No. _____

In the
Supreme Court of the United States

LONNIE LEE OWENS,
Petitioner,

v.

MIKE PARRIS, WARDEN
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the decade since this Court ruled in *Washington v. Recuenco*, 548 U.S. 212 (2006), that errors under *Blakely v. Washington*, 542 U.S. 296 (2004), can be harmless, the lower courts have struggled to apply harmless-error analysis where the jury returned a compromised verdict, the sentencing enhancement at issue required a subjective assessment of the nature of the crime, and the application of the enhancement required the judge to resolve a disputed fact at trial. Here, a Tennessee jury returned a compromise verdict finding Lonnie Lee Owens guilty of second-degree murder, an offense punishable by 20 years in prison. He is serving 24. At sentencing, the judge enhanced Owens's sentence by finding a disputed fact against Owens to conclude that his crime was exceptionally cruel. The state appellate court approved the enhancement, describing Owens's argument that *Blakely* forbids this kind of judicial fact-finding as having "no merit." The district court granted Owens' habeas petition, holding that the state court's decision was contrary to or an unreasonable application of *Blakely* and that the error was not harmless, but the Sixth Circuit reversed, holding that the jury doubtlessly would have agreed that Owens deserved the enhanced sentence. In finding the *Blakely* error harmless, the Sixth Circuit's decision stands in conflict with decisions of several other courts.

The question presented is:

Whether a *Blakely* error is harmless when the jury returned a compromise verdict and the sentencing

enhancement at issue required a subjective assessment of disputed facts and witness credibility.

STATEMENT OF RELATED PROCEEDINGS

- *Owens v. Parris*, No. 17-5488 (6th Cir.) (opinion issued and judgment entered July 30, 2019; mandate issued Aug. 21, 2019).
- *Owens v. Steward*, No. 4:14-cv-00018 (E.D. Tenn.) (opinion issued and judgment entered Mar. 29, 2017).
- *Owens v. Tennessee*, No. M2011-02188 (Tenn. Ct. Crim. App. 2013) (opinion issued Apr. 4, 2013, and permission to appeal denied by Tennessee Supreme Court Oct. 16, 2013).
- *Tennessee v. Owens*, No. M2005-00362 (Tenn. Ct. Crim. App. 2005) (opinion issued Oct. 18, 2005, and permission to appeal denied by Tennessee Supreme Court Mar. 27, 2006).

There are no additional proceedings in any court that are directly related to this case.

PARTIES TO THE PROCEEDING

Lonnie Lee Owens is the petitioner here and was the appellee below.

Mike Parris, Warden, is the respondent here and was the appellant below, having been substituted for Henry Steward.

CORPORATE DISCLOSURE STATEMENT

Lonnie Lee Owens is an individual, and Mike Parris, Warden, is an official of the State of Tennessee.

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PETITION FOR WRIT OF CERTIORARI

While courts have generally had little trouble applying ordinary harmless-error analysis to *Blakely* errors in the decade since *Washington v. Recuenco*, 548 U.S. 212 (2006), there is a recent, growing division among the lower courts over whether a *Blakely* error can be harmless when the jury returns a compromise verdict, the sentencing enhancement at issue requires a subjective assessment of the nature of the crime, and the factual basis for the enhancement requires the judge to resolve a disputed fact. When those circumstances are present, the protections of the Fifth and Sixth Amendments should be at their highest. The Fourth and Ninth Circuits and the California Supreme Court have recognized as much, holding that *Blakely* errors are not harmless when at least one of those circumstances is present.

The Sixth Circuit, however, reached the opposite conclusion when *all* of those circumstances were present. In the decision below, a Tennessee jury returned a compromise verdict finding Lonnie Lee Owens guilty of second-degree murder, an offense punishable by 20 years in prison. He is serving 24, because the sentencing judge enhanced his sentence by finding a disputed fact against Owens to conclude that his crime was exceptionally cruel. The state appellate court approved the enhancement as consistent with *Blakely* and did not reach the harmless-error question.

The district court ultimately granted habeas relief on the ground that the state court's determination of

the constitutional question was contrary to or an unreasonable application of this Court's clearly established law in *Blakely*, and concluded that in light of the compromise verdict, the nature of the enhancement, and the disputed facts it could not conclude that the constitutional error was harmless. *Owens v. Steward*, No. 4:14-cv-18, 2017 WL 1184178, at *7-11 (E.D. Tenn. Mar. 29, 2017). The Sixth Circuit reversed. Although it too identified a constitutional violation, it held that the mistake was harmless because the defendant's testimony was, in the court's view, "fantastic." *Owens v. Parris*, 932 F.3d 456, 459, 461 (6th Cir. 2019).

Whatever is the high-water mark of a harmless-error finding in the *Blakely* context, the Sixth Circuit's holding plainly exceeds it. The core protection of *Blakely* is that the jury—not the judge—decides disputed issues of fact, and in particular credibility determinations. In a case where the jury returns a compromise verdict, the sentencing enhancement at issue is subjective, and the underlying facts are disputed, a *Blakely* error should not be harmless, as the Fourth and Ninth Circuits and California Supreme Court have rightly recognized. This Court should grant certiorari, resolve the conflict between those courts and the Sixth Circuit, and bring clarity to the intersection of harmless-error principles and *Blakely*.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 932 F.3d 456 and reproduced at App.1-10. The district court's opinion is available at 2017 WL 1184178 and reproduced at App.11-70.

JURISDICTION

The Sixth Circuit issued its opinion on July 30, 2019. Justice Sotomayor extended the time to file a petition for a writ of certiorari to and including December 27, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury …" U.S. Const. amend. VI.

The Fourteenth Amendment provides, in relevant part: "No State shall … deprive any person of life, liberty, or property, without due process of law …." U.S. Const. amend. XIV.

The relevant provisions of Tennessee's former sentencing laws, including Tenn. Code Ann. § 40-35-114 and Tenn. Code Ann. § 40-35-210, (2003) are reproduced at App.144-App.148.

STATEMENT OF THE CASE

A. Legal Background

1. The right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). Equally "vital … in our criminal procedure" is the "requirement of proof beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 363 (1970). Taken together, these tenets yield a simple command: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

This rule matters most in preserving the balance of power between judges and juries. Historically, the functions of each were relatively clear. The jury would find that the defendant had committed all the essential elements of the offense, and the judge would simply impose the punishment required by the law. *Apprendi*, 530 U.S. at 478-82; *see also Alleyne v. United States*, 570 U.S. 99, 108-09 (2013). Judges sometimes had discretion over the exact sentence, but only "*within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481 (emphasis in original).

As time went on, however, "novel[] … legislative scheme[s]" shifted greater sentencing responsibility to the judge. *Id*. at 482; *see also United States v. Booker*, 543 U.S. 220, 236-37 (2005). Although the jury still was tasked with finding the defendant guilty of *some*

offense, the judge would determine the minimum and maximum sentences by making factual findings of his own—often by just a preponderance of evidence. *See, e.g.*, *Apprendi*, 530 U.S. at 468-71, 491-92 (describing New Jersey's scheme); *id.* at 485-86 (referencing Pennsylvania's). Indeed, as judicially imposed "enhancements became greater, the jury's finding of the underlying crime became less significant." *Booker*, 543 U.S. at 236.

This Court emphatically rejected this usurpation of the jury's role in *Apprendi*. Like Owens's case, *Apprendi* involved a judge-made finding by a preponderance of the evidence to impose a punishment above the statutory maximum. 530 U.S. at 468-71. Specifically, the defendant in *Apprendi* had pleaded guilty to a gun-possession charge after firing several shots into the home of a black family. *Id.* at 469-70. Although the maximum statutory punishment was 10 years, the judge sentenced him to 12 years by applying a hate-crime enhancement. *Id.* at 470-71; *see also id.* 491-92. This Court reversed, explaining that if factual findings impact "the prescribed range of penalties to which a criminal defendant is exposed," it "is unconstitutional for a legislature to remove [them] from the jury" or to demand less than "proof beyond a reasonable doubt." *Id.* at 490 (citation omitted).

Several decisions since *Apprendi* have left little doubt that judicial findings cannot be the "tail which wags the dog of the substantive offense." *Id.* at 495 (citation omitted). Just two years after *Apprendi*, this Court held that a jury must find "an aggravating circumstance necessary for imposition of the death

penalty." *Ring v. Arizona*, 536 U.S. 584, 609 (2002); *see also Hurst v. Florida*, 136 S. Ct. 616 (2016). And soon after that, the Court declared in *Booker* that the mandatory federal sentencing guidelines were unconstitutional because they depended on judicial fact-finding. 543 U.S. at 226-27, 233-35, 245 (2005).

Most relevant for present purposes is this Court's 2004 decision in *Blakely*. That case clarified that the relevant statutory maximum is the longest "sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" and that the judge may not exceed this cap based on his own findings. *Blakely*, 542 U.S. at 303-04 (emphasis in original). It is irrelevant, the Court explained in *Blakely*, whether requiring a jury to find all of the necessary facts comports with notions of "efficiency or fairness," or whether it might be better to "leav[e] justice entirely in the hands of professionals." *Id.* at 313. All that matters is that, under "the Framers' paradigm for criminal justice …, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.*

But even after *Blakely*, Tennessee retained a judge-centered sentencing regime, in which the jury's verdict produced a "presumptive sentence," Tenn. Code Ann. §§ 40-35-105, -114, -210 (2003), and the judge was then "require[d to] find and consider statutory enhancement factors and mitigating factors" to determine the sentence. *State v. Gomez*, 163 S.W.3d 632, 659 (Tenn. 2005), *vacated* 549 U.S. 1190 (2007). If there were no judge-found enhancement or

mitigating factors, then the law "mandate[d] imposition of the presumptive sentence." *Id.* at 660. But if the judge found an aggravating factor, he could then impose a more severe punishment. *See id.* at 660. To be sure, unlike Washington's sentencing regime in *Blakely*, Tennessee's sentencing regime did not "*mandate* an increased sentence upon [the] finding of an enhancement factor." *Id.* at 660. But it gave the judge—and the judge alone—"discretion to select a sentence *at or above* the presumptive minimum" based on judge-found facts. *Id.*

This Court eventually confirmed what was already clear in *Blakely* itself—that sentencing regimes like Tennessee's violate the Constitution. *See Cunningham v. California*, 549 U.S. 270, 274 (2007) (holding that California's similar scheme was unconstitutional); *Butler v. Curry*, 528 F.3d 624, 635 (9th Cir. 2008) ("[T]he result in *Cunningham* was compelled by precedent …"). *Cunningham* reiterated that "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt," invalidating California's system that permitted an enhanced sentence "only when the trial judge f[ound] an aggravating circumstance" on the ground that it "violate[d] *Apprendi*'s bright line rule." 549 U.S. at 281, 288.

Although the Tennessee Supreme Court invalidated Tennessee's sentencing regime following *Cunningham*, that change came too late for Owens, who was sentenced between *Blakely* and *Cunningham*. Although this Court had already

decided *Blakely* by the time of his direct appeal, the Tennessee Supreme Court had decided that *Blakely* did not invalidate the state's sentencing regime. *See Gomez*, 163 S.W.3d at 661-662 (refusing even "to accept the state's concession that the defendants' sentences were imposed in violation of the Sixth Amendment"). So when Owens presented his *Blakely* argument to the Tennessee Court of Criminal Appeals, the court decided that it had "no merit." App.136.

2. Two years after *Blakely*, in *Washington v. Recuenco*, this Court held that the failure to submit a fact to the jury in violation of *Apprendi*, *Blakely*, and its progeny was subject to harmless-error review. 548 U.S. 212, 220-222 (2006). The Court explained that an error of that kind simply was a member of the vast majority of "constitutional errors [that] can be harmless." *Id.* at 218 (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)).

Recuenco created more questions than it answered. For although it made clear that a *Blakely* error *can* be harmless, the decision offered little guidance on *when* that will be the case. This uncertainty has created confusion and division in the lower courts, as courts have disagreed over whether to hold errors harmless when the jury returned a compromise verdict or when the enhancement required a subjective evaluation of disputed facts and witness credibility.

B. Owens's Case

1. The facts surrounding Owens' killing of his estranged wife were heavily disputed at trial. For present purposes, the dispute centered on whether Owens believed his wife was alive when he covered her face and limbs with duct tape. Only two witnesses at trial testified as to these facts: Owens and the state medical examiner.

a. Owens testified that he accidentally killed his wife by striking her in the head, and that he believed she was dead prior to placing duct tape on her body. He testified that he knew that his wife planned to stop by his house at some point to pick up their children, but she had not given him an exact time when they spoke over the phone. She ended up deciding to surprise Owens, entering his house unannounced and shouting "F-you" at him as he walked into the kitchen. Startled, Owens "swung as hard as [he] could" because "somebody was behind [him] and … right on top of [him]." TT 965, 1024[1]. The blow knocked his wife to the ground, where she lay motionless. She also urinated on herself. Owens checked her arm for a pulse, found none, and concluded that she was dead.

Owens tried to move what he believed was his wife's dead body out of his house but had difficulty because her limbs were flailing. He testified that he sought to solve this problem by binding her feet and arms with duct tape. He also covered her face in tape

[1] "TT" refers to pages from the trial transcript, which can be found at Dkt.10-15- to 10-24 on the district court docket.

because it was turning "gray colored" and he did not want to "look at her." TT 970-72. Owens then temporarily concealed the body in the shed behind his house, and he also hid his wife's vehicle by driving it to the parking lot of a nearby store. Later that evening, he took the body to an island and buried it.

b. The state advanced a different theory: it claimed that Owens had *purposely* suffocated his wife with the duct tape and allowed her to die in an agonizing fashion. The state's evidence, however, was mixed on the manner of death and lacking on Owens's cruel intent. The medical examiner, Dr. Charles Harlan,[2] opined that the victim suffocated because of the duct tape, but he admitted that this was an "[e]xtremely unusual form of death" and that no evidence supported his conclusion besides the presence of the tape and the lack of another obvious cause. TT 808-11, 813-14. Indeed, he admitted to finding none of the type of hemorrhaging that can be indicative of "suffocation or asphyxia." TT 824-26.

Moreover, the medical testimony failed to establish that Owens's wife was conscious as she suffocated. Although Dr. Harlan was skeptical that the punch was *fatal*, he explained that "a blow [could] render [someone] *unconscious*" without "leav[ing] a mark." TT 809-10, 814-15 (emphasis added). In other

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[2] Harlan lost his medical license two years after the trial. *See* App.74. The revocation order reflected "numerous instances of inadequate medical examinations and documentation and erroneous medical findings," as well as "erratic and unprofessional conduct." *Id.*

words, even if Owens's wife had asphyxiated, Dr. Harlan could not say that she had suffered while doing so.

Finally, and perhaps most importantly, the medical evidence never undermined Owens's assertion that he honestly believed that his comatose wife was already dead when he wrapped her in tape. On the contrary, Dr. Harlan agreed that "a person [who] was rendered unconscious might have the appearance of being dead," and he also admitted that someone who was not "a trained medical professional [who] knew how to check for signs of life" might make a mistake. TT 815.

c. The jury ultimately returned a compromise verdict of second-degree murder. Although the state had urged first-degree murder and Owens had suggested voluntary manslaughter, the jury settled in-between. *See* App.95. Under contemporary Tennessee law, this conclusion meant that Owens would spend 20 years in prison unless the judge found the presence of a statutory enhancing or mitigating factor.

Here, the judge thought that Owens deserved more than a 20-year sentence on the ground that he had treated his wife "with exceptional cruelty during the commission of the offense." *See* App.146. Although Tennessee law reserved this enhancement for extreme cases involving "the infliction of pain or suffering for its own sake or [for] the gratification derived therefrom," *State v. Arnett*, 49 S.W.3d 250, 258 (Tenn. 2001) (citation omitted), the judge still found it

appropriate here. In doing so, the judge placed particular emphasis on his belief that Owens's wife had been "duct taped while alive" and "allowed to suffocate and die." App.142.

On appeal, the Tennessee Court of Criminal Appeals affirmed the enhancement based on sufficiency-of-the-evidence analysis, concluding that there was sufficient evidence to show that Owens's wife was alive and conscious as she suffocated. In particular, the court emphasized that she had "desperately … tried to continue breathing" and that Owens had "treated [her] with a calculated indifference to her suffering and … achieved some form of gratification from murdering [her]." App.135. The state court also relied on a key allegation that was *not presented at trial and that later proved to be false*: an erroneous statement in the presentence report that Dr. Harlan "found traces of duct tape in one of the victim's lungs." App.133; *cf.* App.101.

The Tennessee Court of Criminal Appeals, applying the Tennessee Supreme Court's decision in *Gomez*, rejected Owens's *Blakely* claim. The court reasoned that Tennessee's sentencing scheme did not violate *Blakely*, so Owens's theory had "no merit." App.135-36. Having found no *Blakely* error, the state appellate court never considered whether any error would have been harmless.

2. Both federal courts to have considered Owens's claims squarely rejected the Tennessee Court of Criminal Appeals' conclusion that Owens's *Blakely* error had "no merit." Both the district court and the

Sixth Circuit concluded that Owens's sentence was clearly unconstitutional following *Blakely*. *See* App.5; App.28-29. The only real question is whether this clear error was harmful.

a. The district court concluded that the *Blakely* error here was not harmless. The court first reiterated the high legal standard for the cruelty enhancement, App.31. (surveying Tennessee law), and then emphasized the inconclusive nature of the medical evidence at trial. App.36. In particular, it noted the thin proof that asphyxiation was the cause of death and Dr. Harlan's inability to determine whether Owens's wife "was rendered unconscious first." App.34-35 (citation omitted). The district court explained that the "limited and open-ended testimony regarding the timing and nature of the victim's cause of death," coupled with the fact that the jury "specifically rejected a conviction for first-degree murder," left the court with "grave doubt" that the enhancement was harmless. App.36-37. Accordingly, the district court granted the writ. App.38.

b. The Sixth Circuit disagreed. The central premise of its holding was that "the jury rejected Owens's account of the murder and accepted the State's." App.10. Specifically, the court stressed the "fantastic aspects" of Owens's testimony, the prosecution's "simple[r]" theory of the crime, and the jury's decision to return a verdict of second-degree murder instead of manslaughter. App.9-10; *see also id.* App.10 (expressing skepticism "that any sentient juror would have believed any of [Owens's story]"). So given that the state's version of events showed that

Owens suffocated his wife under circumstances "amount[ing] to psychological abuse or torture" and exhibiting "calculated indifference toward her suffering," the Sixth Circuit had "little doubt that, if asked, the jury would have made the requisite finding." *Id.*

REASONS FOR GRANTING THE PETITION

The decision below highlights and entrenches two points of division in the lower courts about how to assess the harmlessness of *Blakely* errors. The first concerns the effect of a verdict showing that the jury at least partially rejected the prosecution's theory of the case. The Ninth Circuit and the California Supreme Court have held that such a verdict means that an enhancement based on the state's version of events is not harmless, whereas the Sixth Circuit has taken the opposite approach. The second is about whether an enhancement can be harmless if it requires a subjective evaluation of disputed facts and witness credibility. Many decisions have refused to hold such qualitative enhancements harmless unless overwhelming and undisputed proof supported the judge's findings. But the Sixth Circuit, again, has taken a contrary approach. This Court should step in to clarify that, although *Blakely* errors can be harmless, the core protections of *Blakely* do not permit a harmless-error finding where the jury returns a compromise verdict, the sentencing enhancement at issue requires a subjective assessment of the nature of the crime, and the facts underlying the enhancement are disputed.

A. The Decision Below Drew The Wrong Inference From A Compromise Verdict In Conflict With The Ninth Circuit And California Supreme Court.

1. Any assessment of harmless error based on a *Blakely* error should start by looking at what the jury actually did. Often a jury verdict does not reflect the binary choice of believing either the prosecution or the defense, but reflects that it rejected *both* sides' theories. Specifically, where a jury rejects the most serious crime charged *and* rejects the defendant's request—settling for a conviction in the middle—then it is hard to tell which version of disputed facts the jury believed.

In such cases of compromise verdicts, courts have refused to find *Blakely* errors harmless when a judge imposed an enhancement based on the prosecution's account of the crime. In *Ramirez v. Vasques*, for example, the Ninth Circuit held harmful an enhancement that rested on three aggravating factors: "planning, sophistication or professionalism," the "vulnerab[ility]" of the victim, and the "cruelty" of the offense. 592 F. App'x 550, 552 (9th Cir. 2014). In the underlying prosecution, the state had charged the defendant with murder for the shooting death of his sister's boyfriend, whereas the defendant claimed self-defense. *Id.* at 551. Although the jury had taken the middle road of voluntary manslaughter, the judge imposed an enhanced sentence after "reciting in large part the prosecution's view of the evidence." *Id.* at 551-52. The Ninth Circuit held that the judge's usurpation of the jury's role was not harmless: "Although one view

of the evidence—that espoused by the prosecution—could likely support one of more of the aggravating factors," that "the jury did not fully accept that version of events" gave the court "grave doubt" about whether the defendant had suffered prejudice. *Id.* at 552.

The Supreme Court of California embraced similar logic in *People v. Sandoval*, holding that a *Blakely* error was not harmless where a judge enhanced a sentence for voluntary manslaughter based on judge-found facts. 161 P.3d 1146, 1154-57 (Cal. 2007). Three of the underlying aggravating factors at issue in that case concerned the defendant's mental state: that her actions were "callous," that she had no "concern regarding the consequences of her actions," and that "the offense reflected planning and premeditation." *Id.* at 1156. Although some evidence supported these conclusions, the court stressed that the "defendant's state of mind was hotly contested at trial" and that, "*[e]vidently, the jury rejected the prosecution's view of the evidence*" by finding the "defendant guilty … only of the lesser included offense of voluntary manslaughter." *Id.* (emphasis added). "In view of th[is] verdict and the state of the evidence," the court could not "conclude with any degree of confidence … that the jury would have found [the necessary facts]."[3] *Id.*; *see also id.* at 1157 (rejecting

[3] To be sure, the California Supreme Court was directly reviewing the sentence and thus had to decide whether the error was harmless beyond a reasonable doubt, *see Sandoval*, 161 P.3d at 1154, whereas federal courts apply a more lenient standard when examining state convictions, *see O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (explaining that an error is harmful if the reviewing court has "grave doubt about whether [it] had

another aggravator because the jury's verdict showed that it "found [the defendant] to be less culpable" than other participants).

2. Here, the Sixth Circuit drew precisely the opposite conclusion from the jury's compromise verdict of second-degree murder. As explained above, the state charged Owens with first degree murder—that is, a "premeditated and intentional killing." App.144. But the jury *rejected* that charge, instead convicting Owens of second-degree-murder, meaning the jury found that Owens "knowing[ly]" killed his wife. App.145. That verdict hardly compels the conclusion that the jury thought that the wife was alive or conscious when Owens wrapped her body in tape. Rather, it simply means that the jury believed that Owens knowingly did *something* to kill his wife, even if he did not "intend[] the consequences" of his actions. *State v. Gray*, 960 S.W.2d 598, 604-05 (Tenn. Crim. App. 1997). For example, the jury may have been skeptical that Owens inadvertently punched his wife; perhaps it instead concluded that she and Owens had argued in the kitchen, that he had struck her in a fit of anger, that the blow had killed her (or at least knocked her unconscious), and that he had hastily wrapped the body in tape to assist in moving it. Under this version of events, the jury could have convicted Owens of second-degree murder *without* concluding

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substantial and injurious effect or influence"). But this distinction is irrelevant here, as the *Sandoval* court made clear that it lacked "*any degree of confidence*" that the jury would have made the required findings. 161 P.3d at 1156 (emphasis added).

that his wife suffered—much less that Owens knowingly let her suffocate.[4]

Indeed, ample trial evidence supported a version of events in which Owens meant to hurt his wife with the punch but earnestly believed that she was dead when he taped up her body. Starting at the beginning of the story, it is plausible that the jury *disbelieved* Owens's claim that he hit his wife wholly out of surprise—after all, he knew that she was coming by his house to pick up their children at some point that day. But it at the same time is plausible that the jury *believed* that Owens honestly thought that the blow had killed her. The testimony at trial showed that Owens was a strong, heavy man whose job involved physical labor, and he admitted to hitting his wife in the temple "as hard as [he] could." TT 965, 988. He testified that the blow knocked her to the ground, left her without a pulse, and caused her to urinate. TT 966-69. Nothing in the testimony of the medical examiner directly contradicted that theory of events: the medical evidence could not establish whether the wife was conscious when Owens wrapped her in tape, and the medical examiner even agreed that someone who "was rendered unconscious might have the appearance of being dead." TT 815. In light of all these facts, the jury could have plausibly decided that

[4] An unarmed assault can support a conviction for second-degree murder in Tennessee. *See, e.g.*, *State v. Scott*, No. W2009-00707-CCA-R3-CD, 2011 WL 2420384, at *29-30 (Tenn. Crim. App. June 14, 2011); *State v. Nelson*, No. 03C01-9706-CR-00197, 1998 WL 694971, at *5 (Tenn. Crim. App. Sept. 9, 1998).

Owens was guilty of second-degree murder without thinking that the crime was exceptionally cruel.

B. The Decision Below Also Conflicts With Numerous Courts That Have Held That A *Blakely* Error Based On a Subjective Enhancement Supported By Inconclusive Evidence Cannot Be Harmless.

1. The very core of the protections afforded to criminal defendants by the Fifth and Sixth Amendments as interpreted by this Court in *Apprendi*, *Blakely*, and their progeny is that the Constitution guarantees a defendant that a jury—not a judge—will resolve factual disputes and ascertain witness credibility when that fact-finding may enhance the defendant's sentence. Many courts have recognized as much. In *Unruh v. Hall*, for example, the Ninth Circuit confronted an enhancement based on three subjective aggravators: the "cruelty" of the crime, the dangerousness of the defendant, and the vulnerability of the victim. 577 F. App'x 657, 658 (9th Cir. 2014). The court granted habeas relief because it had "grave doubt that a jury would have found any of these aggravating factors beyond a reasonable doubt." *Id.* The Ninth Circuit reached that conclusion notwithstanding that the defendant had shot a woman in the face, pointed a gun at her 13-year-old son's head, and held the son "hostage for two minutes … causing him to believe he was going to die." *Id.* at 659 (Clifton, J., dissenting). All that mattered, according to the court, was that there was just enough contrary evidence that a reasonable jury could reach a

different conclusion. *See id.* at 658 (majority opinion) (stressing the brevity of the crime, the defendant's military service and law-abiding history, and the lack of premeditation).

So too in other cases featuring enhancements that require a subjective assessment of the nature of the crime. In *Lyons v. Weisner*, for example, the Fourth Circuit "f[ound] it impossible to conclude with *any* assurance" that the jury would have agreed that the defendant "took advantage of a position of trust" when he sexually assaulted a minor, notwithstanding that the victim had been left in the defendant's care by his parents and had been living at the defendant's home for some time.[5] 247 F. App'x 440, 441-42, 445-46 (4th Cir. 2007). Similarly, the Ninth Circuit has repeatedly refused to hold that similarly subjective "vulnerable victim" enhancements were harmless. *See, e.g.*, *Leon v. Kirkland*, 403 F. App'x 268, 269-70 (9th Cir. 2010) (granting relief even though the defendant ambushed his victim "inside a dark apartment … as she was entering the residence"); *Butler*, 528 F.3d at 651 (expressing "grave doubt" that the jury would have applied this enhancement "based solely on the circumstance of [the victim] being attacked from behind"). And the Supreme Court of California has taken the same approach, rejecting a vulnerable-victim enhancement even though some evidence suggested that the killers had ambushed their

[5] These facts were taken from a proffer and never formally admitted by the defendant, but the court assumed that they were true for the purposes of its analysis. *Lyons*, 247 F. App'x at 445.

intoxicated victims at a bar. *Sandoval*, 161 P.3d at 1154, 1156-57.

To be clear, these courts have heeded this Court's instructions in *Recuenco*—they do not hold, for instance, that *every* fact-based enhancement is harmful. On the contrary, these courts recognize that an error can be harmless where the enhancement involves a clear-cut factual question such as the age of the victim, *Ball v. Ryan*, 494 F. App'x 760, 762 (9th Cir. 2012), or whether the records of the defendant's earlier convictions show that he "committed each of his prior murders with a firearm or deadly weapon," *Rameses v. Kernan*, 377 F. App'x 593, 595 (9th Cir. 2010). Those conclusions follow directly from this Court's decision that approved harmless-error review for *Blakely* errors in the first place, where the enhancement at issue involved a simple yes-or-no question about whether the defendant was armed with a handgun during his crime. *See Recuenco*, 548 U.S. at 214-15.

Moreover, a *Blakely* error may be harmless where the enhancement requires a subjective assessment of the nature of the crime but the supporting evidence "was uncontested and … overwhelming." *Neder*, 527 U.S. at 17. *See, e.g.*, *Mullins v. Ryan*, 679 F. App'x 617, 618 (9th Cir. 2017) (analyzing an enhancement for "la[ying] in wait"); *Johnson v. Kane*, 482 F. App'x 227, 230 (9th Cir. 2012) (considering a vulnerable-victim enhancement).[6] Importantly, however, these decisions

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[6] *See also Plasencia v. Sec'y, Fla. Dep't of Corr.*, 606 F. App'x 511, 516 (11th Cir. 2015) (holding harmless the judge's application of a cruelty enhancement under Florida law based on

stress that the proof truly was "[un]dispute[d]" and "overwhelming," *Mullins*, 679 F. App'x at 618, or "clear-cut, obvious, and indisputable," *Johnson*, 482 F. App'x at 230. In other words, just some evidence favoring the government's theory is not sufficient when the enhancement demands a subjective judgment call.

2. The decision below took the opposite approach as the Fourth and Ninth Circuits and the California Supreme Court. The exceptional cruelty enhancement under Tennessee law required a subjective assessment of the nature of the crime and a rigorous review of the evidence. And in Owens's case, the evidence was disputed, turning principally on an assessment of the defendant's credibility. In these circumstances, it will be the extraordinarily rare case—if any—that the absence of a jury finding could be harmless.

a. Under Tennessee law, whether the evidence supports a cruelty enhancement is not an easy or straightforward question. The prosecution must establish that "the infliction of pain or suffering for its own sake or from the gratification derived therefrom, and not merely pain or suffering inflicted as the means of accomplishing the crime charged." *Arnett*, 49 S.W.3d at 258. Indeed, "the facts must demonstrate a

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evidence that the victim "was conscious and struggling" as the defendant strangled her, relying on the fact that the Florida Supreme Court has "consistently upheld the [cruelty] aggravator in cases where a conscious victim was strangled," *Stephens v. State*, 975 So. 2d 405, 423 (Fla. 2007)).

culpability distinct from and greater than that incident to the offense." *State v. Reid*, 91 S.W.3d 247, 311 (Tenn. 2002). And because this enhancement "is a matter of degree," *id.*, the factfinder must holistically evaluate all of the circumstances of the crime and decide whether it was so cruel as to merit additional punishment, *see, e.g.*, *Arnett*, 49 S.W.3d at 259 (conducting a fact-intensive inquiry).

Here, the inquiry was far from straightforward in light of the inconclusive evidence about whether Owens's wife suffered before she died. If Owens's account were completely true, then his wife was already *dead* from the punch before he applied the tape. And even if Dr. Harlan were correct about the cause of death, it is still quite plausible that she was *unconscious* as she suffocated. While there is theoretically the possibility that Owens's wife regained consciousness before dying and suffered in her final moments, the crucial point is that there are many ways to construe the relevant testimony. That interpretive task belongs to a jury, and not a panel of judges more than 15 years after the fact.

Indeed, the only way that the Sixth Circuit was able to reach its conclusion was by writing off Owens's testimony as not credible, but credibility determinations are uniquely within the province of the jury. According to the Sixth Circuit, the state's theory was so convincing, and Owens's so "fantastic," that it "doubt[ed] that any sentient juror would have believed any of [Owens's account]."App.10. Never mind that the jury's verdict showed that it had similar skepticism about the state's proof.

b. Owens's case is not a one-off error. In *Fults v. Qualls*, the Sixth Circuit held harmless enhancements based on, among other things, the vulnerability of a sex-abuse victim. 635 F. App'x 316, 321-24 (6th Cir. 2016). On the question of victim vulnerability, the court downplayed the defendant's argument that, if the jury had been asked, it "could have accepted the defense's trial portrait of the victim, which was of a sexually experienced, homosexual teenager who manipulated [the defendant]." *Id.* at 322. Instead, the court focused almost exclusively on the prosecution's evidence, explaining that "the question is not whether some evidence in the record supports [the defendant's] version of events." *Id.*[7]

The Sixth Circuit's approach is contrary to the approach of numerous other courts and effectively renders *Blakely* a dead letter when it matters most—when a sentence may be enhanced only by deciding disputed facts based on credibility determinations. When a judge imposes an enhancement that requires a subjective assessment of the allegations in the face of a conflicted record, a reviewing court should decide that judges have done enough and that it is time to let a jury weigh in. The Constitution demands nothing less.

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[7] Similarly, on the issue of the location of the rapes, the Sixth Circuit had little doubt that *all five* occurred on school property, even though it was "not clear whether the victim testified that the fifth incident occurred on school property" and the defendant had "only admitted that 'one or two' of the fellatio incidents occurred [there]." *Id.* at 324.

C. This Case Is An Ideal Vehicle For The Court To Reaffirm *Blakely* and Clarify *Recuenco*.

This case presents a clean opportunity to draw one (or both) of two clear lines: a *Blakely* error cannot harmless if either (1) the jury's verdict suggests that it disbelieved the prosecution's evidence that supported the enhancement, or (2) the enhancement required a subjective assessment of disputed facts and witness credibility. Both principles are straightforward applications of "*Apprendi*'s 'bright-line rule'" that the jury must find all facts essential to punishment. *Cunningham*, 549 U.S. at 291.

That a subjective, qualitative enhancement cannot stand in the face of a compromise verdict follows from settled principles of constitutional law. This Court has repeatedly stressed the primacy of the jury, explaining that it is the "great bulwark of our civil and political liberties," *Apprendi*, 530 U.S. at 477, a "longstanding tenet[] of common-law jurisprudence," *Blakely*, 542 U.S. at 301, and the mechanism that "prevent[s] oppression by the Government," *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); *see also Alleyne*, 570 U.S. at 114 (collecting cases). In light of this critical function, it cannot be that "a lone employee of the State" has the power to override "the unanimous suffrage of twelve of [the defendant's] equal and neighbours." *Blakely*, 542 U.S. at 313-14 (citation omitted). Where the Constitution clearly does not allow the court to take an enhancement out of the jury's hands in the first place, it should not find that

error harmless where doing so would put the enhancement at odds with the jury verdict.

Second, a jury determination is especially critical for enhancements that require a holistic evaluation of disputed facts and testimony. While the jury-trial right attaches to *every* factual finding, regardless of how clear-cut it is, *see Apprendi*, 530 U.S. at 500 (Thomas, J., concurring) ("[I]n order for a jury trial of a crime to be proper, *all* elements of the crime must be proved to the jury." (emphasis added)), as a matter of the common-sense underpinnings of the harmless-error inquiry, *see Rosenberg v. United States*, 360 U.S. 367, 371 (1959), a jury verdict is of the utmost important when the evidence is disputed, *see Apprendi*, 530 U.S. at 475 ("We assume that [the facts] will sometimes be hotly disputed, and that the outcome may well depend in some cases on the standard of proof and the identity of the factfinder."). In those circumstances, the interests protected by *Apprendi* and *Blakely* are at their greatest, and the interests protected by harmless-error doctrine are at their weakest.

This case is an ideal vehicle to settle these important questions. Although arising from federal habeas review of a state-court decision, the question presented does not require AEDPA deference because the Tennessee Court of Criminal Appeals did not decide the harmless-error question on the merits. *See* 28 U.S.C. § 2254(d). That court decided that Owens's *Blakely* claim had "no merit" because the Tennessee Supreme Court had decided that Tennessee's

sentencing scheme did not violate *Blakely* in the first place. App. 136.

The harmless-error question is also case dispositive. Both the district court and the Sixth Circuit concluded that Owens's constitutional rights were violated when the judge enhanced his criminal sentence based on facts not found by the jury. The only question is whether the error was harmless. This case thus does not arrive in the posture where the court below reached the harmless-error question without having first decided whether there was an error—for example, by "[a]ssuming arguendo [the defendant]'s rights were violated," and concluding that "the violation was harmless." *Long v. Coursey*, 683 F. App'x 561 (9th Cir. 2017).

Finally, it is no obstacle to this Court's review that harmless-error questions typically are factbound, as the entire point of harmless-error review is to examine whether a constitutional error was actually injurious to the defendant in light of the facts of the case. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). And the factual dispute in this case is exceptionally straightforward: The defendant testified that he believed his wife was dead when he placed duct tape on her; the medical examiner testified that she died from suffocation, but he did not know whether she was conscious or unconscious at the time. The district court concluded in a well-reasoned opinion that in light of those facts, and in view of the compromise verdict, it could not conclude that the application of the exceptional-cruelty enhancement was harmless. The Sixth Circuit disagreed on the ground that it

simply did not believe the defendant's testimony. The Court would not need to wade through an extensive factual record to conclude that the Sixth Circuit's ruling offends the very core of the protections this Court recognized in *Blakely*. This case thus presents an ideal vehicle for the Court to clarify *Blakely* and *Recuenco* and the circumstances in which a *Blakey* error is not harmless.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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