

NO. 74964-7

SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

ARTURO RECUENCO,

Petitioner.

CLERK

BY C. J. JENNIFER

00 DEC 11 AM 9:06

RECEIVED  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

---

**SUPPLEMENTAL BRIEF OF RESPONDENT ON REMAND**

---

NORM MALENG  
King County Prosecuting Attorney

JAMES M. WHISMAN  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. ISSUES .....	1
B. FACTS.....	1
C. ARGUMENT .....	1
1. THE HARMLESS ERROR DOCTRINE SERVES SEVERAL IMPORTANT PURPOSES. ....	1
2. THE STATE CONSTITUTION DOES NOT PREVENT HARMLESS ERROR ANALYSIS WHERE A SPECIAL VERDICT FORM IS INSUFFICIENTLY PRECISE.....	3
a. Due Process. ....	4
b. Right to Trial by Jury. ....	14
3. A STATUTORY PROCEDURE EXISTS FOR FINDING FIREARM ENHANCEMENTS.....	19
4. THIS CASE IS NOT MOOT.....	23
D. CONCLUSION .....	25

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Chapman v. California, 386 U.S. 18,  
87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)..... 2, 3, 11, 12

Erie v. Pap's A.M., 529 U.S. 277,  
120 S.Ct. 1382, 146 L.Ed.2d 265 (2000).....22

Hurtado v. California, 110 U.S. 516,  
4 S. Ct. 111, 28 L. Ed. 2d 232 (1884)..... 13

Johnson v. United States, 520 U.S. 461  
(1997)..... 2

Kotteakos v. United States, 328 U.S. 750,  
66 S. Ct. 1239, 90 L. Ed. 1557 (1946)..... 2

United States v. Gaudin, 515 U.S. 506,  
115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)..... 17

Washington v. Recuenco, 548 U.S. \_\_\_\_,  
126 S.Ct. 478, 163 L.Ed.2d 362 (2006).....1

Washington State:

In re Dyer 143 Wn.2d 384,  
20 P.3d 907 (2001)..... 4

In re Matteson, 142 Wn.2d 298,  
12 P.3d 585 (2000)..... 4, 5, 12

In re McNeal, 99 Wn. App. 617,  
994 P.2d 890 (2000)..... 23

In re Payne v. Smith, 30 Wn.2d 646,  
192 P.2d 964 (1948)..... 13

<u>In re Personal Restraint Petition of Hall,</u> No. 75800-0.....	22
<u>In re Taylor,</u> 95 Wn.2d 940, 632 P.2d 56 (1981).....	11
<u>McClaine v. Territory,</u> 1 Wash. 345, 25 P. 453 (1890).....	8
<u>Pasco v. Mace,</u> 98 Wn.2d 87, 653 P.2d 618 (1982).....	16
<u>State v. Bailey,</u> 114 Wn.2d 340, 787 P.2d 1378 (1990).....	10
<u>State v. Belmarez,</u> 101 Wn.2d 212, 676 P.2d 492 (1984).....	11
<u>State v. Braithwaite,</u> 34 Wn. App. 715, 667 P.2d 82 (1983).....	11
<u>State v. Brown,</u> 147 Wn.2d 330, 58 P.3d 889 (2002).....	10, 18
<u>State v. Conahan,</u> 10 Wash. 268, 38 P. 996 (1894).....	9
<u>State v. Cook,</u> 31 Wn. App. 165, 639 P.2d 863 (1982).....	11
<u>State v. Courtemarch,</u> 11 Wash. 446, 39 P. 955 (1895).....	9, 20
<u>State v. Deal,</u> 128 Wn.2d 693, 911 P.2d 996 (1996).....	10
<u>State v. Fowler,</u> 114 Wn.2d 59, 785 P.2d 808 (1990).....	11
<u>State v. Guloy,</u> 104 Wn.2d 412, 705 P.2d 1182 (1985).....	12

<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	4, 5, 6, 7, 12, 13, 14, 18
<u>State v. Hall</u> , 95 Wn.2d 536, 627 P.2d 101 (1981).....	11
<u>State v. Hartley</u> , 25 Wn.2d 211, 170 P.2d 333 (1946).....	9
<u>State v. Hazzard</u> , 75 Wash. 5, 134 P. 514 (1913).....	9
<u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005).....	
<u>State v. Jackson</u> , 137 Wn.2d 712, 976 P.2d 1229 (1999).....	18
<u>State v. Lively</u> , 130 Wn.2d 1, 921 P.2d 1035 (1996).....	13
<u>State v. Manderville</u> , 37 Wash. 365, 79 P. 977 (1905).....	19
<u>State v. Manussier</u> , 129 Wn.2d 652, 921 P.2d 473 (1996).....	5
<u>State v. Martin</u> , 73 Wn.2d 616, 440 P.2d 429 (1968).....	2, 10
<u>State v. Mode</u> , 57 Wn.2d 829, 360 P.2d 159 (1961).....	11
<u>State v. Nist</u> , 77 Wn.2d 227, 461 P.2d 322 (1969).....	12
<u>State v. Ortiz</u> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	4, 6, 7
<u>State v. Recuenco</u> , 154 Wn.2d 156, 110 P.3d 188 (2005).....	1
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003).....	7, 17

<u>State v. Strasburg</u> , 60 Wash. 106, 110 P.1020 (1910).....	17
<u>State v. Thompson</u> , 38 Wn.2d 774, 232 P.2d 87 (1951).....	9
<u>State v. Williams</u> , 131 Wn. App. 488, 128 P.3d 98 (2006).....	23
<u>State v. Womac</u> , No. 78166-4 .....	22

Other Jurisdictions:

<u>State v. Allen</u> , 359 N.C. 425, 615 S.E.2d 256 (2005) .....	2
--	---

Constitutional Provisions

U.S. Const., amend. V .....	5
U.S. Const., amend VI .....	15, 16
U.S. Const., amend. V .....	5
U.S. Const., amend. VII .....	15, 16
U.S. Const., amend. XIV .....	5

Washington State:

Const. art. I, § 2.....	6
Const. art. I, § 3.....	6
Const. art. 1, § 21.....	15

Const. art. 1, § 22.....	14
Const. art. I, § 2.....	6
Const. art. I, § 3.....	6
Const. art. IV, section 16.....	19

Statutes

Federal:

Washington State:

Code of 1881, § 1147.....	7
RCW 9.94A.533 .....	21
RCW 9.94A.602 .....	20

Other Authorities

5 W. LaFave et al., <u>Criminal Procedure</u> § 27.6(a), at 933 (2 <sup>nd</sup> ed. 1999).....	1
<u>Journal of the Washington State Constitutional Convention 1889,</u> 154, 496 (B. Rosenow ed. 1999).....	6
R. Traynor, <u>The Riddle of Harmless Error</u> 4-13 (1970).....	1

**A. ISSUES**

1. Whether entry of a firearm enhancement based on a deadly weapon finding can be considered harmless under Washington law.

2. Whether the failure to obtain an express firearm weapon finding in this case was harmless error.

3. Whether this case should be dismissed as moot.

**B. FACTS**

This Court reversed the firearm portion of Recuenco's sentence and remanded the case to Superior Court. State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). That decision was reversed by the Supreme Court, Washington v. Recuenco, 548 U.S. \_\_\_, 126 S.Ct. 478, 163 L.Ed.2d 362 (2006), and the case is now before the Court on remand to determine the questions set forth above. The facts were described in the State's original supplemental brief, and in this Court's previous opinion, and in the interest of brevity will not be repeated.

**C. ARGUMENT**

**1. THE HARMLESS ERROR DOCTRINE SERVES SEVERAL IMPORTANT PURPOSES.**

The practice of reviewing error in order to determine whether it was harmless has roots in English jurisprudence of the 19<sup>th</sup>

century. R. Traynor, The Riddle of Harmless Error 4-13 (1970) (hereinafter "Harmless Error"); 5 W. LaFave et al., Criminal Procedure § 27.6(a), at 933 (2<sup>nd</sup> ed. 1999). American courts were somewhat slow to adopt the concept and ultimately came under heavy and protracted criticism for reversing convictions based upon seemingly insignificant errors. Traynor, Harmless Error, supra, at 13-14; 5 LaFave et al. supra, § 27.6(a), at 933-34. Eventually, "out of widespread and deep conviction over the general course of appellate review in American criminal causes[,] the federal government and each state had adopted some form of statutory or common law harmless-error rule. Traynor, Harmless Error, supra, at 13-14; Kotteakos v. United States, 328 U.S. 750, 759, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946); Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

This trend recognized that the harmless error doctrine promotes fundamental fairness in criminal proceedings by ensuring that criminal cases are decided on the merits, and not on the basis of defects that have no bearing on guilt or innocence. State v. Allen, 359 N.C. 425, 464-55, 615 S.E.2d 256 (2005) (Martin, J., dissenting). The doctrine preserves public confidence in the criminal justice system by reducing the risk that guilty defendants

may go free. Johnson v. United States, 520 U.S. 461, 470 (1997) (quoting Traynor, Harmless Error, *supra*, at 50: "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it."). The harmless error doctrine conserves judicial resources by preventing costly, time-consuming and unnecessary remands. Allen, 359 N.C. at 454 (Martin, J. dissenting) (citing Chapman, 386 U.S. at 22); Traynor, Harmless Error, *supra*, at 14, 51. And, finally, the doctrine promotes stability and predictability in the law because appellate judges will be less likely to bend, stretch, or adapt the law in order to avoid a clearly unwarranted reversal. *Id.* at 455.

**2. THE STATE CONSTITUTION DOES NOT PREVENT HARMLESS ERROR ANALYSIS WHERE A SPECIAL VERDICT FORM IS INSUFFICIENTLY PRECISE.**

There is no state constitutional provision that requires automatic reversal for constitutional error, even where such error concerns omitted or misdescribed elements. In analyzing such error, this Court has consistently adhered to federal due process analysis. There is no principled reason to interpret the state due process clause differently than the federal clause or to interpret the right to a jury trial as forbidding harmless error analysis.

a. Due Process.

Because there is no constitutional provision regarding harmless error review, it has always been analyzed as a component of due process. Thus, an error that relieves the State of proving elements of a crime beyond a reasonable doubt violates due process. Because the Due Process Clause of the United States Constitution and the Due Process Clause of the state constitution are virtually identical, and because analysis of State v. Gunwall, 106 Wn.2d 54, 59-63, 720 P.2d 808 (1986) demonstrates that there is no reasoned basis to interpret the due process clause of the state constitution more broadly in regard to the question presented here, this Court should hold that harmless error analysis is appropriate under the state guarantees of due process.

The six neutral criteria set forth in Gunwall must be addressed before an independent interpretation under the state constitution is appropriate. State v. Ortiz, 119 Wn.2d 294, 302, 831 P.2d 1060 (1992). Only when these criteria weigh in favor of independent interpretation does this Court have a principled basis for departing from federal constitutional precedent. When previously faced with the question of whether the state guarantee of due process should be interpreted differently than the federal

guarantee of due process, this Court has rejected independent interpretation of the state provision. In re Dyer, 143 Wn.2d 384, 394, 20 P.3d 907 (2001); In re Matteson, 142 Wn.2d 298, 310, 12 P.3d 585 (2000); State v. Manussier, 129 Wn.2d 652, 679-80, 921 P.2d 473 (1996); Ortiz, 119 Wn.2d at 302-04.

The first Gunwall criterion is an examination of the textual language of the state constitution. Gunwall, 106 Wn.2d at 61. The due process guarantee of the state constitution is contained in Article 1, Section 3, and states, "[n]o person shall be deprived of life, liberty, or property, without due process of law." The second Gunwall criterion is a comparison between the text of the state constitutional provision and the text of the federal constitution provision. The Fifth Amendment of the United States Constitution uses the identical language as the state constitution, "no person . . . shall be deprived of life, liberty or property, without due process of law." The Fourteenth Amendment uses the same language as well, stating, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Because there is no textual difference between the due process clauses of the state and federal constitution, these criteria do not favor an independent interpretation of the state provision. Matteson, 142 Wn.2d at 310.

The third criterion is whether legislative history of the state provision reveals an intention that the provision be broader than its federal counterpart. Gunwall, 106 Wn.2d at 61. In the past, this Court has noted that no legislative history regarding the state guarantee of due process contained in art. I, § 3 indicates that the framers intended the provision to be broader than the federal provision. Ortiz, 119 Wn.2d at 303. Indeed, art. I, § 3 was adopted as proposed, without any apparent controversy, in language identical to the Fifth and Fourteenth Amendments. Journal of the Washington State Constitutional Convention 1889, 154, 496 (B. Rosenow ed. 1999). It is interesting to note as well that the state guarantee of due process is immediately preceded by art. 1, § 2, which states "[t]he Constitution of the United States is the supreme law of the land." The wholesale adoption of the language of the federal Due Process clauses, immediately following a declaration of the supremacy of the federal constitution, strongly indicates that the framers intended the state provision to be interpreted identically with the federal provision. Compare Gunwall, 106 Wn.2d at 65 (finding that a material difference in the language between the state and federal provisions indicated an intention that the state provision

be more expansive). This third criterion does not support an independent interpretation of the state provision.

The fourth criterion is preexisting state law. Gunwall, 106 Wn.2d at 61. The Gunwall court explained that this criterion involves examining state law that existed before the state constitutional provision was adopted, stating "[p]reexisting law can thus help to define the scope of a constitutional right later established." Gunwall, 106 Wn.2d at 62; State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003) (the law at the time of founding governs interpretation of the state constitution). Statutes and cases surrounding the founding are most persuasive in this regard, and if prior state cases do not provide independent reasons under state law for their holdings, they do not support an independent interpretation of the state provision. Ortiz, 119 Wn.2d at 304.

Preexisting state law does not support an independent interpretation of the state due process clause in regard to the question presented here. Appellate procedure in the Washington Territory was governed by Code of 1881, § 1147:

On hearing all writs of error, the supreme court shall examine all errors assigned, and on the hearing of appeals shall examine all errors and mistakes excepted to at the time, whether waived by the strict rules of law or not; but the court shall consider all amendments which could have been

made, as made, and shall give judgment without regard to technical errors or defects, or exceptions which do not affect the substantial rights of the defendant.

Thus, in Washington Territory, errors committed at a criminal trial did not result in automatic reversal. The appellate court was required to determine whether the error was “technical” and whether it affected “the substantial rights of the defendant.”

Not surprisingly, beginning in the earliest days of statehood, this Court applied harmless error analysis to missing or misdefined elements. In the year following ratification of the constitution, this Court decided a murder by arson capital case in which murder was erroneously defined. McClaine v. Territory, 1 Wash. 345, 25 P. 453 (1890). First, the Court identified and discussed the instructional error that had occurred, concluding that “[i]t is too obvious to admit of discussion that all the elements of the crime necessary to be proven were not presented to the jury in this instruction.” McClaine, 1 Wash. at 352-53. Second, the Court went on to assess whether the error was so harmful as to require reversal of the conviction: “...the question now to be considered is whether this particular instruction was so segregated from the rest of the charge, and made so distinct and impressive, that it would be likely to mislead the jury as to what were essential elements of the crime.” Id. at

353. The Court ultimately concluded that the instruction misled the jury, and reversed the conviction.

Four years later, the Washington Supreme Court found harmless error where an erroneous jury instruction placed the burden on the defendant to prove he acted in self-defense. State v. Conahan, 10 Wash. 268, 38 P. 996 (1894). The very next year, in State v. Courtemarch, 11 Wash. 446, 39 P. 955 (1895), the Court held that a failure to instruct on a lesser offense, and the submission of an improper presumption instruction were harmless errors. Thus, the earliest cases show that this Court did not automatically reverse convictions for constitutional error.

The practice of applying constitutional harmless error analysis continued into the early part of the twentieth century, State v. Hazzard, 75 Wash. 5, 134 P. 514 (1913), and beyond. For instance, in State v. Hartley, 25 Wn.2d 211, 170 P.2d 333 (1946), this Court held that the omission of the words "unless it is excusable or justifiable" from the "to convict" instruction in a murder case was harmless error because there was no evidence to support a defense of excusable or justifiable homicide. In State v. Thompson, 38 Wn.2d 774, 779, 232 P.2d 87 (1951), this Court applied harmless error analysis to an error in the jury instructions

that omitted the element of force from the definition of burglary, and noted that "[i]f all the evidence had been consistent with the theory of a use of force or a breaking, instruction No. 5 might not have constituted prejudicial error." In State v. Martin, 73 Wn.2d 616, 623-27, 440 P.2d 429 (1968), this Court held that an error in the jury instructions that relieved the State of proving knowledge was harmless. Significantly, this Court stated, "[t]he rule is now definitely established in this state that the verdict of the jury in a criminal case will be set aside and a new trial granted to the defendant, only when such error may be designated as prejudicial." Martin, 73 Wn.2d at 627 (listing numerous cases). In State v. Bailey, 114 Wn.2d 340, 349, 787 P.2d 1378 (1990), this Court noted that even if constitutional error had occurred in setting forth the elements of the crime, the error was harmless beyond a reasonable doubt. In State v. Deal, 128 Wn.2d 693, 911 P.2d 996 (1996), this Court held that an instruction that constituted a mandatory presumption, which operated to relieve the State of its burden of proving all of the elements of the crime, was harmless. And, most recently, this Court rejected arguments for a rule of automatic reversal as to missing or misstated elements. State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). In Brown, this Court

held that error in defining the knowledge element of accomplice liability could be harmless.

Similarly, Washington courts have repeatedly engaged in harmless error analysis with respect to sentencing enhancements decided by the jury. See State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961) (failure to submit special interrogatory concerning age of victim was harmless given the undisputed testimony at trial); In re Taylor, 95 Wn.2d 940, 944, 632 P.2d 56 (1981) (failure to instruct jury that it needed to find firearm enhancement beyond a reasonable doubt was harmless error); State v. Hall, 95 Wn.2d 536, 541, 627 P.2d 101 (1981) (same --citing Chapman v. California, 386 U.S. at 24); State v. Belmarez, 101 Wn.2d 212, 216, 676 P.2d 492 (1984) (erroneous conclusive presumption in deadly weapon instruction was subject to harmless error analysis but error was prejudicial); State v. Fowler, 114 Wn.2d 59, 785 P.2d 808 (1990) (harmless error in failing to provide a reasonable doubt instruction specific to the weapon enhancement); State v. Cook, 31 Wn. App. 165, 175-76, 639 P.2d 863 (1982) (same); State v. Braithwaite, 34 Wn. App. 715, 725-26, 667 P.2d 82 (1983) (harmless error that jury not instructed that it needed to find firearm enhancement beyond a

reasonable doubt given uncontroverted evidence that firearm was used).

These cases represent a long history in this state of applying harmless error analysis to instructional errors -- including sentence enhancements -- even when the error relieves the State of the burden of proving every element of the crime or sentencing enhancement to a jury.<sup>1</sup> In sum, the fourth Gunwall criterion does not favor independent interpretation of the state guarantee of due process in regard to the question presented here.

The fifth Gunwall criterion is the difference in structure between the federal and state constitutions. Gunwall, 106 Wn.2d at 62. According to the Gunwall court, the federal constitution is a grant of enumerated powers to the federal government, and the state constitution is a limit on the sovereign power of the state. Gunwall, 106 Wn.2d 62. Nonetheless, this Court has previously concluded that this criterion sheds little if any light on the question of whether a particular state constitutional provision should be

---

<sup>1</sup> This Court has also applied the Chapman standard in reviewing many other constitutional violations. See e.g., State v. Nist, 77 Wn.2d 227, 233-34, 461 P.2d 322 (1969) (erroneous admission of custodial statements); State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985) (confrontation clause violation). Nothing in the state constitution provides a principled basis for adopting different harmless error standards for different violations.

interpreted more broadly than its federal counterpart. Matteson, 42 Wn.2d at 310. This criterion favors independent interpretation in only the most general sense.

Finally, the sixth Gunwall criterion is whether the question presented involves matters of particular state or local concern. Gunwall, 106 Wn.2d at 67. At its most basic level, due process of law simply means fundamental fairness. See State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). Due process of law has been defined as "the law of the land . . . exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." In re Payne v. Smith, 30 Wn.2d 646, 649, 192 P.2d 964 (1948) (quoting Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 2d 232 (1884)). Surely, principles of fundamental fairness do not differ from state to state and between localities. More particularly, the due process concept that the State is required to prove each element of the crime to the jury beyond a reasonable doubt is a nation-wide axiom, not a matter of particular state or local concern. The sixth Gunwall criterion does not favor an interpretation of the state guarantee of due process that is different from the federal guarantee of due process.

In sum, the above analysis of the Gunwall criteria demonstrates that there is no principled basis for interpreting the state guarantee of due process more broadly than the federal guarantee of due process in regard to the question presented here. This Court should hold that under both the federal and state guarantees of due process, an instructional error that relieves the State of the burden of proving each element of the crime is subject to constitutional harmless error analysis.

b. Right to Trial by Jury.

Recuenco has argued that the jury trial guarantee of the Washington State Constitution requires reversal of a judgment whenever the right to jury is affected, and that harmless error analysis affects that right. This argument should be rejected, as the State previously argued in a brief submitted on short notice to this Court. See Respondent's Additional Supplemental Brief on New Claims: Double Jeopardy and Wa. Const. Article 1 § 21, at 2-9. In addition to the arguments made in that brief, a more detailed consideration of the Gunwall criteria suggests that the state jury trial guarantee does not forbid harmless error analysis.

Two provisions of the Washington Constitution deal with the right to trial by jury. Const. art. 1, § 22 provides:

In criminal prosecutions the accused shall have the right ...  
to have a speedy public trial by an impartial jury of the  
county in which the offense is charged. . .

Const. art. 1, § 21 provides:

The right of trial by jury shall remain inviolate, but the  
legislature may provide for a jury of any number less than 12  
in courts not of record, and for a verdict by nine or more  
jurors in civil cases in any court of record, and for waiving  
the jury in civil cases where the consent of the parties  
interested is given thereto.

There are a number of significant differences in the texts of  
these provisions as compared to the federal constitution. Article 1,  
§ 22 is the only provision that deals exclusively with criminal cases.  
The relevant language is substantially identical to language in the  
Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right  
to a speedy and public trial, by an impartial jury of the state  
and district wherein the crime shall have been committed,  
which district shall have been previously ascertained by law.

...

This similarity in language suggests that the two provisions are co-  
extensive. Article 1, § 21, on the other hand, corresponds most  
closely to the Seventh Amendment, which provides:

In suits at common law, where the value in controversy shall  
exceed twenty dollars, the right of trial by jury shall be  
preserved, and no fact tried by a jury, shall be otherwise  
reexamined in any court of the United States, than according  
to the rules of the common law.

There are significant differences between these two provisions, which can lead to different results. One difference is that Article 1, § 21 specifically refers to juries in courts not of record. This Court has relied on this language in extending the right to jury trial to misdemeanors, which are often tried in courts not of record. Pasco v. Mace, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). This distinction, however, relates to the scope of the right, and not to what should occur when the right is violated.

A second difference between the Seventh Amendment and Article 1, § 21 is that the Federal provision covers only civil cases, while the state provision contains no such limitation. This difference does not support the creation of special rules for juries in criminal cases. Logically, such special rules would be placed in Article 1, § 22, which deals specifically with criminal cases, rather than § 21, which does not. As already pointed out, the jury trial provisions of § 22 are substantially identical with those of the Sixth Amendment. This supports the conclusion that the Constitution was not intended to create jury trial rights that specifically apply in criminal cases, beyond those created by the Federal constitution.

As argued, supra at 7-12, state constitutional and common law history does not support an independent state interpretation.

Article 1, § 21 has been construed as preserving the right to trial by jury as it existed at common law in Washington Territory at the time the Constitution was adopted. State v. Smith, 150 Wn.2d at 153. But there is no indication that the jury trial clause operates to prevent harmless error analysis, since harmless error analysis was routinely applied to errors that arguably touched on a defendant's right to trial by jury.

Recuenco claims that Washington courts have traditionally held that when jury instructions relieve the State of proving some element, automatic reversal is required. Supplemental Brief of Petitioner, at 21, 23, 27. In support of this proposition, he cites, *inter alia*, State v. Strasburg, 60 Wash. 106, 110 P.1020 (1910). But, the Court in Strasburg construed the constitutional right to trial by jury as including “the right to have the jury pass upon every substantive fact going to the question of guilt or innocence.” *Id.* at 118. This is identical to the rule under the Federal constitution, where there must be “a jury determination that the defendant is guilty of every element of the crime with which he is charged.” United States v. Gaudin, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). And, the issue in Strasburg was whether the legislature could abolish the right to trial by jury on the question of

insanity, not whether instructional error on insanity must necessarily be reversible error. Consequently, Strasburg does not support a different interpretation of the state constitution with respect to the issues involved here. The issue here is not whether an element should have been submitted to the jury: it is the consequences of the failure to do so. Under Washington case law, that failure does not lead to reversal if the error was harmless.

Recuenco also cites State v. Jackson, 137 Wn.2d 712, 976 P.2d 1229 (1999), as an example of the "rule of automatic reversal." But in Jackson, the missing element was in actual dispute, so it is not surprising that failure to instruct on the element was reversible error. In Brown, this Court clarified that "[N]ot every omission or misstatement in a jury instruction relieves the State of its burden." If the misstatement was harmless, the State has not been relieved of any meaningful burden. Brown, 147 Wn.2d at 339-40. When interpreted in this manner, Jackson is consistent with earlier case law.

Finally, as to the sixth Gunwall criterion, although it can be said that the scope of the state right to trial by jury can be of local concern, the more general principles underlying harmless error analysis are broader. This state certainly has a strong local

concern in the efficient use of judicial resources. It is not efficient to retry cases based on errors that could not reasonably have made any difference.

**3. A STATUTORY PROCEDURE EXISTS FOR FINDING FIREARM ENHANCEMENTS.**

Recuenco will likely argue that harmless error should not be conducted because there is no specific statutory procedure that permits imposition of a firearm enhancement in the first place. This argument is meritless and should be rejected. The notion that the State is prohibited from submitting a firearm enhancement to a jury is not supported by the Recuenco opinion, the Hughes opinion,<sup>2</sup> or any subsequent Washington case. Recuenco's sole basis for this claim is the following sentence: "Because we held in Hughes that we would not imply a procedure by which a jury can find sentencing enhancements on remand, we remand for resentencing based solely on the deadly weapon enhancement which is supported by the jury's special verdict." Recuenco, 154 Wn2d at 164. Nowhere in the opinion did the court suggest or imply that Washington law prohibited submission of the firearm enhancement to the jury at any stage of the proceedings. If this was the Court's conclusion, it

---

<sup>2</sup> State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).

would have been a radical departure from existing law, overturning prior decisions and invalidating a commonly used sentencing enhancement.<sup>3</sup> Clearly, this Court was only referring to the procedure *on remand*, not at original trials.

Moreover, Hughes recognized a distinction between procedures at a remanded sentencing hearing and an original trial. Hughes addressed a different sentencing enhancement, the exceptional sentence provisions of the Sentencing Reform Act, and held that the State could not specially empanel a jury at a new sentencing hearing to find aggravating circumstances. The court carefully limited its ruling to the issue of procedures at a sentencing hearing *upon remand* and did not opine whether the aggravating circumstances could be presented to the jury in an original trial: "We are presented only with the question of the appropriate remedy on remand--we do not decide here whether juries may be given special verdict forms or interrogatories to determine aggravating

---

<sup>3</sup> Trial courts have regularly submitted the question of whether the defendant was armed with "a firearm" to the jury. See e.g. State v. Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219, 1222 (2005) (rejecting challenge to special verdict form for firearm enhancement); State v. Burke, 90 Wn. App. 378, 383, 952 P.2d 619, 621 (1998) (special verdict required that jury find that the defendant was armed with a firearm). Only a few years after the firearm enhancement provisions were enacted, the Washington Supreme Court Committee on Jury Instructions prepared standard jury instructions for submitting the firearm enhancement to the jury. 11 Washington Pattern Jury Instructions: Criminal 10.01, at 15-16 (2<sup>nd</sup> ed. Supp. 1998).

factors at trial." Hughes, 154 Wn.2d at 149-50.<sup>4</sup> Hughes cannot be read as prohibiting the submission to the jury of the firearm enhancement at a trial.

Even if this Court had held in Hughes that aggravating circumstances could not be presented to a jury at a trial, such a holding would not control the firearm enhancement, which is governed by a different sentencing statute. In Hughes, the Court observed that the exceptional sentence statute explicitly required the court, not the jury, to find the aggravating circumstances. The Court observed that "[t]his situation is distinct from those where a statute merely is silent or ambiguous on an issue and the court takes the opportunity to imply a necessary procedure."

Hughes, 154 Wn.2d at 151.

In contrast, the statute governing the deadly weapon enhancement expressly provides that the deadly weapon enhancement question should be submitted to the jury. RCW 9.94A.602; Former RCW 9.94A.125 ("if a jury trial is had...the jury

---

<sup>4</sup> This Court subsequently accepted review of a number of cases presenting the separate issue of whether the State could prove aggravating circumstances as part of an original trial, and a decision on that issue is pending. State v. Pillatos et al., No. 75984-7. The cases in Pillatos case do not involve the sentencing enhancement at issue here.

shall ...find a special verdict as to whether or not the defendant ... was armed with a deadly weapon...").<sup>5</sup> The statute defines a firearm as a deadly weapon. Id. At best, the statute is silent on whether the jury may be asked if the deadly weapon is a firearm. The language and rationale of Hughes does not support the claim that the firearm enhancement may not be submitted to the jury.<sup>6</sup>

Firearms are simply a subset of the general category of deadly weapons. The legislature has clearly authorized procedures for asking juries whether a defendant was armed with a deadly weapon, and for imposing punishment depending on whether the weapon used was a firearm or a deadly weapon. Once the jury has found that a defendant was armed with a deadly weapon when committing the offense, the court determines the range based on the type of weapon used:

---

<sup>5</sup> "In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a *deadly weapon* at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime."

<sup>6</sup> Hughes also observed that many of the aggravating factors were "so technical and legalistic that it is difficult to conceive that the legislature would intend or desire for lay juries to apply them." Hughes, 154 Wn.2d at 151. In contrast, the question of whether a defendant was armed with a firearm is one commonly answered by juries in Washington and throughout the country.

The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm ...

RCW 9.94A.533(3). Clearly, the Legislature intends that the deadly weapon statutory procedure be used for obtaining jury verdicts when a person committed a crime armed with a gun.

**4. THIS CASE IS NOT MOOT.**

Recuenco contends that his sentencing challenge is now moot because he has served his sentence. This contention is unwarranted. A petitioner who has earlier prevailed on a legal claim may not later assert that a case is moot, thereby avoiding final resolution of the legal question, and leaving his opponent disadvantaged. In Erie, the Supreme Court observed:

Here it is the plaintiff who, having prevailed below, now seeks to have the case declared moot. And it is the city of Erie that seeks to invoke the federal judicial power to obtain this Court's review of the Pennsylvania Supreme Court decision. ... The city has an ongoing injury because it is barred from enforcing the public nudity provisions of its ordinance. If the challenged ordinance is found constitutional, then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot. ... Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here.

Erie v. Pap's A.M., 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (citations omitted).

The situation is similar here. Recuenco prevailed in this Court and obtained a published opinion holding that harmless error analysis is not possible where a mistake is made as to an instruction on a sentencing enhancement. Although that precise holding was reversed by the Supreme Court, the previous Recuenco decision has had a ripple effect on other cases, and has called into question the validity of firearm enhancements obtained in many other cases.<sup>7</sup> Because Recuenco and others continue to argue that there is no authority, at all, in Washington to obtain firearm findings, the State's ability to prosecute the law is called into question. Moreover, the last order issued by a Washington court vacated Recuenco's sentence and remanded for resentencing. If that order is not corrected, he will obtain a benefit to which he may not be entitled, simply by claiming the court does not have jurisdiction to litigate the claim he originally brought.<sup>8</sup>

---

<sup>7</sup> The issue is before this court in several cases. See e.g. State v. Womac, No. 78166-4; In re Personal Restraint Petition of Hall, No. 75800-0. Each of these cases presents the issue in a somewhat different substantive and procedural context. See also State v. Williams, 131 Wn. App. 488, 128 P.3d 98 (2006).

<sup>8</sup> It should be noted that Recuenco was sufficiently concerned about this legal issue that he aggressively pursued review even though his term of incarceration was completed in March of 2003, five months before he filed his petition for review to this Court.

Even if this court decides that the firearm finding is technically moot, it should still reach the issues presented because those issues are "of continuing and substantial public interest." In re McNeal, 99 Wn. App. 617, 994 P.2d 890 (2000). The litigation spawned by this Court's earlier opinion in Recuenco should be conclusively resolved. This Court should issue a published opinion reaffirming the law of Washington regarding harmless error analysis. For these reasons, the State respectfully requests that this Court reject Recuenco's mootness claim.

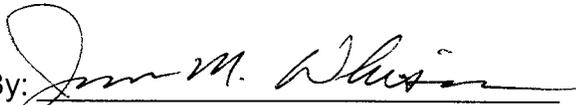
**D. CONCLUSION**

For the foregoing reasons, this Court should find that failure to require an express firearm finding from the jury was harmless under the facts of this case, and that the harmless error question is not moot. Recuenco's judgment and sentence should be affirmed.

DATED this 8<sup>th</sup> day of December, 2006.

Respectfully submitted,

NORM MALENG  
King County Prosecuting Attorney

By:   
JAMES M. WHISMAN, WSBA #19109  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent on Remand, in STATE V. RECUENCO, Cause No. NO. 74964-7, in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame  
Name  
Done in Seattle, Washington

12/08/06  
Date