brooks<sup>1</sup> and its decisions in State v. McNeal<sup>2</sup> and State v. Ryan.<sup>3</sup> He alleges that Reyes-Brooks erroneously concluded that post-Pillatos amendments to the exceptional sentencing statute provided the necessary authority for empaneling a jury to determine a firearm enhancement on remand, while McNeal and Ryan determined the opposite. He then insists that the court of appeals erroneously followed Reyes-Brooks in this case.

However, as noted by the court of appeals below, the holding of Reyes-Brooks was not exclusively grounded in the post-Pillatos amendments to the exceptional sentencing statute. Slip Op. at 5. Rather, the court in Reyes-Brooks also relied on CrR 6.1(a) and the constitutional right to a jury trial for its conclusion that the trial court could empanel a jury to consider a firearm enhancement on remand. 165 Wn. App. at 202-03. Taking care to distinguish between the firearm enhancement aggravator at issue and the exceptional sentencing provisions addressed by the legislature, the Reyes-Brooks court nonetheless found additionally persuasive the statements of intent issued by the legislature when passing the amendments to the exceptional sentencing scheme. Id. at 206. Like Reyes-Brooks, the

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<sup>1</sup> 165 Wn. App. 193, 267 P.3d 465 (2011).

<sup>2</sup> 156 Wn. App. 340, 231 P.3d 1266 (2010).

<sup>3</sup> 160 Wn. App. 944, 252 P.3d 895 (2011).



court of appeals here also relied on CrR 6.1(a) and the constitutional right to a jury trial for its conclusion that the trial court could empanel a jury to consider a firearm enhancement on remand. Slip Op. at 5.

Thomas argues that the opinion in Reyes-Brooks (upon which he alleges the court of appeals improperly relied) conflicts with the holdings of McNeal and Ryan. But McNeal considered whether a trial court had the authority to empanel a jury to determine the “free-crimes” aggravator when the plain language of the statute specifically prohibited such, and instead directed that factual finding to be made by the court. 156 Wn. App. at 353-54. McNeal says nothing about the issue presented both here and in Reyes-Brooks — the court’s authority to empanel a jury to retry a sentencing enhancement under a statute that explicitly permits a jury finding to begin with.

And in Ryan, the court of appeals determined that a non-unanimous verdict as to aggravating sentencing factors equated to an acquittal. 160 Wn. App. at 948. One of the arguments the State had made was that the post-Pillatos statutory amendments to the exceptional sentencing statute empowered courts to empanel juries to retry aggravating factors on remand – implying that acquittal of an aggravating circumstance must be unanimous. Id. at 950. In rejecting the State’s argument, the court of appeals stated that the post-Pillatos amendments addressed only the circumstances of retrial by jury when

a judge had originally made the necessary findings, and said nothing about retrial when the jury was non-unanimous. Id. Thus, Ryan did not address the issue presented in Reyes-Brooks.

Moreover, the court's decision in Ryan was reversed by this Court in State v. Nunez, 174 Wn.2d 707, 285 P.3d 21 (2012), which concluded that a jury must unanimously agree in order to reject aggravating sentencing factors. Implicit in the court's conclusion that non-unanimity does not equal an acquittal is the assumption that the enhancement can be retried. Indeed, the Nunez court specifically noted that retrial of aggravating factors outside the death penalty context is not precluded by double jeopardy. Nunez, 174 Wn.2d at 717-18.

Thomas has failed to establish that the court of appeals decision here conflicts with any decision of this Court or any other decision of the court of appeals. Thomas has failed to establish that review is appropriate under RAP 13.4(b).

**2. THE DEADLY WEAPON STATUTE EXPLICITLY AUTHORIZES THE TRIAL COURT TO EMPANEL A SECOND JURY TO CONSIDER A FIREARM ENHANCEMENT.**

The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review and argues that review by this Court is unnecessary. However, if the court grants review, in the interests of

justice and full consideration of the issues, this Court should also grant review of the lower court's conclusion that the deadly weapon statute itself does not provide a trial court the authority to empanel a second jury to consider a firearm enhancement on which the first jury was unable to agree. RAP 1.2(a); RAP 13.7(b).

Washington law explicitly permits a jury to consider a firearm enhancement. State v. Nguyen, 134 Wn. App. 863, 870-71, 142 P.3d 1117 (2006). Specifically, RCW 9.94A.825 provides that if there is a jury trial, the jury shall determine whether the defendant was armed with a deadly weapon at the time of the crime. The statute defines the term "deadly weapon" to include a "pistol, revolver, or any other firearm." Since a deadly weapon includes a firearm, it follows that the jury may be asked whether the defendant was armed with a deadly weapon that was a firearm. Nguyen, 134 Wn. App. at 870.

Here, the court of appeals agreed that RCW 9.94A.825 provides explicit authority for a trial court to submit the question of a firearm enhancement to a jury. Slip Op. at 3. However, it concluded that the deadly weapon statute "does not answer the question" of whether a second jury can be empaneled to consider the enhancement after the first jury fails to agree. But the court did not explain why, if a trial court has original authority to empanel a jury to

consider a firearm enhancement under the statute, it loses that authority simply because the first jury is unable to unanimously agree.

Moreover, the opinion states in conclusory fashion that RCW 9.94A.825 is arguably read to require the *same* jury that finds the defendant guilty of the underlying crime to also make the special verdict finding. But the deadly weapon statute cannot be read in such a prohibitory manner: “[I]f 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.” RCW 9.94A.825. In State v. Martin, 94 Wn.2d 1, 8, 614 P.2d 164 (1980), cited by Thomas, the death penalty statute at issue explicitly required the “same jury” to determine the sentencing issue as had determined the defendant's guilt. The deadly weapon statute contains no such qualifying language.

The court of appeals here erred when it concluded that the deadly weapon statute does not explicitly authorize the empaneling of a second jury to consider a firearm enhancement after the first jury is unable to agree. Should this Court accept Thomas's petition for review, it should also accept review of that erroneous conclusion.

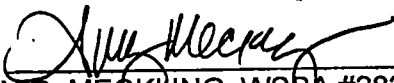
**F. CONCLUSION**

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice, the State seeks cross review of the issue in Section 2 above.

DATED this 8<sup>th</sup> day of January, 2018.

Respectfully submitted,

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**January 08, 2018 - 2:15 PM**

**Filing Petition for Review**

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Answer to Petition for Review and Cross-Petition

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