SUPREME COURT NO. 103395-8
COURT OF APPEALS NO. 84550-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs

NICHOLAS WINDSOR ANDERSON,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent and Cross-Petitioner in this case.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Anderson, No. 84550-1-I, ___ Wn. App. 2d ___, 552 P.3d 803 (July 22, 2024) ("Anderson III").[1]

C. ISSUE PRESENTED FOR REVIEW

The State asks this Court to deny Anderson's petition for review. The State respectfully asks this Court to instead grant review only of the Court of Appeals' published holding that "the trial court did not have authority to empanel a jury for the purpose of deciding a sentencing enhancement under RCW 9.94A.533(7)."

D. STATEMENT OF THE CASE

The facts of the lengthy appellate process and proceedings on remand are recited in greater detail in the

[1] This is the third Court of Appeals opinion in this case.

State's Brief of Respondent below. In March 2017, a jury found Anderson guilty of four counts of vehicular homicide, one count of vehicular assault and one count of reckless driving. CP 20-22. See also State v. Anderson, 9 Wn. App. 2d 430, 437, 447 P.3d 176 (2019), review granted, cause remanded, 195 Wn.2d 1001, 458 P.3d 786 (2020) ("Anderson I"). The trial court imposed sentences adding up to about 50 years in prison. CP 24, 31-32. The sentences included two 24-month enhancements under RCW 9.94A.533(7) because Anderson had two prior convictions for driving under the influence (DUI) and reckless driving. CP 24.

The Court of Appeals affirmed Anderson's convictions but remanded "for the superior court to empanel a jury" to decide "[w]hether Anderson's prior reckless driving conviction qualifies as a 'prior offense' for purposes of enhancing his term of imprisonment for vehicular homicide" because that "involves a question of fact that a jury must decide." Anderson I, 9 Wn. App. 2d at 462. The court's majority reasoned that whether the

reckless driving conviction was a "prior offense" depended on whether the reckless driving conviction was originally charged as a DUI *and* whether "drugs or alcohol were involved in the prior offense." Id. at 446-47 (lead opinion); 9 Wn. App. 2d at 462 (Chun, J., dissenting in part).

The State petitioned for review in Anderson I. While the petition was pending, this Court held in State v. Wu that "involvement of alcohol or drugs" in a prior reckless-driving offense is not an essential element of the crime of felony DUI. 194 Wn.2d 880, 893, 453 P.3d 975 (2019). This Court observed that the plain language of the felony-DUI statute requires only that a reckless driving conviction be originally filed as a DUI to qualify as a "prior offense," not an additional showing that it involved alcohol or drugs. Id. at 890. Importantly, Wu also said that the "trial court's determination of admissibility" included the question of whether a prior reckless-driving conviction qualifies as a "prior offense" under RCW 46.61.5055(14). Id. at 889. In other words, whether the

prior reckless-driving conviction was originally charged as DUI is a *question of law* for the court, not a question of fact for a jury, i.e., not an essential element.

This Court then remanded Anderson's vehicular-homicide case for reconsideration in light of Wu. 195 Wn.2d 1001, 458 P.3d 786 (2020). Without seeking briefing from the parties, the Court of Appeals acknowledged that Wu rejected the drugs-or-alcohol-involvement requirement, but conspicuously misread Wu as holding that a jury must decide, in *sentencing* Anderson *for vehicular homicide*, whether his prior reckless-driving conviction resulted from an original charge of DUI. State v. Anderson, No. 76672-4-I (consolidated with No. 78070-1-I) (unpublished, June 8, 2020), 2020 WL 3047246, rev. denied, 196 Wn.2d 1027 ("Anderson II"). The court remanded the case "for the superior court to empanel a jury to decide this question." Id. at *2.

On remand, Anderson repeatedly asserted that the *single narrow question* for the jury was whether the reckless-driving

conviction was "originally filed as a DUI and amended to a reckless driving." RP 20, 37, 49, 60. "This prior conviction, we know it's there," Anderson said. RP 61. "We know it exists. And so we're not asking, we're not saying that the State needs to prove that." RP 61.

The trial court commenced a trial on that narrow issue in October 2022. RP 96. Anderson never asserted that the trial court lacked authority to convene a jury on the issue. Instead, he agreed to a bench trial. RP 163-65. The State presented district-court documents showing that in 2005, Anderson was charged with DUI and pleaded guilty to an amended charge of reckless driving. RP 123-27; Ex. 1-4. Anderson never objected to the authenticity of the documents. RP 123-27. Instead, in closing argument, despite consistently agreeing pretrial to the existence of the conviction and insisting the only issue was whether the charge originated as DUI, Anderson argued for the first time that the State had not proven the Nicholas Windsor

Anderson on the district-court documents was the same Anderson "who is sitting at counsel table today." RP 129.

The trial court ruled that the mandate on remand was "for trial [on] the narrow issue of whether Mr. Anderson's conviction in 2005 for reckless driving had originally been charged as driving while under the influence." RP 131. The trial court, as fact-finder, found "yes, [Anderson] was originally charged under this cause number with driving under the influence and ultimately was convicted of reckless driving." RP 132-33; CP 127-28. The trial court concluded that the State *had proven beyond a reasonable doubt* "that the Defendant was convicted of reckless driving which was amended from driving under the influence in 2005" and that "the defendant's conviction for reckless driving … is a prior offense pursuant to RCW 46.61.5055, RCW 9.94A.533(7) and is a 24-month enhancement to each vehicular homicide (DUI) conviction in the above-entitled cause." CP 128. The court reimposed the same sentence.

Anderson appealed, and despite having waived a jury below, he argued for the first time, *inter alia*, that the trial court lacked statutory authority to empanel a jury on remand. Brief of Appellant; Anderson III, 552 P.3d at 808. In response, the State argued (1) that Anderson II incorrectly remanded the case because the question of whether Anderson's prior reckless-driving conviction was originally charged as DUI, for the purposes of calculating Anderson's *sentence for vehicular homicide*, was a question of law, i.e., a recidivist fact, that a sentencing court could determine, not a question of fact for a jury; (2) that Anderson waived his statutory-authorization claim; and (3) if remand for a jury trial was indeed required, the trial court *did* have statutory authority to hold such a trial. Brief of Respondent at 15-44.

The Court of Appeals held, confusingly, that "[b]oth parties are correct [that remand for a jury trial should not have occurred] in that the trial court had no statutory authority to empanel a fact-finding jury for resentencing under RCW

9.94A.533(7) and that a judge can determine whether a prior conviction for Reckless Driving was procedurally amended from a charge of Driving Under The Influence (DUI) because that is not an inquiry as to the facts underlying the charge." Anderson III, 552 P.3d at 806. The Court of Appeals held that "a judge, not a jury, properly decided the question on remand," somewhat overlooking the fact that Anderson waived a jury and the judge decided the question in a fact-finding trial, not a mere sentencing hearing. Id.

The lower court's opinion distinguished the United States Supreme Court's recent decision in Erlinger v. United States, ___ U.S. ___, 144 S.Ct. 1840, 1846, ___ L.Ed.2d ___ (2024) (Fifth and Sixth Amendments require unanimous jury to determine beyond a reasonable doubt that defendant's past offenses were committed on separate occasions for purposes of federal Armed Career Criminal Act (ACCA)). The Court of Appeals noted that Erlinger's holding was limited to the fact-intensive "occasions inquiry" of the ACCA, did not overrule

this Court's precedent on judicial determination of facts of prior convictions, such as State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001), and did *not* overrule Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (holding that judges may determine "the fact of a prior conviction"). See Erlinger, 144 S.Ct. at 1840 (decision does not need to revisit Almendarez-Torres).

Yet despite holding that a jury did not need to determine whether a prior reckless-driving conviction was originally filed as DUI, and despite agreeing that Anderson waived a statutory-authority claim, the Court of Appeals nevertheless chose to consider whether the trial court had statutory authority to convene a jury on this issue and decided, with three conclusory paragraphs of analysis, that it did not. Anderson III, 552 P.3d at 808-09. The opinion reasons simply that because RCW 9.94A.537(2) permits empaneling a jury to determine aggravating circumstances listed in RCW 9.94A.535(3), but not sentencing adjustments listed in RCW 9.94A.533, then no trial

court has authority to empanel a jury to decide questions under 9.94A.533. Id.

Anderson has petitioned this Court for review.

E. ARGUMENT

This Court should deny Anderson's petition for review. The lower court's conclusion that a sentencing judge can determine this fact of conviction — whether a prior reckless-driving conviction originated as a DUI charge — was correct and appropriate. Anderson's continued complaints that the State did not prove that the reckless-driving conviction was *his* reckless-driving conviction continue to ignore the facts of this case: (1) he never contested that in his previous sentencing or appeals, (2) it was not an issue on remand to the trial court from the Court of Appeals, and (3) regardless, the trial court *held a trial* (after Anderson *waived a jury*) and *found beyond a reasonable doubt* that he had the prior offense. Anderson's sentence comports with the constitution either way one looks at this issue. And Anderson's newly-asserted claim in his petition

for review, that he argued in a statement of additional grounds that his reckless-driving conviction is invalid, is simply false.

Instead, this Court should review only the Court of Appeals' erroneous and unnecessary published holding that a trial court has no statutory authority to empanel a jury to find any sentencing fact other than the existence of aggravating circumstances listed in RCW 9.94A.535(3). This incorrect holding — based on an unpreserved claim by Anderson — risks significant confusion in the law well outside the context of this case and conflicts with this Court's past decisions.

1. THE COURT SHOULD DENY ANDERSON'S PETITION FOR REVIEW.

RAP 13.4(b) governs consideration of a petition for review. It provides that a petition for review will be granted 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.

The State's briefing in the Court of Appeals adequately addressed the substantive issues raised by Anderson, and the Court of Appeals' decision on the issues on which Anderson now petitions was sound. Anderson fails to establish that his claims merit this Court's review.

a. The Court of Appeals' Conclusion Regarding Judicial Determination of a Fact of Prior Conviction Was Sound.

The Court of Appeals soundly recognized that it was proper, not unconstitutional, for a sentencing judge, not a jury, to find by a preponderance of the evidence that Anderson's reckless-driving conviction originated as a DUI charge. The lower court's holding on this issue comport with this Court's holdings in Wu and Wheeler. The opinion properly distinguished Erlinger from the situation in this case, recognizing that Erlinger was limited to the fact-intensive "occasions inquiry" under the federal ACCA and did not overrule Almendarez-Torres or any of this Court's long-

established precedent permitting a judge to determine the existence of recidivist facts. This Court should not review that holding because doing so is unnecessary under the law.

Review of this issue is also wholly unnecessary in Anderson's case. This Court should note that even if Erlinger applies to the determination of *this* recidivist fact, *Anderson already received the remedy that Erlinger would call for* — a fact-finding trial (after Anderson waived a jury) to determine this fact beyond a reasonable doubt. His sentence does not violate Erlinger or the constitution even if Erlinger applied. Reviewing this issue is not appropriate in this case because there is no violation of the constitution either way.

b. This Court Should Not Review Anderson's Incorrect Claim That the Trial Court Did Not Find the Existence of His Prior Conviction beyond a Reasonable Doubt.

Anderson continues to complain in this appeal that the trial court never found beyond a reasonable doubt that he was the person who was previously convicted of reckless driving. This Court should not review this false assertion. The record in

this case is plain that Anderson *never* affirmatively asserted that he was not the person previously convicted of reckless driving throughout his lengthy appellate process, and even on remand *never* declared under oath that he was not the person previously convicted of reckless driving originating from a DUI charge. That has never been the issue in this case. This is the second appeal stemming from Anderson's original, properly issued sentence for vehicular homicide and assault. The issue has *never* been whether Anderson has that reckless-driving conviction on his record. The question has *always* been *only* whether a jury must decide certain recidivist facts about that conviction.

Regardless, Anderson on remand *received the remedy he sought on appeal* — for a fact-finder to determine beyond a reasonable doubt whether his reckless-driving conviction originated as a DUI charge. On remand, Anderson waived a jury, the trial court held a bench trial, and the trial court, as fact-finder, determined beyond a reasonable doubt that Anderson

indeed has a prior conviction for reckless driving that originated as DUI. For Anderson to now claim that the determination was unfair is disingenuous. This Court should not review it.

c. Anderson Never Asserted That His Reckless Driving Conviction Was Invalid in a Statement of Additional Grounds.

Anderson also claims, confusingly, that the Court of Appeals "declined to address" a supposed argument Anderson made in a statement of additional grounds for review that his prior DUI charge, which resulted in the reckless-driving conviction, was invalid or improper. This Court should not entertain this puzzling claim because it has never been raised before.

Anderson's Statement of Additional Grounds For Review, filed in the Court of Appeals in this case, makes no mention of the argument he now claims that the Court of Appeals supposedly ignored. Anderson's statement of

additional grounds asserted two "grounds": (1) ineffective assistance of counsel for failing to object to "inadmissible blood evidence," and (2) that the Auburn Police Department suborned perjury. See Statement of Additional Grounds For Review.[2]

Anderson appears to be trying to shoehorn, as a new claim of error, vague comments about his prior conviction that he made during his *allocution* on remand.[3] This Court should not entertain Anderson's continued attempts to change the subject of this appeal. It should deny Anderson's petition for review.

[2] Filed November 16, 2023. The State has reviewed the entire docket in the Court of Appeals and has not found any other Statement of Additional Grounds For Review.

[3] It should be noted that during this allocution, Anderson *admitted* that he was previously charged with DUI and it was reduced to reckless driving. RP 148-50. He also admitted that *he* was convicted of that amended charge, not some other Nicholas Anderson.

2. THE PUBLISHED HOLDING THAT A TRIAL COURT HAS NO STATUTORY AUTHORITY TO EMPANEL A JURY TO DETERMINE WHETHER A DEFENDANT HAS A "PRIOR OFFENSE" UNDER RCW 9.94A.533(7) IS INCORRECT AND SHOULD BE REVIEWED.

Although review of the issues Anderson raises is not warranted, the State respectfully asks this Court to review the Court of Appeals' holding that a trial court has no statutory authority to empanel a jury to determine whether a defendant has a "prior offense" under RCW 9.94A.533(7). This published holding, based on a waived claim, was unnecessary to resolve Anderson's case and ignores relevant statutory provisions, court rules, and prior cases from similar contexts that have concluded otherwise. The conclusion lacks an appropriate depth of analysis and threatens to create significant confusion in other areas of criminal procedure by incorrectly implying that a trial court can never empanel a jury to decide any sentencing-related facts other than whether a defendant's underlying crime had

"aggravating circumstances" under RCW 9.94A.535(3). It should be reviewed and overruled.

The court's authority to empanel a jury is a question of law, which this Court reviews *de novo*. State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). Within constitutional limits, the legislature fixes the penalties for criminal offenses and sets the sentencing process. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986); State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975).

If the legislature is silent or ambiguous about the proper sentencing procedure, trial courts long have had statutory authority to infer the existence of procedures for enforcing the defendant's constitutional right to a jury trial and to implement legislative intent:

> When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, *if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of*

> *proceeding may be adopted which may appear most conformable to the spirit of the laws.*

RCW 2.28.150 (emphasis added). This statutory provision has been in place for more than a century. LAWS OF 1891, ch. 54, § 12; Pillatos, 159 Wn.2d at 485 (Chambers, J., concurring).

Court rules also provide the trial courts additional power to empanel juries to determine sentence enhancements. Under CrR 6.1(a), matters "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." The rules further specify the procedure by which juries can make special findings:

> The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict.

CrR 6.16(b).

Caselaw also has long supported that juries may be empaneled to enforce a defendant's jury-trial right even when no such procedures are explicitly incorporated into a particular

statute. In State v. Thomas, the jury's original finding of aggravating circumstances under RCW 10.95.020 was reversed for instructional error, but the defendant's first-degree murder conviction was affirmed. 166 Wn.2d 380, 384, 208 P.3d 1107 (2009) (Thomas II). On remand, the trial court empaneled a jury solely to consider the aggravating circumstances, a finding that would subject the defendant to a life-without-parole or death sentence. Id. at 392. Thomas appealed again, arguing that no statutory authority allowed the trial court to create a procedure for "empaneling aggravating factor juries." Id.

Citing to CrR 6.1(a), this Court concluded that "the power to empanel a jury to consider aggravating factors is a court mandated component of the power to hear cases 'required to be tried by a jury' and not a procedure crafted out of 'whole cloth' because a defendant in a criminal trial has the right to have a jury determine issues of fact." Thomas II, 166 Wn.2d at 393. This Court recognized that if it were to determine that the trial court lacked authority to empanel a jury on the aggravating

circumstances outlined in RCW 10.95, then it would have "to say the court had no power to uphold Thomas's constitutional right to a jury." Id. at 394. This Court dismissed Thomas's argument because courts have the inherent authority to enforce constitutional rights. Id.

In sum, if Anderson had a constitutional right to a jury determination of whether he had a "prior offense" under RCW 9.94A.533(7), i.e., he had a reckless-driving conviction that was originally charged as DUI, then RCW 2.28.150, CrR 6.1(a), and CrR 6.16(b) authorized the trial court to empanel a jury to decide the question. See State v. Nguyen, 134 Wn. App. 863, 870, 142 P.3d 1117 (2006) (recognizing court's inherent power to empanel juries to determine sentencing facts in the absence of explicit statutory authority to the contrary).

The Court of Appeals' reasoning here is simplistic and flawed. The opinion is grounded in an erroneous assumption that the sentencing enhancement at issue — a two-year *adjustment to the standard range* — increased the defendant's

sentence *above the standard range* like the aggravating factors found in the exceptional-sentencing statute, RCW 9.94A.535. Anderson III, 552 P.3d at 809 (citing to RCW 9.94A.535(3) and its "exclusive list" of factors that can be submitted to a jury and used to support a sentence above the standard range).

But the sentencing adjustment in RCW 9.94A.533(7) is not an "aggravating factor" that subjects a defendant to the possible imposition of an exceptional sentence *above* the standard range; it operates instead to increase the standard range itself. See State v. Simms, 171 Wn.2d 244, 250-51, 250 P.3d 107 (2011) (application of the enhancements in RCW 9.94A.533 result in *adjustments* to the standard range, not exceptional sentences *outside* the standard range). The opinion's reference to the "exclusive list" of aggravating factors found in RCW 9.94A.535 was thus inapt.

Indeed, the Court of Appeals ignored prior caselaw, presented by the State in its briefing, upholding a trial court's authority to empanel juries on remand to determine sentencing

enhancements under RCW 9.94A.533 — the very statute under which Anderson's adjustment fell. In State v. Reyes-Brooks, the Court of Appeals affirmed that when a firearm enhancement under RCW 9.94A.533 is reversed due to instructional error, the trial court may empanel a second jury upon remand to consider the enhancement alone. 165 Wn. App. 193, 202, 267 P.3d 465 (2011), modified on remand as noted at 171 Wn. App. 1028 (2012).

Reyes-Brooks found persuasive the reasoning in Thomas II that the constitutional right to a jury trial and relevant statutes and court rules grant inherent authority to trial courts to empanel juries to consider sentencing factors. Reyes-Brooks, 165 Wn. App. at 203. Reyes-Brooks also looked to the legislative-intent statement accompanying the "Blakely[4]-fix" statute, RCW 9.94A.537 — the very statute relied on by the Court of Appeals here to conclude that a jury *could not* be

[4] Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

empaneled. In that statute, the legislature declared its intent "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 (cited with emphasis added in Reyes-Brooks, 165 Wn. App. at 205-06).

Reyes-Brooks relied on that "sweeping use of broad language" to support its decision to empanel a new jury to consider a firearm enhancement under RCW 9.94A.533. 165 Wn. App. at 206. The court stated, "While the statutes cited apply only to certain aggravating factors [in RCW 9.94A.535(3)], the legislature's statement *expresses a guiding public policy applicable to sentence enhancements generally*." Id. (emphasis added). The Court of Appeals here erroneously cited to RCW 9.94A.537 to conclude that a jury could not be empaneled on remand while ignoring the legislature's clear statement of public policy related to sentencing enhancements generally.

The lower court's opinion relied solely on State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), to apparently conclude that trial courts lack inherent authority to empanel juries to decide *any* sentencing enhancement other than the "exclusive" aggravating factors outlined in RCW 9.94A.535(3). Anderson III, 552 P.3d at 809. In so doing, the court ignored the marked distinction between the sentencing adjustment in Anderson's case and the former statutory exceptional-sentencing scheme at issue in Hughes.

In Hughes, the court construed the pre-Blakely version of the exceptional-sentencing statutes and held that a trial court does not have authority to judicially rewrite a sentencing procedure when the one explicitly crafted by the legislature is determined to be unconstitutional. Prior to Blakely, supra, the Sentencing Reform Act (SRA) explicitly directed judges to make the necessary findings relating to aggravating factors for exceptional sentences; it did not include any provision allowing a jury to determine such facts. Former RCW 9.94A.535 (LAWS

OF 2003, ch. 267, § 4 (eff. Jul. 27, 2003)). After Blakely declared judicial fact-finding of aggravating circumstances unconstitutional, Hughes concluded that the statute did not authorize the trial court to empanel a jury on remand because to do so would be contrary to the statute's explicit language directing judges to make the necessary findings. Hughes, 154 Wn.2d at 149.

But the adjustment at issue here did not derive from a statute where a legislatively-created procedure directing the judge to make factual findings was found unconstitutional and the court was 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). The opinion's conclusion that RCW 9.94A.535 specifies *exclusive* sentencing facts for which a trial court has authority to empanel a jury on remand is untenable. See Nguyen, 134 Wn. App. at 871 (rejecting

Hughes' holding that no procedure allowed for a jury to find an enhancement under RCW 9.94A.533 or that one could not be judicially created).

RCW 9.94A.533(7) directs that "an additional two years shall be added to the standard sentence range" for someone convicted of vehicular homicide if they have a "prior offense as defined in RCW 46.61.5055," including a reckless-driving conviction originally charged as DUI. The statute is silent as to who must determine this limited prior-conviction fact. Unlike the pre-Blakely exceptional-sentencing statute, the statute does not require that a *judge* find the facts necessary to impose the two-year adjustment here.

Consistent with the above analysis, when a defendant has a constitutional right to a jury trial and there is no contradictory statutory language or intent, trial courts have the inherent authority to empanel juries to determine sentencing facts. The Court of Appeals' opinion did not consider any of the above analysis, though the State presented it thoroughly. See Brief of

Respondent. The published holding threatens the reasoning of cases such as Thomas II and Reyes-Brooks with no persuasive reasoning of its own. This Court should review this holding and conclude that it is incorrect.

Moreover, this Court should review the holding because it was entirely unnecessary to resolve Anderson's case. Not only did Anderson fail to preserve the claim, and thus waive it, but there was no reason to decide the issue when the Court of Appeals decided that a sentencing judge can determine this fact of conviction under RCW 9.94A.533(7), making a jury trial unnecessary (not to mention Anderson waived a jury). It thus did not matter whether the trial court had authority to empanel a jury. The holding, which threatens to affect many other cases, was not only incorrect, it was unnecessary. It should be reviewed and overruled.

Lastly, this Court has accepted review of this issue before, though it did not decide it. In State v. Arthur Idowu Thomas, the issue was whether the trial court lacked authority to empanel a second jury solely for the purpose of considering a firearm sentence-enhancement allegation when the first jury convicted Thomas of the crime but was unable to reach a unanimous verdict on the firearm allegation. No. 74733-9-I (unpublished, November 20, 2017), 2017 WL 5565659 at *1, rev. dismissed and case remanded on other grounds, 425 P.3d 517. Thomas had argued, much like Anderson does here, "that absent a statute directly authorizing the empaneling of a new jury, the trial court exceeded its authority and his sentence must be reversed." Id. at *2.

The Court of Appeals in that case followed the same reasoning as outlined above, strongly relying on Reyes-Brooks and its consideration of the legislative intent in the Blakely-fix statute, concluding that "Thomas offers no persuasive reason why we should reject the Reyes-Brooks reasoning that trial

courts possess the authority to empanel a new jury in these circumstances," and that Thomas's argument was "incompatible with" Thomas II and its focus "on broad authority provided by court rules rather than tying the holding to a specific statute." 2017 WL 5565659 at *1-*3. The lower court noted this Court's emphasis that under CrR 6.1(a), "the power to empanel a jury to hear aggravating factors is a court mandated component of the power to hear cases 'required to be tried by jury.'" Id. at *3.

However, after accepting review in Arthur Idowu Thomas, this Court asked the State for additional briefing about the circumstances of the trial court's discharging of the jury. The State conceded after further review that Thomas's original jury had been improperly discharged such that jeopardy terminated as to the enhancement and Thomas's subsequent retrial was improper for that reason. Thus, the case was not a

proper vehicle to decide the issue of the trial court's statutory authority to empanel a second jury. Review was dismissed as improvidently granted and the case was remanded without deciding the issue. State v. Thomas, Supreme Court No. 95374-1 (Motion To Dismiss Review As Improvidently Granted And Remand To Trial Court To Dismiss Enhancement).

Anderson's case, however, presents just such a proper opportunity. This hastily considered and incorrect published opinion should be reviewed and overruled.

F. CONCLUSION

The State respectfully asks that Anderson's petition for review be denied. Instead, this Court should grant review of the Court of Appeals' holding as discussed in Section E2 above.

This document contains 4,997 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 4th day of September, 2024.

Respectfully submitted,

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