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 PETITIONER

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QUESTION PRESENTED

Whether 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.

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OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at *State v. Recuenco*, 154 Wash.2d 156, 110 P.3d 188 (Apr. 14, 2005). Pet. App. 1a.[1] The Court of Appeals' decision in this case is unpublished, 117 Wash.App. 1079, 2003 WL 21738927 (Wash.App. July 28, 2003). Pet. App. 9a.

JURISDICTION

The Washington Supreme Court's judgment was entered on April 14, 2005. The petition for writ of certiorari was filed on July 13, 2005, and was granted on October 17, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Fourteenth Amendment to the Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Former Wash. Rev. Code § 9.94A.125 provides in relevant part: "In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, . . . if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime. For purposes of this section, a deadly weapon is 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. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm. . . ."

Former Wash. Rev. Code § 9.94A.310 provides in pertinent part: "(3) The following additional times shall be added to the presumptive sentence . . . if the offender or an accomplice was armed with a firearm. . . Three years for any felony defined under any law as a class B felony. . . . (4) The following additional times shall be added to the presumptive sentence . . . if the offender or an accomplice was armed with a deadly weapon as defined in this chapter other than a

firearm. . . One year for any felony defined under any law as a class B felony. . . .”

STATEMENT

1. On September 18, 1999, Ms. Amy Recuenco and the defendant, Arturo Recuenco, were at home with their children. The defendant told Ms. Recuenco to cook dinner for his sisters, who were scheduled to arrive that evening. Tr. 6:486. The defendant became enraged when he later discovered that Ms. Recuenco had not prepared the meal, and he picked up a metal pipe and hit the stove, smashing it. Tr. 6:488. The defendant then walked into the living room, reached into a file cabinet, and removed his gun. Tr. 6:491. He pointed the gun at Ms. Recuenco with both hands and continued to yell at her. Tr. 6:491. Ms. Recuenco picked up the telephone and dialed 911. Tr. 6:493. The defendant put the gun back in the drawer and yanked the telephone cord from the wall just after the call had gone through to the 911 call center. Tr. 5:244, 6:495. Ms. Recuenco fled to her room. Tr. 6:497.

Two Seattle Police Department officers arrived. Tr. 5:228-31. They immediately heard Ms. Recuenco shout from inside that the defendant had a gun and was going to kill her. Tr. 5:233. After speaking privately with Ms. Recuenco, an officer retrieved the defendant’s gun—a .380 caliber, semi-automatic pistol with a full magazine but without a round in the chamber. Tr. 5:233-39. After he was arrested, the defendant admitted to the police that he had held the gun during the altercation with his wife, but he denied pointing it at her, insisting that she could not have seen it. Tr. 5:242-43.

2. The State of Washington charged the defendant by amended information with assault in the second degree, interfering with domestic violence reporting, and malicious mischief in the third degree. J.A. 3-4. The crime of second degree assault has six alternative means of committing the

crime, but the State of Washington alleged only one: that the assault was committed "with a deadly weapon." J.A. 3 (citing Wash. Rev. Code § 9A.36.021). The definition of "deadly weapon" under this statute includes a firearm. Wash. Rev. Code § 9A.04.110(6).

The State of Washington also charged a sentencing enhancement—that at the time of the crime the defendant was "armed with a deadly weapon, to wit: a handgun." J.A. 3. Under Washington law, a deadly weapon for purposes of a sentencing enhancement was defined as "any dirk, dagger, pistol, revolver, *or any other firearm* . . . ." Former Wash. Rev. Code § 9.94A.125 (emphasis added). A three-year sentence enhancement applied if the offender or an accomplice was armed with a firearm, Former Wash. Rev. Code § 9.94A.310(3)(b), whereas a one-year enhancement applied if the offender was armed with a deadly weapon "other than a firearm." Former Wash. Rev. Code § 9.94A.310(4)(b).[2]

3. At trial, the defendant testified that he damaged the stovetop with a kettle because he was angry that his wife would not cook dinner. Tr. 7:634. He testified that his wife began to call the police after he damaged the stove, and that he attempted to take the phone from her. Tr. 7:639-40. He claimed that, in reaching for the receiver, he unintentionally grabbed the cord, accidentally pulling it from the wall. Tr. 7:640. He admitted that the gun was in his hand that night, but he denied that he pointed it at his wife. Tr. 8:709, 725-27.

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[2] The increased penalty when the "deadly weapon" is a firearm was the product of an initiative passed by the citizens of Washington and approved by the Legislature. 1995 Washington Laws, ch. 129. One of the stated purposes of this enhancement was to "[d]istinguish between the gun predators and criminals carrying other deadly weapons and provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms." 1995 Washington Laws, ch. 129, § 1.

Throughout the trial, there was no dispute that the only weapon involved was the firearm. Pet. App. 18a. After the evidence was received, the court and counsel discussed jury instructions, including how to define the term "deadly weapon" for purposes of the elements instruction on the charge of second degree assault, as well as for purposes of the sentence enhancement. The trial court observed: "Counsel, quite frankly there is no dispute in this case that we are talking about a gun . . . ." J.A. 16. Defense counsel did not disagree; instead, he argued that the definition of "deadly weapon" should include the *manner* in which the firearm was used. J.A. 17-20. The court noted counsel's objection to the definition of the term "firearm," but ruled that " . . . if the only weapon involved is a firearm . . . the simplified definition of deadly weapon should be used . . . And indeed the Court is giving only the more simplified version, since no other weapons are the subject of this trial other than a firearm." J.A. 25.

For the crime of second degree assault, the Court instructed the jury that "[t]he term 'deadly weapon' includes any firearm, whether loaded or not." J.A. 7. With respect to the "deadly weapon" special verdict instruction, the court instructed that "[a] pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded." J.A. 8. The Court also adopted defense counsel's proposed special verdict form, which provided:

> We, the jury, return a special verdict by answering as follows: Was the defendant, ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree? ANSWER: _____ (Yes or No).

J.A. 13. In closing arguments, the prosecutor and defense counsel repeatedly referred to the firearm as the only weapon at issue in the assault charge. See, e.g., Tr. 9:838 (defense).

A jury convicted the defendant on all charged counts and returned a special verdict finding that he had committed the assault while armed with a deadly weapon. J.A. 10-13. Although defense counsel acknowledged that ". . . the allegation and the basis on which this case was tried was under the theory of firearm. . . ," J.A. 30, and that "the firearm is a[n] element of this offense as it has been pleaded and argued to the jury and evidently, perhaps obviously, proven to the jury," J.A. 37, he argued that the court should only apply the one-year sentencing enhancement for deadly weapons other than firearms. J.A. 43. The trial court rejected this argument and sentenced Recuenco using the three-year enhancement based on the court's finding that the defendant had unquestionably been armed with a firearm.[3] J.A. 47.

4. The defendant appealed, arguing *inter alia*, that the trial court erred by imposing a three-year firearm enhancement when the jury had been asked to make only a general "deadly weapon" finding. His appeal was rejected by the Washington Court of Appeals, which found that any error in the special verdict form was harmless beyond a reasonable doubt. Pet. App. 17a-19a. The Court of Appeals observed:

> . . . The only weapon mentioned or charged in connection with the assault here was a firearm. The information specified that the deadly weapon Recuenco used in the

[3] The trial court's decision to apply the three-year enhancement was consistent with Washington law. The "deadly weapon" enhancement statute provided that a defendant had the right to have a jury find whether he was armed with a deadly weapon, but did not expressly require that the jury find the exact type of deadly weapon involved. Former Wash. Rev. Code § 9.94A.125. At the time of Recuenco's trial, Washington courts had held that it was permissible for a trial court to make the finding that the deadly weapon was a firearm at sentencing when determining the length of the sentencing enhancement. *State v. Meggyesy*, 90 Wash. App. 693, 707-09, 958 P.2d 319, *review denied*, 136 Wash.2d 1028, 972 P.2d 465 (1998), *abrogated by State v. Recuenco*, 154 Wash.2d 156, 110 P.3d 188 (2005).

> assault was a handgun, a firearm. The prosecution argued to the jury that Recuenco committed the assault with a firearm. Jury instructions specified that a firearm constituted a deadly weapon. The jury then specifically found that Recuenco had committed the assault using a deadly weapon. No other weapon was mentioned. Any constitutional error was harmless because it is clear beyond a reasonable doubt that the jury's verdict was not affected by the error.

Pet. App. 18a -19a.

The Washington Supreme Court reversed the Court of Appeals and vacated the sentence. The court held that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), an error in permitting a judge to make a decision reserved for the jury is per se reversible. The Washington Supreme Court's decision on this issue in *State v. Recuenco* was short, see Pet. App. 8a, because the court's reasoning was explained in *State v. Hughes*, 154 Wash.2d 118, 110 P.3d 192 (2005), decided the same day. See Pet. App. 20a-27a. The holdings in *Hughes* and *Recuenco* were based upon language in *Sullivan v. Louisiana*, 508 U.S. 275 (1993): "[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Hughes*, 154 Wash. 2d at 144. The Washington Supreme Court held that if a judge decides a sentencing enhancement factual issue reserved for the jury, the error is "structural" and, thus, always reversible, regardless of whether it can be said beyond a reasonable doubt that the instructional error did not deprive the defendant of a fair trial. *Id.* The court did not reject *Neder v. United States*, 527 U.S. 1 (1999). Rather, the court held that harmless error analysis was possible as to erroneous elements, but not sentencing enhancements. *Id.* at 148 n.12.

The State of Washington timely petitioned this Court for a writ of certiorari, and that petition was granted on October 17, 2005.

SUMMARY OF THE ARGUMENT

1. This Court has consistently recognized that criminal convictions should be affirmed where the errors at trial, constitutional or otherwise, clearly did not affect the jury's verdict. *Chapman v. California*, 386 U.S. 18 (1967). Harmless error analysis promotes fundamental fairness in criminal proceedings by helping to ensure that criminal cases are decided on the merits and not on the basis of defects that have no bearing on guilt or innocence. This Court has held unequivocally that jury instructions which omit or misdefine a single element of a criminal offense can be harmless error. *Neder v. United States*, 527 U.S. 1 (1999). Applying the same reasoning, this Court also has held that instructional error as to a death penalty aggravator is subject to harmless error analysis even when the aggravator has not been expressly alleged or proven. *Mitchell v. Esparza*, 540 U.S. 12 (2003). These decisions are well-supported by the history of harmless error analysis, by this Court's numerous harmless error decisions, and by concerns that needless retrials neither protect constitutional rights nor engender respect for the judicial system.

The Washington Supreme Court held that, although an erroneous jury instruction omitting an element of the crime is subject to harmless error review, the same error with respect to a sentencing enhancement is not subject to harmless error review. This decision conflicts with *Neder* and *Esparza*, which illustrate that, for purposes of determining whether harmless error is available, there is no material difference between elements of the offense and sentencing enhancements. Imprecise instructions or verdict forms relating to a sentencing enhancement are subject to the same harmless error analysis that applies to errors setting forth the elements

of the crime; there is no reason for a more restrictive appellate review as to aggravating sentencing factors. Thus, *Neder* and *Esparza* clearly established the principle that harmless error analysis is appropriate as to an incomplete jury verdict, regardless of whether the gap in the verdict was caused by error in an element or a sentencing enhancement instruction. This case calls for a simple application of *Neder* and *Esparza*.

2. The Washington Supreme Court also erred by relying on a thread of reasoning from *Sullivan v. Louisiana*, 508 U.S. 275 (1993) to hold that structural error occurs whenever a judge decides any sentencing fact that should have been decided by a jury, and that such error can never be harmless. Structural errors are rare, and are categorically distinct from other constitutional errors. Such errors occur only where a defect affects the entire framework within which the trial proceeds, rather than simply an error in the trial process itself. Structural errors are inscrutable, unquantifiable, and indeterminate, and must necessarily render a trial fundamentally unfair. An error in a sentencing enhancement instruction which leads to a single gap in a jury's verdict is not within the narrow category of structural errors, because it does not infect the entire framework of the trial nor necessarily render the trial fundamentally unfair. The error here is identical to the errors in *Neder* and *Esparza*—errors that admittedly resulted in a verdict that did not encompass a single element or sentencing factor, but where it is still possible to determine beyond a reasonable doubt that the error did not affect the verdict.

3. Finally, there is no reason to question the soundness or the fairness of the constitutional harmless error rule established in *Chapman*, and applied in *Neder* and *Esparza*. The harmless beyond-a-reasonable-doubt standard is demanding, and requires the appellate court to reverse a conviction unless it can be established beyond a reasonable doubt—the highest burden of proof—that the error did not affect the verdict. The

rule permits a court to affirm the conviction where the inaccurate jury instructions did not truly deprive the defendant of a fair trial. A rule that precludes harmless error analysis of such errors would result in numerous retrials or bars to prosecution where the defendant's guilt is not in question. Moreover, such a rule would affect state court jury verdicts more frequently than federal jury verdicts because states like Washington do not routinely preclude appellate review of errors in jury instructions, even when there is no objection at trial.

The jury in this case found that the defendant was armed with a deadly weapon when he assaulted his wife. The only weapon alleged, argued, or supported by the testimony was a firearm, and the term "deadly weapon" was defined in the instructions as "any firearm." Recuenco even admitted to possessing the firearm. Since this case was tried before *Apprendi v. New Jersey*, 530 U.S. 466 (2000), neither the trial court nor the prosecutor realized that the judge's finding that Recuenco was armed with a firearm infringed on his Sixth Amendment right to trial by jury. Given the undisputed fact that a firearm was the only deadly weapon alleged, the trial court properly imposed the three-year firearm enhancement as required by law. The error in the jury instructions was harmless beyond a reasonable doubt.

ARGUMENT

The Washington Supreme Court's decision in this case is erroneous because it creates two rules for evaluating the effect of trial error: one rule that permits harmless error review of jury instructions with faulty or missing elements, and a second rule that requires automatic reversal for jury instructions that erroneously define a sentencing enhancement. Sentencing enhancements are functionally equivalent to elements under the Sixth Amendment's right to jury trial, so there is no basis for two different standards.

The Washington Supreme Court's error stemmed from two related mistakes. First, the Washington Supreme Court failed to recognize that this Court has authorized harmless error review of incomplete verdicts, regardless of whether the incomplete verdict was caused by the erroneous definition of an element or a sentencing enhancement. Thus, the Washington Supreme Court's decision conflicts with, at a minimum, this Court's decisions in *Neder v. United States*, 527 U.S. 1 (1999) and *Mitchell v. Esparza*, 540 U.S. 12 (2003).

Second, the Washington Supreme Court failed to recognize that its "structural error" holding rested on language in *Sullivan v. Louisiana* that has been expressly disavowed by this Court. The error here was not structural.

I. BECAUSE SENTENCING ENHANCEMENTS ARE THE FUNCTIONAL EQUIVALENT OF ELEMENTS OF THE OFFENSE, ERRONEOUS JURY INSTRUCTIONS ON ENHANCEMENTS ARE SUBJECT TO THE SAME *CHAPMAN*/*NEDER* HARMLESS ERROR REVIEW THAT APPLIES TO FLAWED INSTRUCTIONS ON ELEMENTS.

The practice of reviewing error in order to determine whether it was harmless has roots in English jurisprudence of the 19th century. R. Traynor, *The Riddle of Harmless Error* 4-13 (1970) (hereinafter "*Harmless Error*"); 5 W. LaFave et al., *Criminal Procedure* § 27.6(a), at 933 (2nd ed. 1999). American courts were somewhat slow to adopt the concept and ultimately came under heavy and protracted criticism for reversing convictions based upon seemingly insignificant errors. Traynor, *Harmless Error*, *supra*, at 13-14; 5 LaFave et al. *supra*, § 27.6(a), at 933-34. Eventually, "out of widespread and deep conviction over the general course of appellate review in American criminal causes[,]" both the federal government and each state adopted some form of statutory harmless-error rule by the mid-1960s. *Chapman v.*

California, 386 U.S. 18, 22 (1967); *Kotteakos v. United States*, 328 U.S. 750, 759 (1946); Traynor, *Harmless Error*, *supra*, at 13-14.

In the 1960s, as this Court expanded the reach of the federal constitution into state criminal processes, the Court had increasing occasion to address harmless error in the context of constitutional error. In *Chapman*, the Court held that a federal constitutional error could be harmless, provided an appellate court could "declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24.[4]

Over the past four decades, this Court has found a wide variety of constitutional errors subject to harmless error analysis. *See, e.g., California v. Roy*, 519 U.S. 2, 4-6 (1996) (error in jury instructions defining element of crime); *Yates v. Evatt*, 500 U.S. 391, 402-06 (1991) (unconstitutional burden-shifting malice instruction); *Clemons v. Mississippi*, 494 U.S. 738, 752-54 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Carella v. California*, 491 U.S. 263, 266 (1989) (jury instruction containing an erroneous conclusive presumption); *Satterwhite v. Texas*, 486 U.S. 249, 257-58 (1988) (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); *Pope v. Illinois*, 481 U.S. 497, 501-04 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570, 579 (1986) (jury instruction containing an erroneous rebuttable presumption); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the

[4] The *Chapman* case is an example of how the expanding reach of the federal constitution into the state criminal process speeded the development of harmless error jurisprudence. In *Chapman*, the error at issue, an instruction and comment on the defendant's failure to testify, was authorized under the California constitution and had only recently been recognized as federal constitutional error. *See Griffin v. California*, 380 U.S. 609 (1965).

circumstances of his confession); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (failure to permit cross-examination concerning witness bias); *Rushen v. Spain*, 464 U.S. 114, 117-20 (1983) (denial of right to be present at critical stage of proceedings); *United States v. Hasting*, 461 U.S. 499, 508-09 (1983) (improper comment on defendant's failure to testify); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (admission of witness identification obtained in violation of right to counsel); *Brown v. United States*, 411 U.S. 223, 231-32 (1973) (admission of the out-of-court statement of a non-testifying codefendant in violation of the Sixth Amendment Counsel Clause); *Milton v. Wainwright*, 407 U.S. 371, 372-78 (1972) (admission of confession obtained in violation of right to counsel); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment Confrontation Clause); *Harrington v. California*, 395 U.S. 250, 252-54 (1969) (denial of Sixth Amendment right to confront witnesses); *Chapman*, 386 U.S. at 24-25 (comment on the right against self-incrimination).

The Court has recognized that "while there are some errors to which *Chapman* does not apply, they are the exception and not the rule." *Rose*, 478 U.S. at 578. In *Rose*, this Court reversed a lower court's refusal to engage in harmless error analysis, and explained why harmless error analysis was entirely consistent with the constitutional protections found to have been violated in such cases.

> The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

478 U.S. at 579.

Likewise, in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), this Court considered a decision by the Delaware Supreme Court, which had adopted a per se rule prohibiting harmless error analysis as to a Confrontation Clause error. The Court found that the error was susceptible to review for harmlessness, and reversed the per se approach taken by the Delaware court. *Van Arsdall*, 475 U.S. at 682.

A few years later, this Court reaffirmed its view that the fundamental purpose of a criminal trial is to determine the guilt or innocence of the accused, that harmless error analysis is consistent with this core notion of fairness, and that the rule "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991) (quoting *Van Arsdall*, 475 U.S. at 681). Harmless error analysis is possible because the impact of discrete errors can be assessed in the context of a fully-developed record. "The common thread connecting [harmless error] cases is that each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307-08. "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless error analysis." *Neder*, 527 U.S. at 8 (quoting *Rose*, 478 U.S. at 579).

In sum, these decisions recognize that, in the absence of a constitutional provision mandating a precise remedy for constitutional violations, the Court's role is to fashion a remedy that protects constitutional rights but that does not burden courts with unnecessary retrials when the right was not meaningfully impinged. The harmless error doctrine promotes fundamental fairness in criminal proceedings by helping to

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. *State v. Allen*, 359 N.C. 425, 454-55, 615 S.E.2d 256 (2005) (Martin, J., dissenting). The doctrine ensures public confidence in the criminal justice system by reducing the risk that guilty defendants may go free. *Johnson v. United States*, 520 U.S. 461, 470 (1997) (quoting Traynor, *Harmless Error*, *supra*, at 50: "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it."). The harmless error doctrine thereby conserves judicial resources by preventing costly, time-consuming and unnecessary remands, and thus promotes the constitutional right to a "speedy trial" by reducing the number of cases on trial court dockets. *Allen*, 359 N.C. at 454 (Martin, J. dissenting) (citing *Chapman*, 386 U.S. at 22, and Traynor, *Harmless Error*, *supra*, at 14, 51). And, finally, the doctrine promotes stability and predictability in the law because appellate judges will be less likely to bend, stretch, or adapt the law in order to avoid a clearly unwarranted reversal. *Id.* at 455.

The history, decisions and policies described above were reaffirmed in *Neder v. United States*, wherein this Court applied harmless error analysis to the failure to obtain a jury finding on an element of the offense. Neder had operated several fraudulent real estate schemes funded by illegally obtained bank transactions through which he gained over $40 million. He failed to report at least $5 million on his income tax returns. He was charged with mail fraud, wire fraud, bank fraud, and two counts of filing false income tax returns. *Neder*, 527 U.S. at 5-6. In accord with the prevailing law at the time, but over Neder's objection, the trial judge decided the issue of "materiality," an element of the tax charge, and instructed the jury that it need not consider materiality. *Id.* at 6. Neder was convicted, and he appealed.

In *United States v. Gaudin*, 515 U.S. 506 (1995), this Court had held that "materiality" was an element of a similar crime, and must be submitted to the jury. In *Neder*, the Court applied *Gaudin* to the tax charge brought against Neder, and held that the materiality of Neder's tax omissions should have been decided by the jury. *Neder*, 527 U.S. at 25.

The Court also held that failure of a jury to pass on this element of the offense was subject to harmless error analysis. This holding was rooted in harmless error cases where an "erroneous instruction [that] preclude[d] the jury from making a finding on the *actual* element of the offense" had led to an incomplete verdict. *Neder*, 527 U.S. at 10 (italics in original). Sometimes the error had been a misdescription of an element, *see Pope v. Illinois*, 481 U.S. 497 (1987) (misstatement of "value" element in pornography prosecution), sometimes it had been the omission of an element, *see Johnson v. United States*, 520 U.S. 461 (1997); *California v. Roy*, 519 U.S. 2 (1996), and sometimes it had been the use of a conclusive presumption. *See Yates v. Evatt*, 500 U.S. 391 (1991) (presumption of malice from intentional criminal act); *Rose v. Clark*, 478 U.S. 570 (1986) (jury instruction containing an erroneous rebuttable malice presumption). In each situation the jury's verdict was defective, and incomplete, in the sense that there existed a gap between what was found and what the law required. For instance, a conclusive presumption "deters the jury from considering any evidence other than that related to the predicate facts . . . and 'directly foreclose[s] independent jury consideration of whether the facts proved established certain elements of the offens[e].'" *Neder*, 527 U.S. at 10 (quoting *Carella*, 491 U.S. at 266 (Scalia, J., concurring in judgment)). Although each of these cases involved an incomplete verdict, the Court found the error harmless.

Applying the same reasoning to *Neder*, the Court found that the evidence of "materiality" was overwhelming and

uncontroverted, and that the error which caused the incomplete verdict was therefore harmless beyond a reasonable doubt. *Neder*, 527 U.S. at 16-17.

In 2003, this Court revisited the issue of harmless error analysis in the context of a challenge to aggravating factors that authorized a death sentence, and reversed the grant of a federal habeas corpus petition because the Sixth Circuit had erroneously interpreted this Court's cases as precluding harmless error analysis. *See Mitchell v. Esparza*, 540 U.S. 12 (2003). Esparza killed a store clerk in a robbery by shooting her once in the neck. He was charged with and convicted of capital murder. On post-conviction review, Esparza alleged, citing the Eighth Amendment, *Apprendi v. New Jersey*, and *Sullivan v. Louisiana*, that the death penalty could not be imposed because the state had not alleged the aggravating factor—that Esparza was the "principal offender"—and hence the jury had never found this factor. *Mitchell v. Esparza*, 540 U.S. at 15; *see also Esparza v. Mitchell*, 310 F.3d 414, 418-20 (6th Cir. 2002).[5]

This Court reversed in a per curiam opinion, reaffirming its previous harmless error holdings:

> According to the Sixth Circuit, Ohio's failure to charge in the indictment that respondent was a "principal" was the functional equivalent of "dispensing with the reasonable doubt requirement" 310 F.3d, at 421 (citing *Sullivan v. Louisiana*, *supra*, at 280). Our precedents, however, do not support its conclusion. In noncapital cases, we have often held that the trial court's failure to instruct a jury on all of the statutory elements of an offense is

[5] The issues in *Esparza* were not simply Eighth Amendment-based. The Sixth Circuit Court of Appeals' decision was based on the conclusion that permitting an appellate judge to find an aggravating fact that was neither alleged nor proved would be akin to dispensing with the reasonable doubt requirement, as forbidden in *Sullivan*. *Esparza v. Mitchell*, 310 F.3d at 421, 431 n.4 (Suhrheinrich, J. dissenting).

> subject to harmless-error analysis. *E.g.*, *Neder v. United States*, 527 U.S. 1 (1999); *California v. Roy*, 519 U.S. 2 (1996) *(per curiam); Carella v. California*, 491 U.S. 263 (1989) *(per curiam); Pope v. Illinois*, 481 U.S. 497 (1987).

Mitchell v. Esparza, 540 U.S. at 16. As in *Neder*, the Court distinguished *Sullivan* on the basis that the error in *Sullivan* vitiated all the jury's findings, not just a single finding. *Id.* Accordingly, this Court held that the lower federal courts had exceeded their authority to review state court interpretations of Supreme Court precedent under 28 U.S.C. § 2254(d)(1). *Id.* at 18.

Thus, *Neder* and *Esparza*, as well as the precedents upon which those cases were decided, illustrate that instructional errors as to elements *and* sentencing factors are both subject to harmless error analysis when they result in an incomplete verdict. 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 *Esparza* rules.

The Washington Supreme Court believed, however, that although harmless error analysis was permissible for incomplete verdicts caused by faulty elements instructions, harmless error analysis was not permissible for incomplete verdicts caused by an erroneous sentencing factor instruction. *See Hughes*, 154 Wash.2d at 148 n.12.[6] This holding is incorrect.

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[6] Washington has long applied harmless error analysis to jury instructions that misdefine or omit an element of the offense. *See State v. Brown*, 147 Wash.2d 330, 340, 58 P.3d 889 (2002) (adopting *Neder* because it was consistent with Washington law), and *State v. Courtemarch*, 11 Wash. 446, 39 P. 955 (1895) (improper presumption instruction). Similarly, Washington has a history of applying harmless error review to sentencing enhancement errors. *See State v. Belmarez*, 101 Wash.2d 212, 216, 676 P.2d 492 (1984) (erroneous conclusive presumption in deadly weapon instruction); *In re Taylor*, 95 Wash.2d 940, 944,

The constitutional error that occurred in this case was the failure to submit a fact concerning the sentencing enhancement to the jury. In a number of recent cases, this Court has repeatedly held that, pursuant to the Sixth Amendment, any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Blakely*, 542 U.S. at 301; *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002); *Apprendi*, 530 U.S. at 490. These decisions were based upon the Court's understanding that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478 (footnote omitted). For 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. *Id*. at 494 n.19.

Accordingly, there is no basis for distinguishing between elements and sentencing enhancements when determining whether harmless error applies. In each situation, the question for harmless error analysis is the same—does the error in the element or the enhancement, resulting in a less-than-complete verdict on a single element or enhancement, require automatic reversal? The answer, as established by *Neder* and *Esparza*, is "no." Where the jury failed to make an express finding on a single element or enhancement, that failure can be harmless in some circumstances. A single rule of appel-

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632 P.2d 56 (1981) (failure to instruct jury that it needed to find firearm enhancement beyond a reasonable doubt); *State v. Hall*, 95 Wash.2d 536, 541, 627 P.2d 101 (1981) (same); *State v. Mode*, 57 Wash.2d 829, 360 P.2d 159 (1961) (failure to submit special interrogatory concerning age of victim); *State v. Cook*, 69 Wash. App. 412, 418, 848 P.2d 1325 (1993) (error in defining "deadly weapon").

late review should apply to faulty instructions on elements and sentencing enhancements.

In this case, the Washington Supreme Court departed from this Court's clear precedent, as well as its own history of applying harmless error review. Although it believed its holding was compelled by this Court's decisions, that conclusion was erroneous, and should be reversed. The error that occurred in Recuenco's trial is no different, and certainly no more egregious, than the errors in *Mitchell v. Esparza*, *Neder v. United States*, *Pope v. Illinois*, *California v. Roy*, *Carella v. California*, *Yates v. Evatt*, or *Rose v. Clark*. The error here is subject to the same harmless error review that applied in those cases.

II. THE WASHINGTON SUPREME COURT ERRONEOUSLY RELIED ON *SULLIVAN V. LOUISIANA* TO CONCLUDE THAT STRUCTURAL ERROR OCCURS WHENEVER A JUDGE DECIDES A SENTENCING ENHANCEMENT RESERVED FOR A JURY.

The Washington Supreme Court also held that the trial court's failure to ask the jury to find whether the deadly weapon was a firearm constituted "structural error" and thus was not subject to any harmless error analysis. Pet. App. 8a, 23a-27a. As did the Sixth Circuit in *Esparza*, *supra*, the state supreme court here believed that this holding was compelled by *Apprendi v. New Jersey* and *Sullivan v. Louisiana*. The court was incorrect—an error in defining a sentencing enhancement is not structural.

A few types of error, affecting "a very limited class of cases," are not subject to *Chapman* harmless error analysis. *Johnson v. United States*, 520 U.S. 461, 468 (1997). These "structural" errors are almost always reversible error because they "contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial

process itself." *Neder*, 527 U.S. at 8 (quoting *Fulminante*, 499 U.S. at 310). Such errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), so as to "necessarily render a trial fundamentally unfair." *Rose*, 478 U.S. at 577.

Errors that fit within this limited category include trials wherein there was a complete denial of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); a biased trial judge, *Tumey v. Ohio*, 273 U.S. 510 (1927); racial discrimination in selection of a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); denial of self-representation, *McKaskle v. Wiggins*, 465 U.S. 168 (1984); denial of public trial, *Waller v. Georgia*, 467 U.S. 39 (1984); and the use of a defective reasonable-doubt jury instruction. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Each of these errors is "unquantifiable and indeterminate" such that an appellate court could never discern whether the error did not prejudice the defendant. *Sullivan*, 508 U.S. at 282. If an appellate court cannot make such a determination, then the "criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Fulminante*, 499 U.S. at 310 (quoting *Rose*, 478 U.S. at 577-78) (citation omitted). Structural error has traditionally been a categorical determination based on the nature or the character of the error itself, rather than a case-by-case examination of a particular jury's decision. *Neder*, 527 U.S. at 14.

In *Sullivan v. Louisiana*, the Court concluded that a faulty reasonable doubt instruction was not subject to harmless error analysis because it "vitiates *all* the jury's findings," 508 U.S. at 281, and produces "consequences that are necessarily unquantifiable and indeterminate." *Id.* at 282. An alternative thread of reasoning in *Sullivan* suggested a more restrictive approach to harmless error analysis than had been taken in past cases. Under that reasoning, where there is the absence of an actual verdict of guilty-beyond-a-reasonable-

doubt, "the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Id.* at 280 (italics in original).

Relying on this language, the Washington Supreme Court held that replacing a jury finding with a judge finding was "structural" error which could never be harmless.

> . . . It would be illogical to perform harmless error analysis on the absence of those findings. There is no object upon which to apply harmless error analysis. Instead of asking whether but for the error the findings *would have been the same*, the court would be asking whether but for the error the findings *would have been different.* Such an analysis is the equivalent of speculating on the jury's verdict, which the Supreme Court has held is never allowed.

Pet. App. 23a (internal citations omitted—emphasis in original).

This holding that *Sullivan* bars harmless error review of erroneous sentencing enhancement jury instructions is flawed for a number of reasons. As discussed in the preceding section, this approach cannot be reconciled with *Esparza*, *Neder*, or the precedents on which those cases were built. It is also at odds with this Court's plain error decisions, wherein this Court has noted that judicial findings do not irreparably taint a criminal trial.

First, the broad language in *Sullivan* was expressly disavowed in *Neder*. *See Neder*, 527 U.S. at 11-12 ("Although this strand of the reasoning in *Sullivan* does provide support for Neder's position, it cannot be squared with our harmless-error cases"); *id.* at 13 ("We believe this approach is mistaken for more than one reason."). The Court observed that an extension of the reasoning of *Sullivan* to cases involving jury instructions with a missing element would conflict with the Court's prior decisions, and result in an undesirable rule, even

if such an extension would not be illogical. In short, the Court concluded that ". . . if the life of the law has not been logic but experience, see O. Holmes, The Common Law 1 (1881), we are entitled to stand back and see what would be accomplished by such an extension in this case." *Id.* at 15. Because a retrial would not focus on the omitted issue of materiality, but instead would require re-litigation of issues upon which the jury was properly instructed, the Court concluded that "the Sixth Amendment [does not] require . . . us to veer away from settled precedent to reach such a result." *Id.*; *see also Esparza*, 540 U.S. at 16-18.

Second, this Court has repeatedly rejected appeals based on plain error analysis even where elements or sentencing factors were omitted. Plain error analysis requires a party to show (1) error, (2) that is plain, and (3) that affects substantial rights. If all three steps are met, the Court decides whether to exercise discretion to review the question, considering whether (4) failure to note the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See* Fed. R. of Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725 (1993); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (conviction affirmed in spite of judicial finding on element of "materiality" where defendant failed to object); *United States v. Cotton*, 535 U.S. 625 (2002) (aggravated sentence based on judicial finding of drug amount affirmed where no objection was lodged to judicial finding). In *Johnson* and *Cotton*, this Court refused to grant relief to a defendant who failed to object to a judicial finding on an element (*Johnson*) or a sentencing enhancement (*Cotton*) because "even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Cotton*, 535 U.S. at 632-33.

Although plain error analysis is distinct from constitutional harmless error analysis, in *Neder*, this Court found "instruc-

tive" its earlier decision in *Johnson* that a similar error was not plain. *Neder*, 527 U.S. at 9. The Court recognized that the fact that the error was not plain "cuts against the argument that the omission of an element will *always* render a trial unfair." *Id.* (emphasis in original). Thus, this Court's plain-error cases are consistent with the view that error in permitting a judge, rather than a jury, to decide a single element or sentencing enhancement, is fundamentally different from those errors this Court has deemed "structural."

For these reasons, this Court should reverse the Washington Supreme Court's holding that structural error occurs whenever a trial court errs in instructing a jury on a sentencing enhancement.

III. *CHAPMAN*/*NEDER* HARMLESS ERROR ANALYSIS IS FAIRLY APPLIED BY BOTH FEDERAL AND STATE APPELLATE COURTS; A DIFFERENT RULE WOULD NOT FURTHER JUSTICE AND COULD DISPROPORTIONATELY AFFECT STATE CONVICTIONS.

As argued above, the *Chapman* / *Neder* harmless error test strikes an appropriate balance between competing interests, such that constitutional rights are protected without reversing every imperfect trial. Although nearly every state and federal appellate court has determined that harmless error analysis is appropriate where a judge has decided an issue that should have been decided by the jury, see Pet. 10-15; *State v. Allen*, 359 N.C. at 467 n.13 and 468 n.15 (Martin J., dissenting) (collecting state and federal cases as of July 1, 2005), there is no evidence that these rulings have diminished the jury trial right. In fact, not surprisingly, many courts have reversed jury verdicts under the stringent *Chapman* standard of review, because it could not be said that the error was harmless beyond a reasonable doubt. *See United States v. Casas*, 425 F.3d 23, 59-61 (1st Cir. 2005) (finding that *Blakely* error in

enhancing sentence based upon judicial finding of drug quantity was not harmless beyond a reasonable doubt); *United States v. Olis*, No. 04-20322, 2005 WL 2842077 (5th Cir. filed Oct. 31, 2005) (holding that *Blakely* error was not harmless beyond a reasonable doubt); *United States v. Meyer*, 427 F.3d 558, 560-61 (8th Cir. 2005) (finding that *Booker* error in setting amount of fine was not harmless beyond a reasonable doubt); *United States v. Small*, 423 F.3d 1164, 1190-91 (10th Cir. 2005) (holding that judicial finding of drug quantity at sentencing was not harmless beyond a reasonable doubt). These cases illustrate that appellate courts well understand the limited circumstances under which constitutional error can truly be harmless, and faithfully apply that standard. A rule of automatic reversal is not required.

It should also be noted that the effect of an automatic reversal rule in these circumstances would be significant, and is likely to be greater on state courts than on federal courts because many state courts, including Washington, do not apply the federal plain error rule. In *Neder*, the dissenting justices suggested that the Court was overly concerned that an automatic reversal rule would "invalidate convictions in innumerable cases where the defendant is obviously guilty," and insisted that "there is simply no basis for this concern" because most errors would not have been preserved, and thus would be rejected pursuant to the federal plain error analysis. *Neder*, 527 U.S. at 39 (Scalia, J., dissenting).

But Washington courts employ a considerably more liberal scope of review that permits constitutional errors in jury instructions to be raised for the first time on review. *See, e.g.*, *State v. Mills*, 154 Wash.2d 1, 6, 109 P.3d 415 (2005) (holding that the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal).

Thus, under *Recuenco*, a defendant in Washington whose jury was improperly instructed as to a sentencing enhance-

ment can remain silent at trial, yet obtain automatic reversal on appeal, no matter how insignificant the error. To the extent that this Court's decision on the application of the harmless error test is influenced by the potential impact of that test, we respectfully urge this Court not to adopt a test that will have greater repercussions on the state courts than on the federal courts.

Finally, although the jury instructions and the verdict form in this case should have been drafted to ensure an express jury verdict that Recuenco was armed with a firearm, the error clearly did not deprive Recuenco of a fair trial. Even defense counsel said after trial, "the firearm is a[n] element of this offense as it has been pleaded and argued to the jury and evidently, perhaps obviously, proven to the jury." J.A. 37. Likewise, the trial court observed that, ". . . no other weapons [we]re the subject of this trial other than a firearm." J.A. 25. Under these circumstances, it is clear that the error in drafting these instructions did not affect the verdict on the enhancement, and that the error was harmless beyond a reasonable doubt.

CONCLUSION

The decision of the Washington State Supreme Court should be reversed, and the case should be remanded for a determination of whether the error was harmless, and for consideration of other issues properly presented by Recuenco's appeal.

Respectfully submitted,

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