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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY [Signature]  
DEPUTY

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

IN RE THE PERSONAL RESTRAINT  
PETITION OF:

JOSHUA DEAN SCOTT,

Petitioner.

NO. 34686-9-II

STATE'S RESPONSE TO PERSONAL  
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Under the instructions given at trial, did the jury determine that petitioner was armed with a firearm when he committed his crimes, thereby authorizing the imposition of increased punishment, and was any error, if committed, harmless under Washington v. Recuenco?

B. STATUS OF PETITIONER:

Petitioner, JOSHUA DEAN SCOTT, is restrained pursuant to a Judgment and Sentence (Appendix "A") entered in Pierce County Cause No. 00-1-04425-1.

On February 5, 2006, petitioner was found guilty of two counts of robbery in the first degree, unlawful possession of a firearm in the first degree, possession of stolen property in the first degree, and two counts of possession of a stolen firearm. (Appendix "B"). He was found not guilty of two counts of theft of a firearm. Id.

1 The jury was instructed as follows:

2 For purposes of a special verdict the State must prove beyond a reasonable  
3 doubt that the defendant was armed with a deadly weapon at the time of the  
4 commission of the crime of robbery in the first degree as charged in Counts  
5 I and II and possession of stolen property in the first degree as charged in  
6 Count V.

7 A pistol, revolver, or any other firearm is a deadly weapon whether loaded  
8 or unloaded.

9 If one participant to a crime is armed with a deadly weapon, all accomplices  
10 who know the participant is armed are deemed to be so armed, even if only  
11 one deadly weapon is involved.

12 (Appendix "D," Instruction 49).

13 The jury found that the petitioner was armed with a deadly weapon as to counts I,  
14 II, and V. (Appendix "C").

15 On April 9, 2004, the court imposed three firearm sentencing enhancements, and  
16 sentenced the petitioner to a total of 213 months confinement. (Appendix "A"). On April  
17 11, 2006, the petitioner filed this personal restraint petition.<sup>1</sup>

18 C. ARGUMENT:

19 1. A PETITIONER MUST MEET A HEAVY BURDEN TO SHOW  
20 THAT HE IS ENTITLED TO RELIEF BY PERSONAL  
21 RESTRAINT PETITION.

22 Personal restraint procedure came from the State's habeas corpus remedy, which is  
23 guaranteed by article 4, § 4 of the State Constitution. In re Hagler, 97 Wn.2d 818, 823,  
24 650 P.2d 1103 (1982). Collateral attack by personal restraint petition is not, however, a  
25 substitute for direct appeal. Id. at 824. "Collateral relief undermines the principles of  
finality of litigation, degrades the prominence of the trial, and sometimes costs society the  
right to punish admitted offenders." Id. (citing Engle v. Issac, 456 U.S. 107, 102 S. Ct.

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<sup>1</sup> The State does not assert that this petition is untimely.

1 1558, 71 L.Ed.2d 783, (1982)). These costs are significant and require that collateral relief  
2 be limited in state as well as federal courts. Hagler, 97 Wn.2d at 824.

3 In this collateral action, the petitioner has the duty of showing constitutional error  
4 and that such error was actually prejudicial. The rule that constitutional errors must be  
5 shown to be harmless beyond a reasonable doubt has no application in the context of  
6 personal restraint petitions. In re Mercer, 108 Wn.2d 714, 718 21, 741 P.2d 559 (1987);  
7 Hagler, 97 Wn.2d at 825. Before a personal restraint petition may be granted, the  
8 petitioner must prove that the constitutional errors “worked to his or her actual and  
9 substantial prejudice.” In re Mercer, 108 Wn.2d 714, 721, 741 P.2d 559 (1987). Mere  
10 assertions are insufficient in a collateral action to demonstrate actual prejudice. Inferences,  
11 if any, must be drawn in favor of the validity of the judgment and sentence and not against  
12 it. In re Hagler, 97 Wn.2d at 825-26. To obtain collateral relief from an alleged  
13 nonconstitutional error, a petitioner must show “a fundamental defect which inherently  
14 results in a complete miscarriage of justice.” In re Cook, 114 Wn.2d 802, 812, 792 P.2d  
15 506 (1990). This is a higher standard than the constitutional standard of actual prejudice.  
16 Id. at 810.

17  
18 Reviewing courts have three options in evaluating personal restraint petitions:

- 19 1. If a petitioner fails to meet the threshold burden of showing actual prejudice  
20 arising from constitutional error or a fundamental defect resulting in a  
21 miscarriage of justice, the petition must be dismissed;
- 22 2. If a petitioner makes at least a prima facie showing of actual  
23 prejudice, but the merits of the contentions cannot be determined solely on  
24 the record, the court should remand the petition for a full hearing on the  
25 merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;
3. If the court is convinced a petitioner has proven actual prejudicial error, the  
court should grant the personal restraint petition without remanding the  
cause for further hearing.

1 In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

2  
3 The petition must include a statement of the facts upon which the claim of unlawful  
4 restraint is based and the evidence available to support the factual allegations. RAP  
5 16.7(a)(2); Petition of Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). If the  
6 petitioner fails to provide sufficient evidence to support his challenge, the petition must be  
7 dismissed. Williams at 364. Affidavits, transcripts and clerk's papers are readily available  
8 forms of evidence which a petitioner may employ to support his claims. Id. at 364 365. A  
9 reference hearing is not a substitute for the petitioner's failure to provide evidence to  
10 support his claims. As the Supreme Court stated, "the purpose of a reference hearing is to  
11 resolve genuine factual disputes, not to determine whether the petitioner actually has  
12 evidence to support his allegations." In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086  
13 (1992). "Bald assertions and conclusory allegations will not support the holding of a  
14 hearing," but the dismissal of the petition. Rice at 886; Williams at 364 365.

15  
16 As will be argued below, petitioner has failed to meet his burden of showing that he  
17 is entitled to relief and this petition must be dismissed.

18 2. A PETITIONER HAS FAILED TO DEMONSTRATE THAT HE  
19 WAS ACTUALLY PREJUDICED BY ERROR OF  
20 CONSTITUTIONAL MAGNITUDE BY THE TRIAL COURT'S  
21 IMPOSITION OF FIREARM ENHANCEMENTS.

22 The petitioner asserts that State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005),  
23 requires that the firearm sentencing enhancements imposed by the court require reversal.  
24 On June 26, 2006, however, the United States Supreme Court reversed State v. Recuenco,  
25 and held that failure to submit a sentencing factor to the jury was subject to a harmless

1 error analysis. Washington v. Recuenco, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006)

2 (Appendix “E”). The court stated:

3 The State and the United States urge that this case is indistinguishable from  
4 Neder. We agree. Our decision in Apprendi makes clear that “[a]ny  
5 possible distinction between an “element” of a felony offense and a  
6 “sentencing factor was unknown to the practice of criminal indictment, trial  
7 by jury, and judgment by court as it existed during the years surrounding  
8 our Nation’s founding.” 530 U.S., at 478, 120 S. Ct. 2348, 147 L. Ed. 2d  
9 435 (footnote omitted). Accordingly, we have treated sentencing factors,  
10 like elements, as facts that have to be tried to the jury and proved beyond a  
11 reasonable doubt. Id., at 483-484, 120 S. Ct. 2348, 147 L. Ed. 2d 435. The  
12 only difference between this case and Neder is that in Neder, the  
13 prosecution failed to prove the element of materiality to the jury beyond a  
14 reasonable doubt, while here the prosecution failed to prove the sentencing  
15 factor of “armed with a firearm” to the jury beyond a reasonable doubt.  
16 Assigning this distinction constitutional significance cannot be reconciled  
17 with our recognition in Apprendi that elements and sentencing factors must  
18 be treated the same for Sixth Amendment purposes.

19 ...

20 Put another way, we concluded that the error in Neder was subject to  
21 harmless-error analysis, even though the District Court there not only failed  
22 to submit the question of materiality to the jury, but also mistakenly  
23 concluded that the jury’s verdict was a complete verdict of guilt on the  
24 charges and imposed sentence accordingly. Thus, in order to find for  
25 respondent, we would have to conclude that harmless-error analysis would  
apply if Washington had a crime labeled “assault in the second degree while  
armed with a firearm,” and the trial court erroneously instructed the jury  
that it was not required to find a deadly weapon or a firearm to convict,  
while harmless error does not apply in the present case. This result defies  
logic.

Failure to submit a sentencing factor to the jury, like failure to submit an  
element to the jury, is not structural error. Accordingly, we reverse the  
judgment of the Supreme Court of Washington, and remand the case for  
further proceedings not inconsistent with this opinion.

Id. at 2552-2553 (internal footnotes omitted).

The record in petitioner’s case shows that the jury was instructed that a “firearm”  
is a weapon or device from which a projectile may be fired by an explosive such as  
gunpowder.” (Appendix “D,” Instruction 30). For the purposes of the special verdict, the



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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney or to the attorney for respondent and respondent c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9-29-06 [Signature]  
Date Signature

# **APPENDIX “A”**

*Judgment and Sentence*



00-1-04425-1 20818080 JDSWCD 04-12-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 00-1-04425-1

vs.

JOSHUA DEAN SCOTT,

Defendant.

WARRANT OF COMMITMENT

- 1)  County Jail
- 2)  Dept. of Corrections
- 3)  Other Custody

APR 12 2004

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 4/9/09

By direction of the Honorable

Kevin Stock  
JUDGE  
KEVIN STOCK

By Chris Hutton  
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

**APR 12 2004**  
Date APR 12 2004 By Chris Hutton Deputy

STATE OF WASHINGTON

ss:

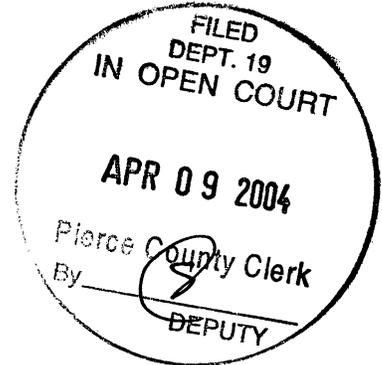
County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

KEVIN STOCK, Clerk  
By: \_\_\_\_\_ Deputy

klb





SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 00-1-04425-1

vs.

JUDGMENT AND SENTENCE (JS)

JOSHUA DEAN SCOTT

Defendant.

NUNC PRO TUNC

- Prison
- Jail One Year or Less
- First-Time Offender
- SSOSA
- DOSA
- Breaking The Cycle (BTC)

APR 12 2004

SID: WA18835544  
 DOB: 05/24/1979

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 02/05/01 by  plea  jury-verdict  bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	ROBBERY IN THE FIRST DEGREE (AAA3)	9.41.00 9.94A.310 9.94A.370 9A.56.190 9A.56.200(1)(a)(b) 9A.08.020	FASE	09/16/00	PCSD 00-20-0368
II	ROBBERY IN THE FIRST DEGREE (AAA3)	9.41.00 9.94A.310 9.94A.370 9A.56.190 9A.56.200(1)(a)(b) 9A.08.020	FASE	09/16/00	PCSD 00-20-0368

Office of Prosecuting Attorney  
 946 County-City Building  
 Tacoma, Washington 98402-2171  
 Telephone: (253) 798-7400

01-9-05604-3

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO
IV	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (9A.04.010)	9.41.040(1)(a)		09/16/00	PCSD 00-20-0368
V	POSSESSING STOLEN PROPERTY IN THE FIRST DEGREE (9A.01.010)	9.41.010 9.94A.310 9.94A.370 9A.56.140(1) 9A.56.150(1) 9A.08.020	FASE	09/16/00	PCSD 00-20-0368

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present.

as charged in the Amended Information

- A special verdict/finding for use of firearm was returned on Count(s) I, II, V RCW 9.94A.602, .510.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	RES BURG	1/25/98	Pierce Cty/WA	08/13/98	A	NV

The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	5	IX	57-75 MOS.	(F)60 MOS.	117-135 MOS.	LIFE
II	5	IX	57-75 MOS.	(F)60 MOS.	117-135 MOS.	LIFE
IV	84	VII	<del>31-41</del> MOS. 36-48	NONE	<del>31-41</del> MOS. 36-48	10 YRS
V	4	II	12+-14 MOS.	(F)36 MOS.	48-50 MOS.	10 YRS.

2.4  EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence  above  below the standard range for Count(s) \_\_\_\_\_. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney  did  did not recommend a similar sentence.

2.5 LEGAL FINANCIAL OBLIGATIONS. The judgment shall upon entry be collectable by civil means, subject to applicable exemptions set forth in Title 6, RCW. Chapter 379, Section 22, Laws of 2003.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

[ ] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows:

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [X] The court DISMISSES Counts VI & VII. The defendant is found NOT GUILTY of Counts VI & VII.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

- RTN/RJN \$ Restitution to:
\$ Restitution to:
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).
PCV \$ 500.00 Crime Victim assessment
DNA \$ 400.00 DNA Database Fee
PUB \$ 2000.00 Court-Appointed Attorney Fees and Defense Costs
FRC \$ 110.00 Criminal Filing Fee
FCM \$ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ Other Costs for:
\$ Other Costs for:
\$ 2610.00 TOTAL

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ per month commencing. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

4.2 RESTITUTION

The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for \_\_\_\_\_

defendant waives any right to be present at any restitution hearing (defendant's initials) \_\_\_\_\_

RESTITUTION. Order Attached

4.3 COSTS OF INCARCERATION

In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

4.4 COLLECTION COSTS

The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

4.5 INTEREST

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

4.6 COSTS ON APPEAL

An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.

4.7  HIV TESTING

The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.8  DNA TESTING

The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DSHS shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 9A.03.754.

4.9 NO CONTACT

The defendant shall not have contact with witnesses herein (name, DOB) except Melissa Scott, but not limited to, personal, verbal, telephonic, written or contact through a third party for 10 days (not to exceed the maximum statutory sentence).

Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence

4.10 OTHER:


4.11 BOND IS HEREBY EXONERATED

4.12 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

<u>57</u> months on Count	<u>I</u>	<u>12+</u> months on Count	<u>II</u>
<u>57</u> months on Count	<u>II</u>	_____ months on Count	_____
<u>36</u> months on Count	<u>IV</u>	_____ months on Count	_____

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

<u>60</u> months on Count No	<u>I</u>	<u>36</u> months on Count No	<u>V</u>
<u>60</u> months on Count No	<u>II</u>	_____ months on Count No	_____
_____ months on Count No	_____	_____ months on Count No	_____

Sentence enhancements in Counts I, II & V shall run  
 concurrent  consecutive to each other.  
 Sentence enhancements in Counts I, II & V shall be served  
 flat time  subject to earned good time credit

Actual number of months of total confinement ordered is: 213 months  
 (Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: \_\_\_\_\_

The sentence herein shall run consecutively to all felony sentences in other cause numbers prior to the commission of the crime(s) being sentenced. \_\_\_\_\_

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: since 9/16/00.

00-1-04425-1

4.13 [ ] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows.

Count \_\_\_\_\_ for \_\_\_\_\_ months;

Count \_\_\_\_\_ for \_\_\_\_\_ months;

Count \_\_\_\_\_ for \_\_\_\_\_ months;

COMMUNITY CUSTODY is ordered as follows:

Count I for a range from: 18 to 36 Months;

Count II for a range from: 18 to 36 Months;

Count \_\_\_\_\_ for a range from: \_\_\_\_\_ to \_\_\_\_\_ Months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC, and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

Defendant shall have no contact with: Witnesses herein (except Melissa Scott)

Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: Per CCO

The defendant shall participate in the following crime-related treatment or counseling services: Per CCO

The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse

mental health [ ] anger management and fully comply with all recommended treatment. Per CCO

The defendant shall comply with the following crime-related prohibitions: Per CCO

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: \_\_\_\_\_

4.14 [ ] WORK ETHIC CAMP RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the

defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.15 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7602.

5.4 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION. Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.5 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicaid, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. N/A

5.7 OTHER: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

DONE in Open Court and in the presence of the defendant this date: 4/9/04 NUNC PRO TUNC.

JUDGE Marguare Andersen  
Print name Marguare Andersen

[Signature]  
Deputy Prosecuting Attorney

[Signature] 30332 FOR  
Attorney for Defendant

Print name: P. Grace Kingman  
WSB # 10717

Print name: Ann Stenberg  
WSB # 22596

J. D. Scott  
Defendant  
Print name: Joshua D. Scott



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CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 00-1-04425-1

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_

Clerk of said County and State, by: \_\_\_\_\_, Deputy Clerk

00-1-04425-1

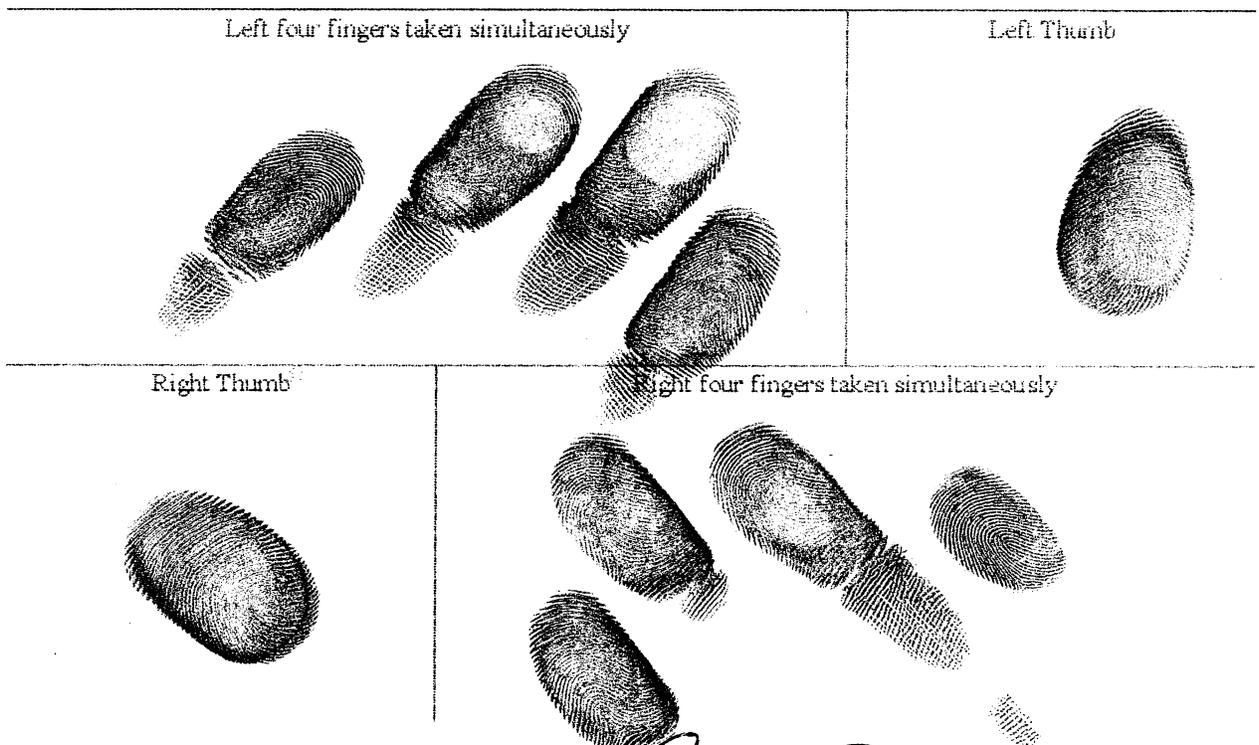
IDENTIFICATION OF DEFENDANT



SID No. WA18835544 Date of Birth 05/24/1979  
(If no SID take fingerprint card for State Patrol)  
FBI No. 664588FB5 Local ID No. UNKNOWN  
PCN No. UNKNOWN Other  
Alias name, SSN, DOB:

Race: [ ] Asian/Pacific Islander [ ] Black/African-American [ X ] Caucasian [ ] Native American [ ] Other: : Ethnicity: [ ] Hispanic [ X ] Non-Hispanic Sex: [ X ] Male [ ] Female

FINGERPRINTS



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, [Signature] Dated: 4-9-04

DEFENDANT'S SIGNATURE: [Signature]

DEFENDANT'S ADDRESS: 2017 S. 300TH ST. FEDERALWAY, WA. 98023

# **APPENDIX “B”**

*Jury Verdicts (General)*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSHUA DEAN SCOTT,

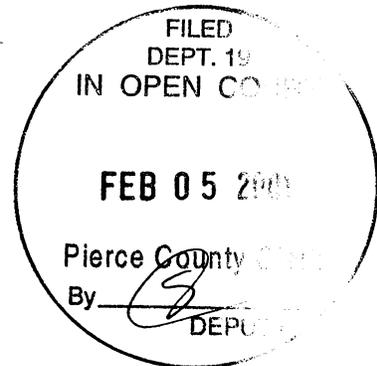
Defendant.

NO. 00-1-04425-1

**VERDICT FORM A**  
Count IV

We, the jury, find the defendant, Joshua Dean Scott, Guilty (Not Guilty or Guilty) of the crime of Unlawful Possession of a Firearm in the First Degree as charged in Count IV.

Norman Frink  
PRESIDING JUROR



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSHUA DEAN SCOTT,

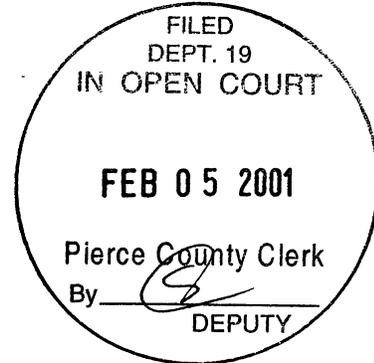
Defendant.

NO. 00-1-04425-1

**VERDICT FORM A**  
Count V

We, the jury, find the defendant, Joshua Dean Scott, Guilty (Not Guilty or Guilty) of the crime of Possession of Stolen Property in the First Degree as charged in Count V.

Norman Feink  
PRESIDING JUROR



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSHUA DEAN SCOTT,

Defendant.

NO. 00-1-04425-1

**VERDICT FORM A**  
Count VI

We, the jury, find the defendant, Joshua Dean Scott, Guilty (Not Guilty or Guilty) of the crime of Possession of a Stolen Firearm as charged in Count VI.

Norman Frink  
PRESIDING JUROR

FILED  
DEPT. 19  
IN OPEN COURT  
  
FEB 05 2001  
Pierce County Clerk  
By [Signature]  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSHUA DEAN SCOTT,

Defendant.

NO. 00-1-04425-1

**VERDICT FORM A**  
Count VII

770 81 000

We, the jury, find the defendant, Joshua Dean Scott, Guilty (Not Guilty or Guilty) of the crime of Possession of a Stolen Firearm as charged in Count VII.

Norman Frink  
PRESIDING JUROR



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSHUA DEAN SCOTT,

Defendant.

NO. 00-1-04425-1

**VERDICT FORM A**  
Count VIII

We, the jury, find the defendant, Joshua Dean Scott, Not Guilty (Not Guilty or Guilty) of the crime of Theft of a Firearm as charged in Count VIII.

Norman Frink  
PRESIDING JUROR



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSHUA DEAN SCOTT,

Defendant.

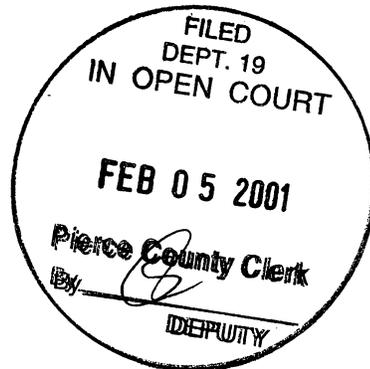
NO. 00-1-04425-1

**VERDICT FORM A**

Count IX

We, the jury, find the defendant, Joshua Dean Scott, Not Guilty (Not Guilty or Guilty) of the crime of Theft of a Firearm as charged in Count IX.

Norman Frink  
PRESIDING JUROR



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSHUA DEAN SCOTT,

Defendant.

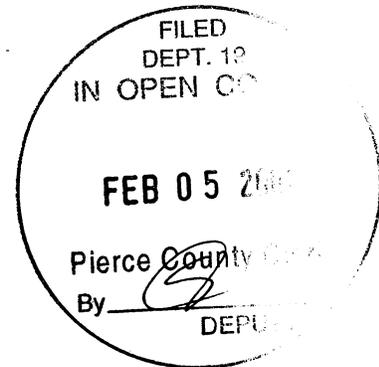
NO. 00-1-04425-1

**VERDICT FORM A**

Count II

We, the jury, find the defendant, Joshua Dean Scott, Guilty (Not Guilty or Guilty) of the crime of Robbery in the First Degree as charged in Count II.

Noeman Frink  
PRESIDING JUROR



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSHUA DEAN SCOTT,

Defendant.

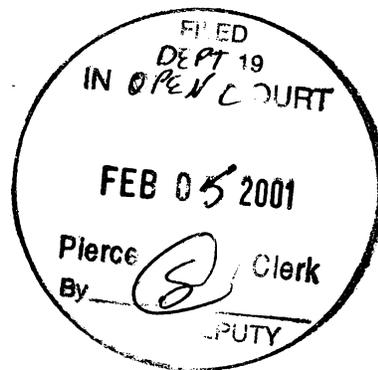
NO. 00-1-04425-1

VERDICT FORM A  
Count I

FEB 06 2001

We, the jury, find the defendant, Joshua Dean Scott, Guilty (Not Guilty or Guilty) of the crime of Robbery in the First Degree as charged in Count I.

Norman Frink  
PRESIDING JUROR



ORIGINAL

## **APPENDIX “C”**

*Jury Verdicts (Special Verdicts)*

00214-116

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,  
  
Plaintiff,  
  
vs.  
  
JOSHUA DEAN SCOTT,  
  
Defendant.

CAUSE NO. 00-1-04425-1  
  
SPECIAL VERDICT FORM

FEB 06 2001

We, the jury, return a special verdict by answering as follows:

Was the defendant, Joshua Dean Scott, armed with a deadly weapon at the time of the commission of the crime in Count I?

ANSWER: Yes (Yes or No)

Norman Frink  
PRESIDING JUROR

FILED  
DEPT. 19  
IN OPEN COURT  
  
FEB 05 2001  
Pierce County Clerk  
By [Signature]  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSHUA DEAN SCOTT,

Defendant.

CAUSE NO. 00-1-04425-1

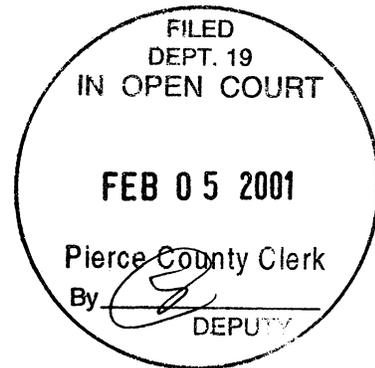
SPECIAL VERDICT FORM

We, the jury, return a special verdict by answering as follows:

Was the defendant, Joshua Dean Scott, armed with a deadly weapon at the time of the commission of the crime in Count V?

ANSWER: yes (Yes or No)

Norman Frink  
PRESIDING JUROR



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSHUA DEAN SCOTT,

Defendant.

CAUSE NO. 00-1-04425-1

SPECIAL VERDICT FORM

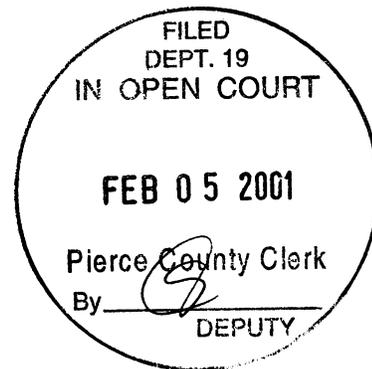
FEB 05 2001

We, the jury, return a special verdict by answering as follows:

Was the defendant, Joshua Dean Scott, armed with a deadly weapon at the time of the commission of the crime in Count II?

ANSWER: Yes (Yes or No)

Norman Frink  
PRESIDING JUROR



# **APPENDIX “D”**

*Court's Instructions*

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

State of Washington,

Plaintiff,

v.

Joshua Dean Scott, and  
Douglas Sean James-Anderson,

Defendant.

NO. 00-1-04425-1  
NO. 00-1-04426-9

COURT'S INSTRUCTIONS  
TO THE JURY

2 FEB - 6 2001

DATED this 1 day of February, 2001.

*Marywave Van Deren*  
HONORABLE MARYWAVE VAN DEREN

FILED  
DEPT. 19  
IN OPEN COURT  
FEB 01 2001  
Pierce County Clerk  
By *[Signature]*  
DEPUTY

ORIGINAL

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the

testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses.

Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff, and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

Neither defendant is compelled to testify, and the fact that the defendants have not testified cannot be used to infer guilt and/or prejudice either of them in any way.

INSTRUCTION NO. 5

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.



**INSTRUCTION NO. 7**

You may give such weight and credibility to any alleged out-of-court statements of the defendant(s) as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 2

You may not consider an admission or incriminating statement made out of court by one defendant as evidence against a codefendant.

INSTRUCTION NO. 9

Evidence has been introduced in this case against Douglas Sean James-Anderson on the subject of a stolen clock for the limited purpose of proving identity of the perpetrator on all counts and for the purpose of showing knowledge in counts VI and VII. You must not consider this evidence for any other purpose, nor may you consider this evidence in evaluating the guilt of Joshua Dean Scott.

INSTRUCTION NO. 10

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

**INSTRUCTION NO. 11**

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime charged, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

INSTRUCTION NO. 12

A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon.

INSTRUCTION No. 13

To convict the defendant, Joshua Dean Scott, of the crime of robbery in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16<sup>th</sup> day of September, 2000, the defendant or an accomplice unlawfully took personal property not belonging to the defendant or an accomplice, *m 2/101* from the person or in the presence of Peter Filipuk and Barrett Thompson of Cascade Custom Jewelers;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence or injury to that person or to the property of another;
- (4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5) That the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon; and
- (6) The acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

To convict the defendant, Douglas Sean James-Anderson, of the crime of robbery in the first degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of September, 2000 the defendant or an accomplice unlawfully took personal property not belonging to the defendant or an accomplice, from the person or in the presence of Peter Filipiuk and Barrett Thompson of Cascade Custom Jewelers;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person or to the person or property of another;

(4) That the force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION No. 15

To convict the defendant, Joshua Dean Scott, of the crime of robbery in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16<sup>th</sup> day of September, 2000, the defendant or an accomplice unlawfully took personal property not belonging to the defendant or an accomplice, from the person or in the presence of Peter Filipuk; *mw 2/1/01*
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence or injury to that person or to the property of another;
- (4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5) That *in the act* the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon; and
- (6) The acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

To convict the defendant, Douglas Sean James-Anderson, of the crime of robbery in the first degree as charged in Count 11, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of September, 2000 the defendant or an accomplice unlawfully took personal property not belonging to the defendant or an accomplice, from the person or in the presence of Peter Filipiuk;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person or to the person or property of another;

(4) That the force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft ~~the~~ takes personal property, not belonging to the defendant, from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to ~~that~~ person or to the person or property of <sup>another. on 2/1/01</sup> anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

INSTRUCTION NO. 18

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 19

A taking from the presence of another can occur in the presence of a person, even though that person was not immediately present, where that person, by force or fear, had been removed from or prevented from approaching the place from which the taking occurred.

INSTRUCTION NO. 20

That means to wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive that person of such property or services.

INSTRUCTION NO. 21

Wrongfully obtains means to take wrongfully the property or services of another.

INSTRUCTION NO. 22

The term "deadly weapon" includes any firearm, whether loaded or not.

INSTRUCTION NO. 23

A person is "armed" with a weapon if ~~the weapon is~~ easily accessible and readily available for either offensive or defensive purposes.

INSTRUCTION NO. 24

A person commits the crime of unlawful possession of a firearm in the first degree when he has previously been convicted, or adjudicated as a juvenile, of a serious offense and knowingly owns or has in his possession or control any firearm.

INSTRUCTION NO. 25

To convict the defendant, Douglas Sean James Anderson, of the crime of unlawful possession of a firearm in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of September, 2000, the defendant knowingly had a firearm in his possession or control;

(2) That the defendant had previously been adjudicated guilty as a juvenile of Burglary in the Second Degree, which is a serious offense; and

(3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 26

To convict the defendant, Joshua Dean Scott, of the crime of unlawful possession of a firearm in the first degree as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of September, 2000, the defendant knowingly had a firearm in his possession or control;

(2) That the defendant had previously been convicted of a serious offense; and

(3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 27

A defendant constructively possesses an item if the defendant had dominion and control over it or over the premises where the item was found.

A vehicle is "premises" for purposes of determining whether a defendant constructively possessed an item.

A person can be in constructive possession jointly with another person.

Exclusive control by a defendant is not required for a finding of constructive possession.

Evidence of a defendant's close proximity to an item is not, standing alone, sufficient to establish constructive possession.

INSTRUCTION NO. 28

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.

INSTRUCTION NO. 29

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 30

"Firearm" is a weapon or device from which a projectile may be fired by an explosive such as

REPRODUCED

INSTRUCTION NO. 31

A person commits the crime of possessing stolen property in the first degree when he or she knowingly possesses stolen property other than a firearm which exceeds \$1500 in value.

Possessing stolen property means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

INSTRUCTION NO. 32

To convict the defendant, Joshua Dean Scott, of the crime of possessing stolen property in the first degree in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of September, 2000, the defendant knowingly possessed stolen property other than a firearm, to wit: a 1990 Chevrolet Blazer;
- (2) That the defendant acted with knowledge that the property had been stolen;
- (3) That the defendant or an accomplice withheld or appropriated the property in the name of someone other than the true owner or person entitled thereto;
- (4) That the value of the stolen property exceeded \$1500; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not

## INSTRUCTION NO. 33

To convict the defendant, Douglas Sean James-Anderson, of the crime of possessing stolen property in the first degree in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of September, 2000, the defendant knowingly possessed stolen property other than a firearm, to wit: a 1990 Chevrolet Blazer;
- (2) That the defendant acted with knowledge that the property had been stolen;
- (3) That the defendant or an accomplice withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;
- (4) That the value of the stolen property exceeded \$1500; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 34

Stolen means obtained by theft or robbery.

INSTRUCTION NO. 35

Value means the market value of the property or services at the time and in the approximate area of the act.

INSTRUCTION NO. 36

A person commits the crime of possessing a stolen firearm when he or she knowingly possesses, carries, delivers, sells, or is in control of a stolen firearm.

Possessing a stolen firearm means knowingly to receive, retain, possess, conceal, or dispose of a stolen firearm knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

INSTRUCTION NO. 37

To convict the defendant, Douglas Sean James-Anderson, of the crime of possessing a stolen firearm as charged in Count VI, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of September, 2000, the defendant knowingly possessed, carried, delivered, sold or was in control of a stolen firearm, a Colt AR-15 rifle;

(2) That the defendant acted with knowledge that the property had been stolen; and

(3) That the defendant or an accomplice withheld or appropriated the property for the use of someone other than the true owner or person entitled thereto;

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 38

To convict the defendant, Joshua Dean Scott, of the crime of possessing a stolen firearm as charged in Count VI, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of September, 2000, the defendant knowingly possessed, carried, delivered, sold or was in control of a stolen firearm, a Colt AR-15 rifle;
- (2) That the defendant acted with knowledge that the property had been stolen; and
- (3) That the defendant or an accomplice withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 39

To convict the defendant, Joshua Dean Scott, of the crime of possessing a stolen firearm as charged in Count VII, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of September, 2000, the defendant knowingly possessed, carried, delivered, sold or was in control of a stolen firearm, a Remington 14 rifle;

(2) That the defendant acted with knowledge that the property had been stolen and

(3) That the defendant or an accomplice withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 40

To convict the defendant, Douglas Sean James-Anderson, of the crime of possessing a stolen firearm as charged in Count VII, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of September, 2000, the defendant knowingly possessed, carried, delivered, sold or was in control of a stolen firearm, a Ruger mini 14 rifle;
- (2) That the defendant acted with knowledge that the property had been stolen; and
- (3) That the defendant or an accomplice withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 41

A person is guilty of theft of a firearm if he or she commits a theft of any firearm.

INSTRUCTION NO. 42

To convict the defendant, Joshua Dean Scott, of the crime of theft of a firearm as charged in Count VIII, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of September, 2000, the defendant wrongfully obtained or exerted unauthorized control over a firearm belonging to another, a Colt 45 Pistol belonging to George Bastaich;
- (2) That the defendant intended to deprive the other person of the firearm;
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 43

To convict the defendant, Douglas Sean James-Anderson, of the crime of theft of a firearm as charged in Count VIII, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of September, 2000, the defendant wrongfully obtained or exerted unauthorized control over a firearm belonging to another, a Colt 45 Pistol belonging to George Bastaich;
- (2) That the defendant intended to deprive the other person of the firearm;
- and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 42

To convict the defendant, Joshua Dean Scott, of the crime of theft of a firearm as charged in Count IX, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of September, 2000, the defendant wrongfully obtained or exerted unauthorized control over a firearm belonging to another, a Smith & Wesson .22 Pistol belonging to George Bastaich;

(2) That the defendant intended to deprive the other person of the firearm;  
and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 45

To convict the defendant, Douglas Sean James-Anderson, of the crime of theft of a firearm as charged in Count IX, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of September, 2000, the defendant wrongfully obtained or exerted unauthorized control over a firearm belonging to another, a Smith & Wesson .22 Pistol belonging to George Bastaich;
  - (2) That the defendant intended to deprive the other person of the firearm;
- and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 46

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 47

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and a verdict form for each defendant and for each count.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty," according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror will sign it and notify the judicial assistant, who will conduct you into court to declare your verdict.

INSTRUCTION NO. 18

You will also be furnished with special verdict forms. If you find the defendant(s) not guilty do not use the special verdict forms. If you find the defendant(s) guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

INSTRUCTION NO. 49

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime of robbery in the first degree as charged in Counts I and II and possession of stolen property in the first degree as charged in Count III.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

If one participant to a crime is armed with a deadly weapon, all accomplices who know the participant is armed are deemed to be so armed, even if only one deadly weapon is involved.

## **APPENDIX “E”**

*Washington v. Recuenco*

LEXSEE 126 S.CT. 2546

**Washington, Petitioner v. Arturo R. Recuenco.****No. 05-83.****SUPREME COURT OF THE UNITED STATES***126 S. Ct. 2546; 165 L. Ed. 2d 466; 2006 U.S. LEXIS 5164; 74 U.S.L.W. 4460; 19**Fla. L. Weekly Fed. S 382***April 17, 2006, Argued****June 26, 2006, Decided**

**NOTICE:** [\*\*\*1] The LEXIS pagination of this document is subject to change pending release of the final published version.

**PRIOR HISTORY:** ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON. *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188, 2005 Wash. LEXIS 363 (2005)

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant was convicted of assault in the second degree based on a jury's finding that he assaulted his wife with a deadly weapon. The state trial court applied a 3-year firearm enhancement to defendant's sentence based on its own factual findings, in violation of *Blakely*. On appeal, the Supreme Court of Washington vacated the sentence, concluding that *Blakely* violations could never be harmless. The United States Supreme Court granted certiorari.

**OVERVIEW:** Defendant argued that the Supreme Court was without power to reverse the judgment of the state supreme court because that judgment rested on adequate and independent state-law grounds. Even if defendant was correct that Washington law did not provide for a procedure by which his jury could have made a finding pertaining to his possession of a firearm, that did not mean that *Blakely* error was structural, or that the Supreme Court was precluded from deciding that question. Thus, the Supreme Court did not need to resolve this open question of Washington law. The Supreme Court previously held that harmless-error analysis applied to errors that concerned a failure to

include an element of an offense in a jury instruction because an instruction that omitted an element of the offense did not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Elements and sentencing factors had to be treated the same for Sixth Amendment purposes. The instant case was indistinguishable from the prior action. Thus, failure to submit a sentencing factor to a jury, like failure to submit an element to a jury, was not structural error.

**OUTCOME:** The judgment of the state supreme court was reversed. The case was remanded for further proceedings.

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Appeals > Reversible Errors > Structural Errors*

*Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Constitutional Errors*

[HN1] The commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, most constitutional errors can be harmless. If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis. Only in rare cases has the United States Supreme Court held that an error is structural, and thus requires automatic reversal. In such cases, the error necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or

innocence.

***Criminal Law & Procedure > Jury Instructions > Particular Instructions > Elements of the Offense  
Criminal Law & Procedure > Appeals > Reversible Errors > Structural Errors  
Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Constitutional Errors***

[HN2] The United States Supreme Court has held that harmless-error analysis applies to errors that concern a failure to include an element of an offense in a jury instruction because an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

***Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Impartial Jury  
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution  
Criminal Law & Procedure > Sentencing > Imposition > Factors***

[HN3] The United States Supreme Court has treated sentencing factors, like elements, as facts that have to be tried to a jury and proved beyond a reasonable doubt. Elements and sentencing factors must be treated the same for Sixth Amendment purposes.

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

***Criminal Law & Procedure > Jury Instructions > Particular Instructions > Elements of the Offense  
Criminal Law & Procedure > Sentencing > Imposition > Factors***

***Criminal Law & Procedure > Appeals > Reversible Errors > Structural Errors***

[HN4] Failure to submit a sentencing factor to a jury, like failure to submit an element to a jury, is not structural error.

**SYLLABUS:** After respondent threatened his wife with a handgun, he was convicted of second-degree assault based on the jury's finding that he had assaulted her "with a deadly weapon." A "firearm" qualifies as a "deadly weapon" under Washington law, but nothing in the verdict form specifically required the jury to find that respondent had engaged in assault with a "firearm," as

opposed to any other kind of "deadly weapon." Nevertheless, the state trial court applied a 3-year firearm enhancement to respondent's sentence, rather than the 1-year enhancement that specifically applies to assault with a deadly weapon, based on the court's own factual findings that respondent was armed with a firearm. This Court then decided *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435, [\*\*\*2] holding that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *id.*, at 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435, and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, clarifying that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict," *id.*, at 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403. Because the trial court could not have subjected respondent to a firearm enhancement based only on the jury's finding that respondent was armed with a "deadly weapon," the State conceded a *Sixth Amendment Blakely* violation before the Washington Supreme Court, but urged the court to find the *Blakely* error harmless. In vacating respondent's sentence and remanding for sentencing based solely on the deadly weapon enhancement, however, the court declared *Blakely* error to be "structural error," which will always invalidate a conviction under *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182.

*Held:*

1. Respondent's argument that this Court lacks power to [\*\*\*3] reverse because the Washington Supreme Court's judgment rested on adequate and independent state-law grounds is rejected. It is far from clear that respondent is correct that at the time of his conviction, state law provided no procedure for a jury to determine whether a defendant was armed with a firearm, so that it is impossible to conduct harmless-error analysis on the *Blakely* error in his case. The correctness of respondent's interpretation, however, is not determinative of the question the State Supreme Court decided and on which this Court granted review, *i.e.*, whether *Blakely* error can ever be deemed harmless. If respondent's reading of Washington law is correct, that merely suggests that he will be able to demonstrate that the *Blakely* violation in this particular case was not harmless. See *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d

126 S. Ct. 2546, \*; 165 L. Ed. 2d 466, \*\*;  
2006 U.S. LEXIS 5164, \*\*\*3; 74 U.S.L.W. 4460

705. But it does not mean that *Blakely* error -- which is of the same nature, whether it involves a fact that state law permits to be submitted to the jury or not -- is structural, or that this Court is precluded from deciding that question. Thus, the Court need not resolve this open question of Washington law. Pp. [\*\*\*4] 3-4.

2. Failure to submit a sentencing factor to the jury is not "structural" error. If a criminal defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that most constitutional errors are subject to harmless-error analysis. E.g., *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35. Only in rare cases has this Court ruled an error "structural," thus requiring automatic reversal. In *Neder*, the Court held that failure to submit an element of an offense to the jury -- there, the materiality of false statements as an element of the federal crimes of filing a false income tax return, mail fraud, wire fraud, and bank fraud, see *id.*, at 20-25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 -- is not structural, but is subject to *Chapman's* harmless-error rule, *id.*, at 7-20, 119 S. Ct. 1827, 144 L. Ed. 2d 35. This case is indistinguishable from *Neder*. *Apprendi* makes clear that "any possible distinction between an 'element' of a felony . . . and a 'sentencing factor' was unknown . . . during the years surrounding our Nation's founding." 530 U.S., at 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435. Accordingly, the Court has treated sentencing factors, like elements, as facts that have to be tried to the jury [\*\*\*5] and proved beyond a reasonable doubt. *Id.*, at 483-484, 120 S. Ct. 2348, 147 L. Ed. 2d 435. The only difference between this case and *Neder* is that there the prosecution failed to prove the materiality element beyond a reasonable doubt, while here the prosecution failed to prove the "armed with a firearm" sentencing factor beyond a reasonable doubt. Assigning this distinction constitutional significance cannot be reconciled with *Apprendi's* recognition that elements and sentencing factors must be treated the same. Respondent attempts unpersuasively to distinguish *Neder* on the ground that the jury there returned a guilty verdict on the offenses for which the defendant was sentenced, whereas here the jury returned a guilty verdict only on the offense of second-degree assault, and an affirmative answer to the sentencing question whether respondent was armed with a deadly weapon. Because *Neder's* jury did not find him guilty of each of the elements of the offenses with which he was charged, its verdict is no more fairly described as a complete finding of guilt than is the verdict here. See 527 U.S., at 31, 119 S. Ct. 1827, 144 L. Ed. 2d 35. Pp. 5-9.

154 Wash. 2d 156, 110 P. 3d 188, reversed and remanded. [\*\*\*6]

**JUDGES:** THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, BREYER, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion. STEVENS, J., filed a dissenting opinion. GINSBURG, J., filed a dissenting opinion, in which STEVENS, J., joined.

**OPINION BY: THOMAS**

**OPINION:**

[\*2549] [\*\*472] JUSTICE THOMAS delivered the opinion of the Court.

Respondent Arturo Recuenco was convicted of assault in the second degree based on the jury's finding that he assaulted his wife "with a deadly weapon." App. 13. The trial court applied a 3-year firearm enhancement to respondent's sentence based on its own factual findings, in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). On appeal, the Supreme Court of Washington vacated the sentence, concluding that *Blakely* violations can never be harmless. We granted certiorari to review this conclusion, 546 U.S. \_\_\_, 126 S. Ct. 478, 163 L. Ed. 2d 362 (2005), and now reverse.

I

On September 18, 1999, respondent fought with his wife, Amy Recuenco. After screaming at her and smashing their stove, he threatened her with a gun. Based on this incident, the State of Washington charged respondent with assault in the second degree, *i.e.*, "intentiona[l] [\*\*\*7] assault . . . with a deadly weapon, to-wit: a handgun." App. 3. Defense counsel proposed, and the court accepted, a special verdict form that directed the jury to make a specific finding whether respondent was "armed with a deadly weapon at the time of the commission of the crime." *Id.*, at 13. A "firearm" qualifies as a "deadly weapon" under Washington law. *Wash. Rev. Code § 9A.04.110(6)* (2006). But nothing in the verdict form specifically required the jury to find that respondent had engaged in assault with a "firearm," as opposed to any other kind of "deadly weapon." The jury returned a verdict of guilty on the charge of assault in the second degree, and answered the special verdict question

in the affirmative. App. 10, 13.

At sentencing, the State sought the low end of the standard range sentence for assault in the second degree (three months). It also sought a mandatory 3-year enhancement because respondent was armed with a "firearm," § 9.94A.533(3)(b), rather than requesting the 1-year enhancement that would attend the jury's finding that respondent was armed with a deadly weapon, § 9.94A.533(4)(b). The trial court concluded that respondent satisfied the condition for [\*\*\*8] the firearm enhancement, and accordingly imposed a total sentence of 39 months.

Before the Supreme Court of Washington heard respondent's appeal, we decided *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely*, *supra*. In *Apprendi*, we held that "[o]ther than [\*\*473] the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S., at 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435. In *Blakely*, we clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U.S., at 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (emphasis in original). Because the trial court in this case could not have subjected respondent to a firearm enhancement based only on the jury's finding that respondent was armed with a "deadly weapon," the State conceded before the Supreme Court of Washington that a *Sixth Amendment* violation occurred under *Blakely*. 154 Wn.2d 156, 162-164, 110 P.3d 188, 191 (2005). See also Tr. of Oral Arg. 10-11. [\*\*\*9]

[\*2550] The State urged the Supreme Court of Washington to find the *Blakely* error harmless and, accordingly, to affirm the sentence. In *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), however, decided the same day as the present case, the Supreme Court of Washington declared *Blakely* error to be "structural" error" which "will always invalidate the conviction." *Id.*, at 142, 110 P. 3d 205 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)). As a result, the court refused to apply harmless-error analysis to the *Blakely* error infecting respondent's sentence. Instead, it vacated his sentence and remanded for sentencing based solely on the deadly weapon enhancement. 154 Wash. 2d, at 164, 110 P. 3d,

at 192.

## II

Before reaching the merits, we must address respondent's argument that we are without power to reverse the judgment of the Supreme Court of Washington because that judgment rested on adequate and independent state-law grounds. Respondent claims that at the time of his conviction, Washington state law provided no procedure for a jury to determine whether a defendant was armed with a firearm. [\*\*\*10] Therefore, he contends, it is impossible to conduct harmless-error analysis on the *Blakely* error in his case. Respondent bases his position on *Hughes*, in which the Supreme Court of Washington refused to "create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure and, instead, explicitly assigned such findings to the trial court." 154 Wash. 2d, at 151, 110 P. 3d, at 209. Respondent contends that, likewise, the Washington Legislature provided no procedure by which a jury could decide at trial whether a defendant was armed with a firearm, as opposed to a deadly weapon.

It is far from clear that respondent's interpretation of Washington law is correct. See *State v. Pharr*, 131 Wn. App. 119, 124-125, 126 P.3d 66, 69 (2006) (affirming the trial court's imposition of a firearm enhancement when the jury's special verdict reflected a finding that the defendant was armed with a firearm). In *Hughes*, the Supreme Court of Washington carefully avoided reaching the conclusion respondent now advocates, instead expressly recognizing that "we are presented only with the question [\*\*\*11] of the appropriate remedy on remand -- we do not decide here whether juries may be given special [\*\*474] verdict forms or interrogatories to determine aggravating factors at trial." *Id.*, at 149, 110 P. 3d, at 208. Accordingly, *Hughes* does not appear to foreclose the possibility that an error could be found harmless because the jury which convicted the defendant would have concluded, if given the opportunity, that a defendant was armed with a firearm.

The correctness of respondent's interpretation of Washington law, however, is not determinative of the question that the Supreme Court of Washington decided and on which we granted review, *i.e.*, whether *Blakely* error can ever be deemed harmless. If respondent is correct that Washington law does not provide for a procedure by which his jury could have made a finding

126 S. Ct. 2546, \*2550; 165 L. Ed. 2d 466, \*\*474;  
2006 U.S. LEXIS 5164, \*\*\*11; 74 U.S.L.W. 4460

pertaining to his possession of a firearm, that merely suggests that respondent will be able to demonstrate that the *Blakely* violation in this particular case was not harmless. See *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). But that does not mean that *Blakely* error -- which is of the same nature, whether it involves [\*\*\*12] a fact that state law permits to be submitted to the jury or not -- is structural, or that we are precluded from deciding that question. [\*2551] Thus, we need not resolve this open question of Washington law. n1

n1 Respondent's argument that, as a matter of state law, the *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), error was not harmless remains open to him on remand.

### III

We have repeatedly recognized that [HN1] the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "most constitutional errors can be harmless." *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." 527 U.S., at 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (quoting *Rose v. Clark*, 478 U.S. 570, 579, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). [\*\*\*13] Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal. n2 In such cases, the error "necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder, supra*, at 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (emphasis omitted).

n2 See *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997), in turn citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (complete denial of

counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 *Ohio Law Abs.* 159, 5 *Ohio Law Abs.* 185, 25 *Ohio L. Rep.* 236 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (defective reasonable-doubt instruction)).

[\*\*\*14]

We recently considered whether an error similar to that which occurred here was structural in *Neder, supra*. *Neder* was charged with mail fraud, in violation of 18 U.S.C. § 1341; wire fraud, in violation of § 1343; bank fraud, in violation of § 1344; and filing [\*\*475] a false income tax return, in violation of 26 U.S.C. § 7206(1). 527 U.S., at 6, 119 S. Ct. 1827, 144 L. Ed. 2d 35. At *Neder's* trial, the District Court instructed the jury that it "need not consider" the materiality of any false statements to convict *Neder* of the tax offenses or bank fraud, because materiality "is not a question for the jury to decide." *Ibid.* The court also failed to include materiality as an element of the offenses of mail fraud and wire fraud. *Ibid.* We determined that the District Court erred because under *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995), materiality is an element of the tax offense that must be found by the jury. We further determined that materiality is an element of the mail fraud, wire fraud, and bank fraud statutes, and thus must be submitted to the jury to support conviction of those crimes as well. *Neder*, 527 U.S., at 20, 119 S. Ct. 1827, 144 L. Ed. 2d 35. [\*\*\*15] [HN2] We nonetheless held that harmless-error analysis applied to these errors, because "an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.*, at 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35. See also *Schriro v. Summerlin*, 542 U.S. 348, 355-356, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (rejecting the claim that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which applied *Apprendi* to hold that a jury

126 S. Ct. 2546, \*2551; 165 L. Ed. 2d 466, \*\*475;  
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must find the existence of [\*2552] aggravating factors necessary to impose the death penalty, was a ""watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding," in part because we could not "confidently say that judicial factfinding *seriously* diminishes accuracy").

The State and the United States urge that this case is indistinguishable from *Neder*. We agree. Our decision in *Apprendi* makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding [\*\*\*16] our Nation's founding." 530 U.S., at 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (footnote omitted). Accordingly, [HN3] we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. *Id.*, at 483-484, 120 S. Ct. 2348, 147 L. Ed. 2d 435. The only difference between this case and *Neder* is that in *Neder*, the prosecution failed to prove the element of materiality to the jury beyond a reasonable doubt, while here the prosecution failed to prove the sentencing factor of "armed with a firearm" to the jury beyond a reasonable doubt. Assigning this distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for *Sixth Amendment* purposes. n3

n3 Respondent also attempts to evade *Neder* by characterizing this as a case of charging error, rather than of judicial factfinding. Brief for Respondent 16-19. Because the Supreme Court of Washington treated the error as one of the latter type, we treat it similarly. See 154 Wn. 2d 156, 159-161, 110 P. 3d 188, 189-190 (2005) (considering "whether imposition of a firearm enhancement without a jury finding that Recuenco was armed with a firearm beyond a reasonable doubt violated Recuenco's *Sixth Amendment* right to a jury trial as defined by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 [(2000)], and its progeny," and whether the *Apprendi* and *Blakely* error, if uninvited, could "be deemed harmless").

[\*\*\*17]

Respondent attempts to distinguish *Neder* on the ground that, in that case, the jury returned a guilty verdict on the offense for which the [\*\*476] defendant was sentenced. Here, in contrast, the jury returned a guilty verdict only on the offense of assault in the second degree, and an affirmative answer to the sentencing question whether respondent was armed with a deadly weapon. Accordingly, respondent argues, the trial court's action in his case was the equivalent of a directed verdict of guilt on an offense (assault in the second degree while armed with a firearm) greater than the one for which the jury convicted him (assault in the second degree while armed with any deadly weapon). Rather than asking whether the jury would have returned the same verdict absent the error, as in *Neder*, respondent contends that applying harmless-error analysis here would "hypothesize a guilty verdict that [was] never in fact rendered," in violation of the jury-trial guarantee. Brief for Respondent at 27 (quoting *Sullivan*, 508 U.S., at 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182).

We find this distinction unpersuasive. Certainly, in *Neder*, the jury purported to have convicted the defendant of the crimes with which [\*\*\*18] he was charged and for which he was sentenced. However, the jury was precluded "from making a finding on the *actual* element of the offense." 527 U.S., at 10, 119 S. Ct. 1827, 144 L. Ed. 2d 35. Because *Neder*'s jury did not find him guilty of each of the elements of the offenses with which he was charged, its verdict is no more fairly described as a complete finding of guilt of the crimes for which the defendant was sentenced than is the verdict here. See [\*2553] *id.*, at 31, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (SCALIA, J., concurring in part and dissenting in part) ("[S]ince all crimes require proof of more than one element to establish guilt . . . it follows that trial by jury means determination by a jury that *all elements* were proved. The Court does not contest this"). Put another way, we concluded that the error in *Neder* was subject to harmless-error analysis, even though the District Court there not only failed to submit the question of materiality to the jury, but also mistakenly concluded that the jury's verdict was a complete verdict of guilt on the charges and imposed sentence accordingly. Thus, in order to find for respondent, we would have to conclude that harmless-error analysis would apply if Washington had [\*\*\*19] a crime labeled "assault in the second degree

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while armed with a firearm," and the trial court erroneously instructed the jury that it was not required to find a deadly weapon or a firearm to convict, while harmless error does not apply in the present case. This result defies logic. n4

n4 The Supreme Court of Washington reached the contrary conclusion based on language from *Sullivan*. See *State v. Hughes*, 154 Wn.2d 118, 144, 110 P.3d 192, 205 (2005) ("There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate" (quoting *Sullivan*, 508 U.S., at 279-280, 113 S. Ct. 2078, 124 L. Ed. 2d 182)). Here, as in *Neder*, "this strand of reasoning in *Sullivan* does provide support for [respondent]'s position." 527 U.S., at 11, 119 S. Ct. 1827, 144 L. Ed. 2d 35. We recognized in *Neder*, however, that a broad interpretation of our language from *Sullivan* is inconsistent with our case law. 527 U.S., at 11-15, 119 S. Ct. 1827, 144 L. Ed. 2d 35. Because the jury in *Neder*, as here, failed to return a complete verdict of guilty beyond a reasonable doubt, our rejection of *Neder*'s proposed application of the language from *Sullivan* compels our rejection of this argument here.

[\*\*\*20]

\* \* \*

[HN4] [\*\*477] Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error. Accordingly, we reverse the judgment of the Supreme Court of Washington, and remand the case for further proceedings not inconsistent with this opinion.

*It is so ordered.*

CONCUR BY: KENNEDY

CONCUR:

JUSTICE KENNEDY, concurring.

The opinions for the Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and their progeny were accompanied by dissents. The Court does not revisit these cases today, and it describes their holdings accurately. On these premises, the Court's analysis is correct. Cf. *Ring v. Arizona*, 536 U.S. 584, 613, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (KENNEDY, J., concurring). With these observations I join the Court's opinion.

DISSENT BY: STEVENS; GINSBURG

DISSENT:

JUSTICE STEVENS, dissenting.

Like *Brigham City v. Stuart*, 547 U.S. \_\_\_, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006), and *Kansas v. Marsh*, 548 U.S. \_\_\_, 126 S. Ct. 2516, 165 L. Ed. 2d 429, 2006 U.S. LEXIS 5163 (2006), this is a case in which the Court has granted review in order to make sure that a State's highest [\*\*\*21] court has not granted its citizens any greater protection than the bare minimum required by the Federal Constitution. Ironically, the issue in this case is not whether respondent's federal constitutional rights were violated -- that is admitted -- it is whether the Washington Supreme Court's chosen remedy for the violation is mandated by federal law. As the discussion in Part II of the Court's opinion demonstrates, whether we even have jurisdiction [\*2554] to decide that question is not entirely clear. But even if our expansionist post-*Michigan v. Long* jurisprudence supports our jurisdiction to review the decision below, see 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), there was surely no need to reach out to decide this case. The Washington Supreme Court can, of course, reinstate the same judgment on remand, either for the reasons discussed in Part II of the Court's opinion, see *ante*, at 4, and n. 1, or because that court chooses, as a matter of state law, to adhere to its view that the proper remedy for *Blakely* errors, see *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), is automatic reversal of the unconstitutional portion of a defendant's sentence. Moreover, because [\*\*\*22] the Court does not address the strongest argument in respondent's favor -- namely, that *Blakely* errors are structural because they

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deprive criminal defendants of sufficient notice regarding the charges they must defend against, see *ante*, at 7, n. 3 -- this decision will have a limited impact on other cases.

As I did in *Brigham City* and *Marsh*, I voted to deny certiorari in this case. Given the Court's decision to reach the merits, however, I would affirm for the reasons stated in JUSTICE GINSBURG's opinion, which I join.

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, dissenting.

Between trial and sentencing, respondent Arturo Recuenco's prosecutor [\*\*478] switched gears. The information charged Recuenco with assault in the second degree, and further alleged that at the time of the assault, he was armed with a deadly weapon. App. 3. Without enhancement, the assault charge Recuenco faced carried a sentence of 3 to 9 months, *id.*, at 15; *Wash. Rev. Code* §§ 9.94A.510, 9A.36.021(1)(c) (2004); the deadly weapon enhancement added one mandatory year to that sentence, § 9.94A.533(4)(b).<sup>n1</sup> The trial judge instructed the jury on both the assault charge and the deadly weapon [\*\*\*23] enhancement. App. 7, 8. In connection with the enhancement, the judge gave the jurors a special verdict form and instructed them to answer "Yes or No" to one question only: "Was the defendant . . . armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?" *Id.*, at 13. The jury answered: "Yes." *Ibid.*

<sup>n1</sup> Since Recuenco was charged, some of the relevant statutory provisions have been renumbered, without material revision. For convenience, we follow the Court's and the parties' citation practice and refer to the current provisions.

Because the deadly weapon Recuenco held was in fact a handgun, the prosecutor might have charged, as an alternative to the deadly weapon enhancement, that at the time of the assault, Recuenco was "armed with a firearm." That enhancement would have added three mandatory years to the assault sentence. § 9.94A.533(3)(b). The information charging Recuenco, however, did not allege the firearm enhancement. The jury received no instruction [\*\*\*24] on it and was given no special verdict form posing the question: Was the defendant armed with a firearm at the time of the

commission of the crime of Assault in the Second Degree? See *154 Wn. 2d 156, 160, 110 P. 3d 188, 190 (2005)* ("The jury was not asked to, and therefore did not, return a special verdict that Recuenco committed the assault while armed with a firearm.").

The prosecutor not only failed to charge Recuenco with assault while armed with a firearm and to request a special verdict tied to the firearm enhancement. He also informed the court, after the jury's verdict and in response to the defendant's motion [\*2555] to vacate: "The method under which the state is alleging and the jury found the assault[t] committed was by use of a deadly weapon." App. 35. Leaving no doubt, the prosecutor further clarified: "In the crime charged and the enhancement the state alleged, there is no element[t] of a firearm. The element is assault with a deadly weapon." *Ibid.* Recuenco was thus properly charged, tried, and convicted of second-degree assault while armed with a deadly weapon. It was a solid case; no gap was left to fill.

Nevertheless, at sentencing, the prosecutor requested, [\*\*\*25] and the trial judge imposed, a three-year mandatory enhancement for use of a firearm. *Ibid.* Recuenco objected to imposition of the firearm enhancement "without notice . . . and a jury finding." *154 Wash. 2d, at 161, 110 P. 3d, at 190.* Determining that there was no warrant for elevation of the charge once the trial was over, the Washington Supreme Court "remand[ed] for resentencing based solely on the deadly weapon enhancement which is supported by the jury's special verdict." *Id., at 164, 110 P. 3d, at 192.* I would affirm that judgment. No error marred the case presented at trial. The prosecutor charged, and the jury found Recuenco guilty of, a complete [\*\*479] and clearly delineated offense: "assault in the second degree, being armed with a deadly weapon." The "harmless-error" doctrine was not designed to allow dislodgment of that error-free jury determination.

## I

Under Washington law and practice, assault with a deadly weapon and assault with a firearm are discrete charges, attended by discrete instructions. As the Court observes, *ante*, at 2, a charge of second-degree assault while armed with a deadly weapon, § 9.94A.533(4)(b), subjects a defendant [\*\*\*26] to an additional year in prison, and a charge of second-degree assault while armed with a firearm, § 9.94A.533(3)(b), calls for an additional term of three years. "Deadly weapon,"

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Washington law provides, encompasses any "implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death," including, *inter alia*, a "pistol, revolver, or any other firearm." § 9.94A.602. "Firearm" is defined, more particularly, to mean "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." § 9.41.010(1). A handgun (the weapon Recuenco held), it thus appears, might have been placed in both categories. n2

n2 But see App. 38. When the prosecutor, post-trial but presentence, made it plain that he was seeking the three-year firearm enhancement rather than the one-year deadly weapon enhancement, Recuenco objected that the statutory definition of "firearm" had not been read to the jury, and that the prosecutor had submitted no evidence showing that Recuenco's handgun was "designed to fire a projectile by explosive such as gunpowder." *Ibid*.

[\*\*\*27]

Washington Pattern Jury Instructions, Criminal (WPIC) (West 2005 Supp.), set out three instructions for cases in which "an enhanced sentence is sought on the basis that the defendant was armed with a 'deadly weapon,'" WPIC § 2.06 (note on use): Deadly Weapon-General, § 2.07; Deadly Weapon-Knife, § 2.07.01; Deadly Weapon-Firearm, § 2.07.02. When the prosecutor seeks an enhancement based on the charge that "the defendant was armed with a 'firearm,'" § 2.06, trial courts are directed to a different instruction, one keyed to the elevated enhancement, § 2.10.01.

Matching special verdict forms for trial-court use are also framed in the WPIC. [\*2556] When a "deadly weapon" charge is made, whether generally or with a knife or firearm, the prescribed form asks the jury: "Was the defendant (defendant's name) armed with a deadly weapon at the time of the commission of the crime [in Count \_\_\_]?" § 190.01. When a "firearm" charge is made, the jury is asked: "Was the defendant (defendant's name) armed with a firearm at the time of the commission of the crime [in Count \_\_\_]?" § 190.02.

In Recuenco's case, the jury was instructed, in line with the "deadly weapon" charge made by the prosecutor, [\*\*\*28] App. 6-7, and the special verdict form given to the jury matched that instruction. The form read:

"We, the jury, return a special verdict by answering as follows:

"Was the defendant ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?

[\*\*480] "ANSWER: [YES] (Yes or No)." *Id.*, at 13.

No "firearm" instruction, WPIC § 2.10.01 (West 2005 Supp.), was given to Recuenco's jury, nor was the jury given the special verdict form matching that instruction, § 190.02; see *supra*, at 3-4, n. 2.

## II

In the Court's view, "this case is indistinguishable from *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)." *Ante*, at 6. In that case, the trial judge made a finding necessary to fill a gap in an incomplete jury verdict. One of the offenses involved was tax fraud; the element missing from the jury's instruction was the materiality of the defendant's alleged misstatements. Under the mistaken impression that materiality was a question reserved for the court, the trial judge made the finding himself. In fact in *Neder*, materiality was not in dispute. See 527 U.S., at 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35; see also [\*\*\*29] *id.*, at 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (*Neder* "d[id] not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed."). "Reversal without any consideration of the effect of the error upon the verdict would [have] sen[t] the case back for retrial -- a retrial not focused at all on the issue of materiality, but on contested issues on which the jury [had been] properly instructed." *Ibid*. The Court concluded that the *Sixth Amendment* did not command that recycling.

Here, in contrast to *Neder*, the charge, jury instructions, and special verdict contained no omissions; they set out completely all ingredients of the crime of second-degree assault with a deadly weapon. There is no occasion for any retrial, and no cause to displace the jury's entirely complete verdict with, in essence, a

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conviction on an uncharged greater offense.

### III

The standard form judgment completed and signed by the trial judge in this case included the following segment:

**"SPECIAL VERDICT OR FINDING(S):**

"(b)  A special verdict/finding for being armed with a **Firearm** was rendered on Count(s) \_\_\_\_.

"(c)  A special verdict/finding for being armed [\*\*\*30] with a **Deadly Weapon** other than a firearm was rendered on Count(s) I." App. 14.

Count I was identified on the judgment form as "ASSAULT IN THE 2ND DEGREE." *Ibid.* Despite the "X" placed next to the "Deadly Weapon" special verdict/finding, and the blanks left unfilled in the "Firearm" special verdict/finding lines, the trial judge imposed a sentence of 39 [\*2557] months (3 months for the assault, 36 months as the enhancement).

Had the prosecutor alternatively charged both enhancements, and had the judge accurately and adequately instructed on both, giving the jury a special verdict form on each of the two enhancements, the jury would have had the prerogative to choose the lower enhancement. Specifically, the jury could have answered "Yes" (as it in fact did, see *supra*, at 4) to the "armed with a deadly weapon" inquiry while returning no response to the alternative "firearm" inquiry. See, *supra*, at 3, and n.

2 (Washington's [\*\*481] statutory definition of "deadly weapon" overlaps definition of "firearm"); cf. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977) ("Regardless of how overwhelmingly the evidence may point in that direction[, [\*\*\*31] t]he trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused."). Today's decision, advancing a greater excluded (from jury control) offense notion, diminishes the jury's historic capacity "to prevent the punishment from getting too far out of line with the crime." *United States v. Maybury*, 274 F.2d 899, 902 (CA2 1960) (Friendly, J.); see also *Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (recognizing jury's role "as circuitbreaker in the State's machinery of justice").

\* \* \*

In sum, Recuenco, charged with one crime (assault with a deadly weapon), was convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the *Fifth* and *Sixth Amendments*, made applicable to the States by the *Fourteenth Amendment*. I would therefore affirm the judgment of the Supreme Court of the State of Washington.

**REFERENCES:** Go To Full Text [\*\*\*32] Opinion

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