In the Matter of the Personal Restraint Petition of Scott (Joshua Dean)

No. 82951-9

C. JOHNSON, J. (dissenting)—The issue in this case, properly framed, is whether a judgment and sentence could ever be valid when a judge sentences someone for something the jury did not find. The answer to that question is, and should always be, no.

The lead opinion concludes correctly that we may consult the verdict forms to illuminate whether the defendant's judgment and sentence is valid on its face. The lead opinion then proceeds, however, to incorrectly apply the information the verdict forms disclose. It is, or at least should be, self-evident that a judge lacks authority to impose a sentence in excess of that legally authorized. Yet that is precisely what the judge in this case did. And the lead opinion, after consulting the verdict forms evidencing this

unauthorized act, concludes the trial court *did not* exceed its authority. This conclusion is vexing.

That the judgment and sentence in this case was final before *Recuenco* III is not dispositive of whether the trial court exceeded its authority, which it necessarily did when it sentenced the defendant for a crime not found by the jury. *State v. Recuenco*, 163 Wn.2d 428, 442, 180 P.3d 1276 (2008) (*Recuenco* III). Incredibly, the lead opinion concludes the defendant in this case is not entitled the "benefit" of our holding in *Recuenco* III. The lead opinion bases this conclusion on its view that our opinion in that case is a static point on a *Blakely* Sixth Amendment jurisprudential timeline. Because the defendant's judgment and sentence became final prior to *Recuenco* III, the lead opinion reasons, the principles supporting our holding in that case do not apply. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). This view is incorrect. In *Recuenco* III, we concluded the error occurred when "the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. The trial court simply exceeded its authority in imposing a

sentence not authorized by the charges." *Recuenco*, 163 Wn.2d at 442. In other words, we recognized that the error occurred after the jury verdict, that is, after the rights the Sixth Amendment protects had been upheld. *Recuenco*, 163 Wn.2d at 441. An error at sentencing, therefore, does not implicate the Sixth Amendment exclusively. I believe it is also a due process violation to convict a defendant of one offense and sentence for another. That such a violation existed prior to *Recuenco* III should not be remarkable or, in my opinion, even questionable. And our recognition of this type of violation in *Recuenco* III did not somehow make it "new."

"[A] careful review of our cases reveals that we have only found errors rendering a judgment invalid under RCW 10.73.090 where a court has in fact exceeded its statutory authority in entering the judgment or sentence." *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 135, 267 P.3d 324 (2011). The lead opinion's conclusion that a court does not exceed its authority by sentencing someone for something the jury did not find borders on absurdity. A judgment and sentence should always be invalid following such an act, regardless of when the judgment and sentence became final.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:
Gerry L. Alexander, Justice Pro Tem.

Richard B. Sanders, Justice Pro Tem.