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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether this court will consider Lander's appeal of the firearm enhancement portion of his sentence where he did not raise that issue on the first appeal and the sentencing court did not address it on resentencing.

2. If this court does consider Lander's appeal, whether the firearm enhancements were properly imposed.

B. STATEMENT OF THE CASE.

David Lander was charged with several charges under two cause numbers, which were consolidated for trial. The jury convicted him of multiple counts. On two of those convictions the jury made a finding that he was armed with a firearm at the time the crimes were committed. [Supp. CP 69, 70] Both of those convictions were under cause number 09-1-00341-0. Because the firearm enhancements are the sole subject of this current appeal, that is the only cause number that will be referenced.

Lander appealed his convictions. The Court of Appeals affirmed in an unpublished opinion issued on January 11, 2011. [Supp. CP] The court did find merit, however, in his argument that some of his convictions constituted the same criminal conduct for purposes of calculating his offender score, and remanded the matter to the trial court to consider whether "any of the convictions

constitute the 'same criminal conduct' under RCW 9.84A.589(1)(a) and for resentencing if his offender score calculation changes as a result." [Supp CP 95]<sup>1</sup>

At the resentencing hearing, held on March 17, 2011, the State conceded that in cause number 09-1-00341-0, theft of a firearm and second degree theft constituted the same criminal conduct. In addition, because theft of a firearm and second degree unlawful possession of a firearm must run consecutively to each other, one is not counted as a point against the other. [03/17/11 RP 5] The prosecutor referred to the firearm enhancements during his explanation of how the standard range was reached. [03/17/11 RP 7] Lander did not contest the firearm enhancements. He did protest that his juvenile conviction should not prohibit him from possessing firearms. [03/17/11 RP 8-9] The court added the firearm enhancements into the sentencing range without comment or objection from the defense. [03/17/11 RP 10-11]

Lander appeals his sentence on the grounds that the firearm enhancements were improperly imposed.

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<sup>1</sup> A party may not cite to an unpublished case as an authority, but may do so as evidence of the facts involving the same case or same parties. RAP 10.4(h), GR14.1(a), In re Pers. Restraint of Davis, 95 Wn. App. 917, 920 n.2, 977 P.2d 630 (1999).

### C. ARGUMENT.

1. Lander may not appeal the firearm enhancements imposed because the trial court did not exercise its independent judgment to review and reconsider them.

An issue which could have been presented in an earlier appeal, but was not, cannot be raised in a later appeal following remand unless the lower court addressed the issue and exercised independent judgment regarding it. Rules of Appellate Procedure (RAP) 2.5(a) provides:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

RAP 2.5(c)(1) provides:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

Lander has not established that any of the conditions in RAP 2.5(a) permit review. Nor have the courts permitted RAP 2.5(c)(1) to allow review of every issue not raised in a prior appeal.

This rule does not automatically revive every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.

State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993).

In Barberio, the defendant was convicted of second degree rape and third degree rape. An exceptional sentence was imposed, which he did not challenge on appeal. The Court of Appeals reversed the third degree rape conviction, affirmed the second degree rape conviction, and remanded for further proceedings. Id., at 49. The State chose not to retry Barberio for the third degree rape. At the resentencing hearing, the defendant for the first time challenged the aggravating factors the court found at the first sentencing, and also argued that because his offender score was reduced there should be a proportionate reduction in his exceptional sentence for the second degree rape. Id. The trial court imposed the same exceptional sentence it had imposed at the first sentencing. Id., at 50.

Barberio appealed again. The Court of Appeals affirmed, as did the Supreme Court. Addressing RAP 2.5(c)(1), the latter court explained that it is a permissive rule—the trial court has discretion to revisit issues not raised on appeal, and if the trial court chooses to do so, the appellate court has the option of reviewing that issue. However, in Barberio’s case, the trial court merely made “corrective changes” in an amended judgment and sentence. Id., at 51.

Similarly, the trial court in Lander’s case made corrective changes and did not even address the firearm enhancements, much less exercise its independent judgment. Nothing changed regarding the enhancements. Explaining why RAP 2.5(c)(1) prohibits reviewing an issue not raised on an earlier appeal, the Barberio court said this:

The issue presented was a clear and obvious issue which could have been decided in 1990 in the first appeal. Instead of a timely and orderly proceeding to determine the matter on the merits, the State, the Court of Appeals, a department of this court, and allied staff, have had to deal with a procedural morass, all of which could have been avoided had the matter been raised when it should have been in the first appeal. In the interest of judicial economy, already too much wasted, we hereby affirm the Court of Appeals without further proceedings.

Id., at 52.

In Lander's case, the mandate had issued before the trial court amended the judgment and sentence, and as to the issue of the firearm enhancements, the case was final. The mandate issued on February 15, 2011; [Supp. CP 72] the resentencing hearing occurred and the First Amended Judgment and Sentence was entered on March 17, 2011. [CP 2] Once a mandate issues, there are no remaining appealable issues unless on remand the trial court exercises discretion as to matters not dismissed or reversed by the appellate court. State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009). In that case, Kilgore had been convicted of three counts of rape of a child and four counts of child molestation. An exceptional sentence was imposed. On appeal, in which Kilgore did not challenge his exceptional sentence, two of the counts were reversed and the remaining five affirmed. The mandate issued before the trial court amended the judgment and sentence to reflect the appellate court's decision. In the interim, the United States Supreme Court issued Blakely v. Washington, 542 U. S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). On remand, after the State declined to retry him on the reversed charges, Kilgore sought to apply the Blakely requirements and have the exceptional sentence vacated. The trial court refused, Kilgore

appealed, and the Court of Appeals dismissed for failure to raise an appealable issue. The Supreme Court affirmed. Id., at 32-33.

The Kilgore court again held that RAP 2.5(c)(1) permits trial courts to revisit issues that were not raised in the earlier appeal. If the trial court does so, and exercises its discretion in regard to it, the issue is restored for appeal. Kilgore, 167 Wn.2d at 38-39. See also State v. Rowland, 160 Wn. App. 316, 324-25, 249 P.3d 635 (2011). Here, the court did not address the firearm enhancements except to re-impose them exactly as they were in the original judgment and sentence.

Finality occurs, however, when the “*availability of appeal*” had been exhausted. . . The fact that the trial court had discretion to reexamine Kilgore’s sentence on remand is not sufficient to revive his right to appeal. Our rules of appellate procedure require that the trial court exercise its discretion in order to give rise to an appealable issue.

Kilgore, 167 Wn.2d at 43 (internal cites omitted, emphasis added by the Kilgore court).

The firearm enhancements to Lander’s sentence ceased to be appealable when the mandate issued from the Court of Appeals, and the trial court on remand took no action that would revive them. Therefore, he cannot now challenge them in this appeal.

2. Even if the court were to address the firearm enhancements, they were correctly imposed.

Lander asserts that In re the Pers. Restraint of Delgado, 149 Wn. App. 223, 204 P.3d 936 (2009), controls, and his firearm enhancements must be reversed. The State disagrees.

a. The facts of Delgado.

In Delgado, the defendant was charged with first degree attempted murder, or, in the alternative, first degree assault, and first degree kidnapping. For each charge, the information alleged that the defendant or an accomplice was “armed with a deadly weapon, to-wit: a firearm,” and cited to RCW 9.94A.602, which provides for a jury special verdict regarding a deadly weapon, and RCW 9.94A.510, which set forth enhancements for both firearms and deadly weapons. It did not specifically cite to RCW 9.94A.510(3), the statute which at that time specifically addressed firearm enhancements. Delgado, 149 Wn. App. at 229.

The jury instructions in Delgado included WPIC 2.07.02, which is the deadly weapon special verdict instruction, and which instructs that any firearm is a deadly weapon, whether loaded or not, and another instruction which also informed the jury that the category of deadly weapons includes firearms, loaded or not. Id.

The special verdict forms asked whether Delgado was armed with a firearm when he committed the crimes for which he was convicted, and the jury answered yes. A co-defendant also faced enhanced sentences; in his case some of the special verdict forms used the word “firearm” and “deadly weapon” on another. Id., at 230. The instructions did not define “firearm.” Id., at 235.

The Court of Appeals concluded that the special verdict forms did not match the jury instructions and therefore the jury did not really find that the defendants were armed with operable firearms. By imposing firearm enhancements that did not reflect the jury’s findings, the sentencing court exceeded its authority. Id., at 237.

b. The facts in Lander’s case are different.

In Lander’s case, however, the facts are somewhat different. The charging document, in counts II and III, included allegations that Landers or an accomplice was “armed with a deadly weapon, to-wit: a firearm.” [CP 26, 27] Each of those charges specifically cited to RCW 9.94A.533(3), which says:

The following times shall be added to the standard range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this

subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. . . .

The jury instructions in Lander's case defined "firearm", [Instruction No. 10, Supp. CP 41] and included WPIC 2.07.02:

For 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 crimes in Counts II and III.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime.

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

[Instruction No. 31, Supp. CP 62]

Both of the special verdict forms attached to counts II and III asked the jury to find whether Lander was armed with a firearm at the time of the commission of the crime. [CP 69, 70]

d. Lander's case is more like In re the Pers. Restraint of Rivera and State v. Williams-Walker than Delgado.

After Delgado was decided, the Court of Appeals issued an opinion in In re the Pers. Restraint of Rivera, 152 Wn. App. 794, 218 P.3d 638 (2009). In that case, Rivera was charged with first degree murder and in the charging language was the allegation that one or more of the defendants was armed with "a deadly weapon, to-wit: a .22 caliber handgun, for the purposes of the deadly weapon enhancement of RCW 9.94A.125 and 9.94A.310(3)(a)."<sup>2</sup> Id., at 797. The jury was given a special verdict instruction identical to the first and third paragraphs of Instruction 31 given to the Lander jury. Id. The special verdicts returned by the jury found that Rivera was armed with a deadly weapon. Id.

Even though the court dismissed Rivera's personal restraint petition because it was time-barred, the court explained that it would have denied the PRP on the merits. It noted that by citing to RCW 9.94A.310(3)(a) in the charging document, the State gave

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<sup>2</sup> RCW 9.95A.310 was recodified as RCW 9.94A.510 by ch. 10, § 6, LAWS OF 2001. The section regarding enhancements was recodified as RCW 9.94A.533 by ch. 290, § 10, LAWS OF 2002.

notice that it was seeking a firearm enhancement. Id., at 800-01. The jury was given facts supporting the firearm enhancement; in fact, the charge specifically stated that the defendant shot the victim to death. Id., at 803. Even though the special verdicts used the term “deadly weapon,” the general verdict of guilty to murder by shooting combined with the deadly weapon finding, was sufficient to support the firearm enhancement. Id. The only error the trial court made was to fail to instruct the jury on the firearm allegation, which the appellate court likened to the omission of an element in the jury instructions that is subject to harmless error analysis. Id., at 804. Because only a firearm was involved, and Rivera was charged with shooting the victim with a gun, the failure to instruct on the firearm enhancement was harmless error. The Rivera court distinguished that case from Delgado, in which the specific statute authorizing a firearm enhancement was not cited in the charging language. Id.

The Supreme Court addressed a similar issue in the cases of three defendants, consolidated in State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010). In all three of those cases the juries returned special verdicts finding deadly weapons were used, even though in two of the cases the charging language specified a

firearm as the deadly weapon. In all three cases, the court held that the sentencing court had erred in imposing the longer firearm enhancement. Id., at 899. The rule that emerges from this case is that the jury verdict controls the enhancement the sentencing court can give.

Where a firearm is used in the commission of a crime, the only way to determine which enhancement is authorized is to look at the jury's special findings. A sentence enhancement must not only be alleged, it must also be authorized by the jury in the form of a special verdict.

Id., at 900.

[O]nly three options exist: First, if the jury makes no finding, no sentence enhancement may be imposed. Second, where the jury finds the use of a deadly weapon (even if a firearm), then the deadly weapon enhancement is authorized. Finally, where the jury finds the use of a firearm, then the firearm enhancement applies. Critically, the sentencing judge can know which (if any) enhancement applies only by looking to the jury's special findings. Where the jury makes such a finding, the sentencing judge is bound by that finding.

Id., at 901-02.

In Lander's case, the charging language, while using the term "deadly weapon, to-wit: a firearm," cited to RCW 9.94A.533(3), the statute that provides for firearm enhancements. Although the words "to-wit: a firearm" should be sufficient to put a

defendant on notice that the firearm enhancement is being sought, the citation to RCW 9.94A.533(3) made it certain. [Supp. CP 26-27] Jury Instruction No. 31, [CP 62] is similar to the one found to be harmless error in Rivera. Also, unlike Rivera, the court in Lander's case defined "firearm" for the jury in Instruction No. 10. [CP 41] Finally, and under Williams-Walker dispositive, the special verdicts returned by the jury specified that Lander was armed with a firearm at the time the crimes were committed. [Supp. CP 69, 70]. It is questionable whether the same result would have been reached in Delgado if it had been decided following Williams-Walker.

Lander was correctly charged and the jury returned special verdicts authorizing firearm enhancements. The jury instructions were more complete than those in Rivera, but even if they were deficient the error was harmless. It cannot be said that without the error the result would have been different.

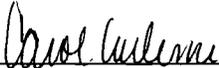
#### D. CONCLUSION.

Landers cannot raise the issue of the firearm enhancements to his sentences in this appeal. He did not raise it in his first appeal, and a mandate issued in that matter before the trial court re-sentenced him. During the re-sentencing hearing, the court

could have addressed the enhancements but did not, merely re-imposing the same enhancements that were part of the original sentence. This did not revive the ability to appeal the enhancements.

Even if this court considers the sentencing enhancements, they were properly imposed for all of the reasons set forth above. The State respectfully asks this court to affirm Lander's judgment and sentence.

Respectfully submitted this 22d day of August, 2011.

  
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COURT OF APPEALS  
DIVISION II

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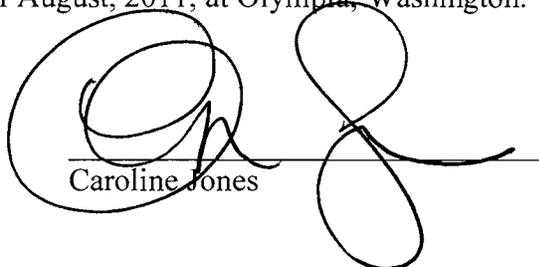
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 22<sup>d</sup> day of August, 2011, at Olympia, Washington.

  
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Caroline Jones