

# Gator's Guns: The Greater the Error, the More Likely Remand Will Be to the Same Judge?

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**Gator's Guns: The Greater the Error, the More Likely Remand Will Be to the Same Judge?**

**By Catherine Smith**

*"Always Appealing" is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, P.S., a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.*

I spend a lot of time talking unhappy litigants out of appealing trial court decisions. This is part of my toolkit to educate potential appellants on the standard of review, the need to preserve potential error at the trial court, the difference between factual findings and legal conclusions, the strict limits on submitting new evidence on review, and the enforceability of a judgment that has not been stayed pending appeal.

But I have found that the ultimate buzzkill for a potential appellant with a viable legal issue is telling them that likely, even if a reversal is obtained, any remand will be to the same trial court judge who made the ruling the potential appellant wants to challenge.

From the perspective of an appellate lawyer — or of a trial or appellate judge — that makes perfect sense. The system is premised on the assumption that the trial court judge whose decision is reversed will on remand properly apply the law,

once the appellate court establishes or clarifies the legal principles relevant to the trial court's decision.

In his majority opinion in the recent Supreme Court decision in *State v. Gator's Custom Guns*, Justice Charles Johnson explained why the State's request to assign a different judge was denied. It was a Consumer Protection Act case that the trial court had dismissed on the ground that the statute prohibiting sale of large-capacity firearm magazines violated the Second Amendment.<sup>1</sup>

After concluding that large-capacity magazines are not "arms" implicating constitutional protections of the right to bear arms, the majority opinion considered the State's request for reassignment to a different judge, first noting the circumstances under which such a request may be made for the first time on appeal:

Parties generally seek reassignment to another judge through a motion for recusal in the trial court, but a party may also seek reassignment for the first time on appeal where, "for example, the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue."<sup>2</sup>

The majority opinion also noted that reassignment may be appropriate "where review of facts in the record shows the judge's impartiality might reasonably be questioned."<sup>3</sup> But where the appellate court's decision "limit[s] the trial court's discretion as to the issue that was appealed," the supreme court concluded that reassignment was not warranted:

Here, Judge Bashor's legal errors in determining that ESSB 5078 was unconstitutional are insufficient to warrant reassignment because our order that the statute is constitutional removes Judge Bashor's discretion as to the validity of ESSB 5078 for the remainder of the case, which will then relate only to consumer-protection enforcement.<sup>4</sup>

This recognition of when reassignment cannot be anticipated neatly highlights the ironic fact that a case presenting a "good" legal issue on appeal is less likely to be remanded to a different trial court judge. If the consequence of reversal limits the

trial court's discretion, it is likely the case will be returned to the same trial court judge.

Justice Johnson's opinion also flags a circumstance when reassignment often is appropriate — when a second (or third) appeal (and remand) is necessary because the first trial court judge reaches precisely the same result reversed on the first appeal:

In *Solis-Diaz*, we granted reassignment where the same judge that originally sentenced the defendant was assigned to resentence the defendant after an appeal, the judge imposed the same sentence at resentencing, and then a subsequent appeal required the same judge to resentence that same defendant a third time, because we found the record reflected the sentencing judge's "frustration and unhappiness at the Court of Appeals requiring him to address anew [the defendant's sentence]."5

I have previously written in this column about the appellate "guardrails" in place to help prevent or limit such "repeat" appeals. The substantive "fix" — the law of the case doctrine — is well-established and well-used; the procedural fix — a RAP 12.9 motion to recall the mandate — much less so.6 And the reluctance of many potential appellants to proceed with an appeal once they know any remand will likely be to the same trial court judge suggests that some litigants, at least, have little confidence that "the law" will govern any decision after reversal.

Nevertheless, Justice Johnson's cogent explanation of the reasons why remand of even the "best" appeal is usually to the same trial court judge in *Gator's Guns* was welcome.

*Catherine W. Smith is a principal in Smith Goodfriend. She founded the Washington Appellate Lawyers Association and is a Past President of the American Academy of Appellate Lawyers. She can be reached at [cate@washingtonappeals.com](mailto:cate@washingtonappeals.com).*

1 *State v. Gator's Custom Guns, Inc.*, \_\_ Wn.3d \_\_, \_\_ P.3d \_\_, 2025 WL 1337218 (May 8, 2025).

2 *Gator's Custom Guns*, 2025 WL 1337218 at \*6, quoting *State v. McEnroe*, 181 Wn.2d 375, 387, 333 P.3d 402 (2014) (footnotes omitted).

3 Gator's Custom Guns, 2025 WL 1337218 at \*6, quoting State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017).

4 Gator's Custom Guns, 2025 WL 1337218 at \*6.

5 Gator's Custom Guns, 2025 WL 1337218 at \*6, quoting Solis-Diaz, 187 Wn.2d at 541 (brackets in original).

6 Catherine Smith, "Once More, With Feeling" — Law of the Case and Motions to Recall the Mandate, King County Bar Association's Bar Bulletin (Nov. 1, 2021), available at [www.washingtonappeals.com/\\_ARTICLES/2111-Once\\_More\\_With\\_Feeling-Catherine\\_Smith.pdf](http://www.washingtonappeals.com/_ARTICLES/2111-Once_More_With_Feeling-Catherine_Smith.pdf).