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STATE OF WASHINGTON  
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SUPREME COURT NO. 95374-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent/Cross-Petitioner,

v.

ARTHUR THOMAS,

Petitioner/Cross-Respondent.

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

The Honorable Jeffrey M. Ramsdell, Judge  
The Honorable Hollis Hill, Judge

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE PRESENTED

At petitioner Arthur Thomas's first trial, the jury found him guilty of assault, but it left blank a special verdict form asking whether he was armed with a firearm during commission of the crime. Following a lengthy second trial addressing only the firearm allegation, a second jury found he was armed with a firearm. The trial court then sentenced Thomas on the underlying crime as well as the firearm enhancement.

Where, however, the trial court lacked authority to empanel a second jury to retry Thomas solely on the firearm allegation, should the firearm sentence enhancement be vacated?

B. STATEMENT OF THE CASE<sup>1</sup>

The State charged Thomas with the first degree assault of Bruce Golphenee. CP 35-37; see RCW 9A.36.011(1)(a) (assaults another with a firearm, any deadly weapon, or by any force or means likely to produce great bodily harm or death); RCW 9A.36.011(1)(c) (assaults another and inflicts great bodily harm). The State also alleged that Thomas was armed with a firearm during the commission of the crime. CP 35; RCW 9.94A.533(3) (providing for additional term of incarceration if accused was armed with a firearm, as that term is defined in RCW 9.41.010).

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<sup>1</sup> This brief refers to the verbatim reports as follows: 1RP – 12/1 and 12/2/15; 2RP – 12/3/15; 3RP – 12/7/15; 4RP – 12/8/15; 5RP – 12/9/15; 6RP – 12/10/15; 7RP – 1/15/16; and 8RP – 10/29 and 11/6/15 (first trial verdicts and hearing between trials). Volumes 1-7 are consecutively paginated.

The allegation was based on a July 2014 shooting outside a Bank of America located in Seattle's Central District. See 2RP 50-51, 56 (trial on firearm enhancement). Thomas punched Golphenee, a bank security guard, and reached for his gun. 2RP 60-61; 3RP 225. The men then struggled for control of the gun. 2RP 61; 3RP 227. In the process, Golphenee was shot twice, and he also sustained other injuries.<sup>2</sup> 2RP 61-62; 4RP 381. Once Thomas gained control of the gun, however, he shot himself in the face. 2RP 62-63. Both men survived the ordeal. 3RP 248, 250.

A jury could not agree on the first degree assault charge but convicted Thomas of the lesser degree crime of second degree assault. CP 91, 107, 109-10; 8RP 1-20; see RCW 9A.36.021(1)(a) (reckless infliction of substantial bodily harm). The trial court instructed the jury to leave the special verdict form blank if it could not reach a unanimous verdict on the firearm allegation. CP 95. The jury left the form blank. CP 111; 8RP 19.

Rather than proceeding to sentencing on second degree assault, the State moved for the court to hold a second trial on the firearm allegation. 8RP 29-30. Thomas objected on the ground that it was unclear on which basis the jury convicted him of second degree assault—the jury might have convicted him based on the ankle injury—and therefore retrial on the

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<sup>2</sup> For example, Golphenee's ankle was fractured in the struggle. 4RP 278, 280.

enhancement would violate due process. 8RP 32-33, 38-39. The court overruled the objection. See generally 8RP 29-43 (discussion of State's theory, accepted by trial court, that assault was a continuing act).

Following a seven-day jury trial re-litigating the details of the underlying incident,<sup>3</sup> the jury answered "yes" to the firearm special verdict. CP 123. The court sentenced Thomas to 42 months of incarceration, including a 36-month firearm sentence enhancement. CP 144-51.

Thomas appealed, arguing that based on this Court's decision in State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007), the trial court lacked the authority to empanel a jury to retry Thomas solely on a firearm allegation. The Court of Appeals disagreed, stating in part that, because "Thomas has failed to establish that the trial court lacked the authority to empanel a second jury, his claim must be denied." State v. Thomas, noted at 1 Wn. App. 2d 1024, 2017 WL 5565659, at \*3 (2017), review granted, 414 P.3d 574 (Apr. 4, 2018). However, the Court observed that RCW 9.94A.825 "arguably can be read as requiring the jury that finds the defendant guilty to also make the special verdict finding." Thomas, 2017 WL 5565659 at \*2.

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<sup>3</sup> The original trial, in comparison, lasted 10 days. CP 175-97.

Thomas filed a petition for review arguing the superior court lacked authority to empanel the sentencing jury. Taking issue with the Court of Appeals' discussion of RCW 9.94A.825, the State filed a cross-petition. This Court accepted review on both matters.

C. ARGUMENT

THE SUPERIOR COURT LACKED AUTHORITY TO EMPANEL A SECOND, FREESTANDING JURY TO RETRY THOMAS SOLELY ON THE FIREARM ALLEGATION.

Under the plain language of the statutes and controlling authority from this Court, the superior court lacked authority to empanel a second jury to retry Thomas on the firearm allegation. The resulting illegal sentence should be vacated.

1. Thomas's challenge may be raised for the first time on appeal.

As a preliminary matter, “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). “[A] sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional.” In re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (citing State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)).

When a sentence has been imposed for which there is no authority in law, appellate courts have “the power and the duty” to correct the erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). The appropriate remedy is reversal of the erroneous, void portion of the sentence. State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980), overruled by statute on other grounds, State v. Barr, 99 Wn.2d 75, 658 P.2d 1247 (1983).

2. Under this Court’s *Pillatos* decision, the trial court lacked authority to empanel a sentencing jury to consider the firearm enhancement, and the sentence must be vacated.

The trial court lacked authority to empanel a sentencing jury to consider the firearm enhancement, and thus the sentence must be vacated.

“[T]he fixing of penalties or punishments for criminal offenses is a legislative function[.]” State v. Bacon, \_\_\_ Wn.2d \_\_\_, 415 P.3d 207, 210 (Apr. 19, 2018) (quoting Pillatos, 159 Wn.2d at 469); accord State v. Mulcare, 189 Wash. 625, 628, 66 P.2d 360 (1937).

“Trial courts lack inherent authority to empanel sentencing juries. Pillatos, 159 Wn.2d at 469-70. Pillatos was issued after 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). In Blakely, the Court held that Washington’s system for imposing exceptional sentences violated the

Sixth Amendment, and that aggravating factors justifying such sentences must be proved to the trier of fact beyond a reasonable doubt. Id.

In response to Blakely, the legislature enacted former RCW 9.94A.537 (Laws of 2005, ch. 68, §1), known as the “Blakely fix,” to bring chapter 9.94A RCW, the Sentencing Reform Act (SRA), into compliance with Blakely. The Blakely fix authorized trial courts to empanel juries to consider aggravating factors listed in RCW 9.94A.535(3) supporting exceptional sentences. Thereafter, in Pillatos, 159 Wn.2d 459, this Court upheld the Blakely fix.

But, in doing so, this Court reiterated its previous holdings that trial courts do not have inherent authority to empanel sentencing juries. Pillatos, 159 Wn.2d 469-70 (citing State v. Hughes, 154 Wn.2d 118, 151-52, 110 P.3d 192 (2005), abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); State v. Martin, 94 Wn.2d 1, 8, 614 P.2d 164 (1980)).<sup>4</sup>

The Hughes court, for example, had stated that “[t]his court will not create a procedure to empanel juries on remand to find aggravating

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<sup>4</sup> This Court held that, moreover, the Blakely fix statute applied only to cases pending trial before its effective date. Pillatos, 159 Wn.2d at 470-74. In response to this portion of Pillatos, the legislature again amended the SRA, expressly authorizing courts to empanel juries to decide aggravating factors “in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.” Laws of 2007, ch. 205, §1 (statement of legislative intent).

factors because the legislature did not provide such a procedure . . . . To create such a procedure out of whole cloth would be to usurp the power of the legislature.” Hughes, 154 Wn.2d at 151-52.<sup>5</sup>

In Martin, this Court refused to imply a “special sentencing provision” that would allow the death penalty to apply to those who pleaded guilty, in the absence of any statutory provision allowing a jury to be empaneled following such a guilty plea. 94 Wn.2d at 7-8.

Although Pillatos upheld the Blakely fix statute, that legislation contains no provision related to firearm enhancements under RCW 9.94A.533. Thus, under Pillatos and the authority cited therein, the trial court lacked authority to empanel a sentencing jury in Thomas’s case. As a result, the firearm enhancement in this case must be reversed. Pillatos, 159 Wn.2d at 466, 480-81.

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<sup>5</sup> In rejecting the argument that courts had inherent authority to empanel sentencing juries on remand, Hughes also remarked that the preexisting statute “explicitly assigned such findings to the trial court.” Hughes, 154 Wn.2d at 151; see Pillatos, 159 Wn.2d at 469 (discussing Hughes). The situation in this case is analogous, because—as explained below—RCW 9.94A.825 explicitly assigns the fact-finding function to the jury that considered the underlying charge.

3. The plain language of RCW 9.94A.825 also requires the same jury that tried the accused on the underlying charge to consider a firearm allegation

Moreover, RCW 9.94A.825 requires the same jury that tried the accused on the underlying charge to consider a firearm allegation.<sup>6</sup>

The Court of Appeals correctly rejected the State's assertion that RCW 9.94A.825 supplied the authority for empanelment of a second jury.<sup>7</sup> However, that Court failed to recognize that, under the same statute, the same jury that found the defendant guilty on the underlying charge is the only jury that may consider whether the defendant was armed.

That statute provides:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, *or if 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.***

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<sup>6</sup> Despite use of the term “deadly weapon” the statute has been held also to apply to firearm allegations. State v. Nguyen, 134 Wn. App. 863, 870-71, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053 (2008), cert. denied, 555 U.S. 1055 (2008).

<sup>7</sup> The Court of Appeals stated that the statute “arguably can be read as requiring the jury that finds the defendant guilty to also make the special verdict finding.” Thomas, 2017 WL 5565659 at \*2.

RCW 9.94A.825 (italics and bold type supplied).<sup>8</sup>

Courts interpret statutes by first looking to their plain language as the indicator of legislative intent. TracFone Wireless, Inc. v. Dep't of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010)). If a statute's meaning is clear on its face, the reviewing court must apply that meaning. State v. Costich, 152 Wn.2d 463, 470, 98 P.3d 795 (2004).

This Court may not delete language from an unambiguous statute. Statutes must be considered so that all the language used is given effect, with no portion rendered meaningless or superfluous. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (quoting State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003)).

Generally, where the words in a statute are undefined, a court will rely on dictionary definitions. State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). "The" is a word indicating that "a following noun or noun equivalent refers to someone or something previously mentioned or clearly understood from the context." WEBSTER'S THIRD NEW INT'L DICTIONARY 2368 (1993). Consistent with this understanding of the word "the," RCW 9.94A.825 clearly indicates "the" jury is the same one that found guilt in the first instance, as indicated by the preceding phrase, "if a

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<sup>8</sup> Other "special allegations" statutes within the SRA contain similar or identical language. See RCW 9.94A.827-.839.

jury trial is had.” Cf. State v. Roberts, 142 Wn.2d 471, 510, 14 P.3d 713 (2000) (for purposes of mens rea requirement for accomplice liability, “the crime” of which accused must have knowledge means the charged offense). Further, *the* jury may only move on to the next step *if* it has found the defendant guilty.

To date, the State has argued the statute to which RCW 9.94A.825 should be contrasted is a prior version of the death penalty statute, which required the “same jury” to determine whether the death penalty should be imposed. State’s Answer and Cross-Petition at 8 (citing Martin, 94 Wn.2d at 8). The State appears to argue that because RCW 9.94A.825 does not use the word “same,” the statute cannot require the same jury.

But the more pertinent statute with which to compare RCW 9.94A.825 is RCW 9.94A.537. Unlike the defunct death penalty statute in Martin,<sup>9</sup> RCW 9.94A.537 is also found in the SRA, and is thus more germane to this Court’s analysis. See Costich, 152 Wn.2d at 475-76 (citing State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (“minimum term” and “release date” in chapter 13.40 RCW have different meanings); Haley v. Highland, 142 Wn.2d 135, 147, 12 P.3d 119 (2000) (“separate property” and “community property” in chapter 26.16 RCW have different meanings)).

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<sup>9</sup> The statute was repealed by Laws 1981, ch. 138, § 24 (eff. May 14, 1981).

Under RCW 9.94A.537

Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, *unless the jury has been impaneled solely for resentencing*, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t) [in which case the trial court may conduct a bifurcated proceeding to avoid unfair prejudice].

RCW 9.94A.537(4) (emphasis added). Thus, in contrast to RCW 9.94A.825, the italicized portion of the Blakely fix statute establishes that a jury may be empaneled solely to consider aggravating factors.

In summary, the Court of Appeals correctly rejected the State's assertion that RCW 9.94A.825 supplied authority for empanelment of a second jury. But the Court did not take this analysis to its logical conclusion, namely, that under the plain language of that statute, the same jury that finds guilt must also consider any firearm enhancement.

4. Reyes-Brooks, as well as the plain language of the statute on which it relies, did not authorize the trial court to empanel a second jury to consider the firearm enhancement.

The Court of Appeals' reliance on State v. Reyes-Brooks, 165 Wn. App. 193, 202-07, P.3d 465 (2011), review granted, cause remanded, 175 Wn.2d 1020, 289 P.3d 625 (2012), was misplaced. Thomas, 2017 WL

5565659 at \*2.<sup>10</sup> Moreover, the statute Reyes-Brooks relies on—the Blakely fix statute itself—is patently inapplicable here. The Court of Appeals erred in relying on it. Indeed, Division Two has held to the contrary.

The meaning of a clear and unambiguous statute is derived from its plain language. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), cert. denied, 534 U.S. 1130 (2002). Courts must assume the legislature means exactly what it says. State v. Delgado, 148 Wn.2d 723, 727, 63 P. 3d 792 (2003) (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)). Different sections of the same statute must be read together. Connolly v. State, 79 Wn.2d 500, 503-04, 487 P.2d 1050 (1971).

In Reyes-Brooks, Division One reversed a firearm enhancement based on a purported error under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) (holding unanimity not required on special verdict as to sentence enhancement, and that giving jury special verdict instruction stating to the contrary constituted error), overruled by State v. Nuñez, 174 Wn.2d 707, 285 P.3d 21 (2012).

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<sup>10</sup> Reyes-Brooks was, in any event, reversed by this Court following this Court's reversal of State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) in Nuñez, 174 Wn.2d 707. On remand from this Court, the Court of Appeals simply affirmed the original sentence. State v. Reyes-Brooks, noted at 171 Wn. App. 1028, 2012 WL 5477830 (2012) (unpublished opinion).

The Court remarked, however, that following vacation of the enhancement on remand, a jury could be empaneled to again consider the enhancement. Reyes-Brooks, 165 Wn. App. at 206. According to the Court, RCW 9.94A.537 supplied the authority to do so. Reyes-Brooks, 165 Wn. App. at 206. After this Court's Pillatos decision, the Court noted, the legislature amended RCW 9.94A.537 to allow trial courts to impanel juries for resentencing in cases regardless of the date of original trial or sentencing. Reyes-Brooks, 165 Wn. App. at 206. The amended statute provides that

[i]n any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

RCW 9.94A.537(2). The Court of Appeals asserted that this provision encompassed firearm enhancements under RCW 9.94A.533 in addition to aggravating circumstances listed in RCW 9.94A.535(3). Reyes-Brooks, 165 Wn. App. at 206.

The Court of Appeals in this case agreed. Like the Reyes-Brooks Court, it found support for this position in the statement of legislative intent corresponding to the amendment of the Blakely fix statute. That statement provides in part that “[t]he legislature intends that the superior

courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing.” Laws of 2007, ch. 205 § 1 (quoted in Thomas, 2017 WL 5565659 at \*2).

But the Court of Appeals’ analysis ignores the post-Pillatos context in which RCW 9.94A.537 was amended. In other words, the legislature’s primary concern was one of timing, not of subject matter. Neither Reyes-Brooks nor the Court of Appeals in this case take time to cite the full statement of legislative intent, which provides that

In State v. Pillatos . . . . , the Washington supreme court held that the changes made to the sentencing reform act concerning exceptional sentences in chapter 68, Laws of 2005 do not apply to cases where the trials had already begun or guilty pleas had already been entered prior to the effective date of the act on April 15, 2005. The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.

Laws of 2007, ch. 205 § 1.

Thus, the statement of intent, considered in full, does not support the holdings of either case. Perhaps more fundamentally, however, both Reyes-Brooks and Thomas ignore the maxim that a reviewing court may not use a statement of legislative intent to contradict the plain language of a statute. State v. Reis, 183 Wn.2d 197, 212, 351 P.3d 127 (2015);

Postema v. Postema Enterprises, Inc., 118 Wn. App. 185, 198, 72 P.3d 1122 (2003).

In State v. McNeal, 156 Wn. App. 340, 353, 231 P.3d 1266 (2010), in contrast, Division Two correctly noted that “[t]he plain language of RCW 9.94A.537(2) . . . authorizes a resentencing court to impanel a jury *only* when the alleged aggravating circumstance is listed in RCW 9.94A.535(3).” (Emphasis in original.)<sup>11</sup>

Thus, Reyes-Brooks was incorrectly decided in this respect. By its plain terms, RCW 9.94A.537 applies only to aggravating circumstances listed in RCW 9.94A.535(3).

A close reading of the statute also reveals that, even under the overly broad gloss adopted in Reyes-Brooks, the statute still would not permit jury empanelment in this case. By its plain language, RCW 9.94A.537 applies to cases “where an exceptional sentence above the standard range *was imposed* and where a new sentencing hearing is required.” RCW 9.94A.537(2) (emphasis added). The first jury rendered no special verdict in this case, so no exceptional sentence was ever

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<sup>11</sup> Another Division One panel considering a Bashaw challenge to special verdicts (as to aggravating circumstances and a sentence enhancement) also reached a different conclusion than did Reyes-Brooks. That panel of judges observed that RCW 9.94A.537 explicitly responded to Blakely and “reveal[ed] nothing about the legislature’s intent concerning retrial” in the event of reversal under Bashaw. State v. Ryan, 160 Wn. App. 944, 950, 252 P.3d 895 (2011), rev’d on other grounds sub nom. Nuñez, 174 Wn.2d 701.

imposed. Thus, RCW 9.94A.537 does not apply and could not authorize the empanelment of a second jury in *this* case.

In summary, Reyes-Brooks, and the plain language of the statute it relies on, did not permit the empanelment of a second jury in this case.

5. Thomas II and court rules also fail to supply the necessary authority to empanel a freestanding enhancement jury.

Contrary to the Court of Appeals' decision, State v. Thomas, 166 Wn.2d 380, 208 P.3d 1107 (2009) (Thomas II) and the court rules cited therein also fail to supply the necessary authority.

Here, the Court of Appeals relied in part on Thomas II to conclude that a jury could be empaneled to consider the firearm enhancement. Thomas, 2017 WL 5565659 at \*3. But Thomas II did not overrule the general rule set forth in Pillatos. Cf. Agostini v. Felton, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (if a higher court's precedent has direct application, yet appears to rest on reasoning rejected in some other line of cases, the lower courts should follow the case that directly controls).

Review of Thomas II's procedural history is necessary. In State v. Thomas (Thomas I), this Court reversed Covell Thomas's death sentence

due to instructional error on the RCW 10.95.020<sup>12</sup> aggravating factors. Thomas I, 150 Wn.2d 821, 876, 83 P.3d 970 (2004). This Court remanded for “a new trial on the aggravating factors or resentencing in accordance with this opinion.” Id. The trial court empaneled a jury, which found four aggravating factors under RCW 10.95.020. The trial court then sentenced Thomas to life in prison without the possibility of parole. Thomas II, 166 Wn.2d at 385.

Thomas again appealed his sentence, arguing that the trial court had no power to empanel a jury because chapter 10.95 RCW provided no mechanism for empanelment of a jury solely to consider the existence of aggravating factors. Thomas II, 166 Wn.2d at 392. Thomas relied in part on Hughes, 154 Wn.2d 118, a case relied on by Pillatos, to argue the trial court lacked such authority. This Court disagreed, however, noting that Hughes dealt with aggravating factors under the SRA and not the provisions pertinent to Thomas’s case. Thomas II, 166 Wn.2d at 392-93.

Here, the State sought empanelment of the jury to consider a SRA firearm enhancement. As a result, Hughes and Pillatos—not Thomas II—control. For this reason alone, Thomas II is not pertinent and the Court of Appeals erred in relying on it.

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<sup>12</sup> RCW 10.95.020 lists aggravating factors by which the State may obtain an enhanced sentence for a defendant found guilty of first degree murder.

But, as noted by the Court of Appeals in this case, 2017 WL 5565659 at \*3, in Thomas II, this Court also relied on CrR 6.1(a) to support its decision. Thomas II, 166 Wn.2d at 393. That rule states that “[c]ases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.” CrR 6.1(a).

The word “case” is defined as “a suit or action in law or equity.” WEBSTER’S, supra, at 345. In the present context, the court rule does not supply the authority for a free-standing sentencing jury. The operative word is “case.” The State could not, for example, bring an action against a defendant on an enhancement alone; an underlying charge is required. If the court rule could not supply authority in that situation, it is difficult to understand how it could supply the authority in this situation. They are equally not fully-formed “cases.”

Similarly, as explained above, RCW 9.94A.825 requires the jury that finds the defendant guilty to also make the special verdict finding. This Court makes every effort to harmonize conflicts between statutes and court rules. State v. Blilie, 132 Wn.2d 484, 491, 939 P.2d 691 (1997). Harmonizing the statute and the court rule, CrR 6.1 can be read to require a jury to be empaneled where permitted by statute, but not otherwise.

As shown, neither the applicable statutes nor the court rules permit empanelment of a freestanding enhancement jury in this case.

6. Likewise, this Court's decision in *Nuñez* does not supply the necessary authority to empanel the second jury.

The Court of Appeals also stated that this Court's *Nuñez* decision—clarifying that a non-unanimous decision on any sentencing enhancement or aggravator is not tantamount to acquittal—will be rendered meaningless by adherence to this Court's decision in *Pillatos*. *Thomas*, 2017 WL 5565659 at \*3. This line of argument should be rejected.

In *Nuñez*, in the course of conducting an incorrect/harmful analysis<sup>13</sup> regarding whether *Bashaw* and its predecessor should be overruled, this Court noted that constitutional double jeopardy principles did not bar retrial on an aggravating factor. *Nuñez*, 174 Wn.2d at 718 n. 5 (citing federal and state authority holding that double jeopardy prohibitions do not prohibit retrial of sentencing factors).

The Court of Appeals compares apples to oranges. Here, *Thomas* did not raise a double jeopardy challenge on appeal. And the question of statutory authority was not before this Court in *Nuñez*. In other words, *Nuñez* does not address the fundamental question of whether a trial

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<sup>13</sup> *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 466 P.2d 508 (1970).

court has statutory authority, in the first instance, to empanel a freestanding sentencing jury on remand following jury deadlock. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (“[Courts] do not rely on cases that fail to specifically raise or decide an issue.”). For these reasons, Nuñez does not provide the authority for empanelment of a freestanding jury in this case.

7. Summary of reasons enhancement must be vacated.

Under Pillatos, the firearm enhancement was not authorized because the trial court lacked authority to empanel a freestanding enhancement jury. The result is no different based upon careful analysis of case law advanced by the State and relied on by the Court of Appeals. The firearm enhancement was not authorized, and it should be vacated.

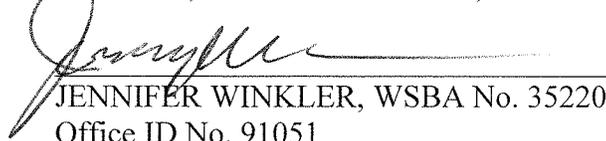
D. CONCLUSION

This Court should reverse the Court of Appeals and remand for the firearm enhancement to be vacated.

DATED this 4<sup>th</sup> day of June, 2018.

Respectfully submitted,

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