No. 05-83

In The
Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

ARTURO R. RECUENCO,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether harmless-error analysis can apply to affirm a trial court's entry of a conviction of a greater crime than that charged by the government and proven to the jury beyond a reasonable doubt, where the jury's verdict is complete in every respect, and there has been no claim of insufficiency in the jury's verdict?

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BRIEF FOR RESPONDENT

STATEMENT

This case comes to this Court on the State's question presented of "[w]hether error *as to the definition of a sentencing enhancement* which results in a violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), is subject to harmless error analysis." Petitioner's Br. at i (emphasis added). This language, however, misrepresents the true nature of Washington law and the proceedings below. The Washington Supreme Court explained in no uncertain terms that the jury instruction defining the sentencing enhancement the State charged – a "deadly weapon" enhancement – "was the correct instruction" according to state law. Pet. App. 7a. The trial court erred not by misdefining any sentence enhancement, but by imposing a *different* (and more serious) enhancement, a "firearm" enhancement, than the State charged or the jury found. Indeed, this different enhancement could not have been presented to the jury even if the State had wanted to do so. Accordingly, the real issue here is whether the *Blakely* error that occurred in the trial court – which had *nothing at all* to do with how the jury was instructed on the sentencing enhancement that was presented to it – is subject to harmless-error review. The Washington Supreme Court correctly held that it is not.

1. Wash. Rev. Code § 9A.36.031 provides a person is guilty of second degree assault if under circumstances not arising to first degree assault he or she assaults another

with a deadly weapon. Wash. Rev. Code § 9.94A.533(4)[1] sets forth the length of additional confinement which a trial court must impose where there has been an allegation and special jury finding that a defendant was armed with a deadly weapon in the commission of a crime. Wash. Rev. Code § 9.94A.602 requires a special allegation and jury finding that a person is armed with a deadly weapon, and a jury finding of that fact. That statute also defines a deadly weapon as "an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death," including "a pistol, revolver, or any other firearm." Wash. Rev. Code § 9.94A.602.

Wash. Rev. Code § 9.94.602 establishes a two-tiered definition of instruments which may be found to be deadly weapons. *State v. Samaniego*, 76 Wash. App. 76, 79-80 (1994). First, the statute defines the term to include "an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." Wash. Rev. Code § 9.94.602. Second, the statute creates a "per se" class of deadly weapons, listing instruments which regardless of the manner in which they are used are deadly weapons. *Id*.; *see also*, *Samaniego*, 76 Wash. App. 79-80. This "per se" list includes firearms as well as any dagger, knife with a blade longer than three inches, or metal pipe or bar used as a club. If the jury returns a deadly weapon

[1] Many of the statutes at issue have been recodified since the time of Respondent's offense. For ease of reference and because the recodified statutes do not effect any substantive changes, Respondent will cite to the current statutes, except where citation to the former statute is necessary.

special verdict along with finding a defendant guilty of second degree assault, a Class B felony, Wash. Rev. Code § 9.94A.533(4)(b) provides for a mandatory additional term of 12 months confinement.

Wash. Rev. Code § 9.94A.533(3) provides for the imposition of a greater term of confinement where the jury finds the defendant committed the offense with a "firearm." In order to qualify as a "firearm," and not just a "deadly weapon," a gun must be capable of firing "a projectile or projectiles . . . by an explosive such as gunpowder." Wash. Rev. Code § 9.41.010. In other words, the gun must be operational. *See*, *e.g.*, *State v. Padilla*, 95 Wash. App. 531 (1999) (an inoperable gun is not a "firearm"); *State v. Franklin*, 41 Wash. App. 409, 416 n.3 (1985) (starter pistol is not firearm because it is not capable of emitting a projectile). A firearm finding for a Class B felony requires the imposition of an additional 36 months confinement.

Unlike the provisions of Wash. Rev. Code § 9.94A.602 pertaining to "deadly weapon" findings, there is no statutory procedure in place that allows a jury to determine that a person was armed with a "firearm." Pet. App. 8a. Instead, in a series of cases, the Washington Court of Appeals concluded that whenever a defendant was charged with, and a jury returned a special verdict finding beyond a reasonable doubt that a "deadly weapon" was used in the commission of the crime, the trial court was required to determine whether the "deadly weapon" was a "firearm." *See State v. Meggyesy*, 90 Wash. App. 693 (1997), *review denied*, 136 Wash.2d 1028 (1998) (holding trial court has discretion to make firearm finding and impose greater sentence); *State v. Rai*, 97 Wash. App. 307, 312-13 (1999) (concluding if evidence indicates firearm involved,

trial court must make firearm finding and is required to impose greater sentence).[2]

2. The State filed an Information charging Arturo Recuenco with second degree assault with the allegation he was armed with a "deadly weapon" pursuant to former Wash. Rev. Code § 9.94A.125[3] and former Wash. Rev. Code § 9.94A.310.[4] J.A. 3. The Information described the deadly weapon as "a handgun," but it did not allege that the handgun amounted to a "firearm" or refer to the statutory definition of a firearm found in Wash. Rev. Code § 9.41.010. Nor did the Information contain any allegation that the firearm enhancement might apply. At the completion of trial, the trial court instructed the jury, consistent with the Information, on the definition of "deadly weapon" and asked the jury to find whether Respondent used a deadly weapon.

The jury returned a verdict finding Respondent guilty of second degree assault with a special verdict finding Respondent was armed with a deadly weapon during the commission of the second degree assault. J.A. 10, 13.

At sentencing, Respondent argued the court could only impose the additional 12-month confinement permitted by the jury's deadly weapon finding and not the 36 months which would be permitted under the firearm

[2] The Washington Supreme Court, in its decision in this case, affirmed both *Meggyesy* and *Rai's* procedural interpretation of Wash. Rev. Code § 9.94A.602 but concluded the result they required violated the Sixth Amendment. Pet. App. 6a.

[3] Recodified as Wash. Rev. Code § 9.94A.602.

[4] Recodified initially as Wash. Rev. Code § 9.94A.510 and subsequently as Wash. Rev. Code § 9.94A.533.

enhancement statute. J.A. 43-44. Concluding that the evidence established Respondent was armed with a firearm, the trial court concluded it had no discretion but to impose an additional 36 month firearm enhancement instead of the 12 months permitted by the deadly weapon allegation and jury finding. J.A. 47. The court did not indicate whether it based its finding on proof beyond a reasonable doubt.

3. Respondent appealed the judgment, relying on this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), to argue his Sixth and Fourteenth Amendment rights to a jury finding beyond a reasonable doubt of each element of the offense were violated where the trial court imposed an additional term based upon a judicial finding that Respondent was armed with a firearm. After the Washington Court of Appeals affirmed the judgment, and while Respondent's petition for review was pending in the Washington Supreme Court, this Court issued its decision in *Blakely v. Washington*, 542 U.S. 296 (2005).

After the Washington Supreme Court accepted review of Respondent's case, the State of Washington conceded the trial court's finding was contrary to *Blakely* and *Apprendi* and violated Respondent's right to jury finding beyond a reasonable doubt. Pet. App. 6a-7a. The State argued, however, that any error was both invited and harmless. Petition 7a. The Washington Supreme Court rejected both arguments and vacated Respondent's sentence. The court found that harmless-error analysis could not be meaningfully applied to the error in this case because in the absence of a jury verdict, such analysis would be purely speculative as to what the jury might have done. Pet. App. 8a. (citing *State v. Hughes*, 154

Wash.2d 118, 142-45 (2005) (finding *Sullivan v. Louisiana*, 508 U.S. 275 (1993), analogous to a situation presented where judicial as opposed to jury findings are used to increase a defendant's sentence based on less than proof beyond a reasonable doubt). Moreover, the Washington Supreme Court in both *Hughes* and *Recuenco* concluded that because there was no statutory mechanism in place to permit the imposition of the aggravated sentences, and because the court was not free to graft such a mechanism onto the statute the only option left to the court was to remand the matters for sentences consistent with the jury's verdict. *See* Pet. App. 8a.

Respondent has completed his term of confinement in this matter including that required by the judicially made firearm finding.

SUMMARY OF ARGUMENT

1. Harmless-error review is impossible here because of an unusual circumstance under state law. The Washington Supreme Court made clear in the decision below that no statutory procedure existed at the time of trial, or exists now, that allows the State to plead and prove firearm enhancements to juries. Pet. App. 8a. Accordingly, the question that an appellate court is supposed to ask in reviewing an error for harmlessness – whether the jury "could reasonably find" the fact at issue, *Neder v. United States*, 527 U.S. 1, 16-19 (1999) – cannot legitimately be asked here. This Court, in other words, cannot sustain a judgment that the State could not have obtained at trial and could not even obtain today. Even if *Apprendi*/*Blakely*

errors could be harmless under other circumstances, there is no way they can be harmless here.

2. Even if state law did not preclude harmless-error review in this unusual case, the trial court's *Blakely* error still could not be harmless. Errors implicating *Apprendi* and *Blakely* are equivalent to a directed verdict in that the jury returns a complete verdict on the crime charged but the trial court makes a post-trial finding effectively setting aside that verdict and entering a judgment convicting the defendant of a greater offense. Such errors are not the same as the instructional error at issue in *Neder*. The error at issue in *Neder* concerned only the failure to instruct the jury on an element of the charged offense.

In this circumstance, harmless-error review is inappropriate for two independent reasons. First, it would violate the Sixth Amendment – and eviscerate *Blakely* itself – by permitting appellate judges to make factual findings that resulted in convictions for more serious crimes than the underlying jury verdicts. While appellate courts may make factual findings concerning omitted or misdescribed elements to *sustain* juries' verdicts, they may not make findings that subject defendants to *new* and greater punishment than jury verdicts do. Indeed, *Neder* itself noted that harmless-error analysis does not apply to directed verdicts. Second, applying harmless-error review would contravene this Court's "structural" error jurisprudence. *Blakely* error permeates a trial in a way that mere instructional error does not. The greater crime at issue is never charged and is not properly subjected to the adversarial process. Consequently, the error is not merely in "the presentation of the case to the jury" and therefore cannot "be quantitatively assessed in the context of the other evidence presented." *Sullivan*, 508 U.S. at 281.

3. Applying harmless-error review here also would not serve the prudential justifications for the doctrine. To the contrary, it would increase litigation in both Washington's trial and appellate courts. Instead of merely remanding cases involving *Blakely* error for mathematical adjustments to sentences, appellate courts would have to review the record in each case to estimate whether defendants actually committed certain conduct. And instead of focusing trials on the elements of the crimes charged, defense counsel will be duty-bound to contest every stray piece of incriminating evidence offered by the State, lest trial and appellate courts later rely on it to support more serious convictions, and longer sentences, than the State sought in charging the matter. The Washington Supreme Court's resolution of this case makes sound practical sense and should not be disturbed.

ARGUMENT

I. The Washington Supreme Court's Binding Construction Of The Sentencing Statutes Involved Here Renders Harmless-Error Review Impossible.

In order to rule that a constitutional error during trial court proceedings was harmless, an appellate court must find beyond a reasonable doubt that the error "did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Neder v. United States*, 527 U.S. 1, 18 (1999) (court must find that a jury still "would have found the defendant guilty absent the error"). Such a finding is impossible to make here because, as the Washington Supreme Court has now made clear, no state-law procedure existed at the time of trial that would have

permitted the State to prove to a jury that Respondent was armed with a firearm when he committed his crime. The trial judge's decision to determine herself that Respondent used a firearm thus *necessarily* "contribute[d] to the verdict obtained." *Id.* Even if *Apprendi*/*Blakely* errors sometimes could be harmless, they cannot be harmless here.[5]

In order fully to understand why state law forecloses any possibility of applying the harmless-error doctrine here, it is necessary to begin with a careful review of the Washington Supreme Court's holding in *Hughes*, 154 Wash.2d 118, the other *Blakely*-type case it decided the same day as this one. In *Hughes*, the State requested that the Washington Supreme Court judicially rewrite the sentencing laws that this Court had invalidated in *Blakely*, so that in cases in which exceptional sentences had to be vacated the State on remand could plead and prove "aggravating factors" to juries. The court rejected the State's request. It explained that "[w]here the legislature has not created a procedure for juries to find aggravating factors and has, instead, [as here] explicitly provided for judges to do so," the only thing a Washington court has the power to do is to confirm that the existing procedure is invalid. *Id.* at 150. Alternately stated, when the legislature has set forth unconstitutional sentencing procedures, Washington courts lack the authority to create or imply new sentencing procedures that are constitutional. *Id.* at 149-50 (citing *State v. Ammons*, 105 Wash.2d

[5] As required by Rule 15.2, Respondent advised this Court in his brief in opposition of this obstacle to resolving the harmless-error issue over which the State claimed the federal and state courts were divided. *See* Br. in Opp. at 7-8.

175, 180 (1986); *State v. Monday*, 85 Wash.2d 906, 909-10 (1975)). Accordingly, the Washington Supreme remanded the case and ordered that Hughes be resentenced without respect to any aggravating facts. *Hughes*, 154 Wash.2d at 156.[6]

Since *Hughes*, the Washington Supreme Court and the Court of Appeals have continued to remand *Blakely*-violative sentences with instructions to resentence the defendants within applicable standard ranges. *See*, *e.g.*, *State v. Ose*, ___ Wash.2d ___, 2005 WL 3446360, at ¶ 22 (Wash. Dec. 15, 2005) ("remand[ing] for resentencing within the standard range"); *State v. Schimelpfenig*, 128 Wash. App. 224, 230 n.4 (2005) (same); *State v. Taylor*, 127 Wash. App. 945, 954 (2005) (under *Hughes*, "the proper remedy is to remand for resentencing in the standard range"). These decisions confirm that *Hughes* does not rest solely on Sixth Amendment or federal structural-error principles. If it did, then Washington courts would merely be vacating defendants' sentences and permitting the State on remand to decide whether to re-charge and re-try to a jury the aggravating factors at issue. *Compare*, *e.g.*, *Quintero v. Bell*, 256 F.3d 409, 416 (6th Cir. 2001) ("only appropriate remedy" for structural error is reversal to allow for a new trial); *United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000) (structural error "mandate[s] a new trial"); *United States v. Mortimer*, 161 F.3d 240, 242 (3d Cir. 1998) (same). But, instead, the Washington courts are precluding the State altogether from seeking to impose aggravated sentences on remand. *Hughes*' construction of

[6] The State included an excerpt from *Hughes* in the appendix to its petition for certiorari, Pet. App. 20a-27a, but it did not include this section of the opinion.

Washington's underlying sentencing statutes has rendered the automatic harmless-versus-structural-error debate moot.

This case followed the same pattern in the Washington Supreme Court. The court first held that Washington's procedures for finding deadly weapon "sentencing enhancements" – like its procedures for finding "aggravating factors" – violated *Blakely.* Pet. App. 6a-7a.[7] The Washington Supreme Court then referenced *Hughes* and refused to "imply a procedure by which a jury can find [firearm] sentencing enhancements on remand," and it ordered that Respondent be resentenced without respect to any firearm finding. Pet. App. 8a.

To be sure, the State and the United States do not appear to read the Washington Supreme Court's decision this way. They suggest that former Wash. Rev. Code § 9.94A.125, which allows the State to prove "deadly weapon" enhancements to juries, also permits the State to plead and prove "firearm" enhancements to juries. Petitioner's Br. at 6 n.3, 26; United States Br. at 3. The United States calls this suggestion "critical[ ]." United States Br. at 3. But this proffered reading of § 9.94A.125 simply

[7] Washington's "sentence enhancements" and its "aggravating factors" appear in different parts of its sentencing code and operate in different ways. Sentence enhancements are akin to facts supporting "offense adjustments" under the Federal Sentencing Guidelines; they trigger mandatory increases in a defendant's standard sentencing range. *See* Wash. Rev. Code § 9.94A.533; *Blakely*, 542 U.S. at 299 (noting firearm sentencing enhancement in Blakely's case). Aggravating factors are akin to facts supporting "upward departures" under the federal guidelines; they allow trial courts, in their discretion, to impose a sentence above the standard range. *See* Former Wash. Rev. Code § 9.94A.535 (2004); *Blakely*, 542 U.S. at 299, 305 n.8.

cannot be squared with the Washington Supreme Court's decision. The Washington Supreme Court held *no* procedure in Washington law allows the State to prove firearm enhancements to juries, and the court refused to create one judicially. Pet. App. 8a. While the Washington Supreme Court might have been able to construe former Wash. Rev. Code § 9.94A.125's provision allowing the State to prove "deadly weapon" enhancements to juries to apply not just to one-year "deadly weapon" enhancements under Wash. Rev. Code § 9.94A.533(4), but also to longer "firearm" enhancements under Wash. Rev. Code § 9.94A.533(3), the Washington Supreme Court declined to do so.

It is axiomatic, of course, that the Washington Supreme Court's construction of state statutory law is binding here, even if this Court might think the state court could have construed the statute differently to avoid constitutional problems. *See*, *e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999); *Id.* at 66-68 (O'Connor, J., concurring in part and concurring in the judgment). And that construction of state law, under state principles of statutory construction, reflects "what the statute has meant since its enactment." *State v. Moen*, 129 Wash.2d 535, 538 (1996); *accord In re Hinton*, 152 Wash.2d 853, 859-60 & n.2 (2004).

The upshot of the fact that there is no valid state-law procedure for imposing firearm sentencing enhancements is that it is impossible to conduct a harmless error inquiry in *any* case in which a trial court imposed such an enhancement. The State and the United States, simply put, are asking this Court to reimpose a sentence that the State could not properly have obtained at trial and that it could not obtain on remand, no matter what the facts of the case might be. Indeed, the State could not even obtain

the sentence it seeks if it charged Respondent for the first time today; the Washington Legislature has not enacted any new law allowing the State to plead or prove firearm enhancements to juries. Accordingly, harmless-error doctrine cannot be invoked here. There is no legitimate way to ask whether a jury "could reasonably find" that Respondent used a firearm, *see Neder*, 527 U.S. at 16-19 because state law prohibited, and still prohibits, juries from making such findings.[8]

This Court's decision in *United States v. Jackson*, 390 U.S. 570 (1968), reinforces the impossibility of conducting a harmless error inquiry here. In *Jackson*, this Court held that the Federal Kidnapping Act violated the jury trial right because it provided that defendants were eligible for the death penalty only if they insisted on a jury trial. This Court further held that it lacked the power to rewrite the

[8] Shortly after *Hughes* was issued, the Washington Legislature did enact new legislation allowing the State to plead and prove "aggravating factors" to juries. *See* 2005 Wash. Legis. Serv. 68 (West). The State then sought rehearing in *Hughes*, arguing that the new legislation gave it the right to seek to reimpose Hughes' exceptional sentence on remand. The Washington Supreme Court denied this motion without comment. Order Denying Reconsideration at 1, *State v. Hughes* (Wash. July 26, 2005) (unpublished order). But even if a Washington court later concluded that the new "aggravating factors" legislation somehow does apply retroactively, such a holding would not affect this case, since there is no new legislation dealing with firearm enhancements.

It is true that before the Washington Supreme Court issued its decision in this case, trial courts in some Washington counties allowed the State to charge and prove firearm enhancements to juries. Defense trial counsel here, in fact, suggested at one point that the State might have been able to do so here. *See* J.A. 37-38. But in light of the Washington Supreme Court's construction of the relevant statutes in the decision below, it is clear as a matter of state law that the State cannot now, and was not permitted to then, charge and prove firearm enhancements to juries.

Act in order to allow the government to keep seeking the death penalty in such cases. In language the Washington Supreme Court repeated in *Hughes*, 154 Wash.2d at 150, this Court explained:

> It is one thing to fill a minor gap in a statute – to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality. . . . This we decline to do.

Jackson, 390 U.S. at 580-81; *see also id.* at 585 ("[T]he capital punishment provision of the Federal Kidnapping Act cannot be saved by judicial reconstruction."). Having concluded that it lacked the power to create a valid procedure under the Act for imposing the death penalty, this Court held in no uncertain terms that "[t]he appellees may be prosecuted for violating the Act, *but they cannot be put to death under its authority*." *Id.* at 591 (emphasis added). In other words, no death sentence imposed under the Act could later be validated by the harmless-error or any other doctrine.

Precluding harmless-error review here also comports with the purposes of the harmless-error doctrine. That doctrine, as the State recognizes, is designed to "conserve[ ] judicial resources by preventing costly, time-consuming and unnecessary remands, and thus . . . [to] reduc[e] the number of cases on trial court dockets." Petitioner's Br. at 15; *see also United States v. Hasting*, 461 U.S. 499, 509 (1983) (the "goal" of the harmless-error doctrine is to "conserve judicial resources"); *cf. Neder*, 527 U.S. at 15 (considering what would happen on remand).

But *foreclosing* harmless-error review here, not allowing it, serves those goals. The Washington Supreme Court's construction of state law means that Respondent is entitled to an administrative adjustment to his record of conviction and a two-year reduction of his sentence. No new trial will occur; Respondent's conviction for second degree assault remains intact. The only way significant additional judicial resources would be expended in Respondent's case and others like it is if this Court somehow said that the State *could* litigate in the future whether erroneous firearm enhancements are harmless.

This Court, in short, has never applied the harmless-error doctrine to allow the government to obtain a result it could not have obtained in the first instance without violating the Constitution and it could not, even theoretically, obtain on remand. There is no legal or prudential justification for doing so here.

II. Even If State Law Did Not Preclude Harmless-Error Review Here, The Trial Court's *Blakely* Violation Could Not Have Been Harmless.

The absence of any Washington procedure for pleading and proving the basis for a firearm enhancement to a jury forecloses applying the harmless-error doctrine here. But even if the Washington Supreme Court had read the pertinent state sentencing statutes to permit such proceedings in the future, harmless-error review would still be inappropriate. *Blakely* errors are not susceptible to harmless-error review.

A. The Error In The Trial Court Was Not An Instructional Error.

This Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any fact, other than the fact of a prior conviction, which increases the statutory maximum penalty to which the defendant is exposed must be proved to a jury beyond a reasonable doubt. *Id.* at 490. In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court clarified that the "statutory maximum" for purposes of *Apprendi* is the maximum sentence to which the defendant could be sentenced based on the jury's verdict. *Id.* at 303-04.

In the Washington Supreme Court, the State "concede[d] the existence of a *Blakely* Sixth Amendment violation," and the court accepted that concession, holding "the [trial] court's imposition of a firearm enhancement violated Respondent's jury trial right as defined by *Apprendi* and *Blakely*." Pet. App. 6a. The State's petition for certiorari was consistent with this concession and holding, advocating the need to resolve a conflict in the lower courts over whether "*Blakely* error" is subject to harmless-error analysis. Pet. 7, 10-14. And the United States, as *amicus curiae*, recognizes that the trial court here violated *Blakely*. United States Br. at I, 5, 7, 9.

Nonetheless, the State now suggests the error here was nothing more than an "[i]mprecise" or "erroneous jury instruction" with respect to the firearm sentencing enhancement. Petitioner's Br. at 8; *see also id.* 18 (suggesting error was "incomplete verdicts caused by erroneous sentencing factor instructions"). Its question presented further muddies the water by suggesting that what occurred below was "an error in the definition of a sentencing enhancement which result[ed] in a violation of [*Apprendi*

and *Blakely*]." *Id.* at i. Not only do these suggestions backtrack from prior concessions and representations, but they are incorrect. The Washington Supreme Court explained in no uncertain terms this case does not involve any "instructional error":

> Respondent did *not* and does *not* assert the special verdict form asking the jury to find the presence of a deadly weapon was error. Indeed he proposed that instruction because he believed and continues to believe that it was the *correct* instruction for the charge of second degree assault with a deadly weapon enhancement. Instead, Respondent claims that the judge's *imposition of the firearm enhancement without the jury's finding the existence of a firearm* was an error violating his due process and jury trial rights.

Pet. App. 7a-8a (emphasis added). The Washington Supreme Court held that just the kind of error that Respondent alleged – pure *Blakely* error – had occurred.

This kind of constitutional error has nothing to do with instructional error. In a case involving instructional error, the trial court errs by failing to instruct (or improperly instructing) the jury concerning an element of a crime. Ordinarily, an underlying criminal statute or constitutional provision requires that the jury be instructed (or that it be instructed in a certain way) but the trial court fails to abide by the statute. *See*, *e.g.*, *Neder*, 527 U.S. at 20-25 (statute required jury to be instructed on materiality); *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987) (First Amendment did not permit instructing to consider community standards in assessing value of material in obscenity prosecution); *Carella v. California*, 491 U.S. 263,

265-66 (1989) (instruction created mandatory presumption in violation of Fourteenth Amendment's Due Process Clause).

But in a case, as here, involving *Blakely* error, the trial court does not contravene any statutory command. Rather, the trial court follows a statute that tells the court that it should not (or at least need not) instruct the jury concerning a certain fact, and instead that it may find that fact itself after the jury already has delivered its verdict. *See supra* at 8-11 (Washington law does not permit courts to instruct juries to find use of firearm for purposes of enhancement); *State v. Meggyesy*, 90 Wash. App. at 707 (courts, not juries, must find presence of firearm); *State v. Rai*, 97 Wash. App. at 312-13 (same). It just turns out that the statute, when applied that way, violates the Sixth Amendment. Pet. App. 6a.[9]

Put another way, the error in the trial court here was not that its "deadly weapon" instruction was somehow imprecise or inadequate. The error was that after the State charged and the jury found Respondent guilty of second degree assault with a deadly weapon the judge convicted him of the more serious crime of second degree

[9] Of course, in some cases an appellate court can cure that problem for future cases by either rewriting the statue or implying different procedural protections. *See*, *e.g.*, *United States v. Booker*, 125 S. Ct. 738, 764-68 (2005) (judicially curing *Blakely* problem in the way federal sentencing guidelines had been interpreted) *United States v. Buckland*, 289 F.3d 558, 563-68 (9th Cir. 2002) (en banc) (judicially curing *Apprendi* problem in the way that federal drug statute had been interpreted). While such appellate action distinguishes those cases from this one by avoiding the impossibility of applying harmless-error review as described *supra* in Part I, such action does not erase the fact that *Apprendi*/*Blakely* error occurred in the case on review.

assault *with a firearm*. While all firearms are deadly weapons under Washington law, not all deadly weapons – not even all guns – are "firearms." In order to constitute a "firearm," a gun must be capable of firing "a projectile or projectiles . . . by an explosive such as gunpowder." Wash. Rev. Code § 9.41.010. In other words, the gun must be capable of working. *See State v. Padilla*, 95 Wash. App. 531 (an inoperable gun is not a "firearm"); *State v. Franklin*, 41 Wash. App. at 416 n.3 (starter pistol is not firearm because it is not capable of emitting a projectile). While the State charged (and presented evidence) that Respondent was armed with a "handgun," it never charged, and the jury never found, that the Respondent used a "firearm." J.A. 3, 5 (third amended information and trial memorandum); J.A. 31, 38 (defense counsel noting that "there was no evidence given that this weapon could or was at least designed to fire a projectile by explosive such as gunpowder"). Only the trial court made that finding.

In sum, the *Blakely* error here – like any *Blakely* error – is different in kind from mere instructional error. Unlike the case of an instructional error, the State did not allege the fact at issue in the charging instrument. And unlike the case of an instructional error, the jury found the defendant guilty of a complete crime, yet the trial court made a post-trial finding that effectively set that verdict aside and entered a judgment convicting Respondent of a more serious crime. Both of those things distinguish the trial court proceedings from the proceedings in *Neder*.

B. A *Blakely* Violation Is Tantamount To A Directed Verdict Convicting The Defendant Of A Greater Offense.

In assessing the impact of a *Blakely* error on trial court proceedings, the best way to understand the effect of such an error is to perceive that the trial court has directed the verdict convicting the defendant of a greater offense than charged or proven to the jury.

The State properly recognizes that "[f]or Sixth Amendment purposes, sentencing enhancements that impose punishment above that authorized by the jury's verdict are the 'functional equivalent' of elements of an offense." Petitioner's Br. at 19 (quoting *Apprendi*, 530 U.S. at 494 n.19); *see also Blakely*, 542 U.S. at 311 (repeatedly referring to such facts as "elements"); *Harris v. United States*, 536 U.S. 545, 557-58 (2003) ("those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for purposes of the constitutional analysis").

But that is just the half of it. As this Court made clear in *Apprendi*: "[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a *greater offense* than the one covered by the jury's verdict." 530 U.S. at 494 n.19 (emphasis altered); *see also Ring*, 536 U.S. at 609 (aggravating circumstance that makes a defendant eligible for increased punishment "operates as the functional equivalent of an element of a *greater offense*") (emphasis added). The trial court in this case thus violated the Sixth Amendment by convicting Respondent of "a greater offense than the one covered by the jury's verdict." *Apprendi*, 530 U.S. at 494 n.19.

This is another way of saying that the trial court entered a directed verdict convicting Respondent of a greater offense than the State charged or proved to the jury. From the jury's earliest origins, it has been understood that "it is the conscience of the jury that must pronounce the prisoner guilty or not guilty." 2 Sir Matthew Hale, *The History of the Pleas of the Crown* 312-13 (1736). The jury must always be given the opportunity to acquit a defendant of criminal accusation, and if the jury issues an acquittal, it "cannot be set aside," no matter what the evidence showed. *Sparf & Hansen v. United States*, 156 U.S. 51, 106 (1895); *accord Clark v. United States*, 289 U.S. 1, 16-17 (1933); *see also* 4 William Blackstone, *Commentaries on the Laws of England* 361-62 (1768). Accordingly, this Court has long held the Sixth Amendment prohibits a court from "do[ing] indirectly that which it has no power to do directly," *id.* – that is, directing a guilty verdict in a criminal case:

> A trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, *see* [*Sparf & Hansen v. United States*, 156 U.S. at 105]; *Carpenters v. United States*, 330 U.S. 395, 408 (1947), regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.

United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977); *Rose v. Clark*, 478 U.S. 570, 578 (1986) (same); *Connecticut v. Johnson*, 460 U.S. 73, 83 (1983) (plurality opinion) (same) *see also Standefer v. United States*, 447 U.S. 10, 21-25 (1980) (double jeopardy principles do not permit the state to seek a judgment not withstanding the verdict

no matter how clear or strong the evidence of guilt); *see generally* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 48-65 (2003) (reviewing historical sources regarding inability of judges to substitute their views for jury verdicts).

Just as in the case of a directed verdict, the trial court in this case entered judgment convicting Respondent of a crime that the jury did not find that he committed. The trial court did so because *it* found that Respondent committed that crime. While the State presented evidence during trial that Respondent was armed with a handgun, the jury (even assuming the "deadly weapon" it found was the handgun) was never allowed to pass judgment on whether Respondent should be convicted for the crime of second degree assault *with a firearm*. It did not even find that the handgun met the narrower statutory definition of a firearm, Wash. Rev. Code § 9.41.010.

The trial court's actions were no different, for constitutional purposes, than if it had found a defendant guilty of murder after the prosecution charged the defendant only with manslaughter. In such a scenario the error is plainly not merely the failure to instruct the jury on the heightened *mens rea* of murder. The error instead is that the court has directed verdict for the government. Such an error is not lessened to any appreciable degree if the jury has found all of the elements but premeditated intent or if the trial court makes its finding on proof beyond a reasonable doubt.[10]

[10] It is true in a prosecution of first degree murder by premeditated intent in the State of Washington that proving premeditated intent

(Continued on following page)

Here, as in the manslaughter/murder scenario, the fact that the jury found Respondent guilty of a lesser offense – in contrast to some scenarios in which trial courts might enter directed verdicts – means that the State did obtain some kind of valid conviction. But it was not the one on which the trial court entered judgment and for which it sentenced Respondent. Consequently, the trial court's judgment must be understood as a directed verdict.

C. A Directed Verdict Cannot Be Subjected To Harmless-Error Review, So Neither Can A *Blakely* Error.

Because the *Blakely* error here was tantamount to directing a verdict finding Respondent guilty of a greater offense, the remedy for that violation should comport with the remedy for entering a directed verdict. That remedy is an automatic reversal. To hold otherwise would (1) violate the Sixth Amendment and (2) contravene this Court's structural-error jurisprudence.

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necessarily establishes the lesser included *mens rea* of recklessness. *See*, *e.g.*, *State v. Warden*, 133 Wash.2d 533, 562-63 (1997) (first and second degree manslaughter are lesser included offenses of first degree premeditated murder). If the State charges the individual with premeditated murder, the parties proceed to trial understanding the charged offense and the proof required, and the State presents facts to support the heightened intent element, but the court fails to instruct the jury that it must find premeditated intent, then that error may be deemed harmless under *Neder*. But it is something altogether different if the State only charges manslaughter, the parties try the case on that charge, the jury returns a verdict on that charge, but the court, upon considering the strength of the case the State put before the jury, imposes a conviction of first degree murder. In the former scenario, the error can be fairly said to be an omitted instruction. But in the latter it is not. It is a directed verdict.

1. The Sixth Amendment Prohibits An Appellate Court From Finding A *Blakely* Error Harmless.

Regardless of whether *Blakely* error is "structural" error, the Sixth Amendment prohibits an appellate court from finding such an error harmless. In the modern era of harmless-error review, this Court was first confronted with a government's request to uphold a criminal conviction unsupported by jury findings in *Bollenbach v. United States*, 326 U.S. 607 (1946). There, the defendant was convicted of a conspiracy charge, but this Court ruled that the trial judge misinstructed the jury on a key component of the crime. The government argued the verdict should nevertheless be sustained on appeal because "abundant evidence" in the record indicated that the defendant violated the statute. *Id.* at 614. This Court, per Justice Frankfurter, rejected this argument: "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." *Id.* An error cannot be harmless, this Court continued:

> if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress [in enacting the federal harmless-error statute] intended to substitute the belief of appellate judges in the guilt of the accused, however justifiably engendered by the dead record, for the ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

Id. at 615. Allowing an appellate court to substitute its factual findings for a jury's, in other words, would violate the Sixth Amendment just as much as allowing a trial court to do so.

About forty years later, in *Rose v. Clark*, 478 U.S. 570 (1986), this Court clarified the general language in *Bollenbach* and held that merely instructional errors could be found harmless on appeal. In particular, when the jury actually has "pronounce[d] the prisoner guilty," 2 Hale, *supra*, at 312-13, an appellate court may conclude that an instructional error had no effect on the verdict. "The legal verdict of the jury, to be recorded, is finding for the plaintiff or the defendant; what they answer, if asked, to questions concerning some particular fact, is not of their verdict essentially." *Bushell's Case*, Vaughn 150, 124 Eng. Rep. 1006, 6 *Howell's State Trials* 999 (1670). Thus, even if a jury was improperly instructed with respect to some particular element, the presence of the jury's ultimate determination of guilty allows an appellate court to determine that the error was harmless.

But this Court sharply distinguished the situation of a directed verdict:

> [H]armless error presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. . . . Where [the Sixth Amendment's right to trial by jury] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

Id. at 578; *see also Carpenters*, 330 U.S. at 408 (appellate court cannot sustain directed verdict, "[n]o matter how

strong the evidence may be"). The Sixth Amendment, in short, permits an appellate court to make findings in order to *sustain* a jury's guilty verdict. But neither a trial court nor appellate court may make findings of the defendant's guilt of a *new crime*.[11]

That is exactly what happened here; the "wrong entity," *Rose*, 478 U.S. at 578, found Respondent guilty of the greater crime of second degree assault with a firearm. To be sure, the jury found Respondent guilty of the lesser offense of second degree assault with a deadly weapon. But the trial judge set aside that verdict and entered a new one convicting Respondent of a greater offense. Just as the Sixth Amendment prohibits the trial court from directing a verdict for such a greater offense, it likewise prohibits an appellate court from making factual findings to the same effect, because it still deprives the defendant of his right to have a *jury* pronounce whether he is guilty of that offense. The directed verdict here must be vacated and the case must be returned to the trial court for re-entry of the jury's verdict.

Nothing in *Neder* is to the contrary. There, this Court held that an appellate court could conduct harmless-error review in order to *uphold a jury verdict* when the jury was not instructed that it had to find a certain element of a

[11] Not only would such action violate the Sixth Amendment, but it also would raise serious double jeopardy problems. It is well settled that once a defendant has been convicted of a lesser offense, the State may not seek a conviction for a greater offense. *See*, *e.g.*, *United States v. Dixon*, 509 U.S. 688 (1993); *Brown v. Ohio*, 432 U.S. 161 (1977). If an appellate court could uphold a directed verdict on a greater offense after the jury already had convicted the defendant on a lesser offense, the government would be able to obtain on appeal what it could not obtain in a subsequent trial if the defendant had not appealed.

crime. But this Court made plain that its holding covered only "the narrow class of cases like the present one." *Id*., at 17 n.2. *Neder* thus stands solely for the proposition that an appellate court may conduct harmless-error review with respect to an "incomplete verdict" so long as the jury was allowed at trial to perform its "constitutional responsibility" of "draw[ing] the ultimate conclusion of guilt or innocence." *United States v. Gaudin*, 515 U.S. 506, 514 (1995). But the Sixth Amendment forbids extending *Neder* to situations in which an appellate court would need to "hypothesize a guilty verdict that [the jury] never in fact rendered." *Sullivan*, 508 U.S. at 279.

Indeed, the defendant in *Neder*, as well as this Court's dissenting Justices, contended that if this Court allowed appellate courts to find omitted elements of crimes, the next step could be that this Court would "allow a directed verdict against a defendant in a criminal case contrary to *Rose v. Clark*, 478 U.S. 570, 578 (1986)." *Neder*, 527 U.S. at 17 n.2; *see also id.* at 34 (Scalia, J., concurring in part and dissenting in part). This Court, however, made clear that it would not extend harmless-error review to such a situation: "We have no hesitation reaffirming *Rose* at the same time that we subject the narrow class of cases like the present one to harmless-error review." *Id.*

This conclusion was sound, and it is all that is necessary to decide this case. The Framers intended the Sixth Amendment's jury-trial guarantee to be a bulwark not just against judges directing verdicts in the classic sense but also against judges' punishing defendants for greater crimes than juries found them guilty of. *See* Barkow, 152 U. Pa. L. Rev. at 78-79 (gathering historical sources showing that Framers intended juries to have unreviewable authority to convict on lesser offenses, no matter

what the evidence a trial showed); Thomas A. Green, *Verdict According to Conscience* xv-xix (1985) (describing such judicial power in common-law England); *cf. United States v. Powell*, 469 U.S. 57, 63-66 (1943) (inconsistent verdicts unreviewable in criminal cases when juries issue partial acquittals as acts of lenity); *Dunn v. United States*, 284 U.S. 390, 394 (1932) (same; such verdicts "cannot be upset"); *United States v. Maybury*, 274 F.2d 899, 902 (2d Cir. 1960) (Friendly, J.) (juries may issue verdicts "in the teeth of both law and facts . . . to prevent punishment from getting too far out of line with the crime") (quotation omitted). Accordingly, this Court explained in *Blakely* that the Sixth Amendment requires juries to be interposed as a "circuitbreaker" between defendants and trial judges not just with respect to entire crimes but also with respect to facts that are the functional equivalent of elements of greater offenses. *Blakely*, 542 U.S. at 306-07; *see also Apprendi*, 530 U.S. at 494 n.19.

The same is true with respect to appellate judges. Such judges likewise are "part of the State." *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring). And they are just as apt to be "perhaps overconditioned or biased," *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), or be "compliant," "eccentric," or "too responsive to a higher authority." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Accordingly, the right to "jury trial is meant to ensure [the people's] control over *the judiciary*," *Blakely*, 542 U.S. at 306, not just trial judges. The Framers were loathe to "entrust plenary powers over the life and liberty of citizens to one judge or group of judges," *Duncan*, 391 U.S. at 156, regardless of what kind of court they sat on.

Allowing an appellate court to make factual findings to uphold a trial court's decision convicting a defendant of

a greater crime than the jury did would trample this understanding of the Sixth Amendment. *See Sullivan*, 508 U.S. at 279. Indeed, reversing here would eviscerate the holding of *Blakely* itself. It would allow courts in states like Washington to continue to make factual findings that increase defendants' sentences, so long as when the defendants appealed the states' appellate judges agreed with the trial judge's assessment of the record. In cases like *Blakely*, it would allow courts to accept defendants' guilty pleas and then enter convictions and sentences for greater offenses – again, so long as an appellate court agreed that the record supported the findings necessary for the more serious conviction. Surely *Apprendi* and *Blakely* cannot be circumvented by transferring factfinding responsibility from trial judges to appellate judges.

What is more, if harmless-error review is permissible here, there is no reason why it would not be permissible in a situation in which the State charged and obtained a guilty verdict for manslaughter, but the judge then decided that the evidence showed premeditated intent and entered a conviction for murder. In that situation, just like the one here, the trial court's error would be that the verdict "did not encompass a single element"– the element that creates the greater offense. Petitioner's Br. at 9; *see also* United States' Br. at 7 (seeking rule that "the failure to obtain a jury finding on an element of an offense" is always susceptible to harmless-error review). Whenever, in fact, a trial judge concluded after hearing the evidence that the State undercharged the case, the judge could *sua sponte* enter a conviction on a greater offense, and that conviction would be upheld if the appellate court agreed that the record showed that the defendant committed the greater offense.

The manslaughter/murder scenario is different from this case in the respect that no statutory scheme exists in Washington inviting judges to enter such directed verdicts. But that difference only makes this case worse. An unconstitutional judicial action is doubly harmful when accompanied by an unconstitutional legislative action. Put another way, if the presence of underlying legislation could somehow cleanse directed verdicts for purposes of appellate review, then all states would need to do would be to pass laws saying that when trial judges believe the evidence in a criminal case establishes a more serious crime than the State charged and the jury found, the trial judges have the power to convict the defendant of the more serious crime. The harmless-error doctrine should not backhandedly encourage states to enact such unconstitutional legislation.

The right to trial by jury in criminal cases reflects "a profound judgment about the way in which law should be enforced and justice administered." *Duncan*, 508 U.S. at 281. Juries must be given the opportunity to decide whether to convict a defendant of a given offense before he may be punished for it. Accordingly, courts may *uphold* jury verdicts, but the Sixth Amendment prohibits them from entering or approving of a judicial decision to convict a defendant of a more serious crime than the jury did. That time-honored principle requires affirmance here.

2. *Blakely* Error Is "Structural Error."

Even if the Sixth Amendment somehow permitted harmless-error review of *Blakely* errors, this Court's structural error jurisprudence would prohibit it.

The State spends most of its brief maintaining that the error in the present case is for all purposes the same as that in *Neder*: "This case does not present the issue of whether to extend *Neder* or apply it to a slightly different context; it merely involves an application of the *Neder* and [*Mitchell v.*] *Esparza*[12] rules." Petitioner's Br. at 18. But, as the United States recognizes, because *Blakely* error is not of the same stripe as the error in *Neder*, the State is in fact seeking an extension of its harmless-error analysis. United States Br. at 14. The United States is correct that this case is different than *Neder*, but, contrary to the United States' argument, the error here is not susceptible to harmless-error review because it is structural.

Neder involved a situation where the defendant was charged with filing a false federal tax return and mail fraud, where both parties understood the government would be required to prove the materiality of the misstatements in the tax return. 527 U.S. at 5-6. However, because the case was tried shortly before this Court's decision in *Gaudin*, clarifying that materiality was an element of the offense to be submitted to the jury, the trial court in *Neder* removed the question of materiality from the jury. *Neder*, 527 U.S. at 6. This Court concluded while the error led to an incomplete verdict, that error could be subjected to harmless-error analysis. The Court noted

> Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected impartial jury

[12] *Mitchell v. Esparza*, 540 U.S. 12 (2003) (concluding that in light of harmless-error "*precedent from this Court[which] is*, *at best*, *ambiguous*" state court decision was not unreasonable application of Supreme Court law and thus petitioner not entitled to habeas relief.)

> was instructed to consider all of the evidence and argument in respect to Neder's defense against the tax charges.

Id. at 10. In such a case, this Court concluded the trial court's failure to submit a single element to the jury could be subjected to harmless-error analysis. *Id.*

From this holding, the State argues that *Blakely* errors as a class are the equivalent of the error in *Neder* and thus subject to harmless error. The State faults the Washington Supreme Court for "believ[ing] . . . that harmless error analysis [is] permissible for incomplete verdicts caused by faulty elements instructions, [but] harmless error analysis was not permissible for incomplete verdicts caused by an erroneous sentencing factor instructions." Petitioner's Br. at 18 (citing *Hughes*, 154 Wash.2d at 148). Such a claim ignores the holding of the Washington court in *Recuenco*, that there was no error in the instructions or verdict, Pet App. 8a, and mischaracterizes the facts and holding of *Hughes*.

A review of the facts of *Hughes* illustrates, its holding, like the holding in this case, had nothing to do with erroneous instructions or an incomplete verdict. Daniel Hughes was charged and tried for first degree theft for illegally logging old-growth cedar trees. *Hughes*, 154 Wash.2d at 129. Pursuant to Wash. Rev. Code § 9A.56.030 a person is guilty of first degree theft where he takes the property of another with a value in excess of $1,500. At trial the jury heard the testimony of a forest technician that the value of the trees Hughes was accused of illegally logging was $4,465. *Hughes*, 154 Wash.2d at 129. The jury convicted Hughes of the charged offense and he faced a standard range sentence of 3 to 9 months. *Id*. At the sentencing hearing, however, the court heard testimony

from a United States Forest Service ecologist that the monetary and ecological components of the theft had an actual value of $145,599. *Id*. Based upon this testimony the trial court concluded a sentence of 90 months was appropriate based on five aggravating factors including: (1) the facts substantially distinguished the crimes from other thefts; (2) the offense was a major economic offense based on the actual value lost; and (3) the harm to the environment was severe. *Id*. at 129-30. The facts supporting the conviction of the greater offense – principally the value and ecological damage – were never put before the jury. The jury was never permitted to hear much less consider the evidence on which the court relied at sentencing or to consider any potential defenses to those claims.[13] And, of course, the jury was never provided instructions asking it to determine whether the State had proven beyond a reasonable doubt the acts were a major economic offense or caused severe environmental damage.[14]

[13] Under Washington law prior to *Blakely* an aggravating factor supporting an exceptional sentence was legally sufficient only if it was not taken into account by the Legislature in defining the standard range, and thus could not be supported by a fact necessary to support the conviction of the substantive offense. *State v. Grewe*, 117 Wash.2d 211, 215-16 (1991). Thus, by definition the facts supporting an aggravating factor were not considered by the jury in reaching its verdict, nor necessarily presented to the jury.

[14] "Major economic offense" is a statutorily defined aggravating factor which may be based on a finding that the loss was more than "substantially greater than typical" or that the offense "involved a high degree of sophistication." The Washington Supreme Court has held in applying aggravating factors at trial, and reviewing them on appeal, courts cannot engage in proportionality and instead the trial judge's subjective view of the appropriateness of the aggravating factor control. *State v. Solberg*, 122 Wash.2d 688, 702-04 (1993). The court has rejected attacks that such an inherently subjective procedure violates the vagueness doctrine of the Fourteenth Amendment's Due Process

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Contrary to the State's claim, in neither *Hughes* nor this case, has the Washington Supreme Court even addressed a scenario of an incomplete verdict on a sentencing factor, much less concluded such a verdict can never be harmless.

Further undercutting the State's view that *Blakely* errors are synonymous with the error in *Neder* is the scenario where *Blakely* errors occur after a guilty plea where the defendant has either not been told that the State will seek a sentence on a greater offense or the defendant has not waived his rights to a jury determination of the additional facts beyond a reasonable doubt. In such a scenario, a defendant could claim the failure to inform him of the elements of the greater offense upon which the trial entered judgment, rendered his guilty plea involuntary, as a "plea could not be voluntary in the [constitutional] sense that it constituted an intelligent admission that he committed the offense unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976) (citing *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Accepting that the facts which implicate *Blakely* are at least the functional equivalent of the elements of a greater offense, where a defendant is not informed of these additional elements in entering a guilty plea he has not been informed of "the true nature of the charge." *See Smith*, 312 U.S. at 334. While constituting *Apprendi*/*Blakely* error, such an involuntary plea is fundamentally a different type

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Clause, not because the factors are not vague, but because the court concluded the vagueness doctrine only applies to elements and not sentencing factors. *State v. Baldwin*, 150 Wash.2d 488, 457-59 (2003).

of error than in *Neder*, or the error in this case. Nor can *Neder* apply such that the error may be deemed harmless. Instead, either the sentence must be vacated or the defendant must be permitted to withdraw it, regardless of the strength of the evidence of guilt the government possesses, or the soundness of counsel's advice to enter the plea. *Henderson*, 426 U.S. at 644-45.

In sum, *Blakely* errors are different in kind from mere instructional error. Unlike *Neder*, in Respondent's case, as in *Hughes*, the error is the failure to conduct a trial in any constitutional sense of the offenses on which the court ultimately entered convictions.[15]

The doctrine of harmless error "recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Harmless-error analysis "presupposes a trial, at which the defendant, represented by counsel may present evidence and argument before and impartial judge and jury." *Rose*, 478 U.S. at 578.

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[15] Contrary to the State's suggestion (Petitioner's Br. at 23-24), nothing in this Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), suggests harmless-error review is appropriate here. That case involved an application of the plain-error doctrine, not the harmless-error doctrine. Holding that defendants are not entitled to reversal when they fail to object to *Apprendi* violations does nothing more than confirm that *Apprendi* rights can be waived. *See*, *e.g.*, *Blakely*, 542 U.S. at 310; *Neder*, 527 U.S. at 33-34 (Scalia, J., dissenting). Just because an error permeates a trial from start to finish does not necessarily mean that it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 469 (1997) (quotation omitted).

In this case, the proceedings "produce[ ] 'consequences that are necessarily unquantifiable and indeterminate.'" *Neder*, 527 U.S. at 11 (citing *Sullivan*, 508 U.S. at 281-82). The jury was never allowed to resolve the factual question of the defendants' guilt on the greater offenses, not because they were not instructed on the element, but because the facts necessary to support the element of the greater offense were not litigated to the jury, i.e., that the handgun was capable of firing. *See* J.A. 30, 38. So too in *Hughes* the jury was never presented with the facts necessary to support the conclusion that Mr. Hughes' actions caused substantial ecological damage to a degree not contemplated by the legislature as the state did not present that evidence until after the jury had returned its verdict. In each instance the "central purpose of [the] criminal trial" has been frustrated as the jury was not presented with nor permitted to resolve the "factual question of the defendant's guilt or innocence." The error here prevents the jury from finding the defendant guilty of the crime of conviction, both factual and legally. *See*, *Sullivan*, 508 U.S. at 283-84 (Rehnquist, C.J., concurring). The error is not merely in "the presentation of the case to the jury" and therefore cannot "be quantitatively assessed in the context of the other evidence presented." *See Sullivan*, 508 U.S. at 281 (citing *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)).

The analysis in *Rose* illustrates this. There the Court concluded an erroneous instruction which shifted the burden of proof by requiring the jury to presume malice if it found certain facts had been proven and the defendant had not rebutted the presumption was harmless. 478 U.S. at 582. In reaching its decision the Court concluded that even before the jury could apply the erroneous presumption it

was required to and had necessarily found the facts from which the presumption arose beyond a reasonable doubt. *Id*. at 581. Thus, the jury had found "'every fact necessary' to establish every element of the offense beyond a reasonable doubt." *Id*. (quoting *In re Winship*, 397 U.S. 364 (1970)). But here the parties never litigated the question of whether the handgun met the standard of a "firearm" and thus the jury did not find every fact necessary to establish every element of the offense beyond a reasonable doubt.

The error in this case lies in the "constitution of the trial mechanism," *Sullivan*, 508 U.S. at 281, and is thus structural.

III. The Prudential Reasons For Applying The Harmless-Error Doctrine In Instructional Error Cases Are Absent Here.

Not only is there no legal justification for applying the harmless-error doctrine here, but there is no practical justification either. The State cites eighteen harmless-error cases on pages 12-13 of its brief. The issue in fifteen of those cases was whether to reverse a defendant's conviction, thereby requiring a new trial. The issue in the other three was whether to reverse a death sentence, thereby requiring a new sentencing trial. Neither is at stake in this case. The sole issue here is whether the record of Respondent's conviction for second degree assault will reflect that he used a firearm or a deadly weapon, thereby determining whether his official prison term – which he already has completed – will be recorded as 15 months or 39 months.

The only way that further litigation will take place in this case and others like it is if this Court decides that the *Blakely* error here is subject to harmless error.[16] In that instance, parties will clog appellate courts with such harmless-error arguments. Instead of simply remanding the cases for a mathematical adjustment to the defendants' sentences, appellate courts will have to study the records to predict whether a jury would have found the sentence-enhancing facts at issue, had those facts been alleged and proven to the jury.

But the extra work generated in appellate courts will be just the beginning of the extra litigation that reversing here would spawn. The practical effect of upholding trial courts' *Blakely*-violative findings when appellate courts think the record supports such findings would be that defense counsel would be duty-bound to challenge every stray piece of prosecutorial evidence in criminal trials.

[16] Although the State requests simply that this case "be remanded for a determination of whether the error was harmless," Petitioner's Br. at 27, the United States urges this Court to go ahead and decide whether the error was harmless. Respondent agrees with the State that if this Court holds that the *Blakely* error here is susceptible to harmless-error review, this case should be remanded for a determination of whether the error was harmless. This Court's "general custom" is to "allow[ ] state courts initially to assess the effect of [constitutional errors] in light of substantive state criminal law." *Lilly v. Virginia*, 527 U.S. 116, 139 (1999). That custom warrants following here. Contrary to the United States' suggestion (United States' Br. at 28), there is good reason to believe the error here could not be found harmless under any view of federal harmless-error law. The State never charged that Respondent used a "firearm," as that term is defined under Washington law. *See supra* at 16. And while the State presented evidence at trial that Respondent used a handgun during the assault, Respondent made clear he did not concede that gun was a "firearm." J.A. 38. Indeed, Respondent argued below that there is insufficient evidence in the record to support such a finding. *Id.*

Under our current system of adversarial justice, defense counsel needs to concern themselves with disputing only the elements of the offenses that the prosecution charges (and that the jury will decide). The practical effect of applying harmless error to these circumstances is to require defendants at trial to contest not only the offense charged and submitted to the jury, but also the elements of every greater offense, charged or uncharged, which the trial court might later decide has been proven by the government. And in abundance of caution, to defend against new elements that the trial court might never imagine lest they support a finding of harmless error on appeal.

The Sixth Amendment, as well as this Court's structural-error doctrine, simply forbids appellate courts from subjecting *Blakely* violations to harmless-error review. When such error occurs, an appellate court should simply vacate the "enhancement" and remand for resentencing consistent with the jury's verdict.

CONCLUSION

For the reasons stated above in Part I, this Court should consider dismissing this case as improvidently granted. In the alternative, this Court should affirm the decision of the Washington Supreme Court.

Respectfully submitted,

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