

No. 83682-5

IN THE SUPREME COURT OF WASHINGTON

Court of Appeals Nos. 26910-8-III and 27548-5-III

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STATE OF WASHINGTON,

Respondent,

v.

THEODORE M. KOSEWICZ,

Appellate.

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT ALAN BROWN,

Appellate.

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BRIEF *AMICUS CURIAE*  
OF THE  
WASHINGTON ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS (WACDL)

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## I. INTRODUCTION

In both *State v. Kosewicz* and *State v. Brown* – codefendant cases involving the same victim – the state charged the defendant with first-degree kidnapping along with other crimes having first-degree kidnapping as an ingredient. In *Kosewicz*, the defendant was convicted of aggravated first-degree murder with murder-during-the-course-of-kidnapping as the aggravating factor, conspiracy to commit kidnapping, and also first-degree kidnapping. In *Brown*, the defendant was convicted of felony murder based on the felony of first-degree kidnapping, and also first-degree kidnapping. In both cases, the Court of Appeals reversed the first-degree kidnapping conviction due to legal error in the first-degree kidnapping jury instruction (not due to insufficiency of evidence). In both cases, however, the Court of Appeals allowed the other conviction(s) to stand. Section II.

The state defended the appellate court’s decisions to reverse the kidnapping conviction, but to affirm the felony murder and aggravated murder convictions based on that reversed kidnapping conviction, on the ground that the kidnapping conviction was not an element of those greater offenses. Section III.

The state errs. Its position conflicts *directly* with controlling Supreme Court precedent holding that the underlying felony upon which a

felony murder conviction is based *is* a lesser included offense of the felony murder based upon that underlying felony. *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). Since this Court defines a lesser included offense (in part) as one that contains a subset of the elements of the greater offense, the first-degree kidnapping in Mr. Brown's case was necessarily a lesser included offense of the felony murder based on that same kidnapping of that same victim. If the kidnapping conviction is invalid, then it necessarily follows that the felony murder conviction of which that kidnapping was a critical element is equally invalid. Section IV.

The same logic should apply to the greater offense of aggravated first-degree murder where, as here, the aggravating factor is the same kidnapping of the same person. An arguably contrary decision of this Court was issued well before the controlling decisions of the Supreme Court in *Jones*,<sup>1</sup> *Apprendi*,<sup>2</sup> *Ring*,<sup>3</sup> *Blakely*,<sup>4</sup> *Booker*,<sup>5</sup> and before this

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<sup>1</sup> *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

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

<sup>3</sup> *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

<sup>4</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

<sup>5</sup> *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

Court's decisions in the *Recuenco*<sup>6</sup> cases, holding that factors in aggravation of penalty are the functional equivalent of elements of the crime for Sixth Amendment, due process, and right-to-jury-trial purposes. Section V.

Finally, the parties' briefs raise the question of the proper remedy where, as here, it is impossible for the court to say whether the conviction was based on a valid legal theory, or legally invalid theory. Those briefs fail to note that the U.S. Supreme Court has already ruled that where a conviction is based on a general verdict and there are two possible bases for its decision – one legally valid and one legally invalid – the conviction must be reversed. The conviction can be affirmed only if the invalidity was insufficiency of evidence; the reason is that the jury is deemed capable of sorting out whether evidence is sufficient or not, but incapable of sorting out whether a legal theory is valid or not. Since the error here is that the jury instructions allowed conviction based on an invalid legal theory, the convictions must be reversed. Section VI.

We acknowledge that some federal courts have engrafted an additional harmless-error inquiry onto the traditional legal invalidity/factual insufficiency analysis. This approach is inconsistent

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<sup>6</sup> *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), *reversed and remanded on other grounds*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), *on remand*, 163 Wn.2d 428, 180 P.3d 1276 (2008).

with not just the legal invalidity/factual insufficiency analysis adopted by the U.S. Supreme Court, but also with this Court's interpretation of the Washington Constitution. Nevertheless, even if such harmless error analysis were added on to the legal invalidity/factual insufficiency analysis for this sort of case, the burden must fall on the state to prove any error harmless beyond a reasonable doubt. The state has failed to do that here. Section VII.

**II. THE STATE CHARGED FIRST-DEGREE KIDNAPPING AND OTHER CRIMES WITH FIRST-DEGREE KIDNAPPING AS AN INGREDIENT, BUT THE INSTRUCTION ON EACH FIRST-DEGREE KIDNAPPING WAS WRONG; THE APPELLATE COURT, HOWEVER, REVERSED ONLY THE KIDNAPPING CONVICTION IN EACH CASE.**

**A. The Kosewicz Charges, Conviction, and Reversal**

Mr. Kosewicz was convicted of aggravated first-degree murder, first-degree kidnapping, and conspiracy to commit first-degree kidnapping. CP 35-36.

The first-degree kidnapping charge alleged abduction with the "intent to inflict bodily injury." CP 36. The jury instruction on that crime, however, permitted the jury to convict if it found that the defendant had *either* the intent "to inflict bodily injury" *or* the intent "to inflict extreme mental distress." Instruction No. 13, CP 98. The variance between the charge and the jury instructions caused the appellate court to reverse this

first-degree conviction; that court ruled that it violated due process/notice requirements to permit conviction based on the latter, uncharged, alternative, rather than just the former, charged, alternative. *State v. Kosewicz*, 2009 Wash. App. LEXIS 1542 (2009).

The aggravating factor raising the first-degree murder conviction to aggravated first-degree murder, however, was the same kidnapping of the same victim, Mr. Esquibel, by the same defendant, on the same date and at the same place. The January 28, 2008, Second Amended Information charged that aggravating factor as:

COUNT I: PREMEDITATED MURDER IN THE FIRST DEGREE, WITH AGGRAVATING CIRCUMSTANCES, committed as follows: That the defendants, THEODORE M. KOSEWICZ and CARLTON JAMES HRITSCO, as actors and/or accomplices of Levov G. Burnham, in the State of Washington, on or about between June 01, 2005 and June 30, 2005, with premeditated intent to cause the death of another person, did cause the death of SEBASTIAN L. ESQUIBEL, a human being, said death occurring on or about on or about between June 1, 2005 and June 30, 2005, *and the murder was committed in the course of, in furtherance of or in immediate flight from the crime of Kidnapping in the First Degree, ...*

CP 35-36 (emphasis added).

There was a jury instruction on first-degree murder. CP 38. There was no separate instruction on the kidnapping aggravating factor. Instead, a Special Verdict Form simply referred back to “the crime of First Degree

Kidnapping,” CP 123, which had been defined and discussed in jury instructions concerning the kidnapping. No instruction on aggravated murder contained a separate definition of first-degree kidnapping, or separate list of elements of first-degree kidnapping, or distinguished the first-degree kidnapping conviction from the first-degree murder kidnapping aggravating factor in any way.

Mr. Kosewicz was thus convicted of aggravated murder based on the same kidnapping as the kidnapping conviction, with a general verdict of guilty.

The Court of Appeals ruled that the conviction of first-degree kidnapping was tainted by improper jury instructions that broadened the charge from what was contained in the Second Amended Information, and reversed that conviction. It reasoned that the instructions permitted conviction of first-degree kidnapping based on an incorrect legal theory:

Here, the amended information charged Mr. Kosewicz with first degree kidnapping: “[A]s actors and/or accomplices of Levoy G. Burnham ... did, with intent to inflict bodily injury on [Mr. Esquibel], intentionally abduct such person.” CP at 36. Jury instructions 13 and 14, which define the offense and set forth the elements of kidnapping, instructed the jury that kidnapping could be completed by either intentionally abducting another person with intent “to inflict bodily injury,” or “to inflict extreme mental distress.” CP at 97-98.

*State v. Kosewicz*, 2009 Wash. App. LEXIS 1542 at \*\*11-12.

The Court of Appeals did not, however, disturb the aggravated first-degree murder conviction. Nor did it give a reason for letting it stand.

**B. The *Brown* Charges, Conviction, and Reversal**

Mr. Brown was charged with the same kidnapping and the same murder of the same victim, Mr. Esquibel. The state charged Mr. Brown with first-degree murder either as intentional murder or, alternatively, as felony murder based on kidnapping. CP 25-26. The relevant portion of Count II of the Second Amended Information charging first-degree kidnapping provided :

KIDNAPPING IN THE FIRST DEGREE, committed as follows: That the defendant ROBERT ALAN BROWN, ... on or about between May 18, 2005, and June 13, 2005, did, *with intent to inflict bodily injury* on SEBASTIAN L. ESQUIBEL, intentionally abduct such person, and the defendant, as an actor and/or accomplice of Theodore M. Kosewicz, Levoy Goff Burnham, and Carton James Hritsco, being at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A533(3) ...

CP 148 (emphasis added). As the emphasized material shows, the only intent it alleged was “intent to inflict bodily injury.” *Id.*

Like the *Kosowicz* instructions, the *Brown* instructions permitted conviction based on a second, uncharged, intent – the intent “to inflict extreme mental distress on that person or a third person.” That alternative was listed in both Instruction 15, defining kidnapping, CP 358, and

Instruction 16, listing the elements of kidnapping. CP 359.

Mr. Brown's felony murder conviction was based on the exact same first-degree kidnapping. The relevant portion of Count I of the Second Amended Information charging first-degree murder, under the felony murder prong, provided:

And further charges the following crime, as an act connected with and as a crime alternative to Premeditated Murder in the First Degree, MURDER IN THE FIRST DEGREE, committed as follows: That the defendant, ROBERT ALAN BROWN, ... in the State of Washington, on or about between May 18, 2005 and June 13, 2005, *while committing or attempting to commit the crime of First Degree Kidnapping, and in the course of and in furtherance of said crime and in immediate flight therefore, did cause the death of SEBASTIAN L. ESQUIBEL, a human being, not a participant in such crime, said death occurring on or about between May 18, 2005 and June 13, 2005 ...*

CP 147-8 (emphasis added). As the emphasized material shows, the predicate felony on which this felony murder charge is based is "the crime of First Degree kidnapping." And the only first-degree kidnapping relevant to this case and discussed in the Information is the first-degree kidnapping of Mr. Esquibel.

Further, the instructions used only a single definitional instruction on kidnapping, and only a single elements instruction on kidnapping – not one for kidnapping and a different one for felony murder. So the only instruction defining felony murder contains the element of commission of

the single crime of “first degree kidnapping”:

INSTRUCTION NO. 13

A person commits the crime of murder in the first degree when he or she or an accomplice commits or attempts *to commit kidnapping and, in the course of or in furtherance of such a crime or in immediate flight from such crime*, he or she or another participant causes a death of a person other than one of the participants.

CP 355 (emphasis added). The same is true of the instruction listing the elements of felony murder:

INSTRUCTION NO. 14

As to Count 1 as an alternative:

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the 18th of May, 2005, and the 13th of June, 2005, SEBASTIAN L. ESQUIBEL was killed;

(2) That the defendant, as an actor and/or accomplice, was committing or attempting *to commit first degree kidnapping*;

(3) That the defendant, as an actor and/or accomplice, caused the death of SEBASTIAN L. ESQUIBEL *in the course of or in furtherance of such crime or in immediate flight from such crime*; and

(4) That SEBASTIAN L. ESQUIBEL was not a participant in the crime ...

\* \* \*

CP 356 (emphasis added). Mr. Brown was convicted of felony murder based on these instructions, with a general verdict of guilty. CP 377.

The Court of Appeals reversed the kidnapping conviction due to the same instructional error as in *Kosewicz*. *State v. Brown*, 2010 Wash. App. LEXIS 1292 (2010). It did not disturb the felony murder conviction.

**III. THE STATE DEFENDS AFFIRMANCE OF THE FELONY MURDER AND AGGRAVATED MURDER CONVICTIONS BASED ON KIDNAPPING ON THE GROUND THAT KIDNAPPING IS NOT A LESSER INCLUDED OFFENSE, OR ELEMENT, OF THOSE CRIMES**

In both the *Brown* and *Kosewicz* cases, the state charged first-degree kidnapping of the same victim, Mr. Esquibel, on the same dates, based solely on “intent to inflict bodily injury.” In both cases, the jury instructions added another, alternative ground on which the defendant could be convicted: acting with “intent to inflict extreme emotional distress.” The appellate court ruled that this was a legal error: it violated the due process requirement that the defendant has the right to be fully informed of the charges against him. *Brown* at p. 7; *Kosewicz* at pp. 10-11. The appellate court therefore reversed the first-degree kidnapping convictions; it did not, however, disturb any other conviction of which first-degree kidnapping was a constituent part.

The state defends this outcome on the ground that first-degree kidnapping is not really an included offense of felony murder or

aggravated murder, even when the felony in “felony murder” and the aggravating factor in “aggravated murder” are the exact same kidnapping as the reversed, invalid, kidnapping conviction. *E.g.*, Brief of Respondent/Cross-Appellant in *Brown*, p. 18. The state treats the felony upon which the felony murder and aggravated murder are based as a generic felony, not a specific charged felony, and concludes: “Accordingly, elements of the underlying felony are not elements of the crime of felony murder [or aggravated murder].” *Id.* (citation omitted).<sup>7</sup>

**IV. THE STATE’S ARGUMENT – THAT THE FELONY UPON WHICH FELONY MURDER IS BASED IS NOT AN “ELEMENT” OF THE FELONY MURDER CHARGE – CONFLICTS DIRECTLY WITH THE SUPREME COURT’S DECISION IN *HARRIS v. OKLAHOMA***

The state’s position conflicts directly with controlling Supreme Court precedent. That Court has held that felony murder and the underlying felony on which it is based are greater and lesser offenses. *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (double jeopardy clause bars conviction of lesser crime, robbery with

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<sup>7</sup> See also *Kosewicz* Answer to Petition for Review, p. 8 (arguing that first-degree kidnapping charge was a “specific” one, whereas the other two were based on “general” kidnapping principles: “The trial court had to provide both definitions to fulfill its responsibility based upon the crimes charged, to wit: murder committed during or in the furtherance of a kidnapping and conspiracy to commit a kidnapping.”); *id.*, p. 9 (state argues that kidnapping charge was based on specific method of kidnapping alleged, but conspiracy and aggravated murder charges were based on kidnapping in general, which could have been based on any method even uncharged ones).

firearms, where defendant convicted of greater crime, felony murder, based on same incident). *See In re Nielsen*, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889).

A lesser included offense, of course, is one that contains a subset of the elements of the greater offense. *State v. Speece*, 115 Wn.2d 360, 362, 798 P.2d 294 (1990) (explaining legal and factual tests for lesser included offenses).<sup>8</sup> Since the felony upon which a felony murder is based constitutes a lesser included offense of felony murder, that felony also constitutes an element or a subset of elements of that felony murder.

That makes the kidnapping of Mr. Esquibel a lesser included offense of, and a subset of the elements of, the greater offense of felony murder in Mr. Brown's case. *Harris v. Oklahoma*, 433 U.S. 682; *United States v. Jose*, 425 F.3d 1237, 1241 (9th Cir. 2005), *cert. denied*, 547 U.S. 1060 (2006) ("Thus, a lesser included offense, which by definition 'requires no proof beyond that which is required for conviction of the greater,' is the 'same' for purposes of double jeopardy as any greater offense in which it inheres. *Brown*,<sup>9</sup> 432 U.S. 161, 97 S.Ct. 2221."); *State*

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<sup>8</sup> *Accord State v. Harris*, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). In *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997), this Court reaffirmed "the lesser included rule as laid forth in *Workman*." *Berlin*, 133 Wn.2d 541, 547-48.

<sup>9</sup> *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d (1977).

*v. McJimpson*, 79 Wn. App. 164, 901 P.3d 354 (1995) (discussion based in part on Wash. Const. art. 1, § 9), *review denied*, 129 Wn.2d 1013 (1996).

This is consistent with the rule that felony murder is considered the “same criminal conduct” as the underlying felony upon which the homicide count is based. *State v. Dunaway*, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987), *corrected by*, 749 P.2d 160 (1988). The intent required for felony murder is no more and no less than the intent required for the underlying felony.<sup>10</sup>

The implication of these rules for the *Brown* case is clear. The first-degree kidnapping conviction in *Brown* is a lesser included offense of the felony murder that was based on the same kidnapping. It meets both the “factual” and “legal” tests of being such a lesser included offense.<sup>11</sup> Since the lesser included offense – that is, the lesser included elements – are legally invalid, the conviction of the greater offense of which those invalid elements are also elements, must also be reversed. The instructions relieved the state of its obligation to prove the elements of the greater offense, of which kidnapping was an element, just as surely as it

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<sup>10</sup> *State v. Bowerman*, 115 Wn.2d 794, 807, 802 P.2d 116 (1990) (“Intent and premeditation are not elements of first degree felony murder. The only state of mind the prosecution need prove to establish felony murder is the state of mind necessary to commit the underlying felony.”) (citation omitted).

<sup>11</sup> *See State v. Speece*, 115 Wn.2d 360, 362.

relieved the state of its obligation to prove the elements of kidnapping itself.<sup>12</sup>

**V. THE SAME LOGIC APPLIES TO THE AGGRAVATED MURDER CONVICTION BASED ON THE KIDNAPPING AGGRAVATING FACTOR**

The same logic applies to the *Kosewicz* aggravated murder conviction. The elements of premeditated murder are, “With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.” RCW 9A.32.030(1)(a). The ingredients of the aggravating factor charged here, that is, “kidnapping in the first degree,” CP 35-36, are the elements of the charged first-degree kidnapping itself.

This Court – or, more accurately, a plurality of this Court – did come to a contrary conclusion on this point in a highly splintered 1998 opinion: *State v. Irizarry*, 111 Wn.2d 591, 763 P.2d 432 (1998). In that case, this Court ruled that aggravated murder in first degree consists of premeditated murder in first degree accompanied by one or more of the aggravating factors listed in RCW 10.95.020. This Court continued that

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<sup>12</sup> See *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) (“An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.”) (emphasis added); *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001) (“If the instructions allowed the jury to convict ... without finding an essential element of the crime charged, the State has been relieved of its burden of proving all elements of the crime(s) charged beyond a reasonable doubt, and thus the error affected his constitutional right to a fair trial.”) (emphasis added).

the statutory aggravating factors that elevate first-degree murder to aggravated murder are factors in “aggravation of penalty,” not elements of the crime. *Id.* at 594 & n.7. This Court concluded that since a lesser included offense exists only when all elements of the lesser offense are necessary elements of the greater offense; and since commission of a felony is just a factor in aggravation of penalty and not an element of aggravated murder; felony-murder is not a lesser included offense of aggravated murder for purposes of giving a lesser-included offense instruction.

*Irizarry* was decided in 1998.<sup>13</sup> There has been a lot of water under the bridge since then. In *Jones v. United States*, 526 U.S. 227, following *Irizarry*, the Supreme Court ruled that the provisions of the federal carjacking statute establishing higher penalties for certain carjacking convictions actually created elements of the crime, not sentencing factors. Controlling decisions following *Jones* provide even

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<sup>13</sup> We are aware that this Court has cited *Irizarry*'s holding on this point with approval, even in recent years. As far as we can tell, however, none of those decisions have addressed the argument raised here, in the context raised here, that is, whether invalidity of a crime constituting an aggravating factor also invalidates the aggravated murder conviction. *E.g.*, *State v. Thomas*, 166 Wn.2d 380, 387-88, 208 P.3d 1107 (2009) (not addressing *Apprendi* issue); *State v. Yates*, 161 Wn.2d 714, 758, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008) (addressing adequacy of charging instrument to describe aggravating factor at all); *State v. Brett*, 126 Wn.2d 136, 154, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996).

more compelling support for this conclusion. In *Apprendi*, *Ring*,<sup>14</sup> *Blakely*,<sup>15</sup> *Booker*, and *State v. Recuenco* or *Washington v. Recuenco*,<sup>16</sup> the U.S. Supreme Court and this Court have both made clear that any fact that increases the maximum penalty that may be imposed upon a criminal defendant is akin to an element of the crime, in that it must be proven to the jury beyond a reasonable doubt. In other words, the aggravating factor now acts as the *functional equivalent of an element*.<sup>17</sup>

In fact, in *State v. Womac*, 160 Wn.2d 643, 661 n. 11, 160 P.3d 40 (2007), following *Jones*, *Apprendi*, *Ring*, *Booker*, and *Recuenco*, this Court explicitly stated: “for Sixth Amendment purposes, elements and sentencing factors must be treated the same as both are facts that must be tried to the jury and proved beyond a reasonable doubt.”

The portion of the *Irizarry* plurality holding that felony murder can never be considered a lesser included offense of aggravated murder, because aggravating factors are never elements but are merely sentencing factors, should therefore be reconsidered. The many post-*Irizarry*

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<sup>14</sup> The Court in *Ring* ruled that the right to trial by jury is violated by a sentencing judge sitting without a jury and finding aggravating circumstances necessary to impose the death penalty. *Ring*, 536 U.S. at 609.

<sup>15</sup> In *Blakely*, the Court held that the statutory maximum is the maximum sentence that a judge may impose solely on the facts reflected in the jury verdict or admitted by the defendant. *Blakely*, 542 U.S. at 303.

<sup>16</sup> *Washington v. Recuenco*, 48 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

<sup>17</sup> See *State v. Goodman*, 150 Wn.2d 774, 785-786, 83 P.3d 410 (2004).

decisions discussed above undermine its logic. They compel the conclusion that at least where the question is the nature of proof required at trial, for Sixth and Fourteenth Amendment purposes, aggravating factors elevating premeditated murder to aggravated murder constitute the functional equivalent of elements.

It is true that this Court declined to extend the aggravators-equals-elements logic to firearm enhancements in *State v. Kelley*, 168 Wn.2d 72, 81, 226 P.3d 773, 778 (2010). The *Kelley* decision, however, acknowledges that the aggravators-equals-elements logic works for Sixth Amendment, jury trial right, questions. It reasoned that the defendant there was trying to extend that logic to Fifth Amendment, double-jeopardy, issues, for the purpose of invalidating convictions of both assault-with-a-deadly-weapon plus the deadly-weapon aggravating sentencing factor. The *Kelley* Court ruled that the legislative intent to punish defendants for both assault with a deadly weapon and the deadly weapon enhancement at the same time was so clear, and legislative intent so clearly controlled the double jeopardy analysis, that it was irrelevant what the aggravating sentencing factor was called.<sup>18</sup> The *Kelley* Court did

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<sup>18</sup> *Kelley*, 168 Wn.2d at 80-81 (“... Kelley may be arguing in part that because sentencing factors are treated as ‘elements,’ the ‘offense’ of being armed with a firearm (the sentence enhancement) is the same in fact and law as the second degree assault of which he was convicted, and a double jeopardy violation occurred. If this is his argument, we reject it because it fails to account

not comment on the question presented here, that is, whether *Apprendi* and its progeny apply to the definition of aggravating factors in the context presented here. As discussed above, following *Jones*, *Apprendi*, and their progeny, including *Recuenco* and *Womac*, the answer to that question must be yes.

**VI. THE SUPREME COURT HAS RULED THAT WHERE A CONVICTION IS BASED ON A GENERAL VERDICT AND THERE ARE TWO POSSIBLE BASES FOR IT – ONE LEGALLY VALID AND ONE LEGALLY INVALID – THE CONVICTION MUST BE REVERSED UNLESS THE ERROR WAS LIMITED TO EVIDENTIARY INSUFFICIENCY**

The Supreme Court has held that when a general verdict of guilty could have been based on either a legally valid or a legally invalid alternative, it must be set aside. *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957) (when general verdict could rest on legally valid or legally invalid alternative bases, the conviction must be set aside); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed.2d 1117 (1931).<sup>19</sup>

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for the fact that cumulative punishments can be imposed in the same proceeding if this is the legislature's intent, notwithstanding *Blockburger*. It appears that *Kelley* has invoked *Blockburger*'s rule of statutory construction without regard to the initial question whether there is clear evidence of legislative intent that cumulative punishments be imposed.”)

<sup>19</sup> *Suniga v. Bunnell*, 998 F.2d 664 (9th Cir. 1993) (California jury was told that it could convict Suniga of second-degree murder if it was committed with malice aforethought or if the killing occurred during the commission of assault with a deadly weapon, an jury returned general verdict of guilty; because

The only exception is where the invalid theory involves insufficiency of evidence. In that situation, the guilty verdict can stand because the jury is presumed capable of differentiating between evidentiary sufficiency and insufficiency, even though it is considered incapable of differentiating between legal validity and invalidity. *Griffin v. United States*, 502 U.S. 46, 59, 112 S.Ct. 46, 116 L.Ed.2d 371 (1991) (distinguishing an alternative that is legally invalid from one that fails only because the evidence was insufficient to support it).

Thus, following *Stromberg*, *Yates*, and *Griffin*, it is only where a general verdict of guilty might have been based on lack of sufficient evidence that it will be affirmed if there is actually sufficient evidence in the record to support any theory of liability.<sup>20</sup> Where the general verdict

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the second alternative was legally invalid under California law, *id.*, at 666-67, the conviction may have rested on an invalid theory and relief was granted, *id.* at 670).

<sup>20</sup> *Griffin*, 504 U.S. 46, 59 (“That surely establishes a clear line that will separate Turner [referring here to erroneous conviction based on insufficiency of evidence] from Yates [referring here to legal error], and it happens to be a line that makes good sense. Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law – whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence ...”).

of guilty might have been based on an invalid legal theory, the conviction must be reversed.

The convictions of felony murder, aggravated first-degree murder, and first-degree kidnapping in these two cases all suffer the invalidity problem, not the factual insufficiency problem. The jury convicted Brown and Kosewicz using general verdicts of guilty – they did not specify whether they were relying on a permissible theory or on the legally invalid “intent to inflict extreme mental distress” theory. Following *Griffin* and *Yates*, since those general verdicts might rest on a legally invalid alternative rather than a factually insufficient one, they must be set aside.

This conclusion is compelled with even greater force in Washington. This Court has discussed the effect of *Griffin* on convictions based on alternative legal bases, where there is insufficient evidence of one basis – the context in which *Griffin* counsels affirmance. This Court ruled that, despite *Griffin*, the more protective state constitution requires reversal in that situation:

Under the federal constitution, a general verdict of guilty on a single count charging the commission of an offense by alternative means is valid when any single means is sustainable. *See Griffin v. United States*, 502 U.S. 46, 50, ... The Washington Constitution provides greater protection of the jury trial right, requiring reversal if it is impossible to rule out the possibility the jury relied on a charge unsupported by sufficient evidence. *Ortega-Martinez*, 124 Wash.2d at 708, 881 P.2d 231; *State v. Green*, 94 Wash.2d

216, 233, 616 P.2d 628 (1980) (remanding for retrial where jury may have relied on legally insufficient alternative predicate felony in committing felony murder) ....

*State v. Wright*, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009) (emphasis added) (supporting citations omitted).

The context we are faced with here is the situation where the conviction could be based on legal invalidity, not just evidentiary insufficiency, and hence where even U.S. Supreme Court precedent compels reversal (*i.e.*, the outcome is controlled by *Yates* rather than by *Griffin*). If this Court is more protective of individual rights in the alternative-means/insufficient-evidence context, then this Court must also be more protective of individual rights in the context actually presented here, that is, the alternative-means/legal-invalidity context. In this *Yates* context, this Court must certainly require reversal without inquiry into the amount of evidence presented.

**VII. EVEN IF HARMLESS ERROR ANALYSIS IS APPLIED, THE STATE BEARS THE BURDEN OF PROVING THE ERROR HARMLESS BEYOND A REASONABLE DOUBT; THE STATE HAS FAILED TO DO THIS**

We acknowledge that in recent years, conflicting views have been expressed on whether harmless error analysis should be applied after the *Griffin-Yates-Stromberg* analysis. Under *Griffin-Yates-Stromberg*, the reviewing court first characterizes the error as “legal error” or an error

regarding sufficiency of evidence; if the conviction is plagued by the second error, it scours the record for sufficiency of evidence of any valid issues for conviction. It seems redundant to apply an additional harmless inquiry on top of the *Griffin-Yates-Stromberg* inquiry.

Nevertheless, some courts do. This conundrum was summarized by the majority in *United States v. Holly*, 488 F.3d 1298 (10th Cir. 2007), *cert. denied*, 552 U.S. 1310 (2008): “As the Supreme Court confirmed in *Neder v. United States*, the conclusion that a jury instruction was erroneous does not necessarily end the inquiry. *Neder*, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Rather, like most constitutional violations, an instructional error on an element of the offense is generally subject to harmless error review. In this case, however, the apparent availability of harmless error review must be squared with the well-established rule of *Stromberg v. California*, 283 U.S. 359, 368 ....” *Holly*, 488 F.3d at 1304 (citation omitted).

The majority in that case “squared” the two – “the apparent availability of harmless error review” and “the well-established rule of *Stromberg*[, *Yates* and *Griffin*]” rejecting further harmless-error review, by adopting harmless error for cases where the legal error was instructional error, but not for cases where the legal error was something that it considered a more basic problem. *Holly*, 488 F.3d at 1305-06.

The dissent took a different position. It explained that the erroneous instruction in that case permitted the jury to convict the defendant of felony civil rights violations involving aggravated sexual abuse if the victim suffered “fear,” while the statute required the government to prove that the victim suffered “fear that any person will be subjected to death, serious bodily injury, or kidnapping.” *Holly*, 488 F.3d at 1311 (Kelly, J., concurring and dissenting). It continued that this was legal error of the *Yates* and *Stromberg* type, not sufficiency of evidence error of the *Griffin* type, and that those Supreme Court cases compelled the appellate court to reverse without the harmless-error analysis adopted by the majority:

The circumstances in this case call to mind the holdings of *Yates v. United States*, 354 U.S. 298 ... and *Griffin v. United States*, 502 U.S. 46 .... *Yates* teaches that a general verdict must be set aside where “the verdict is supportable on one ground [ (here, the force component of § 2241(a)(1)) ], but not on another [ (here, the fear component of § 2242) ], and it is impossible to tell which ground the jury selected.” 354 U.S. at 312, 77 S.Ct. 1064 ...

The error in this case falls within the legal error category with which jurors are particularly ill suited to deal-after all, there is no reason to believe that the jurors' “own intelligence and expertise” would have led them to conclude that placing another in fear of “some bodily injury” was legally insufficient and that placing another in fear of “death, serious bodily injury, or kidnapping” is what the statute actually requires. And because we cannot be

sure that the jury's verdict relied solely on the properly instructed force component, I would simply set aside the verdict as to all counts, including Count V, without conducting harmless error review.

*Holly*, 488 F.3d at 1312.

This would present a fascinating issue for this Court – a chance to choose whether to engage in arguably redundant harmless error analysis after making the preliminary *Griffin-Yates-Stromberg* decision about whether the case was one which fell into the category of *Yates*, automatic reversal, or *Griffin*, harmless-error, review. If this Court were to address that issue, cases like *State v. Wright*, 165 Wn.2d 783, 803 & n.12, *supra*, pp. 21-22, would compel this Court to reject the more forgiving level of harmless error review.

That decision, however, is best left for another day. The first reason is that the error in this case is not mere instructional error, to which harmless-error review is traditionally applied. It is an error of potentially convicting a defendant on an uncharged theory and, hence, it is a due process/notice error rather than just an instructional error so the harmless error analysis applicable to instructional errors is out of place here.

The second reason is that a constitutional error like this can be harmless only if “it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Neder*, 527 U.S.

at 15. The government – here, the state – bears the burden of proving that such a constitutional error is harmless beyond a reasonable doubt. *State v. Irby*, \_\_\_ P.3d \_\_\_ (2011) (No. 82665-0), 2011 WL 241971 (Jan. 27, 2011) at \*6. The state has not carried that burden in this case.

#### **VIII. CONCLUSION**

The felony murder and aggravated murder convictions must be reversed.

DATED this 31st day of January, 2011.

Respectfully submitted,

s/Sheryl Gordon McCloud  
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## CERTIFICATE OF SERVICE

I certify that on the 1st day of February, 2011, a true and correct copy of the foregoing BRIEF *AMICUS CURIAE* OF THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (WACDL) was served upon the following individuals via e-mail:

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