No. 05-83

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF FOR PETITIONER

NORM MALENG
King County Prosecuting Attorney
JAMES M. WHISMAN *
Senior Deputy Prosecuting Attorney
BRIAN MCDONALD
Senior Deputy Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9650

* Counsel of Record — *Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTION, STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 05-83

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF FOR PETITIONER

ARGUMENT IN REPLY

Recuenco does not dispute the propriety of this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), applying harmless error analysis to missing elements. Nor does Recuenco defend the reasoning of the Washington Supreme Court distinguishing *Neder*. Instead, the central theme of Recuenco's brief, and the idea upon which his arguments depend, is the claim that the error in this case, and all *Apprendi*[1] error, includes error in charging, such that when the judge instead of jury finds even a single sentence-enhancing fact, the judge has directed verdict on an uncharged crime. This claim is incorrect, both generally and as applied to Recuenco's case. His arguments ignore settled law

[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

that will prevent the abuses he foretells, and he fails to distinguish *Neder*.

I. *NEDER* AND *APPRENDI* ERROR ARE LEGALLY DISTINCT FROM CHARGING ERROR ANALYSIS.

1. Recuenco and his amicus curiae argue that unless *Apprendi* error is deemed structural error, judges will impose verdicts on a completely different crime than the crime charged, comparing the situation to a judge imposing a murder verdict when only manslaughter was charged. Brief for Respondent at 19.

The argument overlooks the constitutionally-based and well-established case law prohibiting conviction for an uncharged crime. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ." Const. amend VI. This Court has held that Sixth Amendment notice is insufficient if the defendant was "prejudicially surprised" by the claimed omission of an element. *United States v. Miller*, 471 U.S. 130, 134 (1985). *See generally* 4 W. LaFave, J. Israel, & N. King, Criminal Procedure §§ 19.2-19.3 (1999). This Court has also held, however, that a plain error analysis will apply where the defendant did not challenge the charging document at trial. *United States v. Cotton*, 535 U.S. 625 (2000).

Similarly, under the Washington State Constitution, an accused cannot be tried for an offense not charged. Washington const. art. I, § 22; *State v. Pelkey*, 109 Wash.2d 484, 487, 745 P.2d 854, 855-56 (1988). "All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him," *State v. Kjorsvik*, 117 Wash.2d 93, 97, 812 P.2d 86, 88 (1991), but the charging document need not repeat the exact language of the statute.

State v. Leach, 113 Wash.2d 679, 686, 782 P.2d 552, 555 (1989). Where the defendant challenges the information prior to verdict, the language of the charging document is strictly construed to determine whether all elements are included, and the defendant need not show he was prejudiced by the defect. *State v. Johnson*, 119 Wash.2d 143, 149-50, 829 P.2d 1078, 1080-81 (1992). If the charging document is challenged post-verdict, however, the document will be liberally construed, or the defendant must show prejudice. *Kjorsvik*, 117 Wash.2d at 104-06, 812 P.3d at 91-92.

Thus, contrary to Recuenco's arguments, failure to hold that *Apprendi* error is structural will not eviscerate *Apprendi* and lead to verdicts on uncharged crimes, because under federal and state law, a defendant who is prejudiced by a deficient charging document may be entitled to relief under existing analyses that are independent of *Neder* or *Apprendi*. There is simply no reason to mix *Neder*'s harmless error analysis with the charging error analysis set forth above. To do so will unnecessarily complicate each analysis.

2. Moreover, Recuenco suggests that without a structural error rule for *Apprendi* error, *Apprendi* will be eviscerated and judges will impose verdicts on completely different crimes than the crimes charged. Brief for Respondent at 7, 19, 37-39; Brief of Amici Curiae the National Association of Criminal Defense Lawyers et al. ("Brief of Amici") at 11-21. The argument fails because there is no evidence whatsoever that the *Neder* or *Apprendi* rules have unleashed such judicial wantonness. The vast majority of appellate courts have applied harmless error review to *Neder* and *Apprendi* errors for six years,[2] yet Recuenco cannot show that harmless error

[2] Brief of the States as Amici Curiae in Support of Petitioner at 24-25 (listing *Neder* harmless error cases). Shortly after *Apprendi* was decided in 2000, appellate courts began applying harmless error review to *Apprendi* error. *See United States v. Bailey*, 270 F.3d 83, 88-89 (1st Cir. 2001); *United States v. Barbosa*, 271 F.3d 438, 459-61 (3rd Cir. 2001), *cert.*

review has led to any of the adverse consequences he foretells. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 n. 25 (2001) ("Noticeably absent from the parade of horribles is any indication that the 'potential for abuse' has ever ripened into a reality").

II. RECUENCO NEVER ALLEGED CHARGING ERROR, SO HE CANNOT PRESUME IT NOW.

1. The well-established body of law described above governing charging deficiencies in Washington has been used by countless appellate courts to resolve claims that a charging document was constitutionally insufficient. Yet, not once in the state appellate process did Recuenco cite to this line of authority, or seek to invoke its protections. Instead, he relied on *Apprendi* and *State v. Thomas*, 150 Wash.2d 821, 83 P.3d 970 (2004) (*Apprendi* error never subject to harmless error analysis). S*ee* Supplemental Brief of Petitioner in the Washington Supreme Court at 4-8. To be sure, Recuenco used the word "notice" in his briefing, but only in the very general sense that the term is used in *Apprendi* to indicate that the Sixth Amendment requires notice. But, since *Apprendi* did not involve a challenge to the charging document, and does not establish any analysis for defective charging documents, *Apprendi*, 530 U.S. at 477 n.3, citation to *Apprendi* and the use of the word "notice" does not establish a constitutional charging violation. Recuenco's claim was thus limited to a Fourteenth Amendment Due Process challenge of the type applied in *Neder*, *Apprendi*, *Ring v. Arizona*, 536 U.S. 584 (2002) and *Blakely v. Washington*, 542 U.S. 296 (2004).

---

denied, 537 U.S. 1049 (2002); *United States v. Clinton*, 256 F.3d 311, 315-16 (5th Cir.), *cert. denied*, 534 U.S. 1008 (2001); *United States v. Adkins*, 274 F.3d 444, 454-56 (7th Cir. 2001), *cert. denied*, 537 U.S. 891 (2002); *United States v. Anderson*, 236 F.3d 427, 429-30 (8th Cir.), *cert. denied*, 534 U.S. 956 (2001); *State v. Davis*, 255 Conn. 782, 796, 772 A.2d 559, 568 (Conn. 2001); *People v. Amaya*, 321 Ill. App. 3d 923, 932, 748 N.E.2d 1251, 1259 (Ill. App. Ct. 2001).

His reasons were clearly strategic, as the strategy he chose was legally more attractive. If he pursued a claim under *State v. Thomas* he could invoke the Washington Supreme Court's "no harmless error for *Apprendi* error" rule, and the court would not examine the charging document at all—much less liberally construe it—and he would not have to prove prejudice. He could simply identify an *Apprendi* error, and obtain automatic reversal.

Recuenco's charging claim was weak under state law because he had not challenged the charging document before verdict, even though he clearly should have been on notice that a firearm sentence was going to be imposed. Under the liberal construction used to analyze alleged charging error, a Washington court would have found the information to be sufficient. *See, e.g., State v. Summers*, 107 Wash. App. 373, 380, 28 P.3d 780, 784 (2001) (finding that error in failing to allege knowledge element in firearm case was not reversible error when challenged for the first time on appeal), *modified on other grounds*, 43 P.3d 526 (2002).

Nor could Recuenco have shown that he was surprised by the evidence or the sentence. The information alleged that at the time of the crime Recuenco was armed with "a deadly weapon, to wit: a handgun." J.A. 3. Under Washington law at the time this case was tried, if a defendant was charged with a "deadly weapon" enhancement and if the weapon at issue was a firearm, the trial judge was *required* to impose the greater firearm enhancement. *State v. Rai*, 97 Wash. App. 307, 983 P.3d 712 (1999); *State v. Meggyesy*, 90 Wash. App. 693, 958 P.3d 318 (1998), *review denied*, 136 Wash.2d 1028, 972 P.2d 465 (1998). Accordingly, Washington case law made it clear that an information alleging use of a "deadly weapon" would require a firearm sentence if supported by the evidence.

Because Recuenco relied only on *Apprendi* in state court, and chose not to independently challenge notice under established Washington case law, the Washington Supreme Court never reached that issue, and it certainly did not hold that the charging document was inadequate.

Yet, Recuenco now pretends that the charging issue was resolved by the Washington court in his favor, repeatedly suggesting that he was not charged with a "firearm" enhancement, and citing language in the Washington court's "invited error" holding to support his claim. Brief for Respondent at 17. But the language in the court's invited error holding simply posits what Recuenco *may* have subjectively believed or wanted when he asked the court to instruct on the lesser weapon enhancement. This language cannot substitute for a holding on a distinct, constitutional, legal challenge to the charging document that was never raised. In short, Recuenco asks this court to presume the answer to a constitutional question that he never asked the Washington court to decide. Indeed, the Washington Supreme Court clearly framed the issue as whether *Apprendi* error had occurred, and whether it was harmless, just as Recuenco had asked. *See* Supplemental Brief of Petitioner in the Washington Supreme Court at 4-9. The way in which the Washington court framed the issue limits the claims presented for this Court's decision. Pet. App. 1a-2a.

As done in *Apprendi*, this Court should express no opinion on the charging issue, and should instead simply resolve the question squarely presented by this case—whether harmless error analysis is possible where a sentencing enhancement has been decided by a judge instead of a jury. The Washington Supreme Court has now repeated that holding in three separate published opinions, reversing cases against five defendants on a federal constitutional theory that is erroneous, squarely presented in this case, and that will continue to adversely affect sentences obtained under Washington's sen-

tencing scheme. *See* Petition at 17; Reply to Brief in Opposition at 4-5; Brief for Petitioner at 25-26.

2. Contrary to the assertions of Recuenco and Amici, Recuenco had ample motive at trial to contest the operability of the firearm in this particular case. A "handgun" was charged as a sentencing enhancement, the law of Washington at the time of trial permitted the judge to impose the firearm finding if supported by the evidence, and there was no dispute that Recuenco possessed a fully-loaded gun during the offense. Under these circumstances, it would have been apparent to anyone that a firearm sentence was going to be imposed, regardless of whether a judge or jury was going to make the finding.[3]

III. THE JURY'S SPECIAL VERDICT WAS TECHNICALLY INCOMPLETE, BUT IT WAS NOT "DIRECTED."

Recuenco makes two slightly different, and flawed, arguments alleging that the trial court directed the verdict in his case, and that without a structural error rule, presumably

[3] The degree to which a firearm even needs to be operable is an open question under Washington law. *Compare State v. Faust*, 93 Wash. App. 373, 380, 967 P.2d 1284, 1288 (1998) (holding that the gun "need not be loaded or even capable of being fired to be a firearm") *with State v. Padilla*, 95 Wash. App. 531, 532, 978 P.2d 1113, 1114 (holding that "a gun rendered *permanently* inoperable is not a firearm" because it is not ever capable of being fired), *review denied*, 139 Wash.2d 1003, 989 P.2d 1142 (1999). Here, all evidence indicated operability. The gun was fully loaded, was kept by Recuenco in a ready location on a file cabinet in the living quarters of the residence, and Recuenco testified that he warned his children never to touch it. Tr. 5:236-37; 7:643-44; 8: 677. Ms. Recuenco also testified as to her fear of the gun. Tr. 6: 497-98. Also, any argument that the gun was inoperable would have undercut Recuenco's legal argument (at trial and on appeal, *see* Pet. App. 12a-17a) for a jury instruction on the lesser crime of Aiming a Firearm. Wash. Rev. Code § 9.41.230(1)(a).

applying only to *Apprendi* error, judges will continue to impose such directed verdicts. Brief for Respondent at 20-25.

Recuenco derives his "directed verdict" argument from a misinterpretation of that term as used in *Rose v. Clark*, 478 U.S. 570, 578 (1986), where this Court said that "harmless error analysis presumably would not apply if a court directed verdict for the prosecution in a criminal trial by jury." *Id*. But, in context, this quote was hypothesizing a judge entering a judgment of conviction on an entire criminal charge. Under such circumstances, the jury trial right is "*altogether* denied." *Id*. In *Rose v. Clark*, however, this Court found harmless error where the jury had been instructed to *presume* that the element of malice had been proved if it found certain facts. *Id*. The Court affirmed because "no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury." *Id*. at 580-81 (italics in original). This Court expressly rejected the "directed verdict" analogy in *Rose v. Clark*, *id*., and again in *Neder* where it held a court could conduct harmless error review when an element was omitted from the jury instructions. *Neder*, 527 U.S. at 17 n.2.

So, too, in this case no rational jury could have found Recuenco was armed with a deadly weapon without concluding he was armed with a firearm. The special verdict form was not sufficiently precise but the jury's decision was clear. The trial court did not direct a verdict and altogether deny Recuenco a fair trial under the Sixth Amendment. Instead, the court simply imposed the verdict that the jury necessarily found based on the evidence and the verdict it rendered.

IV. *NEDER* ERROR AND *APPRENDI* ERROR ARE INDISTINGUISHABLE.

Recuenco attempts to distinguish *Neder* in a variety of respects but each is tied to his central argument that *Apprendi* error is different than *Neder* error because *Apprendi* error

necessarily includes error in charging, instruction, and sentencing, and thus "permeates" trial, whereas *Neder* cases involve mere instructional error that is more limited and quantifiable. Brief for Respondent at 7, 19. *See also* Brief of Amici at 4-11. This claim is fatally flawed for numerous reasons. Charging defects can occur as to both elements and sentencing enhancements, so charging does not distinguish *Neder* error from *Apprendi* error.

1. Errors related to offense elements often occur because neither the court nor the parties recognized that a fact was an element for the jury. When that is the case, it often follows that the missing element was not set forth in the charging documents. For instance, after this Court held in the second part of *Neder* that a scheme to defraud under the wire and mail fraud statutes included the element of material falsehood, 527 U.S. at 25, defendants filed federal appeals claiming that failure to include this element in the indictment, in jury instructions, or in both, was reversible error. *See, e.g.*, *United States v. Bieganowksi*, 313 F.3d 264, 285-86 (5th Cir. 2002) (addressing claim that materiality element of mail fraud was not properly alleged in indictment), *cert. denied*, 528 U.S. 1014 (2003); *United States v. Fernandez*, 282 F.3d 500, 508-09 (7th Cir.) (addressing claim that materiality element of mail fraud was neither alleged in indictment nor included in the jury instructions), *cert. denied*, 537 U.S. 1028 (2002); *United States v. Gee*, 226 F.3d 885, 891-92 (7th Cir. 2000) (same).[4] Thus, in many cases, the new holding triggered both charging error *and Neder* error.

---

[4] *See also State v. Anderson*, 141 Wash.2d 357, 359, 5 P.3d 1247, 1249 (2000) (holding that the crime of unlawful possession of a firearm included an implied element of knowledge). *Anderson* triggered appeals claiming errors in both the charging document and the "to convict" instruction. *See, e.g.*, *State v. Warfield*, 119 Wash. App. 871, 873, 80 P.3d 625, 627 (2003) (finding error in omitting element from jury instructions and information).

Likewise, charging deficiencies can occur in *Apprendi*-type cases where a sentence enhancement has been decided by a judge but not submitted to a jury. *See Mitchell v. Esparza*, 540 U.S. 12, 14 (2003) ("principal offender" death penalty aggravator omitted from indictment but used to impose sentence of death); *United States v. Cotton*, 535 U.S. 625 (2002) (indictment charged conspiracy to distribute a "detectable amount" of cocaine but sentence enhanced based on conspiracy to distribute at least 50 grams).

Yet, neither the *Neder* nor the *Apprendi* line of cases depends on the adequacy of the charging document. In fact, this Court noted that Apprendi's challenge was based on "'due process of law' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). ("Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment"). The Court distinguished indictment errors under the Fifth Amendment, and general notice claims raised in state courts under the Due Process Clause of the Fourteenth Amendment. *Id*. at 477 n.3.

Likewise, in *Ring v. Arizona*, this Court noted that it was not addressing any issue concerning notice. 536 U.S. 534, 597 n.4 (2002) ("Ring does not contend that his indictment was constitutionally defective."). And in *Blakely v. Washington*, although it appears that Blakely was not charged with the aggravating factors, 542 U.S. at 298-99, neither this Court nor the Washington Supreme Court analyzed Blakely's claim as a charging deficiency. *Id.* at 296, 301. Thus, charging deficiencies do not always accompany *Apprendi* error, and they do not permeate the entire structure of the trial in a way that is distinct from *Neder* error. Recuenco's alleged distinction is illusory, and thus cannot justify a different harmless error rule for *Apprendi*-type cases.

Recuenco and Amici also make the related argument that harmless error analysis is inappropriate here because counsel may have adopted a different approach to development of the record had he known he was facing the firearm enhancement. In the general sense, this argument is faulty because it again purports to turn on the notice question. But as discussed, *supra* at 9-10, a defendant without notice of either an element *or* a sentencing enhancement might try the case differently if he knew the charge he was facing. Thus, this argument fails to distinguish *Neder* error from *Apprendi* error. Notice issues can be independently challenged to determine whether counsel was prejudiced by the charging document. An ambiguous charging document might influence a reviewing court's decision to find an error harmless, but it does not provide a reason to categorically preclude harmless error analysis.

2. Recuenco also claims that *Apprendi* error is unique because a judge deciding a sentencing enhancement is elevating an existing conviction to a higher degree in a manner that does not occur when a judge decides an element. This claim is mistaken. Many jurisdictions divide offenses into degrees. When *Neder* error occurs, it can obviously involve the element that distinguishes one degree of crime from another degree. As a result of such error, the jury will have been properly instructed only on the elements that establish the lesser crime. See, e.g. *State v. Mills*, 154 Wash.2d 1, 109 P.3d 415 (2005) (error in jury instructions concerning the "threat to kill" element—an element that elevated a misdemeanor to felony). But there is no authority that *Neder* error occurring in this situation is different and less susceptible to harmless error review than an error affecting another element of the crime. In fact, it is difficult to understand why it would be more offensive to conduct harmless error review when the missing element elevates the crime from a lower degree to a higher degree than when the elements expressly found by the jury do not establish any crime at all, as occurred in *Neder*.

In any event, the artificiality of the Washington Supreme Court's distinction between *Neder* and *Apprendi* is illustrated by *State v. Thomas*, 150 Wash.2d 821, 83 P.3d 970 (2004). In *Thomas*, the court examined an erroneous accomplice liability instruction that affected the jury's verdicts on both the substantive crime of murder, and the death penalty aggravating circumstance. Applying *Neder*, the Washington Supreme Court affirmed the murder conviction but reversed the death sentence, holding that the same accomplice liability error that was harmless as to an element was not subject to any harmless error analysis with respect to the aggravating circumstance. *State v. Thomas*, 150 Wn.2d at 845-49, 83 P.3d at 983-84. Because charging distinctions do not support the court's different rule, and because the approach in *Sullivan v. Louisiana*, 508 U.S. 275 (1993) has been rejected, there is simply no reason to distinguish *Neder* error from *Apprendi* error for harmless error analysis.

As courts and state legislatures respond to *Apprendi* and *Blakely*, the distinction between elements and sentencing enhancements has become even less clear, suggesting that a different harmless error rule depending on labels will be very difficult to apply. For instance, in light of *Apprendi*, some courts now characterize facts previously viewed as sentencing enhancements as elements of the crime. *See United States v. Thomas*, 274 F.3d 655, 673 (2nd Cir. 2001) (holding that, in light of *Apprendi*, drug type and quantity are elements of the offense under 21 U.S.C. § 841); *United States v. Lott*, 310 F.3d 1231, 1238-39 (10th Cir. 2002) (same); *State v. Upton*, 339 Or. 673, 681, 125 P.3d 713, 718 (Or. 2005) (holding that "each aggravating or enhancing factor encompassed with the sentencing guideline statute is essentially a new element of an aggravated form of the underlying offense."). Under the Washington Supreme Court's approach, this difference in label will be very significant for harmless error review.

Also, the Washington state legislature amended its sentencing scheme after *Blakely* to provide Sixth Amendment protections for sentencing enhancements, including advance notice of aggravating circumstances for exceptional sentences, and providing that most aggravating circumstances shall be presented to the jury during the trial on the charged crime. 2005 Wash. Laws ch. 68. *See also* Alaska Stat. § 12.55.155 (2005); Ariz. Rev. Stat. §§ 13-702, 13-702.01 (2005); Minn. Stat. § 244.10 (2005); N.C. Gen. Stat. § 15A-1340.16 (2005). Under these new procedures, is an error in instructing the jury on an aggravating circumstance a *Nede*r error or an *Apprendi* error? One can only imagine the litigation that will occur as counsel characterize the error in conflicting ways to take advantage of different standards of review. A single harmless error rule as set forth in *Neder* would avoid much wrangling and gamesmanship.

3. Indeed, recognizing the similarities between *Neder* claims and *Apprendi* claims, the vast majority of courts have concluded that *Apprendi* or *Blakely* errors are subject to harmless error review. *See* Petition for a Writ of Certiorari at 10-16. And the same reasons that supported the adoption of harmless error in *Chapman v. California,* 386 U.S. 18 (1967), and its application in *Neder*, apply to *Apprendi* error. The rule will promote respect for the law by focusing on the underlying fairness of the trial rather than the inevitable presence of immaterial error; it will ensure that criminal cases are decided on the merits and not on the basis of defects that have no bearing on the jury's verdict; and it will conserve judicial resources by avoiding unnecessary remands or retrials. *See* Brief for Petitioner at 11-15.

In providing for increased penalties for the use of a firearm, the people of the State of Washington intended that defendants like Recuenco would receive more severe punishment than those committing assault without the use of a firearm. As this Court observed in *Cotton* when applying plain

error review to the failure to allege a sentencing enhancement in the indictment, "the fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments." *Cotton*, 535 U.S. at 634. The identical concerns and reasoning apply here: there was overwhelming and uncontroverted evidence that Recuenco was armed with a loaded firearm. This Court has adopted harmless error analysis to avoid exactly what occurred here—the reversal of a sentence for an error that had no effect on the outcome of the case.

State v. Williams, 2006 WL 224278, No. 23124-1-III (Wash. Ct. App. filed Jan. 31, 2006) illustrates quite vividly how the Washington courts' approach undermines the principles of the justice system, and the principles of harmless error review. Williams shot and killed a man and was charged with, *inter alia*, first-degree murder. The information alleged that Williams was armed with a *firearm* during commission of the offense. 2006 WL 224278, at *6. (italics added). Williams was convicted as charged. Because the special verdict form only asked if he was armed with a deadly weapon, the court reversed the firearm enhancement observing that, "while it would seem that the harmless error doctrine would easily accommodate this error, that is not the holding of *Recuenco*." *Id.* Had the jury been improperly instructed on the element of premeditation to commit murder, however, the error would have been subject to harmless error review.

In sum, Recuenco fails to distinguish *Apprendi* error from *Neder* error. The same harmless error rule should apply to both types of Sixth Amendment violation.

V. CERTIORARI WAS PROPERLY GRANTED.

Recuenco argues that certiorari may have been improvidently granted, claiming that harmless error review is improper in this case because there is no valid procedure under Washington state law to request a jury to make a firearm

finding. Brief for Respondent at 8-15. In essence, he claims that the firearm enhancement statute is facially unconstitutional such that an appellate court cannot affirm the enhancement by conducting harmless error review. This new argument should be rejected for several reasons.

1. First, this state-law argument was waived, as it was belatedly made for the first time in the Brief for Respondent. Recuenco never claimed before any Washington state court that there was no valid procedure for seeking firearm enhancements. And, in opposition to the petition for certiorari, Recuenco described the relevant statute as requiring a jury finding: "Wash[.] Rev. Code §9.94A.533(3) provides for the imposition of confinement *where the jury finds* the defendant committed the offense with a firearm." Brief in Opposition at 2 (emphasis added).[5]

This Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). The Court normally does not consider arguments that were not presented in a brief in opposition, much less arguments that were not even raised in the courts below. *See Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998); *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999). Because Recuenco did not raise this objection to the question presented earlier, the Court should deem it waived. Sup. Ct. R. 15.2.

2. The Washington Supreme Court squarely addressed the appropriateness of harmless error review for the federal constitutional error—an issue that Recuenco now claims

[5] Apparently recognizing this defect, Recuenco insists that he raised the issue in his Brief in Opposition, and cites to a section in that brief where he cited to the court's language in *Recuenco* about the limited relief upon *remand*. *See* Brief for Respondent at 9 n. 5. He never claimed, however, that there is ***no*** valid statutory procedure to submit the firearm question to the jury at all, which is his present claim.

should have been irrelevant. After holding that "without an explicit firearm finding by the jury, the court's imposition of a firearm sentence enhancement violated Recuenco's jury trial rights," Pet. App. 6a, the court addressed the constitutional harmless error question. Pet. App. 8a. The court's decision referred to the lengthy analysis in the *Hughes* decision, all of which was based upon the court's interpretation of federal constitutional law. *State v. Hughes*, 154 Wash.2d 118, 142-48, 110 P.3d 192, 204-08 (2002).

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court adopted a standard for evaluating whether a state-court decision rested upon an adequate and independent state ground.

> [When] a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

463 U.S. at 1040-41; *see also Arizona v. Evans*, 514 U.S. 1, 7-8 (1995). Here, the Washington Supreme Court's decision clearly identifies the federal constitution as the basis for its refusal to conduct harmless error review; the court did not even suggest that the decision was based upon state law grounds.

Even if Recuenco's interpretation of Washington state law is correct, his claim does not establish that *Apprendi* error is structural. At best, it shows that the error here is not harmless. Contrary to Recuenco's argument,[6] an *Apprendi* error is "either structural or . . . not." *Neder v. United States*, 527

[6] Brief for Respondent at 6-7 ("Even if *Apprendi/Blakely* errors could be harmless under other circumstances, there is no way they can be harmless here.").

U.S. at 14. This Court rejected "a case-by-case approach" in determining whether an error was structural, because "that is more consistent with our traditional harmless-error inquiry (*i.e.*, whether an error is harmless)." *Id*. Here, the Washington Supreme Court based its decision on the broad principle that all *Apprendi* error is structural. *Pet. App.* 8a ("*Blakely* Sixth Amendment violations . . . can never be deemed harmless."). The fact that a court might find error not harmless based on an alleged quirk in state law does not mean that *Apprendi* error is structural error.

3. Recuenco's new interpretation of Washington State law is also meritless as a matter of state law. The notion that the State is prohibited from submitting a firearm enhancement to a jury is not supported by the *Recuenco* opinion, the *Hughes* opinion, or any subsequent Washington case. Recuenco's sole basis for this claim is the following sentence: "Because we held in *Hughes* that we would not imply a procedure by which a jury can find sentencing enhancements on remand, we remand for resentencing based solely on the deadly weapon enhancement which is supported by the jury's special verdict." Pet App. 8a. Nowhere in the opinion did the court suggest or imply that Washington law prohibited submission of the firearm enhancement to the jury at all stages of the proceedings. If this was the court's conclusion, it would have been a radical departure from existing law, invalidating a commonly used sentencing enhancement.[7] The court was

[7] In Washington, trial courts have regularly submitted the question of whether the defendant was armed with "a firearm" to the jury. *See, e.g.*, *State v. Barnes*, 153 Wash.2d 378, 383, 103 P.3d 1219, 1222 (2005) (rejecting challenge to special verdict form for firearm enhancement); *State v. Burke*, 90 Wash. App. 378, 383, 952 P.2d 619, 621 (1998) (special verdict required that jury find that the defendant was armed with a firearm). Only a few years after the firearm enhancement provisions were enacted, the Washington Supreme Court Committee on Jury Instructions prepared standard jury instructions for submitting the firearm enhancement to the

only referring to the procedure *on remand*, not at original trials.

Hughes, cited in *Recuenc*o, provides no support for Recuenco's argument. *Hughes* recognized a distinction between procedures at a remanded sentencing hearing and an original trial. *Hughes* addressed a wholly different type of sentencing enhancement under the exceptional sentence provisions of Washington's Sentencing Reform Act, and held that the State could not specially empanel a jury at a new sentencing hearing to find aggravating circumstances. The court carefully limited its ruling to the issue of procedures at a sentencing hearing *upon remand* and did not opine whether the aggravating circumstances could be presented to the jury in an original trial: "We are presented only with the question of the appropriate remedy on remand—we do not decide here whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial." *Hughes*, 154 Wash.2d at 149-50, 110 P.3d at 208.[8] *Hughes* cannot be read as prohibiting a jury decision on all sentencing enhancements at a trial.

Even if the Washington Supreme Court had held in *Hughes* that exceptional sentence aggravators could not be presented at *any* jury trial, such a holding would not control the firearm enhancement, which is governed by a different sentencing statute. In *Hughes*, the Court observed that the exceptional sentence statute explicitly required the court, not the jury, to find the aggravating circumstances: "This situation is distinct from those where a statute merely is silent or ambiguous on an issue and the court takes the opportunity to imply a

---

jury. 11 Washington Pattern Jury Instructions: Criminal 10.01, at 15-16 (2nd ed. Supp. 1998).

[8] The Washington Supreme Court is presently considering the separate issue of whether the State could prove aggravating circumstances as part of an original trial. *State v. Pillatos et al.*, No. 75984-7. Deadly weapon and firearm enhancements are not at issue.

necessary procedure." *Hughes*, 154 Wash.2d at 151, 110 P.3d at 209. The statute governing the deadly weapon enhancement is different in just that way—it expressly provides that the deadly weapon enhancement question should be submitted to the jury. Wash. Rev. Code § 9.94A.602; Former Wash. Rev. Code § 9.94A.125 ("if a jury trial is had . . . the jury shall . . . find a special verdict as to whether or not the defendant . . . was armed with a deadly weapon . . ."). The statute defines a firearm as a deadly weapon. *Id*. At best, the statute is silent on whether the jury may be asked if the deadly weapon is a firearm. The language and rationale of *Hughes* do not support the claim that the firearm enhancement may not be submitted to the jury.

Moreover, since the *Recuenco* and *Hughes* decisions, no Washington appellate court has held that the firearm enhancement cannot be submitted to the jury. Indeed, the Washington Supreme Court has affirmed sentences since *Recuenco* that included firearm enhancements found by juries. *See State v. Louis*, 155 Wash.2d 563, 566-67, 120 P.3d 936, 937-38 (2005); *State v. Cubias*, 155 Wash.2d 549, 550, 120 P.3d 929, 930 (2005). Likewise, the Washington Court of Appeals upheld a firearm enhancement against a challenge based upon *Recuenco* because the jury instructions stated that the jury had to find that "the defendant was armed with a *firearm* at the time of the commission of the crime." *State v. Pharr*, ___ Wash. App. ___, 126 P.3d 66, 69 (2006) (emphasis added). Under Recuenco's interpretation of Washington law, all of these decisions have affirmed illegal sentences.

4. Finally, Recuenco notes that he has served his sentence but he does not argue that the case is moot for that reason. Brief for Respondent at 6. In fact, Recuenco was released in March 2003, five months before he sought review in the Washington Supreme Court. The length of Recuenco's sentence and the fact that a special firearm enhancement was imposed may have any number of collateral consequences.

The firearm finding makes Recuenco ineligible in the future to participate in mental health court or drug court in Washington state. *See* Wash. Rev. Code § 2.28.170(3)(b)(iii)(c); Wash. Rev. Code § 2.28.180(3)(b)(iii)(c). And a previous conviction for a violent offense involving a firearm is an aggravating factor under the federal death penalty statute. 18 U.S.C. § 3592(c)(2). Similarly, a prior offense involving "firearms use" also counts as a serious violent offense under the federal "three strikes" statute. 18 U.S.C. § 3559(c)(2)(F)(i). Collateral consequences may also include the setting of bail and the length of the sentence in any future criminal case, or the possibility of a pardon. *See Minnesota v. Dickerson*, 508 U.S. 366, 371 n.2 (1993) (rejecting mootness claim because of the possible collateral legal consequences even though charges had been dismissed after completion of probation); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 n. 3 (1977) (rejecting mootness argument because defendant had served his sentence). Recuenco was sufficiently concerned about these collateral consequences of the firearm finding that he aggressively pursued state court review of his sentence, even after it had been served. This issue is not moot—certiorari was properly granted.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney
JAMES M. WHISMAN *
Senior Deputy Prosecuting Attorney
BRIAN MCDONALD
Senior Deputy Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9650
* Counsel of Record
Counsel for Petitioner