

NO. 81939-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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IN re PERSONAL RESTRAINT PETITION OF  
JAMES T. EASTMOND,  
Petitioner

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2010 AUG 13 PM 8:00  
STATE OF WASHINGTON  
SUPREME COURT  
CLERK  
CJ

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## **I. SUMMARY OF ARGUMENT**

Williams-Walker announced a new rule of law. Defendant's conviction was final when Williams-Walker was decided. The rule meets neither exception that would require retroactive application. Accordingly, it does not apply in this case.

Since Mandanas did not announce a new rule, retroactive application is not an issue.

## **II. ISSUES**

1. Does the new rule of law announced in State v. Williams-Walker<sup>1</sup> apply retroactively to this case?

2. State v. Mandanas<sup>2</sup> did not announce a new rule of law. Is retroactive application Mandanas an issue?

## **III. STATEMENT OF THE CASE**

The facts of petitioner's crimes are adequately set out in State v. Eastmond, No. 53836-5-I (unpublished, 2005), review denied, 161 Wn.2d 1015 (2007).

On October 2, 2007, this Court denied review of petitioner's judgment and sentence. Petitioner did not petition the United

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<sup>1</sup> State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010).

<sup>2</sup> State v. Mandanas, 168 Wn.2d 84, 228 P.3d 13 (2010).

States Supreme Court for review. On November 16, 2007, the Court of Appeals issued its mandate.

On July 31, 2008, the instant personal restraint petition was filed in this Court. On October 30, 2008, this Court stayed consideration of the petition pending the decisions in State v. Mandanas, and State v. Williams-Walker. On January 14, 2010, this Court issued its decision in Williams-Walker. On January 28, 2010, this Court issued its decision in Mandanas. On June 15, 2010, this Court ordered the parties “to file supplemental briefs . . . addressing the applicability and effect, if any, of Williams-Walker and Mandanas on this case.

#### IV. ARGUMENT

##### A. THE RULE ANNOUNCED IN WILLIAMS-WALKER DOES NOT APPLY RETROACTIVELY TO CASES THAT WERE FINAL WHEN IT WAS ANNOUNCED.<sup>3</sup>

Washington has “attempted to stay in step with the federal retroactivity analysis.” In re the Personal Restraint of St. Pierre, 118 Wn.2d 321, 324, 823 P.2d 492 (1992). The United States Supreme Court does not apply new rules of law to collateral review of cases that were final when the new rule was announced unless:

[E]ither: (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures implicit in the concept or ordered liberty.

St. Pierre, 118 Wn.2d at 326, citing Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 248 (1989).

### 1. Williams-Walker Announced A New Rule Of Law.

A new rule of law is one where “the result was not dictated by precedent existing at the time the defendant’s conviction became final.” Teague, 489 U.S. at 301(emphasis in original). “If before the opinion is announced, reasonable jurists could disagree on the rule of law, the rule is new. State v. Evans, 154 Wn.2d 438, 444, 144 P.3d 627, cert. denied, 546 U.S. 983 (2005).

This Court indicated that Williams-Walker was not dictated by precedent:

The cases before us present a different and much closer question: whether a trial court may impose a firearm enhancement in the absence of a jury finding by special verdict that the defendant used a firearm (or deadly weapon).

Williams-Walker, 167 Wn.2d at 898.

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<sup>3</sup> The same analysis would apply to whether the new rule announced in State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (Recuenco III).

Further, that reasonable jurists could disagree on the rule of law before the decision was announced is established by Justice Faihurst's well-reasoned dissent that was joined by Justices J, Johnson and Chambers. Williams-Walker, 167 Wn.2d at 902-21.

Clearly, Williams-Walker announced a new rule of law.

**2. Defendant's Case Was Final When This Court Decided Williams-Walker.**

"The critical issue in applying the current retroactivity analysis is whether the case was final when the new rule was announced." St. Pierre, 118 Wn.2d at 327.

We define finality for purposes of retroactive application of a new rule of law as the point at which "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."

State v. Kilgore, 167 Wn.2d 28, 35-36, 216 P.3d 393 (2009), quoting, Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

This Court denied defendant's petition for review on October 2, 2007. Eastmond, 161 Wn.2d at 1015. Defendant did not petition the United States Supreme Court for review. Accordingly, this case became final on December 31, 2007, 90 days after review was

denied. That was more than two years before the decision in Williams-Walker was announced.

### **3. Neither Exception Requiring Retroactive Application Of The New Rule Applies.**

As set out above, there are two situations in which retroactive application of a new rule of law is required: (1) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (2) the rule requires the observance of procedures implicit in the concept or ordered liberty. St. Pierre, 118 Wn.2d at 326.

This Court refused retroactive application of the new rules announced in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Evans, 154 Wn.2d at 448. The new rule announced in Williams-Walker was based in large part on the holdings of Apprendi and Blakely. There is no reason for reaching a different result on the issue of retroactivity in respect the new rule announced in Williams-Walker.

### **B. THE DECISION IN MANDANAS DID NOT ANNOUNCE A NEW RULE OF LAW.**

This Court in Mandanas made it clear that its prior decisions concerning the statutes pertaining to firearm enhancements and

sentencing required a court to impose separate enhancements for each conviction and run them consecutively to each other and the rest of the sentence. Mandanas, 168 Wn.2d at 88-89, quoting State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003), and State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005). Binding precedent requiring the same outcome as Mandanas was in effect on November 1, 2007, the date defendant's conviction became final. No new rule of law was announced in Mandanas. See Teague, 489 U.S. at 301.

#### V. CONCLUSION

The decision in this case was final before this Court's decisions in Williams-Walker and Mandanas. Since Williams-Walker announced a new rule of law, it does not apply to this case.

Since Mandanas did not announce a new rule of law, rather, it set out what the law has always required, it does apply to this case.

The petition should be dismissed.

Respectfully submitted on August 2, 2010.

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