No. 82363-4
(consol. w/83923-9)

MADSEN, C.J. (concurring)—I agree that the personal restraint petitions should be dismissed in these cases. However, unlike the majority, I would address the petitioners' claims that the procedural time bar to filing personal restraint petitions does not bar their petitions.

First, each relies on RCW 10.73.090(1) to argue that his judgment and sentence is invalid on its face and therefore the one-year time bar does not apply. As I explained in my concurrence in *In re Personal Restraint of Coats*, 173 Wn.2d 123, 144, 267 P.3d 324 (2011) (Madsen, C.J., concurring), I believe that the plain language of RCW 10.73.090(1) and the historical meaning of the words "valid on its face" means that in order to avoid the one-year bar on collateral attack of a judgment, a petitioner must claim a defect that actually appears on the face of the document. If no such defect appears on the face of the judgment and sentence, then the time bar applies unless an exception in RCW 10.73.100

applies. A court should not consider the special verdict forms returned by juries when the court considers the issue of whether invalidity respecting sentence enhancements appears on the face of the judgment and sentence.

In each case, there is no invalidity on the face of the judgment and sentence and, accordingly, no exemption from the time bar under RCW 10.73.090(1). In petitioner Ronnie Jackson's case, the sentencing court affirmatively checked a box next to "[a] special verdict/finding for use of a firearm was returned on Counts I, II, and III." State's Resp. to Pet'r's Third Personal Restraint Pet., App. A (J. & Sentence at 2). The judgment and sentence is otherwise consistent, except in one other finding that says that the jury returned a deadly weapon special verdict with regard to the attempted murder count. The court imposed a firearm sentence enhancement on each count.

In petitioner Salvador Rivera's case, the judgment and sentence is consistent throughout that a deadly weapon special verdict was returned and otherwise refers to petitioner as having been armed with a deadly weapon. The sentencing court imposed a firearm sentence enhancement.

I would conclude that neither judgment and sentence shows invalidity on the face of the document. Case law that developed after these petitioners were sentenced does not apply to require that only a deadly weapon sentence enhancement could be imposed if that is what the jury's special verdict provided. Among the cases are *State v. Recuenco* (*Recuenco* I), 154 Wn.2d 156, 110 P.3d 188 (2005), and *State v. Recuenco* (*Recuenco* III), 163 Wn.2d 428, 180 P.3d 1276 (2008), which the majority holds do not apply

retroactively. Accordingly, that a judgment and sentence shows return of a deadly weapon finding and imposition of a firearm sentence enhancement does not constitute invalidity that appears on the face of the judgment and sentence.

The petitioners also rely on exceptions in RCW 10.73.100. Each maintains that there has been a material intervening change in the law that applies retroactively, and this exempts his petition from the time bar. RCW 10.73.100(6). Petitioners rely on *Recuenco* I and *Recuenco* III. The claims fail because, as the majority holds and contrary to the arguments, these cases do not apply retroactively.[1] Accordingly, the exception in RCW 10.73.100 does not apply.

I concur in the majority's result that the personal restraint petitions must be dismissed.

[1] Because this claim fails, it is unnecessary to address Mr. Jackson's second claim under RCW 10.73.100. The best that could happen is that he has filed a mixed petition that must be dismissed.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: