No. 82567-0

ALEXANDER, J. (dissenting)—I dissent. The issue in this case is whether a special "firearm" verdict that a jury rendered in 1996 is a "deadly weapon" verdict. This issue is particularly significant here because if it is considered a "deadly weapon" verdict, it gives Schawn Cruze a third strike and his sentence of life imprisonment without the possibility of parole must stand. The majority, after engaging in a statutory interpretation analysis, concludes that even though Cruze had been convicted by the jury specifically for use of a firearm, pursuant to the definition of "deadly weapon" in former RCW 9.94A.125 (1983),[1] the jury's verdict was a "deadly weapon" verdict and not a "firearm" verdict. This conclusion is incorrect because it fails to recognize Cruze's rights to due process and to a jury trial, pursuant to our decisions in *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008), and *State v. Williams-Walker,* 167 Wn.2d 889, 225 P.3d 913 (2010).

Key to this case is former RCW 9.94A.030(23)(t) (1996), *recodified as* RCW 9.94A.030(29)(t), which defines a "'[m]ost serious offense'" as "[a]ny . . . felony with a

[1] *Recodified as* RCW 9.94A.825.

deadly weapon *verdict* under [former] RCW 9.94A.125." (Emphasis added.) Cruze, the record shows, was found guilty of possession of methamphetamine, a felony, and the jury rendered a special verdict, in which it answered "yes" to the following question: "Was the defendant Schawn James Cruze armed with a firearm at the time of the commission of the crime?" Pers. Restraint Pet. at App. A.

It is clear that at the time Cruze was sentenced for the methamphetamine offense, the sentencing judge properly treated the finding as a "firearm" verdict for purposes of sentence enhancement. Now that we are concerned with sentencing for a subsequent felony, second degree assault, which the State asserts is a third strike, the State is contending that the "firearm" special verdict on the possession of methamphetamine charge was a "deadly weapon" special verdict. In my judgment, because the State, at its request, obtained a "firearm" verdict instead of a "deadly weapon" verdict, it cannot now establish, 14 years after the fact, that it is a "deadly weapon" verdict.

In *Recuenco*, we held that applying a sentence enhancement that was not found by the jury, despite it being implied in the conviction, was a violation of Recuenco's due process rights. *Recuenco*, 163 Wn.2d 428. There, Recuenco was charged with, and convicted of, second degree assault with a "deadly weapon" enhancement. We determined that Recuenco's due process rights were violated by the trial court when it imposed a "firearm" enhancement at sentencing rather than a "deadly weapon" enhancement. In doing so we said that "[a]n accused has a constitutionally protected

right to be informed of the criminal charge against him, so he will be able to prepare and mount a defense at trial." *Id*. at 440 (citing *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000)). Cruze, like Recuenco, was denied due process, i.e., his right to be informed of the "firearm" enhancement that the State claims it was seeking.

In another case, *Williams-Walker,* we held that not only must a jury find a sentence enhancement, it "also must specify the type of weapon used," and that "[a] sentence enhancement must not only be alleged, it also must be authorized by the jury in the form of a special verdict." *Williams-Walker*, 167 Wn.2d at 898, 900. The defendant there was convicted of first degree robbery and first degree murder and, similar to the defendant in *Recuenco*, the jury returned a finding by a "deadly weapon" special verdict. However, the defendant was sentenced as though the jury had returned a "firearm" special verdict. We held in *Williams-Walker*, as we had in *Recuenco*, that where a sentencing judge exceeds the sentence allowed by the jury verdict, the judge commits error and the accused must be resentenced. We specifically declined to hold that "guilty verdicts alone are sufficient to authorize sentence enhancements." *Id.* at 899.

In the instant case, the State could have sought a special verdict form that asked: "Was the defendant armed with a deadly weapon, to wit: a firearm at the time of the commission of the crime?" The State, however, chose not to pursue a "deadly weapon" verdict at the time of Cruze's 1996 proceedings, perhaps because it wanted the greater enhancement that flows from a "firearm" finding. To allow the State to now

change its position 14 years after the methamphetamine sentence is a violation of Cruze's due process rights and his right to a trial by jury. *See* Wash.Const. art. I, §§ 21-22.

In sum, Cruze was charged with possession of methamphetamine and his sentence was enhanced by the jury's "firearm" finding. The State never requested a "deadly weapon" enhancement, nor did the jury return a "deadly weapon" enhancement. Now, after the fact, the State is asserting that what the jurors reached was actually a "deadly weapon" verdict. This position finds no support in the cases cited above. Indeed, I believe it was a fundamental due process violation to convict Cruze of one offense and sentence him for another, a practice we have repeatedly held to be unconstitutional. *See Williams-Walker,* 167 Wn.2d 889; *Recuenco*, 163 Wn.2d 428; *see also State v. Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980) (holding that failure to give notice of a sentencing enhancement prior to trial was a due process violation); *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073 (1972) (stating that where a factor aggravates an offense and imposes a greater punishment, due process requires its presentation to a jury for consideration); *State v. Nass*, 76 Wn.2d 368, 456 P.2d 347 (1969) (holding that any factor that would enhance a sentence must be alleged prior to trial to allow defendant time to respond).

For the reasons stated above, I conclude that Cruze's due process rights and his right to a jury trial have been violated. Because the majority concludes otherwise, I respectfully dissent.

AUTHOR:
Justice Gerry L. Alexander

WE CONCUR:

Justice Richard B. Sanders