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**H**

Court of Appeals of Washington,  
 Division 2.  
 In the Matter of PERSONAL RESTRAINT OF  
**Joshua Dean SCOTT**, Petitioner.  
**No. 34686-9-II.**

March 10, 2009.

**Background:** Petitioner's convictions in the Pierce County Superior Court, [Grant L. Anderson](#) and Marywave Van Deren, JJ., of first-degree robbery and first-degree possession of stolen property, with firearm enhancements, were affirmed at [116 Wash.App. 1053, 2003 WL 1986423](#), and petitioner sought relief from personal restraint.

**Holdings:** The Court of Appeals, [Quinn-Brintnall](#), J., held that:

- (1) time bar on personal restraint petition did not operate, where judgment and sentence was facially invalid, and  
 (2) petitioner was entitled to relief from firearm enhancements imposed based on trial court's misstatement of jury verdict.

Petition granted.

West Headnotes

**[1] Habeas Corpus 197 ↪764**

[197](#) Habeas Corpus  
[197III](#) Jurisdiction, Proceedings, and Relief  
[197III\(C\)](#) Proceedings  
[197III\(C\)4](#) Conclusiveness of Prior Determinations

[197k764](#) k. Matters Determined on Appeal. [Most Cited Cases](#)

A personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue.

**[2] Habeas Corpus 197 ↪764**

[197](#) Habeas Corpus  
[197III](#) Jurisdiction, Proceedings, and Relief  
[197III\(C\)](#) Proceedings  
[197III\(C\)4](#) Conclusiveness of Prior Determinations

[197k764](#) k. Matters Determined on Appeal. [Most Cited Cases](#)

Determination on direct appeal of sufficiency of amended information, against petitioner's appellate argument that amended information did not give him adequate notice of a firearm enhancement, did not preclude petitioner from raising in personal restraint petition claim that judgment and sentence misstated the jury's verdict on firearm enhancement.

**[3] Habeas Corpus 197 ↪447**

[197](#) Habeas Corpus  
[197II](#) Grounds for Relief; Illegality of Restraint  
[197II\(A\)](#) Ground and Nature of Restraint  
[197k447](#) k. Deprivation of Fundamental or Constitutional Rights; Miscarriage of Justice. [Most Cited Cases](#)

**Habeas Corpus 197 ↪764**

[197](#) Habeas Corpus  
[197III](#) Jurisdiction, Proceedings, and Relief  
[197III\(C\)](#) Proceedings  
[197III\(C\)4](#) Conclusiveness of Prior Determinations

[197k764](#) k. Matters Determined on Appeal. [Most Cited Cases](#)

Personal restraint petitioner as to whom other arguments have been raised and rejected on direct appeal may raise new issues in personal restraint petition, including both errors of constitutional magnitude that result in actual and substantial prejudice and nonconstitutional errors that constitute a fundamental defect which inherently results in a complete miscarriage of justice.

**[4] Habeas Corpus 197 ↪665.1**

[197](#) Habeas Corpus  
[197III](#) Jurisdiction, Proceedings, and Relief

[197III\(C\)](#) Proceedings  
[197III\(C\)1](#) In General  
[197k665](#) Petition or Application  
[197k665.1](#) k. In General. [Most Cited](#)

[Cases](#)

Regardless of whether personal restraint petitioner bases his challenges on constitutional or nonconstitutional error, he must support his petition with facts or evidence on which his claims of unlawful restraint are based and not rely solely on conclusory allegations.

[151 Habeas Corpus 197](#) ↪603

[197](#) Habeas Corpus  
[197III](#) Jurisdiction, Proceedings, and Relief  
[197III\(A\)](#) In General  
[197k603](#) k. Laches or Delay. [Most Cited](#)

[Cases](#)

Time bar on personal restraint petition did not operate, where judgment and sentence imposing firearm enhancements was facially invalid; sentencing court's indication that jury found that defendant was armed with a firearm misstated verdict wherein jury found that defendant was armed with a deadly weapon, and sentencing court did not enter a finding that the weapon used was a firearm. [West's RCWA 10.73.090, 10.73.100.](#)

[161 Habeas Corpus 197](#) ↪791

[197](#) Habeas Corpus  
[197III](#) Jurisdiction, Proceedings, and Relief  
[197III\(C\)](#) Proceedings  
[197III\(C\)5](#) Determination and Disposition;

Relief

[197k791](#) k. In General. [Most Cited](#)

[Cases](#)

Defendant filing personal restraint petition was entitled to relief from firearm enhancements, where sentencing court's indication that jury found that defendant was armed with a firearm misstated verdict wherein jury found that defendant was armed with a deadly weapon, and sentencing court did not enter a finding that the weapon used was a firearm. [West's RCWA 9.94A.310](#) (2001).

[171 Habeas Corpus 197](#) ↪603

[197](#) Habeas Corpus

[197III](#) Jurisdiction, Proceedings, and Relief  
[197III\(A\)](#) In General  
[197k603](#) k. Laches or Delay. [Most Cited](#)

[Cases](#)

Either a constitutional or nonconstitutional error can render a judgment and sentence facially invalid for purposes of time bar on personal restraint petitions. [West's RCWA 10.73.090.](#)

[181 Habeas Corpus 197](#) ↪603

[197](#) Habeas Corpus  
[197III](#) Jurisdiction, Proceedings, and Relief  
[197III\(A\)](#) In General  
[197k603](#) k. Laches or Delay. [Most Cited](#)

[Cases](#)

A judgment and sentence is "facially invalid," for purposes of time bar on personal restraint petitions, if it evidences the invalidity without further elaboration, but courts may look at documents other than the judgment and sentence, including charging documents and verdict forms, to determine facial invalidity.

[191 Courts 106](#) ↪100(1)

[106](#) Courts  
[106II](#) Establishment, Organization, and Procedure  
[106II\(H\)](#) Effect of Reversal or Overruling  
[106k100](#) In General  
[106k100\(1\)](#) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)  
United States Supreme Court decision in [Blakely v. Washington](#) did not apply upon collateral review of case that was final when [Blakely](#) was decided.

[1101 Courts 106](#) ↪100(1)

[106](#) Courts  
[106II](#) Establishment, Organization, and Procedure  
[106II\(H\)](#) Effect of Reversal or Overruling  
[106k100](#) In General  
[106k100\(1\)](#) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)  
United States Supreme Court decision in [Blakely v. Washington](#) would apply on resentencing of defendant whose sentence, final when [Blakely](#) was decided, was vacated on collateral review.  
\*\*986 [Suzanne Lee Elliott](#), Attorney at Law, Seattle, WA, for Petitioner.

Michelle Hyer, Pierce County Prosecutor, Tacoma, WA, for Respondent.

QUINN-BRINTNALL, J.

\*215 ¶ 1 Joshua D. Scott seeks relief from personal restraint after the sentencing court imposed two 60-month consecutive firearm enhancements on two counts of first degree robbery and one 36-month firearm enhancement on one count of first degree possession of stolen property. In the amended information, the State notified Scott of its intention to invoke the firearm sentence enhancement provisions of former [RCW 9.94A.310](#) (1999). But it submitted deadly weapon special verdict forms to the jury rather than firearm enhancement special verdict forms. The jury returned the special verdict forms, finding that Scott was armed with a deadly weapon during the commission of the charged offenses. When Scott was sentenced, the law allowed the judge, rather than the jury, to enter a finding that the deadly weapon at issue was a firearm, but the sentencing court did not do so. Accordingly, the record does not support the firearm enhancement provisions of Scott's judgment and the sentence enhancement portion of Scott's judgment and sentence is invalid on its face. We grant the petition and remand with directions \*216 to correct Scott's \*\*987 judgment and sentence by imposing deadly weapon enhancements in place of the firearm enhancements.

FACTS

¶ 2 On September 16, 2000, Scott and Douglas James-Anderson parked a stolen Chevrolet Blazer in front of Cascade Custom Jewelers, entered the store, threatened to kill two employees with a rifle, and tied the employees' hands behind their backs.<sup>FNI</sup> Scott and James-Anderson stole about \$80,000 worth of goods, including jewelry, diamonds, cash, three guns, and a wallet from a store employee's pocket. The police arrested Scott and James-Anderson shortly after they left the jewelry store, recovering two rifles and four pistols from the Blazer. Scott confessed.

<sup>FNI</sup> Unless otherwise noted, all facts are taken from the opinion in Scott's direct appeal, [State v. James-Anderson and Scott, noted at 116 Wash.App. 1053, 2003 WL 1986423 \(2003\)](#). Additionally, there are no

Clerk's Papers for PRPs, so all citations to documents are to the attachments to the parties' briefs.

¶ 3 The State charged Scott by amended information with two counts of first degree robbery (counts I and II), first degree unlawful possession of a firearm (count IV), first degree possession of stolen property (count V), two counts of possession of a stolen firearm (counts VI and VII), and two counts of firearm theft (counts VIII and IX). As relevant here, the amended information included the following sentencing enhancements for first degree robbery (counts I and II):

[T]he defendant or an accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon, to-wit: a rifle, that being a firearm as defined in [former] [RCW 9.41.010](#) [1997], and invoking the provisions of [former] [RCW 9.94A.310](#) and adding additional time to the presumptive sentence as provided in [former] [RCW 9.94A.370](#) [1999].

Suppl. Br. of Resp't, App. B. The information for count V also charged that Scott possessed

\*217 stolen property other than a firearm, to-wit: a 1990 Chevrolet Blazer, of a value in excess of \$1,500.00, belonging to Esperanza Mattos, with intent to appropriate said property to the use of any person other than the true owner or person entitled thereto, that being a firearm as defined in [former] [RCW 9.41.010](#), and invoking the provisions of [former] [RCW 9.94A.310](#) and adding additional time to the presumptive sentence as provided in [former] [RCW 9.94A.370](#).

Suppl. Br. of Resp't, App. B.

¶ 4 The trial court instructed the jury on deadly weapon sentencing enhancements, but it did not instruct the jury on firearm enhancements.

¶ 5 The jury entered guilty verdicts on counts I, II, IV, V, VI, and VII and not guilty verdicts on counts VIII and IX. The jury also returned special verdicts for the sentencing enhancements, finding that Scott was "armed with a deadly weapon" when he committed first degree robbery (counts I and II) and first degree possession of stolen property (count V).

¶ 6 The sentencing court wrote on Scott's judgment and sentence, "as charged in the *Amended* Information[, a] special verdict/finding for use of *firearm* was returned on Count(s) I, II, V [RCW 9.94A.602](#), .510." Suppl. Br. of Resp't, App. A (emphasis added). The sentencing court imposed two 60-month firearm sentencing enhancements on counts I and II and a 36-month firearm enhancement on count V, each to run consecutively.

¶ 7 Scott filed a direct appeal with this court, arguing in part that count V of the amended information did not give him adequate notice of a firearm enhancement because it omitted the critical words "and in the commission thereof the defendant was armed with a firearm, to wit: a rifle." [James-Anderson, 116 Wash.App. 1053, 2003 WL 1986423, at \\*9](#). We applied the [Kjorsvik](#)<sup>FN2</sup> test for post-verdict challenges to the sufficiency of an information and held that the information was sufficient to notify Scott \*218 of a firearm enhancement. \*\*988 [James-Anderson, 116 Wash.App. 1053, 2003 WL 1986423, at \\*10](#). We also reversed Scott's convictions for possession of stolen firearms (counts VI and VII) because the evidence was insufficient to support the element that Scott knew the firearms in the Blazer were stolen. [James-Anderson, 116 Wash.App. 1053, 2003 WL 1986423, at \\*10](#).

[FN2. State v. Kjorsvik, 117 Wash.2d 93, 108-09, 812 P.2d 86 \(1991\).](#)

¶ 8 Scott was resentenced on April 9, 2004, and did not appeal that judgment and sentence. He filed this personal restraint petition (PRP) over two years later, on April 11, 2006.

## ANALYSIS

### PRP Standards

[\[1\]\[2\]](#) ¶ 9 As a threshold matter, we note that a personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue. [In re Pers. Restraint of Taylor, 105 Wash.2d 683, 688, 717 P.2d 755 \(1986\)](#). On direct appeal, Scott argued that count V of the amended information did not give him adequate notice of a firearm enhancement be-

cause it omitted the critical words "and in the commission thereof the defendant was armed with a firearm, to wit: a rifle." [James-Anderson, 116 Wash.App. 1053, 2003 WL 1986423, at \\*9](#). We held that the information was sufficient to charge a firearm enhancement. [James-Anderson, 116 Wash.App. 1053, 2003 WL 1986423, at \\*10](#). We did not decide the issue before us here, whether the judgment and sentence misstated the jury's verdict. Accordingly, the prior direct appeal which addressed a substantially different issue, does not preclude the relief from the erroneous firearm enhancement on count V requested here. See [In re Taylor, 105 Wash.2d at 688, 717 P.2d 755](#).

[\[3\]\[4\]](#) ¶ 10 The petitioner may raise new issues, including both errors of constitutional magnitude that result in actual and substantial prejudice and nonconstitutional errors that \*219 constitute "a fundamental defect which inherently results in a complete miscarriage of justice." [In re Pers. Restraint of Cook, 114 Wash.2d 802, 812, 792 P.2d 506 \(1990\)](#); [In re Pers. Restraint of Mercer, 108 Wash.2d 714, 721, 741 P.2d 559 \(1987\)](#); [In re Pers. Restraint of Hews, 99 Wash.2d 80, 87, 660 P.2d 263 \(1983\)](#). Regardless of whether the petitioner bases his challenges on constitutional or nonconstitutional error, he must support his petition with facts or evidence on which his claims of unlawful restraint are based and not rely solely on conclusory allegations. [Cook, 114 Wash.2d at 813-14, 792 P.2d 506](#).

### Timeliness Of Scott's PRP

¶ 11 We must also determine whether Scott's PRP is timely.

[\[5\]\[6\]](#) ¶ 12 [RCW 10.73.090\(1\)](#) provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

A PRP is a collateral attack on a judgment. [RCW 10.73.090\(2\)](#). Scott's judgment and sentence became final on April 9, 2004, when his judgment was filed upon resentencing. See [RCW 10.73.090\(3\)\(a\)](#). Accordingly, when Scott filed the present petition on

April 11, 2006, more than one year had elapsed and we cannot review petitioner's claims unless either (1) the time bar does not apply because his judgment and sentence is facially invalid, (2) the judgment and sentence was not rendered by a court of competent jurisdiction, or (3) one or more of the six exceptions to the time bar enumerated in [RCW 10.73.100](#) <sup>FN3</sup> applies. **\*\*989** We hold that the **\*220** time bar does not operate here because Scott's judgment and sentence is facially invalid.

[FN3. RCW 10.73.100](#) provides:

The time limit specified in [RCW 10.73.090](#) does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
- (3) The conviction was barred by double jeopardy under [Amendment V of the United States Constitution](#) or [Article I, section 9 of the state Constitution](#);
- (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- (5) The sentence imposed was in excess of the court's jurisdiction; or
- (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legis-

lative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

[\[7\]\[8\]](#) ¶ 13 Either a constitutional or nonconstitutional error can render a judgment and sentence facially invalid under [RCW 10.73.090](#). *In re Pers. Restraint of Goodwin*, 146 Wash.2d 861, 866, 50 P.3d 618 (2002). A judgment and sentence is facially invalid if it evidences the invalidity without further elaboration. *Goodwin*, 146 Wash.2d at 866, 50 P.3d 618. But courts may look at documents other than the judgment and sentence, including charging documents and verdict forms, to determine facial invalidity. See *In re Pers. Restraint of Richey*, 162 Wash.2d 865, 870-72, 175 P.3d 585 (2008); *In re Pers. Restraint of Hemenway*, 147 Wash.2d 529, 532, 55 P.3d 615 (2002).

¶ 14 Here, the jury was instructed on deadly weapon sentencing enhancements and returned special verdicts finding that Scott was "armed with a deadly weapon" when he committed the crimes. Scott's judgment and sentence misstates the jury's special verdict by (1) stating that the jury found that Scott was armed with a firearm (rather than a deadly weapon) when he committed the crimes and (2) imposing firearm enhancements without a jury or judicial finding that Scott was armed with a firearm. Accordingly, [RCW 10.73.090](#) does not bar Scott's petition because the judgment and sentence evidences, without further elaboration, that firearm enhancements were imposed on deadly weapon special verdicts and, thus, the judgment and **\*221** sentence is facially invalid. *State v. Recuenco*, 163 Wash.2d 428, 439, 180 P.3d 1276 (2008) (sentencing court commits error by imposing a sentence that the jury's verdict does not authorize).

[\[9\]](#) ¶ 15 We note that when Scott was sentenced, case law allowed a trial court to impose a firearm enhancement on a jury's deadly weapon special verdict. See, e.g., *State v. Meggyesy*, 90 Wash.App. 693, 958 P.2d 319, review denied, 136 Wash.2d 1028, 972 P.2d 465 (1998), abrogated by *State v. Recuenco*, 154 Wash.2d 156, 110 P.3d 188 (2005), *aff'd*, 163 Wash.2d 428, 180 P.3d 1276; *State v. Rai*, 97 Wash.App. 307, 310-11, 983 P.2d 712 (1999), abrogated by *Recuenco*, 154 Wash.2d 156, 110 P.3d 188; *State v. Olney*, 97 Wash.App. 913, 987 P.2d 662

(1999), *abrogated by* [Recuenco](#), 154 Wash.2d 156, 110 P.3d 188. In the relevant cases, the trial court, rather than the jury, found that the deadly weapon that the jury had found the defendant used in the crime was in fact a firearm.<sup>FN4</sup> [Meggyesy](#), 90 Wash.App. at 709, 958 P.2d 319 (“if the deadly weapon finding is a sentencing factor, the sentencing court may make the required [firearm] finding”); [Rai](#), 97 Wash.App. at 311, 983 P.2d 712 (upon deadly weapon special verdict, sentencing court judge is *required* to make independent finding regarding whether the weapon was a firearm); [Olney](#), 97 Wash.App. at 918-19, 987 P.2d 662 (sentencing court is allowed to make factual finding of firearm). But courts have long been required to memorialize their factual findings in a written document. *See* [RCW 10.46.070](#); [CR 52\(a\)](#); [State v. Wilks](#), 70 Wash.2d 626, 628-29, 424 P.2d 663 (1967).

<sup>FN4</sup>. Although such judicial fact-finding is now prohibited under [Blakely v. Washington](#), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and its progeny, that case law does not apply retroactively to cases that were final when [Blakely](#) was decided. [State v. Evans](#), 154 Wash.2d 438, 457, 114 P.3d 627, cert. denied, 546 U.S. 983, 126 S.Ct. 560, 163 L.Ed.2d 472 (2005). Scott's judgment and sentence became final on April 9, 2004, when his judgment was filed upon resentencing. The United States Supreme Court decided [Blakely](#) on June 24, 2004, two months after Scott's case was final and, therefore, [Blakely](#) does not apply retroactively to Scott's collateral review. *See* [Evans](#), 154 Wash.2d at 457, 114 P.3d 627.

**\*\*990** ¶ 16 Here, the sentencing court did not enter a finding that the weapon Scott used was a firearm. Instead, the court's notation on the judgment and sentence indicated that it believed the jury had made such a finding. The trial **\*222** court wrote on Scott's judgment and sentence “as charged in the *Amended Information*[, a] special verdict/finding for use of firearm was returned on Count(s) I, II, V [RCW 9.94A.602](#), .510.” Suppl. Br. of Resp't, App. A. This notation misstates the jury's verdict, in which it found only that Scott was armed with a deadly weapon. Other sections of the judgment and sentence clarify that “the court finds” other facts and that the court, if it found reasons justifying an exceptional sentence,

would attach written findings of fact and conclusions of law.

¶ 17 Although on April 9, 2004, the date Scott was resentenced, the sentencing court could have found that Scott was armed with a firearm, it did not do so. Instead, the judgment and sentence misrepresents the jury's special verdict. This error is contrary to the jury's verdict and renders the judgment and sentence facially invalid. [State v. Robinson](#), 104 Wash.App. 657, 664, 17 P.3d 653 (holding judgment and sentence valid on its face in light of similar challenge because the judgment and sentence following a guilty plea “states that the court made a finding on the deadly weapon enhancement”), *review denied*, 145 Wash.2d 1002, 35 P.3d 380 (2001).

[10] ¶ 18 Accordingly, we vacate Scott's judgment and sentence and remand to the trial court with directions that it correct the erroneous firearm enhancements. The resentencing court shall impose the deadly weapon enhancements that the jury's special verdicts authorized and strike the firearm enhancements the trial court erroneously imposed.<sup>FN5</sup>

<sup>FN5</sup>. On counts I and II, Scott was sentenced to two 60-month firearm enhancements, which should be replaced with two 24-month deadly weapon enhancements. Former [RCW 9.94A.310](#)(4)(a). On count V, Scott was sentenced to a 36-month firearm enhancement, which should be replaced with a 12-month deadly weapon enhancement. Former [RCW 9.94A.310](#)(4)(b). All deadly weapon enhancements must run consecutively. Former [RCW 9.94A.310](#)(4)(e). Further, the firearm sentencing enhancements were “served in total confinement,” meaning that Scott was not eligible for good time while he served them. Former [RCW 9.94A.310](#)(3)(e). We leave it to the parties and the Department of Corrections to resolve whether Scott's good time should be reassessed in light of the erroneous sentence. We also note that, because this opinion vacates Scott's prior judgment and sentence, [Blakely](#) and its progeny apply at resentencing and, therefore, the resentencing court may not employ judicial fact-finding in order to sentence Scott to firearm enhancements. *See* [Evans](#), 154 Wash.2d at 457, 114

202 P.3d 985  
149 Wash.App. 213, 202 P.3d 985  
(Cite as: 149 Wash.App. 213, 202 P.3d 985)

Page 7

[P.3d 627](#).

\*223 ¶ 19 Petition granted.

We concur: [ARMSTRONG, J.](#), [PENNYAR, A.C.J.](#)  
Wash.App. Div. 2,2009.  
In re Personal Restraint of Scott  
149 Wash.App. 213, 202 P.3d 985

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