

82699-4

23247-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NICHOLAS BAINARD, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF CHELAN COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF

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A. ARGUMENT

The Supreme Court's recent decision, *State v. Recuenco*, -- Wn.2d --, 110 P.3d 188 (2005), is dispositive with respect to the first issue in Mr. Bainard's opening brief. "The imposition of a firearm enhancement that was not supported by the jury's special verdict violated [defendant's] Sixth Amendment jury trial right as defined by *Apprendi*¹ and *Blakely*²." *State v. Recuenco*, 110 P. 3d at 192. Unlike the instruction in *Recuenco*, the jury instruction in the present case permitted, but did not require, a deadly weapon finding predicated on possession of a firearm. But since the instruction did not require the jury to find the deadly weapon was a firearm, the imposition of a firearm enhancement violated Mr. Bainard's right to a jury trial just as it did in the *Recuenco* case.

The *Recuenco* court did not consider whether a deadly weapon enhancement may be based on a jury finding under an instruction that permits the jury to find the defendant was armed with a deadly weapon if he was armed with a firearm. But here, the jury instruction expressly authorized the jury to find that the defendant was armed with a deadly weapon if he was armed with a firearm. The instruction was incorrect

¹ *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

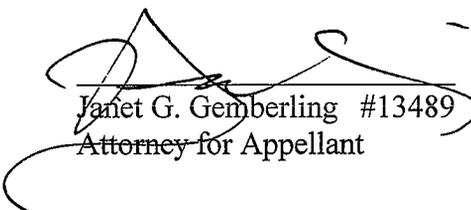
² *Blakely v. Washington*, -- U.S.--, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

because the statute defines a deadly weapon as a weapon other than a firearm. Thus, unlike the *Recuenco* case, this matter should not be remanded for imposition of the deadly weapon enhancement. The enhancement should be vacated.

B. CONCLUSION

This court should reverse the firearm enhancements and strike the resulting mandatory consecutive sentences totaling 120 months of confinement.

Dated this 13th day of June, 2005.



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