

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WASHINGTON, :

4 Petitioner :

5 v. : No. 05-83

6 ARTURO R. RECUENCO. :

7 - - - - -X

8 Washington, D.C.

9 Monday, April 17, 2006

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 10:02 a.m.

13 APPEARANCES:

14 JAMES M. WHISMAN, ESQ., Senior Deputy Prosecuting
15 Attorney, Seattle, Washington; on behalf of the
16 Petitioner.

17 PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.;
19 on behalf of the United States, as amicus curiae,
20 supporting the Petitioner.

21 GREGORY C. LINK, ESQ., Seattle, Washington; on behalf
22 of the Respondent.

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CHIEF JUSTICE ROBERTS: We'll hear argument first today in Washington v. Recuenco.

Mr. Whisman.

ORAL ARGUMENT OF JAMES M. WHISMAN

ON BEHALF OF THE PETITIONER

MR. WHISMAN: Mr. Chief Justice, and may it please the Court:

When a judge, rather than a jury, decides a fact that increases the defendant's punishment above the applicable standard range, the Sixth Amendment's jury trial right is violated. This is true regardless of whether the fact is called an element or whether it is called a sentencing factor because elements and sentencing factors are functionally equivalent under the Sixth Amendment of the United States Constitution.

It follows that the same harmless error rule that applies to missing or misdescribed elements should also apply to missing or misdescribed sentencing enhancements.

In a series of Washington decisions, the Washington Supreme Court has held that harmless error analysis may never be conducted as to a missing or misdescribed sentencing enhancement simply because it

1 is called a sentencing enhancement. This rule of
2 absolute prohibition is inconsistent with this Court's
3 jurisprudence and should be corrected.

4 Before I go on, however, to explain the legal
5 basis and the flaws in the legal reasoning of the
6 Washington State Supreme Court, I would like to take a
7 brief moment to address a few State law issues that
8 have been raised by the Respondent's brief.

9 The first is the question of whether or not
10 at all in Washington we can, at present, seek deadly
11 weapon enhancements or, more specifically, firearm
12 enhancements. It was alleged in the Respondent's brief
13 that we cannot, and I'd just point out to the Court
14 that there is no authority in Washington for that
15 proposition. And so asking this Court to simply affirm
16 the -- the firearm enhancement that was originally
17 imposed in this case does not constitute imposing a
18 sentence that would any way be inconsistent with
19 Washington law.

20 JUSTICE KENNEDY: On -- on that point, I have
21 -- I have one question. At page 3a of the petition
22 appendix, the Washington Supreme Court's opinion is set
23 forth, and in the course of that opinion, it says, to
24 the contrary, when defense counsel argued the
25 definition should have been submitted to the jury, the

1 prosecutor explicitly stated that the method under
2 which the State is alleging and the jury found assault
3 was committed was by the use of a deadly weapon. And
4 then he goes on to say, in the crime charged in the
5 enhancement, the State alleged there is no element of a
6 firearm. The element is assault with a deadly weapon.

7 I don't -- this was at the sentencing
8 proceeding, I take it?

9 MR. WHISMAN: I believe that's correct, Your
10 Honor.

11 JUSTICE KENNEDY: Yes, because I couldn't
12 find it in the sentencing proceeding.

13 MR. WHISMAN: In the -- in a subsequent or
14 nearly subsequent breath, the prosecutor then asked for
15 the enhancement, the 36-month enhancement, that applies
16 for firearms. I think what you're seeing there is that
17 the prosecutor was responding to the -- to defense
18 counsel's use of the term element. And in -- in the
19 year 2000, before Apprendi, before Blakely, we never
20 would have used that term as applied to a sentencing
21 enhancement. We just didn't think of it that way.
22 Now, we have since changed our thinking, obviously,
23 after Apprendi.

24 But I think if you -- on the -- on the
25 overall point, if you look at defense counsel's

1 comments beginning with the comments pretrial, where he
2 notes that I can see no relevance to -- to the
3 admission of a different gun. Then he comments, Ms.
4 Recuenco was threatened with a 380 automatic with a
5 clip. Regarding the charge in particular, counsel at
6 JA, page 30 says, the allegation and the basis on which
7 this case was tried was under a theory of firearm. At
8 JA 37, counsel said, the firearm is an element of this
9 offense as it has been pleaded and argued to the jury
10 and evidently, perhaps, obviously proven to the jury.
11 So --

12 JUSTICE KENNEDY: It does sound as if he
13 thinks there was -- the prosecutor thought there was no
14 error. A deadly weapon is a deadly weapon, and then --

15 MR. WHISMAN: That's right. And -- and I
16 think, Your Honor, that stems from the -- from the way
17 the statutes are structured. Beginning many, many
18 years ago, in Washington we had what we called a deadly
19 weapon enhancement. And so there was no distinction made
20 between any kind of weapon. In 1995, the law changed.
21 There was a distinction made as to firearms. The --
22 the penalty was increased as to firearms. And so
23 beginning that time, there was a material distinction
24 depending on the weapon that was used. But I think
25 that --

1 JUSTICE SCALIA: Was deadly weapon still an
2 enhancement at that point, or was deadly weapon part of
3 the definition of a new crime?

4 MR. WHISMAN: Deadly weapon was still called
5 an enhancement, Your Honor, under the statute. And so
6 the statute defined deadly weapon very generally, and
7 then in the punishment section, the punishment
8 provisions, which specifically were formerly under
9 section 310 of the Sentencing Reform Act -- now it's
10 been renumbered to be 533. Under that provision -- you
11 have two provisions, one which provides the punishment
12 for deadly -- for firearms, and under this -- for this
13 case, that would be 3 years. And then as to the rest,
14 it says if someone was armed with a deadly weapon other
15 than a firearm, you have a lesser penalty.

16 So as I say, I think that for a long time we
17 have treated -- in Washington, we've treated all of
18 these things as deadly weapons, but recognized that if
19 it was a firearm, the penalty was greater than if it
20 were something other than a firearm.

21 JUSTICE GINSBURG: I thought the deadly weapon
22 -- the definition of deadly weapon -- that that could
23 include a revolver or a pistol. You -- you seem to be
24 describing now deadly weapon. That's one thing, and
25 that excludes guns. And then firearm, a discrete

1 category. But I thought that deadly weapon includes at
2 least pistols and revolvers.

3 MR. WHISMAN: A firearm includes pistols and
4 revolvers because a firearm is something -- anything
5 from which a projectile is fired. So --

6 JUSTICE GINSBURG: But -- but didn't the deadly
7 weapon -- definition of deadly weapon include firearms?

8 MR. WHISMAN: That's the way it was defined
9 to the jury in this case. That's correct, Justice
10 Ginsburg. It was -- it was -- the -- the jury
11 instructions went to the jury to find deadly weapon as
12 a firearm. And over and over, the court reiterated,
13 especially in the instructions conference, that the --
14 there's no question but that the only weapon here is a
15 firearm, and so they used the simplified version of the
16 instructions.

17 JUSTICE SOUTER: Wasn't --

18 JUSTICE GINSBURG: But with a 1 -- 1-year
19 enhancement or -- I thought that that could apply in a
20 case where the deadly weapon was a gun.

21 MR. WHISMAN: No. Our -- our position, Your
22 Honor, is that it cannot, that if -- you either have a
23 firearm or you have no enhancement whatsoever. If --
24 the only way that a -- that a gun could be a -- it's --
25 it's because of the language, other than a firearm.

1 So, in other words, you have either a firearm and a 3-
2 year enhancement, or you have, as I say, no -- no
3 weapon enhancement at all. So, in other words --

4 JUSTICE KENNEDY: Well, would it be either
5 proper or required by the Washington trial court to
6 tell the jury, ladies and gentlemen of the jury, the
7 charge is assault? There is also the possibility of a
8 sentence enhancement. It's a 1-year enhancement if
9 it's a deadly weapon. It's a 3-year enhancement if
10 it's a firearm and a pistol is a firearm. Would the
11 judge err if he did that? Or another way of putting
12 the same question, would it be proper for the judge to
13 leave out the 1-year deadly weapon instruction and just
14 instruct you can -- you must determine whether it's an
15 assault and you must determine whether there's a 3-year
16 enhancement for the use of a firearm?

17 MR. WHISMAN: We believe that's exactly what
18 the court did in this case, Your Honor, by -- by
19 instructing the jury that deadly weapon is firearm. In
20 Washington, we never tell the jury --

21 JUSTICE KENNEDY: No, no. My hypothetical is
22 he says it's a 3-year enhancement if the deadly weapon
23 is a firearm. That's -- what I'm asking is, in effect,
24 under Washington law, is it error if the judge allows
25 the definition of deadly weapon also to go to the jury

1 so it can find a lesser included offense.

2 MR. WHISMAN: Well, there -- there are two
3 parts to the answer. Let me answer that one first.

4 There -- our position is there is no lesser
5 included offense of a firearm that's still a deadly
6 weapon. And if you look at State v. Olney, O-l-n-e-y,
7 that was one of the cases reversed in the Recuenco
8 case, you'll see that -- that they explain why that's
9 the case. In other words, it's either a firearm or
10 there's no enhancement whatsoever.

11 The -- the other part of the question I
12 wanted to just clarify is that in Washington, we would
13 not be telling the jury the length of time that -- that
14 the defendant would face --

15 JUSTICE KENNEDY: Well, then you're saying
16 the instruction here was proper.

17 MR. WHISMAN: I'm saying that the
18 instructions that went to the jury, correct, were --
19 were proper.

20 What was improper in this case is that the
21 special verdict form did not sufficiently or
22 specifically enough preserve the jury's verdict so
23 that, in other words, when the jury passed on this case
24 and returned a verdict form that said deadly weapon,
25 that did not expressly encompass the firearm. And so

1 -- and that was -- that was the -- the mistake that was
2 made in this case. We should have submitted a verdict
3 form to the jury that would -- that would let a jury
4 expressly describe what the verdict was.

5 JUSTICE STEVENS: Could you -- could you
6 clarify one thing for me? I just want to be sure I
7 have it in mind correctly. Is it correct that the
8 firearm has to be an operable firearm?

9 MR. WHISMAN: That portion of the Washington
10 law, Your Honor, isn't -- isn't crystal clear, but what
11 I can say is that that's not in this case because trial
12 counsel at -- at trial in more than one occasion
13 specifically said it was irrelevant to this case. What
14 we have to prove is that the firearm was a real gun,
15 and --

16 JUSTICE STEVENS: But is -- just again, I'm
17 not trying to find out the answer to what happened
18 here, but just as a matter of what the law provides.
19 Is it conceivable that a -- a gun which was not
20 operable could nevertheless be a deadly weapon because
21 it can be used as a club?

22 MR. WHISMAN: In that circumstance, yes, Your
23 Honor.

24 JUSTICE STEVENS: It could be.

25 MR. WHISMAN: But -- but obviously, as

1 counsel -- on page JA 31 and at JA 38, counsel very
2 specifically said the State tries to say that the
3 nonworking firearm would also be the basis for this
4 offense, and certainly it can be. And then at -- at
5 page 38, they say, obviously, the question of whether
6 it actually worked or not would be irrelevant under the
7 law. So the -- strictly speaking, the question of
8 operability wasn't before the jury.

9 We did have to prove that it was real. And,
10 of course, there was never any dispute about that. The
11 defendant's -- by the defendant's own testimony, for
12 example, in the -- in the transcript at page 677 --
13 that would be volume 8, on 1/24/2000, page 677 -- the
14 defendant spoke at some length about the fact that he
15 was worried about his children getting a hold of this
16 gun. There were significant safety concerns. At page
17 680, he talked about how he locks it up all the time.

18 JUSTICE GINSBURG: Would you explain again
19 why it was irrelevant whether the gun was operable or
20 not?

21 MR. WHISMAN: Operability, Your Honor, is --
22 is -- there were a series of cases that -- that arose
23 in Washington having to do with -- with a gun that was
24 basically a real gun, but that there was something
25 technically wrong with it. And those series of cases

1 discussed how soon it could be rendered operable to make
2 it still constitute a real gun. But I think that's really
3 kind of an esoteric area of the law.

4 JUSTICE GINSBURG: But to be a real gun, it
5 has to be operable.

6 MR. WHISMAN: Well, that's what the -- what
7 the cases have said is that it only has to be ready --
8 could be made ready to -- to fire in a short amount of
9 time, yes. As I say, that's simply not in this case
10 because counsel conceded this gun -- that operability
11 wasn't an issue here. All we had to prove was that it
12 was a real gun.

13 JUSTICE SOUTER: Now, did you have to prove
14 that because, as -- as I have assumed, the charge
15 included the statement that he had used a handgun? Was
16 that the term used?

17 MR. WHISMAN: Yes, Your Honor.

18 JUSTICE SOUTER: Okay.

19 MR. WHISMAN: The charging document said the
20 defendant was armed with a deadly weapon, which
21 establishes the general category, and then, to wit, a
22 handgun. As I say, there -- there was no issue either
23 -- either pretrial or throughout the course of the
24 trial that counsel knew precisely what he was facing.

25 JUSTICE GINSBURG: But all that the jury

1 found was deadly weapon because that's all they were
2 asked to find.

3 MR. WHISMAN: That's right. They only used
4 the terms, deadly weapon, Your Honor, and that's why in
5 the Washington State Supreme Court, we conceded that,
6 technically speaking, the jury's verdict didn't
7 encompass the firearm finding. The express verdict
8 didn't encompass the firearm finding. But under the
9 facts and circumstances of this case, it's our -- our
10 view that that error, even though it could be an error,
11 is harmless.

12 JUSTICE SCALIA: Well, you -- you could -- it
13 could be argued that it not only didn't encompass the
14 firearm finding, but it excluded the firearm finding.
15 If, as you tell us, there are two categories, one being
16 deadly weapon, which does not include firearm, and the
17 other being firearm, wouldn't you say that the jury
18 verdict positively contradicted?

19 MR. WHISMAN: I think, Your Honor, Justice
20 Scalia, if you imagine a situation, as Justice Kennedy
21 was posing, where the jury was presented with two
22 options and they were going to choose one or the other,
23 you might be able to make that argument.

24 But here, the jury was presented only with
25 the definition saying deadly weapon is a firearm,

1 whether loaded or not. And under those circumstances
2 and under the circumstances where the only weapon
3 associated with this assault is a firearm, the only
4 thing that they could have premised their decision on
5 was the firearm.

6 So, as I say, it's not as though they were
7 choosing either or. In Justice Kennedy's hypothetical,
8 you might have had that situation.

9 CHIEF JUSTICE ROBERTS: Is the jury given a
10 copy of the information?

11 MR. WHISMAN: They are ordinarily read a copy
12 of the information, Your Honor, at the start of the
13 case. I don't recall that being transcribed in the --
14 in the transcript as -- as the court has it. That is
15 the ordinary course of proceedings.

16 In -- in the Respondent's brief, there is a
17 fair amount of time spent on distinguishing this case
18 or -- or trying to analogize this case actually to
19 charging defects. And as I've indicated already for the
20 past few minutes, I believe that this case simply
21 doesn't present that issue because it was readily
22 apparent that this defendant was fully advised of what
23 he was facing.

24 Now, if there were other defects -- if there
25 were true defects in the charging document or if the

1 defendant was surprised by the sentence that the judge
2 ultimately imposed, then we would have to analyze,
3 separately analyze, whether or not the charging document
4 was sufficient. And under this Court's jurisprudence
5 and under Washington law, that is a separate analysis, a
6 separate analysis --

7 JUSTICE GINSBURG: Why was deadly weapon put
8 in by the prosecutor at all? If -- if you're right
9 that this is not a deadly weapon case, this is strictly
10 a firearm case, it's not a lesser included, here the
11 prosecutor charged deadly weapon --

12 MR. WHISMAN: Correct.

13 JUSTICE GINSBURG: -- to wit, a handgun.
14 And then the special verdict form doesn't say one word
15 about firearm. So couldn't the defendant expect, well,
16 they charged the main thing? They charged me with
17 deadly weapon, and they asked the jury to find deadly
18 weapon.

19 MR. WHISMAN: And -- and I think to answer
20 that question, Your Honor, again we have to step back
21 to the year 2000 and -- pre-Apprendi, et cetera. At
22 that time, there were a series of cases, Meggyesy,
23 Olney and Rai, R-a-i, that -- that are overturned,
24 quite frankly, by the Recuenco opinion, where the
25 appellate courts had quite expressly said that it was

1 sufficient to submit the deadly weapon verdict form in
2 that form to a jury where it's clear that the only
3 weapon at issue was a firearm. In each one of those
4 cases, that was what was done. And in fact, in at
5 least one of them, the victim was shot, so there
6 couldn't be any question. So there was -- there was a
7 well-established practice in Washington law at the time
8 of proving that sort of thing.

9 Now, it's true that the more thorough
10 practice, the more precise practice would have been to
11 submit a verdict form that said firearm, but that
12 wasn't done in this case, but it wasn't done, I
13 believe, pursuant to those cases.

14 Unless the Court has any additional
15 questions, I'd like to reserve the rest of my time for
16 rebuttal.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Ms. Millett.

19 ORAL ARGUMENT OF PATRICIA A. MILLETT

20 ON BEHALF OF THE UNITED STATES,

21 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

22 MS. MILLETT: Mr. Chief Justice, and may it
23 please the Court:

24 In *Neder*, this Court held that the failure to
25 submit an element to a jury -- an element of a crime to

1 a jury is subject to harmless error analysis because it
2 is a nonstructural trial error.

3 In *Apprendi* and *Blakely*, this Court held that
4 the Sixth Amendment right to trial by jury recognizes
5 no distinction between elements that set a maximum
6 punishment, sentencing elements, and elements of the
7 underlying offense.

8 For that reason, the failure to submit an
9 element that sets the sentence to the maximum sentence
10 available should be subject to exact same harmless
11 error analysis that was applied in *Neder*. The exact
12 same constitutional value and constitutional right is
13 at stake. The exact same analysis of the effects of
14 the error will be applied by the court, and it's the same
15 sort of discrete error in time that you had in *Neder*.
16 There's no functional distinction between *Neder*.

17 In addition, in *Schriro v. Summerlin*, this
18 Court held that the failure to submit a sentencing
19 element to a jury is not the type of error that calls
20 into question the fairness, accuracy, or reliability of
21 the underlying proceeding.

22 In *Cotton*, this Court held that that same
23 type of error does not impugn the integrity, public
24 reputation, or fairness of judicial proceedings.

25 And in *Mitchell* --

1 JUSTICE STEVENS: Ms. Millett, can I ask you
2 this one question? Would there ever be a case where it
3 was not harmless error when the judge makes the
4 finding? Isn't it -- wouldn't it be reasonable for the
5 appellate court to assume, well, if the judge made the
6 finding, it's probably supported by the evidence and
7 presumably the jury would have come out the same way?

8 MS. MILLETT: No, I don't -- I don't think
9 that's true, Justice Stevens, that there will be times
10 -- I don't think this is one of those cases, but there
11 will be --

12 JUSTICE STEVENS: But there might be a rare
13 case, but in about 95 percent of the cases, wouldn't it
14 be true that the fact the judge made the finding is
15 pretty good evidence that the jury would have made the
16 same finding?

17 MS. MILLETT: I think it will depend on
18 whether the evidence was disputed before the judge in a
19 -- in a -- in the Federal system would have been
20 sentencing hearing. And remember, sometimes --

21 JUSTICE SCALIA: The judge doesn't have to
22 find it beyond a reasonable doubt, does he?

23 MS. MILLETT: Exactly. Exactly, Justice
24 Scalia. There's not only -- there may be disputed
25 evidence, but the standard may be different. It's not

1 clear whether it was here, but at least as to some
2 factors. It's clearly not enough that there's
3 sufficient evidence to support the judge's
4 determination. The question would be whether there's
5 any -- a jury could have found any doubt or when it's
6 clear beyond a reasonable doubt, that the outcome would
7 have been the same.

8 But I do think in a case like this, it's
9 important to keep in mind that it's -- this case
10 illustrates that these things are not categorically or
11 necessarily unamenable to harmless error review. And
12 in fact, what would happen in cases like this and a lot
13 in the Federal system, where you have undisputed,
14 uncontested facts -- and we know that because they had
15 the incentive to contest them at a sentencing
16 proceeding.

17 And so to hold that automatic reversal is
18 required would mean it would go back for a retrial that
19 would have nothing to do -- nothing to do with the
20 element that was not decided by the jury. That would
21 be undisputed. There's not going to be any contest
22 back here that the firearm, the semi-automatic that was
23 handed to the jury loaded and passed around to the
24 jury, was a firearm. It would just be a second bite at
25 the apple to contest things that were decided properly

1 and beyond a reasonable doubt by the jury, consistent
2 with the defendant's constitutional rights.

3 JUSTICE SOUTER: What -- what do we do about
4 the problem that is raised by -- by counsel on the
5 other side, that Washington law is such -- or at least
6 at the time the briefs were written, Washington law is
7 such, as they understand it, that the -- that the issue
8 could never properly have been submitted to the jury,
9 and -- and therefore, if -- if Washington courts are
10 going to follow Washington law, in every case in which
11 a firearm is an issue, the case is going to be handled
12 exactly like this? It's not -- the firearm issue is
13 not going to the jury. The firearm determination will
14 be made by the judge.

15 If the State of Washington decides not to
16 amend its law, we would have a situation in which, in
17 effect, Apprendi is read out of the -- the
18 constitutional law simply by State procedure. And in
19 every case, the -- the response would have to be
20 harmless error analysis on your theory. That is a
21 pretty neat way to undercut Apprendi. Is that not a
22 good reason to say we shouldn't have harmless error
23 analysis?

24 MS. MILLETT: No, it's not, Justice Souter.
25 First of all, the Hughes opinion on which they rely is

1 crystal clear that the only thing the court found was
2 that there was no procedure to re-empanel a jury on
3 remand. And I point the Court to page 208 -- that's a
4 P.3d citation and 149 in the Washington Reporter
5 citation -- where the court specifically said, we are
6 only talking about remand and not deciding whether
7 these things could ever be submitted to a jury in the
8 first instance.

9 JUSTICE SOUTER: So you're -- I'm sorry.
10 You're saying their argument is wrong, in effect, as a
11 -- as a statement of Washington law.

12 MS. MILLETT: I think that's right, but even
13 if it weren't, if -- if you had some State that decided
14 not to fix its law, in light of Apprendi and Blakely, I
15 expect that what would happen is defendants would bring
16 sort of -- there would be a facial constitutionality
17 problem with any attempt to prosecute under that. And
18 that may be the way to deal with it.

19 There's no question of willfulness here.
20 This is decided at a time when, in good faith, pre-
21 Apprendi even -- this isn't even the Apprendi/Blakely
22 window -- that it was acceptable to have this sort of
23 two-tier proceedings much like we are used to in sort
24 of a death penalty context. And there's -- there's
25 been no -- I'm sorry.

1 JUSTICE SCALIA: I don't understand what --
2 what you meant by a facial unconstitutional -- facially
3 unconstitutional problem. You mean a Federal court
4 would enjoin the criminal prosecution because it's
5 unconstitutional on its face? We wouldn't do that,
6 would we?

7 MS. MILLETT: I can't imagine the Federal
8 court would intervene in an ongoing State proceeding.

9 JUSTICE SCALIA: Neither can I.

10 MS. MILLETT: But State courts are perfectly
11 capable of -- of applying and we assume that they would
12 apply and adhere to constitutional law from this Court.

13 JUSTICE SCALIA: So that -- that's not really
14 an adequate answer, that it would be facially
15 unconstitutional.

16 MS. MILLETT: Well, my understanding was that
17 the Washington law -- Washington legislature didn't
18 amend its law to say that this could be submitted to a
19 jury. And then every defendant at the outset of the
20 case, would say you need to, you know, strike the
21 indictment, dismiss this charge --

22 JUSTICE SOUTER: A motion in limine kind of
23 --

24 MS. MILLETT: Right. I think there would be
25 a way -- I'm -- I'm confident there would be a way to

1 deal with it. And I don't think the way to deal with
2 it is to assume that that's a reason to make harmless
3 error not available to these types of errors across the
4 board.

5 CHIEF JUSTICE ROBERTS: The assumption of the
6 hypothetical is, I take it, that the Washington State
7 judges would deliberately violate our holding of a
8 matter of constitutional law in imposing the
9 enhancement.

10 MS. MILLETT: They would, and I think that's
11 not a fair assumption and it's certainly not the way to
12 decide whether harmless error analysis should apply. I
13 mean, Blakely has been on the books for a couple of
14 years. Neder has been out there for 7 years, and we
15 haven't seen people deliberately trying to get around
16 people's Sixth Amendment rights.

17 JUSTICE KENNEDY: Do you agree in this case
18 that the court did have the obligation to submit a
19 special verdict form indicating that the defendant --
20 asking whether the defendant was armed with a deadly
21 weapon?

22 MS. MILLETT: Yes, that's required by
23 Washington law. The jury --

24 JUSTICE KENNEDY: No. As a matter -- a
25 constitutional matter.

1 MS. MILLETT: That --

2 JUSTICE KENNEDY: Suppose the -- suppose the
3 judge didn't ask about deadly weapon at all, just --
4 just asked whether there's an assault.

5 MS. MILLETT: Well, the -- it's assault in
6 the second degree which requires -- itself requires use
7 of a deadly weapon. So it wouldn't even be assault in
8 the second degree under Washington law without the jury
9 finding a deadly weapon.

10 JUSTICE KENNEDY: But you -- so -- so there
11 had to be an instruction that there was an assault in
12 the second degree?

13 MS. MILLETT: There had -- there had to be a
14 deadly weapon to have assault in the second degree, and
15 then -- and I may not get all the nuances of Washington
16 law, but then the jury had to have the sentencing
17 enhancement, had to make a separate finding that the
18 defendant was armed with a deadly weapon at the time.
19 I'm not sure, again, if it's essentially redundant in
20 second degree assault cases or not. It's a little
21 confusing.

22 But the -- the law required that you find a
23 deadly weapon but it wasn't which deadly weapon. It
24 was just a baseline eligibility, and then it was up to
25 the court to decide which deadly weapon which would

1 then dictate the sentence.

2 And one other point I'd like to make clear is
3 there's been some argument that this case is different
4 from *Neder* because you have a completed defense. That
5 is no different at all. You had a completed verdict
6 for a non-offense in *Neder*, and the distinction between
7 a judge making findings that make a verdict that
8 support a non-offense into offense is not one that
9 makes a structural difference.

10 And in *Carella v. California*, *Rose v. Clark*,
11 you had elements that stood on the fault line between
12 lesser included offenses and greater included offenses.
13 And now, there they weren't missing -- they weren't
14 technically missing elements, but they were elements that
15 were subject to mandatory presumptions by the jury. And
16 yet, this Court said that they're subject to harmless
17 error analysis.

18 Now, obviously, the type of the element is
19 going to affect the government's ability to prevail
20 under harmless error analysis, and there may well be
21 times when the government will not succeed in that
22 process, especially as you get elements that are more
23 central to, you know, the -- the crime and -- and
24 traditional elements like the intent issues that were
25 at issue in both *Carella* and in *Rose v. Clark*.

1 The other point I wanted -- I wanted to make
2 is that the fact that the jury verdict form here came
3 back consistent with -- with the -- or the jury verdict
4 form in Neder came back with the completed crime
5 shouldn't make a difference. The change in the -- that
6 jury verdict only came back because of a second
7 mistake. The jury was wrongly and mistakenly told that
8 if it found elements A, B, and C, it would -- it would
9 establish a -- a completed crime.

10 The fact that in this case you don't have
11 that second error isn't again a difference that makes
12 one error structural and the other nonstructural.

13 The important thing is that the right is the
14 same. The cost -- the right to the same, the ability
15 of courts to analyze this error is the same. And on
16 the other hand, a rule of automatic reversal will
17 impose an enormous cost on victims and the public.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, Ms.
20 Millett.

21 Mr. Link.

22 ORAL ARGUMENT OF GREGORY C. LINK

23 ON BEHALF OF THE RESPONDENT

24 MR. LINK: Mr. Chief Justice, and may it
25 please the Court:

1 The Washington Supreme Court correctly held
2 that as a matter of Federal and State law, the error in
3 this case, as in Blakely cases generally, could not be
4 subjected to harmless error analysis.

5 I think it's important to clarify that as a
6 matter of State law and -- and as recognized by the
7 Washington Supreme Court in its decision in Recuenco,
8 the deadly weapon enhancement and the firearm
9 enhancement are, in fact, lesser and greater offenses
10 of one another. We know that based on -- on what --
11 what action the court took on remand. It didn't
12 dismiss the -- the enhancement altogether. It said the
13 only thing that could be done on remand was imposition
14 of the lesser enhancement.

15 JUSTICE SCALIA: How could it be lesser
16 included when, as we've heard, firearm does -- I'm
17 sorry -- deadly weapon does not include firearm? If
18 deadly weapon included firearm, then certainly -- I'm
19 sorry -- deadly weapon would -- would -- could be a
20 lesser included offense somehow. But the two are
21 exclusive categories, aren't they?

22 MR. LINK: Under Washington law -- it's
23 important to understand that under Washington law, a
24 handgun is -- is a deadly weapon per se, but that
25 handgun is only a firearm if the State establishes the

1 additional fact that it has the capacity to fire, which
2 is -- which is why the statute, the deadly weapon
3 statute, and the definition of deadly weapon in -- in
4 the statutory provision specifically includes handguns,
5 revolvers, and other guns.

6 JUSTICE SCALIA: But if it has the capacity
7 --

8 JUSTICE KENNEDY: But the statute does say
9 deadly weapon other than a firearm.

10 MR. LINK: The definition statute of -- of
11 deadly weapon doesn't. It's --

12 JUSTICE KENNEDY: But the enhancement section
13 does.

14 MR. LINK: It's a separate provision on the
15 enhancement -- or excuse me -- as to the length of the
16 enhancement that would be imposed does.

17 JUSTICE KENNEDY: Well, do you think in this
18 case you'd be entitled to a lesser included offense
19 instruction as a matter of law?

20 MR. LINK: I believe that as a matter of
21 Washington law, the answer would be yes. And again, I
22 think it turns on the fact that there's this additional
23 factor, additional element, of capacity to fire that
24 differentiates a handgun from a firearm.

25 JUSTICE KENNEDY: Well, was there any

1 evidence that it didn't have the capacity to fire?

2 MR. LINK: There was no evidence, I think, to
3 suggest that it did.

4 JUSTICE KENNEDY: You're not entitled to --
5 you're not entitled to a lesser included offense
6 instruction for which there's no evidence.

7 MR. LINK: Under Washington law, a defendant
8 gets a lesser included instruction so long as the
9 evidence, viewed in the light most favorable to him,
10 would support the fact that the lesser was -- was
11 included.

12 Now, it can't turn on whether or not the
13 State -- or whether the jury simply disbelieves the
14 State's proof, but it can -- when looking at the -- the
15 evidence in the light most favorable to the defendant,
16 look at holes in the State's evidence, such as the fact
17 that there is no evidence before this jury about this
18 gun's capacity to fire.

19 JUSTICE SOUTER: No, but there -- there is
20 evidence from which the jury could find that it was a
21 real gun, and in the absence of any indication to the
22 contrary, that is competent evidence for the jury to
23 use in concluding that it would function like a real
24 gun. It's not -- they didn't have to put in further
25 technical evidence. An issue might have been raised.

1 I mean, your -- the -- the defendant might have come up
2 and -- and presented evidence to the effect that it was
3 only a starter pistol, in which case, okay, there would
4 be a real issue. But in the absence of any reason to
5 doubt that the handgun was what it purported to be,
6 there would be no reason to -- there would be no
7 requirement of further evidence about functionality,
8 would there be?

9 MR. LINK: As a matter of Washington law and
10 as of the fact that this is, indeed, an element of a
11 greater offense, there is a requirement on the State to
12 come forward with additional proof of the capacity to
13 fire.

14 JUSTICE SOUTER: What's -- what's your
15 authority? I mean, that doesn't seem -- as a matter of
16 factual common sense, that doesn't seem required. Is
17 -- is there a Washington case that requires that?

18 MR. LINK: There is not. It's the statutory
19 language of the deadly weapon enhancement itself.

20 JUSTICE SOUTER: And what exactly in the
21 language is it that you hang your hat on?

22 MR. LINK: The fact that the deadly weapon
23 enhancement can apply specifically to a handgun
24 regardless of the manner in which it's used. For
25 instance, it -- a -- a handgun that does not have the

1 capacity to fire could be used to -- to strike an
2 individual, and in that context would be a deadly
3 weapon regardless of whether it was likely to cause a
4 serious bodily harm.

5 JUSTICE SOUTER: No -- no question. But if
6 there -- but if there is no reason to question its
7 apparent functionality, I mean, you know, it's a
8 handgun. It looks like a handgun. Somebody is holding
9 it like a handgun -- there -- there is no reason, it
10 seems to me, as a matter of fact or based on the
11 statute to doubt that it would be functional. And
12 therefore, it would seem to me that the proof would be
13 competent that it was a functioning handgun in the
14 absence of any question raised.

15 MR. LINK: Again, if we compare the
16 definition of a deadly weapon under Washington law with
17 the definition of a firearm under Washington law, a
18 handgun is by definition a deadly weapon. But a
19 handgun is not by definition a firearm.

20 CHIEF JUSTICE ROBERTS: Counsel, you asked
21 for an instruction on the lesser offense of aiming a
22 firearm. Under that provision of Washington law, does
23 the firearm have to be operable as well?

24 MR. LINK: It would seem that the -- the same
25 definition of firearm would apply.

1 CHIEF JUSTICE ROBERTS: So you ask for an
2 instruction assuming that the firearm at issue in this
3 case was operable.

4 MR. LINK: No. Again, I believe that he --
5 he asks -- an individual could ask for an instruction
6 in that case and still maintain that the State hasn't
7 met the proof of -- of establishing even the lesser.
8 And there's nothing tactically contradictory about
9 doing so. If -- if one -- if an attorney can convince
10 the court to -- to allow the jury to consider a lesser,
11 and then still challenge that -- the proof of that
12 lesser --

13 CHIEF JUSTICE ROBERTS: But if the firearm
14 were not operable, you would not have been entitled to
15 a jury instruction on the lesser offense of aiming a
16 firearm. Correct?

17 MR. LINK: If the firearm -- if looking at
18 the evidence in the light most favorable to the State,
19 he may not have been entitled under the -- the factual
20 prong that -- that the Washington courts use on lesser
21 and greater offenses.

22 JUSTICE ALITO: Let's say a new case comes up
23 tomorrow and the person is charged in an information
24 with assault in the second degree, and it's clearly
25 alleged in the information that a firearm was used.

1 But then when the case is submitted to the jury, the
2 judge just forgets to charge on the firearm factor or
3 element. Would that -- could that be harmless error?
4 Is that any different from the case that's before us?

5 MR. LINK: I think that if the parties
6 litigate the question of whether or not it was an
7 assault with -- with a firearm, as opposed to litigate
8 the offense of assault with a deadly weapon, and then
9 there's merely an omission from the elements, I think
10 that's a different case. But I don't --

11 JUSTICE ALITO: Well, it's a different -- is
12 it a materially different case?

13 MR. LINK: I think it's a materially --

14 JUSTICE ALITO: Is it just like *Neder*, or is
15 it different from *Neder*?

16 MR. LINK: I think that scenario would be
17 closer to *Neder*, but I think that's a different
18 scenario than what we have here. And I think the
19 reason why it's different here is because the jury
20 returned -- under Washington law, returned a complete
21 verdict. There is no -- there was no error in either
22 the verdict or in the jury instructions as a --

23 JUSTICE BREYER: Take Justice Alito's case,
24 and nobody litigated it because nobody doubted that it
25 was a loaded gun. Now, what's the result?

1 MR. LINK: In that scenario, if the evidence
2 is overwhelming as -- as perhaps it was in Neder, one
3 might assume that the error is uncontroverted. But --

4 JUSTICE BREYER: All right. So -- so,
5 therefore, it's harmless. So, therefore, we use
6 harmless error analysis. So what's the difference
7 between that case and this case?

8 MR. LINK: Because I think unlike Neder this
9 case involves a jury -- or excuse me -- the -- a -- the
10 wrong entity has determined the defendant's guilt not
11 on the crime at issue --

12 JUSTICE BREYER: Yes, I quite -- I quite
13 agree with you that there is the difference that in the
14 Alito case as amended, it all happened before the jury
15 got its verdict. In our case, it happened after the
16 jury reached a verdict. Now, absolutely true.

17 And my question, of course, is why does that
18 matter.

19 MR. LINK: Because in a scenario where the
20 jury has been properly instructed and has returned a
21 complete verdict --

22 JUSTICE BREYER: No, no. It was improperly
23 instructed. The judge forgot to give this instruction
24 about the nature of the firearm. I take it -- at least
25 my case -- the judge forgets to instruct about the

1 firearm. He just forgets. All right? And then the
2 jury goes out. It comes back and the lawyer says,
3 Judge, I handed you the instruction. Why didn't you
4 give it? He says, oh, my God, I forgot. Now, does
5 harmless error apply to that case?

6 MR. LINK: I think that scenario is closer to
7 Neder than it is to this case.

8 JUSTICE BREYER: And I want to know why that
9 matters because the only thing I've tried to create the
10 hypothetical to matter is the one thing happens before
11 the jury goes out, and the other happens after. And
12 why does that matter?

13 MR. LINK: I think it matters because in a
14 scenario like this, as opposed to either Neder or -- or
15 the hypothetical, the only offense that has ever been
16 litigated to the parties -- or by the parties to the
17 jury was the lesser offense. The parties understood
18 that only the lesser offense was at issue, and we know
19 that because in response to Mr. Recuenco's motion to
20 vacate, the State told the judge you aren't required to
21 give the firearm instruction because that's not an
22 element of either the substantive charge or the
23 enhancement.

24 JUSTICE SOUTER: No. But it's also the case,
25 as I understand it, and as counsel on the other side

1 confirmed a few moments ago, that the charge
2 specifically specified that a handgun had been used.
3 So this is not a case, as I think you were suggesting,
4 in which there has never been a charge of the offense
5 plus the enhancement they now claim. The -- the
6 problem was in the jury verdict, not in the charge, not
7 in notice to the defendant. And if that's the case,
8 why isn't it just like Neder?

9 MR. LINK: Because, again, I go back to
10 Washington law. And the fact that handgun is alleged
11 in the information does not establish that it's a
12 firearm because a handgun --

13 JUSTICE SOUTER: Well, a -- a firearm, as I
14 understand it, is defined to include a pistol or a
15 revolver. Is that correct?

16 MR. LINK: It is.

17 JUSTICE SOUTER: All right. Isn't the
18 natural reading of -- or understanding of the word
19 handgun that it's a pistol or a revolver? I mean,
20 isn't that what people would normally take it to mean?

21 MR. LINK: That may be, but as a matter of
22 Washington law, that's not the case. And it may defy
23 common sense, but that's what it does.

24 JUSTICE SOUTER: Yes, but you're asking for a
25 -- you're asking for a Federal constitutional ruling,

1 and right now, if I understand you correctly, you're
2 arguing that you ought to win because if you don't win,
3 as a matter of Federal constitutional law, we would be
4 condoning a verdict for an offense that was never
5 charged.

6 But if, in fact, handgun is properly read,
7 properly understood to mean a pistol or a revolver, and
8 that's what a firearm -- that's -- that's what a
9 firearm is -- is defined to include under Washington
10 law, then in fact the offense has been charged. The
11 enhancement has been charged. And as a matter of
12 Federal constitutional law, it seems to me that ought
13 to be enough to bring it within Neder regardless of
14 what the quirks of Washington law may be.

15 MR. LINK: If, in fact, the allegation of
16 handgun is sufficient to bring it in the context of
17 Neder, then there -- there was no error at all. There
18 would not have been a Blakely violation in this case.
19 And the wrong -- the State was wrong all along to
20 concede that there was because Apprendi doesn't just
21 involve -- doesn't just say that sentencing elements
22 are the equivalent of elements in the traditional
23 sense. It says they're the equivalent of elements of a
24 greater offense. And the State concedes and the
25 Washington Supreme Court has found that, in fact, there

1 was a Blakely violation in this case.

2 JUSTICE SOUTER: And that's because it -- it
3 didn't go to the jury.

4 MR. LINK: That's because the judge, as
5 opposed the jury --

6 JUSTICE SOUTER: Yes.

7 MR. LINK: -- decided Mr. Recuenco's guilt on
8 a greater offense.

9 JUSTICE SOUTER: Right.

10 MR. LINK: So -- so as a matter of Washington
11 law, Mr. Recuenco's jury was properly charged and
12 properly returned a verdict on the only offense
13 litigated and that was the lesser offense of assault
14 two with a deadly weapon.

15 JUSTICE SOUTER: Well, when you say it's not
16 litigated, do you mean simply that nobody, none of the
17 witnesses, none of the counsel in argument, disputed
18 that a handgun was there? In other words, it was just
19 one of those things everybody understood. Is that what
20 you mean when you say it wasn't litigated?

21 MR. LINK: What I mean by saying it wasn't
22 litigated is that it was the understanding of the
23 parties at trial that the firearm element was not at
24 issue because that had not been charged, that that was
25 not the charge in front of the jury.

1 JUSTICE SOUTER: And -- and what do you --
2 what do you base that statement on? In other words, I
3 -- I think you're now arguing that the understanding
4 was that although it looked as though the -- the most
5 serious enhancement had been charged, the understanding
6 of the parties was that it had not been. If that's
7 your argument, what is your basis for saying that?

8 MR. LINK: Again, I could point to the -- the
9 prosecutor's response in the motion to vacate. I can
10 point to the court's judgment and sentence, which I
11 don't have the cite for right off the -- my head, but
12 it is in the joint appendix. On that form, as is
13 common in Washington, there are two boxes for the court
14 to check. One says that a verdict regarding a deadly
15 weapon -- or excuse me -- that a firearm other than a
16 deadly weapon was returned. The other says that a -- a
17 -- excuse me. One says that a verdict form for finding
18 that the person was armed with a firearm was returned.
19 The other says that it was merely the verdict form for
20 being armed with a deadly weapon other than the
21 firearm. The trial --

22 CHIEF JUSTICE ROBERTS: Counsel, what your
23 trial counsel said was that the -- I'm quoting from the
24 joint appendix, page 30 -- the allegation and the basis
25 on which this case was tried was under the theory of

1 firearm. It seems inconsistent with your
2 representation that nobody had an idea that they were
3 trying this under the theory of a firearm.

4 MR. LINK: I think it's -- it would be
5 equally inconsistent with the State's current position
6 if we look at JA 35 where the prosecutor's response was
7 we didn't need that instruction because firearm was not
8 an element of the crime charged.

9 JUSTICE KENNEDY: Do you think it would have
10 been error in this case based on the evidence presented
11 and the way the -- the case was argued -- would it have
12 been error for the judge to instruct the jury that if
13 they found that there was a firearm involved, they
14 should make a -- they could make a -- a finding on
15 that?

16 MR. LINK: Well, it's interesting because
17 post *Recuenco*, after the Washington Supreme Court's
18 ruling in this case, yes, that would be an error
19 because after the Washington Supreme Court's decision
20 in this case, what they said is that --

21 JUSTICE KENNEDY: But as a constitutional
22 matter, would it have been error for the judge to
23 instruct the jury in this case, based on this evidence,
24 that they could return a verdict that a firearm was
25 used as part of the assault?

1 MR. LINK: As a matter of constitutional
2 error, no, I don't believe it would have been. But as
3 -- but under Washington law, it was a verdict they
4 couldn't -- as we know from Recuenco now, it's a
5 verdict they couldn't have returned.

6 CHIEF JUSTICE ROBERTS: Ms. Millett tells us
7 that that only applies on remand under -- under the
8 Hughes case.

9 MR. LINK: Under Washington law, when a court
10 -- as I think is common under Federal law, whenever a
11 court interprets a statute, determines what it means,
12 that is what the statute has always mean -- means, and
13 -- and that is what that statute will mean in the
14 future until such time as the legislature amends it.

15 As of this date, while the -- the legislature
16 has amended the statutes at issue in Hughes, it has
17 done nothing with respect to this statute. So, as it
18 stands now, based on the recognition of the Washington
19 Supreme Court that at the time of the entry of that
20 decision, there was no provision to submit that
21 question to a jury in Mr. Recuenco's case. There was
22 also no provision to submit it to a jury in another
23 case because prior to Recuenco, the only means by which
24 the firearm enhancement could be obtained was pursuant
25 to the decisions in Meggyesy, Rai, and Olney. And that

1 was the very manner that was used here, and that was
2 the very procedure that the Washington Supreme Court
3 found violative of Blakely.

4 JUSTICE STEVENS: Mr. Link, will you just --
5 maybe I -- I should know this, but the information
6 charges an assault in the second degree using the deadly
7 weapon. If they had charged use of a firearm rather
8 than a deadly weapon, what would the crime have been?
9 Would that also have been assault in the second degree?

10 MR. LINK: Well, that's an interesting twist
11 under Washington law because the deadly weapon is -- is
12 actually two elements of assault two. Under the
13 substantive offense, it's a component of -- of assault,
14 and also an element of the -- but to allege a firearm,
15 it is possible that the substantive offense could have
16 been elevated to assault one. It's also possible that
17 it could have simply been an assault two with a firearm
18 enhancement. So --

19 JUSTICE STEVENS: The firearm enhancement
20 itself would not covert it from second degree to first
21 degree.

22 MR. LINK: No.

23 And -- and I think this illustrates a point.

24 Under Washington law, the State could charge assault
25 three with a firearm enhancement in -- in a case in

1 which a person used a gun. There's nothing under
2 Washington law that requires the prosecutor to charge
3 the greatest offense. There's nothing under Federal
4 constitutional law that even if that greater offense is
5 charged, that the jury must return a verdict on that
6 greater offense. In fact, the jury, as the circuit
7 breaker in the system, has always -- always has the
8 right, regardless of the strength of the evidence and
9 regardless of -- of what the trial court might view as
10 the correctness of the charge, to return the verdict on
11 the lesser.

12 JUSTICE KENNEDY: You say regardless of the
13 strength of the evidence. How about no evidence at
14 all?

15 MR. LINK: I think this Court's jurisprudence
16 on -- on questions of -- of lenity and interpreting
17 jury verdicts would allow a jury to return a verdict
18 that -- that isn't necessarily supported by the
19 evidence. It's the understanding that it's their --

20 JUSTICE KENNEDY: Well, the question is
21 whether or not it requires it.

22 MR. LINK: I don't think this Court requires
23 that the jury -- but I think what -- what I'm trying to
24 say, I guess, is that it requires -- not requires. It
25 -- it imposes deference on the trial courts that they

1 cannot second-guess the jury, that because the jury is
2 always free to return a verdict on the lesser offense,
3 there simply cannot be a situation in which the trial
4 court, based on its own assessment of the facts, gets
5 to enter the greater.

6 CHIEF JUSTICE ROBERTS: Well, doesn't --
7 isn't that true in Neder as well?

8 MR. LINK: I think in Neder -- Neder is a
9 different case and for a number of reasons. Unlike
10 Neder, there has never been a claim that there's any
11 incorrectness in either the verdict in the charge or in
12 the jury instructions. In fact, Mr. Recuenco from the
13 outset had no reason to suggest that there was anything
14 wrong because the State was free to charge him with the
15 lesser offense, and they did. There would be no motive
16 on his part to say, excuse me, Your Honor, I think I'm
17 really guilty of a greater offense. Please ask the
18 State to amend its information.

19 JUSTICE ALITO: You keep saying a lesser
20 offense and a greater offense, but under Washington
21 law, there's just one offense. Isn't that right? It's
22 second -- it's assault in the second degree.

23 MR. LINK: It's assault in the second degree
24 with the additional deadly weapon enhancement.

25 JUSTICE SOUTER: And if we accept -- going

1 back to our earlier exchange, if we accept the
2 proposition that charging that he used a handgun was
3 sufficient to charge a firearm, then the charge against
4 him was assault in the second degree with the maximum
5 enhancement for use of a firearm.

6 MR. LINK: Again, had --

7 JUSTICE SOUTER: You -- you and I may
8 disagree on -- on how to read -- how to understand
9 firearm, but if you read it the way I just suggested,
10 then the charge was assault two with the maximum
11 enhancement. Isn't that correct?

12 MR. LINK: I think if the information and --
13 and the instructions were read in that manner, the
14 State was wrong to concede that there was Blakely error
15 here at all because, if as a matter of law, a handgun
16 is automatically a firearm, there would have been no
17 Blakely violation at all. But that's not the case.

18 JUSTICE SOUTER: Well, I thought the -- I
19 thought the reason they conceded the Blakely violation
20 was that in the instructions to the jury, the
21 instruction only went to deadly weapon and the
22 instruction did not specifically refer to firearm. I
23 thought that's why they -- they stipulated that there
24 was a Blakely error. As a matter of the fact about the
25 instruction, is -- is my description correct?

1 MR. LINK: I'm not sure I can answer right --
2 I believe the instruction mentioned handgun. The
3 instruction --

4 JUSTICE SOUTER: All right. And it didn't --
5 it didn't use the -- let's put it this way. it didn't
6 use the word firearm. Right?

7 MR. LINK: No, it did not.

8 JUSTICE SOUTER: That's -- that's why they
9 conceded a Blakely error.

10 MR. LINK: But again, if -- if under
11 Washington law, a handgun were automatically a firearm,
12 the instruction wasn't erroneous at all.

13 CHIEF JUSTICE ROBERTS: Well, but the special
14 verdict form still was.

15 MR. LINK: But the instructions for use of
16 the special verdict form would not have been. And --
17 and it's because of that -- that quirk in Washington
18 law -- and the State offered us some suggestion of why
19 that quirk exists. The deadly weapon provisions have
20 been a part of the Washington sentencing scheme since
21 its enactment in the mid-'80's. It was only about 10
22 years later that the additional enhancements for
23 firearm were added, and -- and they were enacted by --
24 by a citizens initiative. And there's very little
25 reference between the two of them.

1 But they still exist together because there's
2 nothing that suggests, again, that the State couldn't
3 allege the lesser offense even where a handgun is -- is
4 involved because it is the difference between a handgun
5 with nothing more and a handgun that has the capacity
6 to fire. And it's that additional component of
7 capacity to fire that truly creates the greater and
8 lesser offense in this case.

9 JUSTICE STEVENS: May I just clarify one
10 other thing? Capacity to fire doesn't mean it had to
11 be loaded, though.

12 MR. LINK: Capacity to fire does not mean per
13 se operability. It -- it means that this instrument
14 has the capacity to fire whether or not --

15 JUSTICE STEVENS: An unloaded gun could be a
16 firearm.

17 MR. LINK: An -- an unloaded gun could be a
18 firearm so long as it has the capacity to fire.

19 JUSTICE KENNEDY: In the charging document,
20 where it says that he was armed with a deadly weapon,
21 to wit, a handgun, and then it cites the Washington
22 statutes, those citations include the 3-year
23 enhancement provision?

24 MR. LINK: The -- the citation to what is now
25 --

1 JUSTICE KENNEDY: It cites RCW 9.994A.125 and
2 9.94A.310. Is one of -- is one of those the 3-year
3 enhancement?

4 MR. LINK: .310 is -- is the definition of
5 deadly weapon. The other one -- excuse me -- .125 --

6 JUSTICE KENNEDY: 9.94A.125.

7 MR. LINK: That includes both the firearm --
8 the additional time for firearm enhancement, as well as
9 the time for the deadly weapon enhancement.

10 JUSTICE KENNEDY: So it includes the 3 years.

11 MR. LINK: It -- it cites both, depending on
12 what subsection it's citing. So it doesn't necessarily
13 identify one as opposed to the other.

14 JUSTICE KENNEDY: But it does include it.

15 MR. LINK: It is in that -- that statute,
16 yes.

17 CHIEF JUSTICE ROBERTS: And do you know if
18 the information went to the jury in this case?

19 MR. LINK: As is consistent with Washington
20 law, it's read to the jury at -- at the outset, but it
21 -- it would be inconsistent, I think, with practice in
22 Washington to have actually submitted the -- the
23 information to the jury.

24 In a situation like this, where the wrong
25 entity has determined a person's guilt, despite the

1 jury's complete verdict on a lesser offense, the
2 application of harmless error simply eviscerates what
3 Blakely sought to draw as the limits -- or excuse me --
4 as the -- as the outer boundaries of the jury's right.

5 And in fact, it -- it's the equivalent of a second
6 Sixth Amendment violation because in each instance, the
7 jury's complete verdict on the lesser offense is being
8 set aside. In the first instance, it's based on the
9 trial court's review of -- of the strength of the
10 evidence, and in the second instance, it's based on the
11 -- the appellate court's review of the strength of the
12 record to support not the jury's verdict, but instead
13 the trial court's assessment of the proper charge.

14 CHIEF JUSTICE ROBERTS: Well, the other way
15 of looking at it is it's based on trying to understand
16 what the jury meant when it said deadly weapon when the
17 only evidence of a deadly weapon they were presented
18 was a firearm.

19 MR. LINK: It assumes, I think, that -- that
20 the -- it assumes the correctness of the judge's -- of
21 the trial court's assessment of the facts rather than
22 simply accept the -- the jury's verdict for what it was
23 because, again, as a matter of Washington law, Mr.
24 Recuenco could be found guilty of assault two with a
25 deadly weapon even if he used what appeared to be a

1 handgun, absent some proof of capacity.

2 And again, as a matter of -- of Sixth
3 Amendment jurisprudence, even had the State put
4 together evidence establishing the capacity of the
5 instrument to fire, the jury would have been free to
6 return a verdict on the lesser offense of deadly
7 weapon, even if it were to contradict Washington law on
8 that point. The jury would --

9 CHIEF JUSTICE ROBERTS: And in Neder, even if
10 the jury had been asked to rule on materiality, it
11 could have decided not to rule according to the
12 evidence. The same argument applies in Neder.

13 MR. LINK: But -- but, again, in Neder, the
14 jury returned a verdict of guilty on the offense that
15 was litigated to it and based on the parties'
16 understanding of what offense was at issue. In this
17 case, that doesn't happen. And, again, it's
18 illustrated by the prosecutor's response to Mr.
19 Recuenco's motion to vacate, and it's illustrated by
20 the court's judgment and sentence, which is at page 14
21 of the joint appendix, where it specifically finds that
22 the only verdict -- and -- and again, doesn't question
23 the verdict -- that the only verdict returned was
24 deadly weapon other than a firearm. It doesn't assume
25 that the jury found that it was the firearm verdict.

1 It doesn't make that assumption. It recognizes that
2 verdict for what it was. But based on then-existing
3 Washington law, which Recuenco overturned, it concluded
4 it had to impose the firearm enhancement.

5 So there's no suggestion by either the
6 parties or the trial court or the Washington Supreme
7 Court, for that matter, that there was anything wrong
8 with the jury returning a verdict of deadly weapon
9 because, as a matter of Washington law and as
10 recognized by each of those -- those entities, the jury
11 -- the jury could do that, and they did.

12 Refusing to apply harmless error in this case
13 doesn't require a single retrial of a single
14 individual. Unlike the normal case, unlike Neder
15 itself, in -- in those cases, had harmless error not
16 applied, the defendants would have been entitled to a
17 new trial. That's not true after Blakely. At best,
18 what would happen is -- is defendants would be remanded
19 back to -- to the various trial courts for the reentry
20 of the sentence that's supported by the -- the jury's
21 verdict. There will be no need to conduct new trials.

22 There will be no need to do anything, other than that
23 simple ministerial act. There simply is no prudential
24 reason. There won't be the flood of -- of retrials or
25 -- or the prison doors thrown open for -- for people to

1 walk free with no convictions.

2 JUSTICE KENNEDY: Well, I -- I take it
3 Washington wouldn't have the option -- suppose that you
4 prevail. Washington doesn't have the option to give
5 him a whole new trial, do they, because there's been
6 double jeopardy, I take it.

7 MR. LINK: As it exists now and based on the
8 Washington Supreme Court's decision in Hughes and
9 Recuenco, those individuals sentenced before the
10 Washington legislature amended the act would simply be
11 entitled to have their cases remanded back for entry of
12 a conviction based on the jury's verdict.

13 JUSTICE KENNEDY: What I'm saying, you don't
14 concede, do you, that Washington would have the option
15 to retry him to try to obtain the 3-year enhancement.

16 MR. LINK: I -- I certainly don't.

17 JUSTICE KENNEDY: I wouldn't think so.

18 MR. LINK: And both as a matter of double
19 jeopardy and as a matter of Washington law, I don't
20 think that -- that would -- could occur.

21 The Washington Supreme Court correctly held
22 that harmless error analysis could not apply where the
23 trial court has set aside the jury's complete verdict
24 on a lesser offense in favor of a judgment on the
25 greater, both as a matter of State and Federal law.

1 And Mr. Recuenco would ask this Court to affirm that
2 decision.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Whisman, you have 4 minutes remaining.

5 REBUTTAL ARGUMENT OF JAMES M. WHISMAN

6 ON BEHALF OF THE PETITIONER

7 JUSTICE SCALIA: Mr. Whisman, can I -- can I
8 ask you a hypothetical which I think puts in starker
9 form what the -- what your colleague here says this
10 case involves?

11 Suppose that -- that you have a statute, a
12 murder statute, which applies to the murder of a single
13 individual, but -- but you have another statute with a
14 death penalty called aggravated murder. And it's a
15 different crime and it -- it requires the -- the
16 killing of more than one person in -- in the same -- in
17 the same event.

18 Let's assume a trial in which somebody came
19 into a bank with a machine gun. Only one person came
20 in, and five people were killed. But the prosecution
21 only brought a prosecution for simple murder. Okay?
22 And the jury comes back with a verdict for -- for
23 simple murder.

24 Certainly a judge would not be able to say,
25 well, no jury could possibly have found simple murder

1 here without also thinking that this person was guilty
2 of -- of this greater offense of -- of aggravated
3 murder and, therefore, I'm going to enter a judgment of
4 aggravated murder.

5 That's what the -- the defense says happened
6 here, that there was just a verdict of -- of the lesser
7 offense. That's all the jury found. It could have
8 found more and maybe -- maybe in finding that, it -- it
9 must have thought that the greater offense also
10 existed, but it never came in with a verdict for the
11 greater offense.

12 Now, tell me why what happened here is
13 different from -- from the hypothetical.

14 MR. WHISMAN: I think the key difference is
15 the charging part of your hypothetical. Your
16 hypothetical assumes this defendant was never put on
17 notice that he was facing aggravated murder, and if
18 that were true, then under your cases and under --
19 under our Washington law, we would analyze that as a
20 failure of notice. The -- and it could have any number
21 of implications for a defendant, including the evidence
22 that they marshal at trial, but also including perhaps
23 his interest in negotiating a plea agreement if a
24 defendant doesn't know that he's facing aggravated
25 murder at the end. So --

1 JUSTICE KENNEDY: Well, suppose under Justice
2 Scalia's hypothetical, aggravated murder is -- is in
3 the charging documents, but the judge doesn't say
4 aggravated murder when he submits it to the jury.

5 MR. WHISMAN: Then I think that is
6 susceptible to harmless error analysis, Your Honor.
7 And it would be -- there would be an open question as
8 to whether or not, of course, it is harmless, but then
9 I think that we're back to the Neder situation.

10 JUSTICE STEVENS: But then we'd have Justice
11 Scalia's case if this information left out the words,
12 to wit, a handgun.

13 MR. WHISMAN: You would be closer to Justice
14 Scalia's case, Justice Stevens, yes. Although under
15 Washington law, we analyze the charging document and
16 the sufficiency of it and ask whether or not it was --
17 the words used sufficiently appraised the defendant.
18 But I think the defendant would have a stronger
19 argument for the fact that he didn't know what he was
20 facing if you had that hypothetical.

21 CHIEF JUSTICE ROBERTS: And those are the
22 sort of considerations that can be taken into account
23 under harmless error analysis. Right? The absence of
24 notice, the prejudice. I would have put on this
25 evidence if I had known I was accused of using a

1 handgun.

2 MR. WHISMAN: They can be a component of the
3 harmless error analysis. Ordinarily in Washington, we
4 would handle that as a charging document challenge. In
5 other words, the defendant would say I was never
6 charged with this crime and therefore I didn't marshal
7 my evidence, et cetera. It's a due process violation.
8 Either way, I don't think that the -- the conviction
9 stands much chance of surviving.

10 I did want to answer, first, a question that
11 had been raised by pointing the Court to JA 18 where
12 the defendant says, my proposed instruction makes clear
13 that the deadly weapon in question is the firearm, that
14 -- not that some other kind of weapon might have been
15 deadly. So I think that focuses the issue
16 appropriately.

17 I also wanted to point out that Justice
18 Alito's hypothetical is really the State v. Williams
19 case that we cited at page 14 in our reply brief where
20 the defendant was expressly charged firearm and the
21 victim was shot during the course of the crime. And
22 the issue didn't go -- the -- the same verdict form as
23 we have here -- in other words, it said only deadly
24 weapon -- was given to the jury, and the Washington
25 court of appeals, feeling itself bound by Recuenco,

1 reversed that finding.

2 So I think that the opinion of the Washington
3 Supreme Court is unduly broad and should be overturned.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MR. WHISMAN: Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: The case is
7 submitted.

8 (Whereupon, at 11:02 a.m., the case in the
9 above-entitled matter was submitted.)

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