No. 05-83

THE SUPREME COURT OF THE UNITED STATES

STATE OF WASHINGTON,

Petitioner,

v.

ARTURO R. RECUENCO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In Sullivan v. Louisiana, 508 U.S. 275 (1993) this Court concluded the denial of a jury verdict based on proof beyond a reasonable doubt is structural error which always requires the conviction be reversed. The Washington Supreme Court concluded the trial court's entry of a conviction of a greater crime than that found by the jury is not the product of a jury verdict based on proof beyond a reasonable doubt and thus pursuant to Sullivan concluded the error automatically required reversal. Should this court grant the State of Washington's petition for writ of certiorari?

2. Factual findings which increase the statutory maximum penalty are elements of enhanced or greater offenses. The Double Jeopardy provisions of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, bar the entry of a judgment notwithstanding the verdict in favor of the government in a criminal case. Does the Double Jeopardy clause also bar a reviewing court from concluding an error in entering a judgment on a greater offense then reflected in the jury verdict alone is harmless?

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Arturo Recuenco respectfully requests this Court deny the State of Washington's petition for a writ of certiorari to review the opinion of the Washington Supreme Court.

JURISDICTION

The Washington Supreme Court entered its decision on April 14, 2005. State v. Recuenco, 154 Wn.2d 156 (2005). The petition was filed on July 14, 2005. The jurisdiction of the Court was invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The State of Washington's petition for writ of certiorari properly notes that this case implicates the Fifth and Fourteenth Amendments to the United States Supreme Court. However, the State of Washington's petition in its statement of Constitutional Provisions Involved fails to note that the Sixth Amendment is involved as well.

STATEMENT OF THE CASE

Wash. Rev. Code §9.94A.533(4)[1] sets forth the length of additional confinement to which a trial court must impose where there has been an allegation and special jury finding that a defendant was armed with a deadly weapon in the commission of a crime. Wash. Rev. Code §9.94A.602, requires a special allegation that a person is armed with a deadly weapon, and a jury finding of that fact. That statute also defines a deadly weapon to include any firearm. Wash Rev Code §9.94A.602. With respect to the crime of second degree assault, a Class B felony, Wash. Rev. Code §9.94A.533(4)(b) provides for a mandatory additional term of 12 months confinement if the jury returns a deadly weapon special verdict.

[1] The statutes at issue have been recodified since the time of Mr. Recuenco's offense. For ease of reference, and because the recodified statutes did not effect any substantive changes, Mr. Recuenco will cite to the current statutes.

Wash Rev. Code §9.94A.533(3) provides for the imposition of a greater term of confinement where the jury finds the defendant committed the offense with a firearm. A firearm finding for Class B felony requires the imposition of an additional 36 months confinement.

In its petition, the State of Washington erroneously cites to Wash. Rev. Code §9.94A.510 instead of Wash. Rev. Code §9.94A.533. See e.g. Petition at 2.

The charging document in this case charged Mr. Recuenco with second degree assault with the additional allegation he was armed with a deadly weapon. Recuenco, 154 Wn.2d at 158. The jury returned a special verdict finding Mr. Recuenco was armed with a deadly weapon during the commission of the second degree assault. Id. The jury was not asked and did not return a special verdict concluding Mr. Recuenco was armed with a firearm. Id. at 160.

In its statement of the case the State incorrectly asserts "[t]here was no evidence of any other weapon in the assault." Petition at 2. However, the evidence established that during the course of the incident Mr. Recuenco wielded a metal pipe. Petition at 10a. Pursuant to Wash. Rev Code § 9.94A.602, "any metal pipe or bar used or intended to be used as a club" is a deadly weapon.

At sentencing, Mr. Recuenco argued the court could only impose the additional time permitted by the jury's deadly weapon. Recuenco, 154 Wn.2d at 160. Concluding that the evidence established Mr. Recuenco was armed with a firearm, the trial court concluded it had no discretion but to impose an additional 36 month firearm enhancement instead of the 12 months permitted by deadly weapon allegation and jury finding. Id.

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

After the Washington Supreme Court accepted review, the State of Washington conceded the trial court's finding was contrary to Blakely and Apprendi and violated Mr. Recuenco's right to jury finding beyond a reasonable doubt. Recuenco, 154 Wn.2d at 162-63. The State argued, however, that any error was harmless contending the evidence plainly established Mr. Recuenco was armed with a handgun.

Mr. Recuenco argued first that because under Blakely the determination that a person was armed with either a deadly weapon or a firearm elevates the punishment to which he or she is exposed, each finding is an element of an aggravated version of the substantive offense they arise from. Mr. Recuenco argued there is a continuum of three relevant degrees or levels of offenses: second degree assault; second degree assault with a deadly weapon finding; and second degree assault with a firearm finding. Mr. Recuenco contends that any judicial finding which increases the crime of conviction along that continuum, beyond that permitted by the jury verdict, not only violates the Sixth and Fourteenth Amendments, it also violates the Fifth Amendment's Double

Jeopardy Clause, as it constitutes a judgment notwithstanding the verdict. Mr. Recuenco also argued that because such a finding was not made by jury beyond a reasonable doubt, Sullivan did not permit a reviewing court to find that the error was harmless. In addition, Mr. Recuenco argued an independent analysis of the jury trial guarantees of the Washington Constitution precluded application of a harmless error analysis.

The Washington Supreme Court concluded that harmless error analysis could not apply because to do so would be to speculate on the absence of jury findings. Recuenco, 154 Wn.2d at 164) (citing, State v. Hughes, 154 Wn.2d 118, 144-45 (2005) (finding Sullivan analogous to situation presented where judicial as opposed to jury findings are used to increase a defendant's sentence based on less than proof beyond a reasonable doubt). Moreover, the Washington Supreme Court in both Hughes and Recuenco concluded that because there was no statutory mechanism in place to permit the imposition of the aggravated sentences, and because the court was not free to graft such a mechanism onto the statute, the only option left to the court was to remand the matters for sentences consistent with the jury's verdict. See, Recuenco, 154 Wn.2d at 164 (citing Hughes, 154 Wn.2d at 151-52).

Because it rested its decision on its analysis in Hughes, the Washington Supreme Court did not address Mr. Recuenco's additional argument that Double Jeopardy also barred application of a harmless error analysis. Recuenco, 110 P.3d at 192 n.3. Nor did the court address Mr. Recuenco's argument that application of the jury trial guarantees of the Washington Constitution precluded application of a harmless error analysis.

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

REASONS FOR DENYING THE PETITION

A. This case does not present any federal question upon which courts are divided.

1. This case does not present the question of whether a *Apprendi* error can be harmless because the trial court erred even more fundamentally by entering a judgment notwithstanding the verdict.

While Washington law provides for an additional term for a deadly weapon finding and a longer term based upon a firearm, Wash. Rev Code §9.94A.602 provides that a firearm is a deadly weapon for purposes of the deadly weapon enhancement. Moreover, the jury was expressly instructed this was so. Because a firearm supports both a deadly weapon finding and firearm finding, the deadly weapon finding is in effect a lesser included finding of a firearm finding.

The jury instructions set forth each element of the offense the State of Washington alleged Mr. Recuenco had committed – second-degree assault with a deadly weapon. The verdict the jury returned was complete with respect to every element of the offense charged and was based upon the proper standard of proof. Certainly the state could have asked the jury to return a more serious finding that Mr. Recuenco was armed with a firearm as opposed to merely a deadly weapon, but the state did not. The state elected to pursue the lesser finding and was successful in that endeavor.

But despite this complete verdict, the trial court concluded that a greater finding was necessary. There is no statutory provision legislative directive that required the

court to do so, rather this procedure is solely the product of caselaw. See Recuenco, 154 Wn.2d at 162 n.2. In doing so the court necessarily is making its own determination as to proper verdict encroaching upon the province of the jury by placing its judgment ahead of the jury's.

Cases like Blakely and Apprendi, by contrast, do not involve the same judicial disregard of the jury's verdict. Instead, in Apprendi, for example, a jury was not asked to make any finding as to the motivation for the crime much less whether it was racially motivated, nor did Mr. Apprendi make a stipulation as to motivation in his guilty plea. In making, the racial motivation finding the trial court, while going beyond that permitted by the either jury verdict or guilty, was not in any way suggesting the insufficiency of a jury's verdict returned or placing its judgment ahead of the jury's. And in both Apprendi and Blakely, the findings were statutorily authorized, as opposed to the sort of judicially driven encroachment present here.

By setting aside the jury's verdict in this case, a scenario not present in either Blakely or Apprendi, the trial court case engaged in distinctly different and fundamentally more problematic practice than in those two cases. Thus, this case does not properly present the question of whether Apprendi error in a simpler form may be deemed harmless.

2. Even if this case presented the question of whether *Apprendi* error can be harmless, there is no federal conflict on that issue because the two state courts which have deemed *Apprendi* errors structural did so substantially for law reasons.

The State of Washington claims the decision in Recuenco and Hughes, as well as the decision of the North Carolina Supreme Court in State v. Allen, __ S.E..2d

(N.C.) (2005 Lexis 695) holding harmless error analysis cannot apply are in conflict with decisions of several other state courts. Petition at 13-16. But this "conflict" is as much if not more about differences in state sentencing law than about a conflict in interpreting this Court's precedent.

Recuenco concluded the error

> was neither harmless nor invited. We reverse the Court of Appeals and vacate Recuenco's sentence. Because we held in Hughes that we would not imply a procedure by which a jury can find sentencing enhancements on remand, we remand for resentencing based solely on the deadly weapon enhancement which is supported by the jury special verdict.

Recuenco, 154 Wn.2d at 164 (footnote omitted) (citing Hughes, 154 Wn.2d 118). In Hughes the court concluded there was no statutory sentencing scheme in place which permitted the submission of a aggravating factors to a jury. 154 Wn.2d at 149. Moreover, the Court concluded the creation of such a procedure was for the legislature and not the courts. Id. Thus, because no statute permitted a jury to have made the findings necessary to support the aggravating factors in that case, the Hughes court concluded it could not do so.

The North Carolina Supreme Court reached the same conclusion in Allen, stating "[a]lthough this Court might envision measures which could cure the constitutional defect in [the relevant statute] we are in agreement that the choice of remedy is properly within the province of the General Assembly." 2005 Lexis 695, 50-51.

Each of these decisions rests in large measure on the conclusion of state courts that correction of the relevant statutory schemes lies with the legislative branches in those states as opposed to the judiciary. The resolution of the highest courts of these states of the proper balance of authority among the branches of government in their

states does not create a conflict with courts of other states which have not employed such restraint.

B. The question presented implicates an extremely small, and ever dwindling, number of cases.

The State of Washington argues it is necessary for this Court to resolve the question of the applicability of harmless error to Apprendi error as the issue has far-ranging impact. Petitioner greatly exaggerates the impact any decision would have in either federal courts or in the various states.

In United States v. Booker, this Court substantially limited the number of cases which present a Blakely argument on direct appeal. 125 S. Ct. 738 (2005). Booker necessarily has substantially limited the number of cases which will ever address the question of harmless error on direct appeal in federal court. The question presented in this case will almost never come up with respect to the federal sentencing guidelines because almost no defendants raised Apprendi challenges before Booker, and Booker requires unpreserved claims be reviewed under the plain error doctrine.

In the State of Washington itself, new legislation was enacted effective April 18, 2005, providing procedures for alleging and proving to a jury facts which a trial court may rely upon to impose an aggravated sentence. App. A1-10 (ch. 68 Laws 2005 §§1-7 amending Wash. Rev. Code §9.94A.530 and Wash. Rev. Code §9.94A.535, and adding new section to Wash Rev. Code ch.9.94A). Pursuant to this act, all aggravated sentences for offenses committed after April 18, 2005 will be based upon facts proved to a beyond a reasonable doubt to a jury. Further, the Washington Supreme Court has ruled Blakely is not retroactive to cases which were final prior Blakely. State v. Evans,

Wn.2d __ (2005 Lexis 541). Even in Washington, at best any decision by this Court will apply only to that small class of cases which arose after Blakely was decided in June 2004, but before enactment of the new legislation. But even that small class may shrink to the point of disappearing, as the State of Washington has begun arguing the new legislation applies even in the case of offenses committed prior to its enactment. If this is the case, any decision by this Court in this matter will effect no one in Washington other than Mr. Recuenco, and because Mr. Recuenco has completed his sentence in this matter even its impact on his case will be minimal.

What has occurred in Washington can reasonably be expected to occur in other states as well, as legislature's correct the varied sentencing statutes to reflect this Court's decision in Blakely, cases requiring a determination of whether an error was a harmless will steadily disappear. See Allen, 2005 Lexis 695, 50-51 (concluding that question of how to correct sentencing procedure which violated Blakely is a matter for the North Carolina General Assembly).

> Unless, the State of Washington is contending that the issue in this case is important because it and other prosecutorial authorities intend to continue to seek the imposition of sentences which violate Apprendi and Blakely, the importance of the issues presented here will be short lived. At best the State of Washington's argument is nothing more than an effort to correct what it perceives to be an erroneous ruling by the Washington Supreme Court, which stands in the way of the State's effort to save a finite and ever decreasing group of wrongful judgments. There is no reason to grant a writ of certiorari in such a case.

C. The Washington Supreme Court's decision on the facts of this case is correct.

1. The State's argument is premised on the incorrect assertion that neither the deadly weapon nor firearm findings are elements of an offense.

As it did in Blakely, the State of Washington maintains that facts which increase the maximum sentence to which a defendant is exposed are not in fact elements of a greater crime. Petition at 9-10. The State of Washington claims "The weapon enhancement is a sentencing factor, not an element of the crime." Id. Such a contention is contrary to this Court's decisions.

The judicial determination of factors which increase a defendant's sentence implicate the Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt because such facts are elements of a greater offense. Apprendi, 530 U.S. at 490; Ring, 536 U.S. at 604, 609. The Court has gone further to explain that the facts at issue must be treated in every respect as elements of the offense. In Apprendi, the Court distinguished the term "element" from the term "sentencing factor" noting that the former refers to facts which increase the maximum penalty for an offense while the later refers to facts which set the penalty with the existing range. Apprendi, 530 U.S. at 494. The Court further explained this saying

> Apprendi and [McMillan v. Pennsylvania, 477 U.S. 79 (1986)], mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are **the elements** of the crime for purposes of the constitutional analysis.

Harris v. United States. 536 U.S. 545, 557-58 (2003) (Emphasis added); See also, Ring, 536 U.S. at 609 (aggravating circumstances that make a defendant eligible for increased punishment "operates as the functional equivalent of an element of a greater

offense"), Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) (plurality decision)("we can think of no principled reason to distinguish, between what constitutes an offense for the purposes of the Sixth Amendment's jury-trial guarantee and constitutes and 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause"). Thus it is plain that the facts used to impose a greater sentence then permitted by the jury's verdict in Mr. Recuenco's case are elements, and must be analyzed as such.

Further, the State wrongly claims the error here was merely in "misdefining a sentence enhancement." The Washington Supreme Court flatly rejected the State's effort to redefine the claimed error when it rejected the State's argument that Mr. Recuenco invited the error. The Washington Supreme Court said:

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

Recuenco, 154 Wn.2d at 163-64. Nonetheless the State of Washington persists in its effort to recast the issue in this case.

Because a firearm supports both a deadly weapon finding and firearm finding, the deadly weapon finding is in effect a lesser included finding of a firearm finding. Thus, the error was not merely in misdefining a "sentencing factor." Rather, the error was in the trial court ignoring the jury's verdict to make a finding of a greater element finding based upon an undisclosed standard of proof. It is this misunderstanding of

Apprendi and this recasting of the claimed error upon which the State of Washington bases its argument.

2. The Decision of the Washington Supreme Court is consistent with this Court's decision in *Sullivan* and *Neder*.

The State of Washington maintains the decision of the Washington Supreme Court in this case and its Hughes decision are contrary to this Court's decision in Neder v. United States, 527 U.S. 1 (1999). Petition at 7-10. But no conflict exists, and the decision is wholly consistent with both Neder and Sullivan.

Neder concerned only the question of whether harmless error could apply where the jury was not charged on an element of an offense, and the judge instead found the element beyond a reasonable doubt. See Neder, 527 U.S. at 9 (noting that while trial judge removed element from jury, trial judge employed the correct standard of proof to find the element). Sullivan by contrast involved a situation where the jury returned a verdict on each element but did so without having been instructed on the proper standard of proof. Neder made clear it was not overruling Sullivan and expressly noted its holding was "consistent with the holding (if not the entire reasoning of [Sullivan]." Neder, 527 U.S. at 10.

It is only by recasting the error in this case as merely a misdefinition of an element that the State of Washington can claim that Neder is implicated. See Petition at 8-9. But, as the Washington Supreme Court recognized that is not the case. Recuenco, 154 Wn.2d at 163-64. Unlike Neder the court did not remove a single element from the jury's consideration. Instead, what the court did was to go beyond the jury's complete verdict to enter judgment against Mr. Recuenco on a greater offense.

The State of Washington's claim is akin to claiming that where a person is charged with assault and the jury fully instructed on the charge of assault but the trial judge enters a conviction of murder, the error merely lies in the failure to instruct the jury on the elements of murder. Neder plainly does not reach such a scenario.

If, as the State of Washington contends, Sullivan does not apply where a judicial finding of an element is made on less than proof beyond a reasonable doubt, the State offers no explanation of when Sullivan might apply. Because the error in this case and Hughes not only involved the denial of a jury determination but also denial of the right to have that finding made on proof beyond a reasonable doubt Neder has no application.

3. Although it did not reach the question, the Washington Supreme Court's rejection of harmless error analysis is consistent with and dictated by this Court's Double Jeopardy jurisprudence.

As explained above, because a finding which increases the maximum punishment of an offense is an element, for purposes of this case there is a continuum of three relevant degrees or level of offenses: second degree assault; second degree assault with a deadly weapon finding; and second degree assault with a firearm finding.

The Fifth Amendment provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. The Fifth Amendment's double jeopardy protection is applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787 (1969).

Where a defendant is sentenced based on the jury's verdict plus a fact found by a judge, the defendant has been convicted of an aggravated version of the crime actually reflected in the jury's verdict. See e.g., Ring, 536 U.S. at 609 (aggravating circumstances that make a defendant eligible for increased punishment "operates as

the functional equivalent of an element of a greater offense"), see also Sattazahn, 537 U.S. at 111 (Plurality decision).[2] Justice Scalia's plurality decision went beyond merely restating the Ring holding: "we can think of no principled reason to distinguish, between what constitutes an offense for the purposes of the Sixth Amendment's jury-trial guarantee and constitutes and 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause." Sattazahn, 537 U.S. at 111.

Double jeopardy principles do not permit the state to seek a judgment not withstanding the verdict no matter how clear or strong the evidence of guilt. Standefer v. United States, 447 U.S. 10, 21-25 (1980). In addition, the double jeopardy principles bar any effort to uphold the greater conviction on appeal, or to permit the State to seek a verdict on the greater offense on remand. "Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." Green v. United States, 355 U.S. 184, 193-94 (1957). Put simply, where jeopardy has attached to one offense by means of a conviction or acquittal, an appeal of another offense as violating double jeopardy does not allow removing the jeopardy bar which attached to the first. Benton illustrates this point.

In Benton a defendant was acquitted of larceny but convicted of burglary. 395 U.S. at 785. Because both the grand and petit juries had been selected under an

[2] This portion of Sattazahn was only joined in by four justices, as Justice O'Connor, consistent with her dissent in Apprendi and Ring, refused to join in this section of the opinion. See 537 U.S. at 117 (O'Connor, J., concurring in part and concurring in the judgment). It is nonetheless undoubtedly an accurate statement of the law in light of Apprendi and Ring, as the four-justice dissent in Sattazahn, although disagreeing with the majority's refusal to find a jury's inability to reach a unanimous verdict on whether to impose the death penalty was the equivalent of an acquittal, specifically relied on Ring for the point that aggravating factors in death penalty cases are the equivalent of elements. Sattazahn, 537 U.S. at 126 n.6 (Ginsburg, J., dissenting).

conviction, and proof of a second offense necessarily proves the first, the conviction on the first will bar prosecution on the second. In Dixon, the Court found that pursuant to the Blockburger[4] test, a defendant could not be convicted of both contempt, for violating conditions of release by possessing drugs, and of the substantive offense of possession of drugs even though the defendant could commit contempt without possessing drugs, as the possession charge was "a species of lesser-included offense." 509 U.S. at 98, citing, Illinois v. Vitale, 447 U.S. 410, 420-421 (1980) (Double Jeopardy Clause would be violated if the state's proof of manslaughter required proof of the misdemeanor crime of failure to slow to avoid accident of which the defendant has already been convicted); and Whalen v. United States, 445 U.S. 684, 694 (1980) (convictions of both rape and felony murder based on rape violated double jeopardy).

A "firearm" is by definition in Washington law a deadly weapon. Wash. Rev. Code §9.94A.602. Thus, proof sufficient to support a firearm special verdict necessarily establishes the lesser deadly weapcn finding, and second degree assault with a deadly weapon finding is a "a species of lesser-included offense" of second degree assault with a firearm. Dixon, 509 U.S. at 698. Therefore, the jury's verdict on the lesser will bar any effort to seek a verdict or conviction on the greater. Id.

Because Mr. Recuenco's appeal of the conviction of the greater offense of second degree assault with a firearm does not waive his claim of former jeopardy which arises from his final conviction of second degree assault with a deadly weapon, no further action can be taken to seek or affirm the conviction of second degree assault with a firearm. See Green, 355 U.S. at 193-94; and Benton, 395 U.S. at 797. This

[4] Blockburger v. United States, 284 U.S. 299 (1932).

necessarily includes any effort to apply a harmless error analysis to affirm the conviction on appeal or any effort by the State on remand to seek a verdict on second degree assault.

Any argument that double jeopardy principles have no application here as this matter merely involves the sentence imposed miscomprehends Apprendi, Ring, and Blakely. This case is no more about sentencing than would a case where a jury convicts an individual of second degree robbery but the judge concludes the individual is guilty of first degree robbery. Apprendi, Ring, and Blakely merely make clear what is an element of a crime. Ring states any judicial finding which increases the maximum penalty is the functional equivalent of an element of a greater offense. Sattazahn establishes that elements for purposes of the Sixth Amendment are elements for purposes of double jeopardy. This case is not about sentencing at all. Instead the only question is whether a court's finding which goes beyond the jury's verdict to enter a conviction of a greater offense than that found to have been committed by the jury in its verdict can be affirmed as harmless. In short, can a reviewing court enter a judgment notwithstanding the jury's verdict. The answer is of course no.

This Court's decision in California v. Monge, 524 U.S. 721 (1998), does not require a different conclusion. Monge concluded that a reversal for sufficiency of the evidence to establish a sentencing factor – proof of a prior conviction - did not implicate double jeopardy provisions because that fact was not an element of a crime nor an "offense." In reaching this result the Court pointed to its then recent decision in Almendarez-Torres v. United States which of course held the fact of recidivism was a sentencing factor in the traditional sense and need not be pleaded and proved to a jury

beyond a reasonable doubt. Monge, 524 U.S. at 728-29 (citing inter alia Almendarez-Torres, 523 U.S. 224 (1998)). Monge stated "[Almendarez-Torres] rejected an absolute rule that an enhancement constitutes an element of the offense any time it increases the maximum sentence to which a defendant is exposed." 524 U.S. at 729. Thus, the critical point for the Court was whether the fact at issue was an element or merely a sentencing factor, and because the Court concluded the fact at issue was not an element, double jeopardy principles were not implicated.

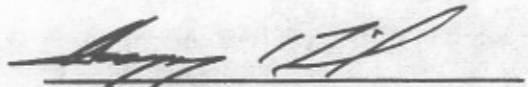
Monge only holds that double jeopardy is not implicated where sentencing factors are involved. But since that time, the Court has adopted an "absolute rule" that facts which increase the maximum penalty are elements and not merely sentencing factors. See, Apprendi, 530 U.S. at 494; Harris, 536 U.S. at 557-58; Ring, 536 U.S. at 609; Sattazahn, 537 U.S. at 111. As there is "no principled reason to distinguish between what constitutes an offense for the purposes of the Sixth Amendment's jury-trial guarantee and constitutes an 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause" application of harmless error analysis to this case would violate the Double Jeopardy Clause. See e.g. Sattazahn, 537 U.S. at 111.

The decision of the Washington Supreme Court, while not reaching this issue, is nonetheless consistent with this Court's Double Jeopardy jurisprudence.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted this 11th day of August, 2005.



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