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COURT OF APPEALS
DIVISION II

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No. 35455-I-II

STATE OF WASHINGTON
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DEPUTY
DIVISION TWO

IN RE THE PERSONAL RESTRAINT PETITIONS OF
CHRISTOPHER DELGADO AND ERNESTO MEZA,

Petitioners

THURSTON COUNTY SUPERIOR COURT

The Honorable Daniel J. Berschauer, Judge
Cause No. 03-1-00051-9

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE

Whether the *Recuenco II* decision prevents the misstatement in the special verdict for Count III of Defendant Meza, or any error in the “firearm” instruction, from being subject to harmless error analysis.

B. ARGUMENT

After initial briefing and oral argument, this court has ordered the parties to submit additional briefing on this issue in light of Washington State Supreme Court’s decision in *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) (*Recuenco II*).

This Court should affirm the firearm enhancements imposed by the trial court because the jury found beyond a reasonable doubt that the defendants were armed with a “firearm.” Any error that occurred with respect to the jury instruction for “firearm” should be deemed harmless. Furthermore, the *Blakely* error that occurred in the special verdict form of Count III for Defendant Meza should also be deemed harmless. The State has set forth these arguments in its original brief, thus, the State will only examine the issues in light of the most recent *Recuenco II* decision.

1. The *Recuenco II* holding does not apply to this case, because, unlike the facts in that case, both the charging documents and the verdict forms included “firearm” enhancements.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held 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 proven beyond a reasonable doubt.” *Id.* at 490. Later, in *Blakely v. Washington*, 542 U.S. 296 (2004), the Court held that for *Apprendi* purposes, the “statutory maximum...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.” *Id.* at 303.

Following the *Apprendi* and *Blakely* decisions, the Washington State Supreme Court considered the question of whether a firearm enhancement, absent a jury finding that the defendant is armed with a firearm beyond a reasonable doubt, violates the defendant’s Sixth Amendment right to a jury trial. *State v. Recuenco*, 154 Wn.2d 156, 159, 110 P.3d 188 (2005) (*Recuenco I*). In that case, Recuenco was charged with a deadly weapon enhancement, and the jury returned a special verdict¹ that he was armed with a deadly weapon. *Id.* at 158. The Court applied *Apprendi* and *Blakely*, holding that imposing the lengthier firearm

¹ The special verdict form read: “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?” *State v. Recuenco*, 154 Wn.2d at 159.

enhancement violated the defendant's Sixth Amendment right to a jury trial. *Id.* at 165. The Court also held that *Blakely* error can never be deemed harmless because to do so would be "to speculate on the absence of jury findings." *Id.* at 164 (citing *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005)).

Ultimately, the Court's decision did not resolve the issue of whether the harmless error analysis should be applied to *Blakely* error. The Supreme Court of the United States granted review of this question in the *Recuenco* case, and reversed the Washington State Supreme Court's decision, stating that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Washington v. Recuenco*, 548 U.S. 212, 222 (2006). Structural error, which rarely occurs, "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Recuenco*, 548 U.S. at 218-19 (quoting *Neder v. United States*, 527 U.S. 1, 9 (1999)).

While the Supreme Court of the United States rejected the contention that a trial court's failure to submit a sentencing factor to a jury to prove beyond a reasonable doubt can never be deemed harmless, it left open the issue of whether under state law the error in the *Recuenco* case was harmless. *Id.* at 217-18. Thus, the

question for the Court on remand, in *Recuenco II, supra*, was whether Recuenco could demonstrate “that the Blakely violation *in [that] particular case* was not harmless.” *Id.* at 218 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Faced with this issue on remand, in a 5-4 decision, the Washington State Supreme Court vacated the defendant’s sentence, holding that harmless error *analysis* did not apply. *Recuenco II*, 163 Wn.2d at 442. The Court concluded that “it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury. *Id.* In reaching its conclusion, the Court reasoned that the State failed to provide Recuenco with notice of the enhanced penalty sought. *See id.* at 435-36. The Court also relied on the fact that the special verdict form only referenced a “deadly weapon.” *Id.* at 441.

Even though the United States Supreme Court concluded that the issue for the Washington State Supreme Court on remand was whether the *Blakely* error was harmless in that particular case, the *Recuenco II* Court refused to even *apply* harmless error analysis. *Recuenco II*, 163 Wn.2d 428 at 431 (“[H]armless error analysis does not apply in these circumstances.”). The Court held that doctrine did not apply to the circumstances in *Recuenco*

because “no error occurred in the jury’s determination of guilt. The charge brought by the State, the jury instruction, and the jury’s explicit finding left no fundamental ‘gap’ for the trial court to fill.” *Id.* at 441. Rather, the error occurred when the trial court exceeded its authority by imposing the firearm enhancement “for something the State did not ask for and the jury did not find.” *Id.* at 442.

A. Recuenco II should be applied narrowly, and should not extend to this case, where error occurred in the jury’s determination of the defendants’ guilt.

The precise holding of *Recuenco II* is that “harmless error analysis does not apply *in these circumstances.*” *Id.* at 431 (emphasis added). However, the majority opinion fails to discuss when, exactly, harmless error *does* apply, or when it applies to circumstances other than the circumstances of the *Recuenco* case—where a crime *is* charged, or *is* sought at trial, or *is* found by a jury. See *id.* at 449 n. 7 (Fairhurst, J., dissenting). As the dissent correctly points out, the majority’s opinion “provide[s] no guidance for the future because it is unclear when, if ever, harmless error analysis applies. *Id.* The majority’s holding in *Recuenco II* should not apply to this case because the circumstances of this case differ from those in *Recuenco*.”

The most relevant distinction between *Recuenco* and this case is that the error occurred in the *jury's determination of guilt*, leaving a "fundamental gap" for the trial court to fill. The court did not impose something that the "State did not ask for and the jury did not find." Rather, the State *did* ask for the firearm enhancements in the charging documents, and the jury *did* find the defendants guilty of possession of such a firearm. In Count III, while the jury did not find the defendant Meza in possession of the firearm, the State asked for the enhancement as evidenced by the charging document. See Appendix C of State's Response to PRP ("the defendant...was armed with a deadly weapon, to-wit: a firearm.").

Also, in this case the jury returned special verdict forms stating that the defendants were armed with a firearm at the time of the commission of the crimes for which they were found guilty. See Appendix F of State's Response to PRP. Even Count III, for which the special jury verdict form used the phrase "deadly weapon" instead of "firearm," can be distinguished from the circumstances of *Recuenco* because the charging document for that count alleges that defendant Meza was armed with a firearm. See Appendix C of State's Response to PRP

As further evidence that the holding in *Recuenco II* does not apply to this case, the court in that case relied, in part, on the fact that the defendant was not given notice that the firearm enhancement may be imposed. It was clear in *Recuenco* that the State only sought a deadly weapons enhancement because when defense counsel argued that the definition of firearm should have been given to the jury, the prosecutor stated that none was needed because “in the crime charged and the enhancement the state alleged, there is no elements [sic] of a firearm. The element is assault with a deadly weapon.” *Recuenco I*, 154 Wn.2d at 159-60.

In this case, the defendants were charged and given notice that it was the State’s intention to allege that they were in possession of a firearm. The charging documents accused the defendants of being “armed with a deadly weapon, to wit: a firearm.” Appendix C of State’s Response to PRP. In addition to the fact that the charging documents specifically alleged possession of a firearm, at sentencing the prosecutor outlined the sentencing ranges of the defendants with reference to the “firearm enhancements.” See Appendix A to State’s Supplemental Brief at 7. Defense counsel made no objections to the jury instruction given at trial, and made no objection during sentencing, concurring that

the sentencing “range [was] properly calculated. *Id.* at 14. Thus, because any *Blakely* error in this case occurred in the jury’s determination of guilt, and not a result of the trial court imposing a sentence for something the State did not request and the jury did not find, the Court’s narrow holding in *Recuenco II* should not apply to this case.

2. Under state law, harmless error analysis applies to any *Blakely* error in this case.

Under Washington State law, any error made in the trial court’s failure to submit an element of the firearm enhancement to the jury for determination beyond a reasonable doubt in this case should be subject to harmless error analysis. Because it is apparent that the holding of *Recuenco II* does not apply to this case, where the special verdict form *does* include the firearm enhancement charged by the prosecutor,² the question then becomes whether or not harmless error analysis applies, and under such analysis, whether the error in this case is harmless. This court should answer both questions in the affirmative.

Given the court’s express reasoning in *Recuenco II*, that the error did not occur in the jury’s determination of guilt, the opinion at

² The exception is Count III for Meza, but even for that count *Recuenco II* does not apply because, unlike the defendant in *Recuenco*, Meza was charged with possessing a firearm for that count as well as for the other counts.

least impliedly suggests that any *Blakely* error in a jury's determination of guilt *would* be subject to harmless error analysis. Even so, an independent analysis of Washington State law reveals that this conclusion is well supported by existing legal precedent.

Simply put, it would defy logic for Washington courts to apply harmless error analysis to error in jury instructions on elements of a charged offense, but refuse to apply harmless error to misstatements or omissions in instructions for enhancements. As previously noted, the Supreme Court of the United States in *Washington v. Recuenco* held that failure to submit an element to the jury is subject to harmless error analysis under federal law. *Recuenco*, 548 U.S. at 222. The Supreme Court of the United States held that “[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error.” *Id.* The court relied on its earlier holding in *Neder*, in which it determined that harmless error analysis applied to “an instruction that omits an element of the offense...” *Neder*, 527 U.S. at 9. Thus, the U. S. Supreme Court in *Recuenco* was not deciding the issue of whether an error in a jury instruction for an element is subject to harmless error because that question was already settled. In its opinion, the court made it clear that the distinction between error in

a sentencing factor and an 'element' is irrelevant; the failure to submit an element to the jury and the failure to submit a sentencing factor to the jury are analogous for purposes of harmless error analysis. See *Recuenco*, 548 U.S. at 220.

Applying this rationale to Washington law, unless there is independent state law that prevents harmless error from being applied to misstatements or omissions in jury instructions for *elements* of crimes, Washington law should also allow the application of harmless error analysis to instructions for *sentencing enhancements*, because under federal law they are indistinguishable for harmless error purposes. Indeed, it is well settled that harmless error analysis also applies to misstatements or omissions in jury instructions under Washington law. See e.g., *State v. Williams*, 158 Wn.2d 904, 148 P.3d 993 (2006); *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002); *State v. Stovall*, 115 Wn. App. 650, 63 P.3d 192 (2003). Thus, the fact that Washington State law applies harmless error to misstatements or omissions of elements in jury instructions supports the contention that Washington law should similarly subject *Blakely* error to harmless error analysis.

This is the reasoning that Justice Fairhurst uses in the dissenting opinion of *Recuenco II*, but in this case such reasoning may be reconciled with the majority's opinion because misstatements or omissions in jury instructions for sentencing enhancements are errors in a *jury's* determination of guilt, and not errors that occur when the trial court imposes an enhancement for which the defendant was neither charged nor found guilty beyond a reasonable doubt by a jury.

Justice Fairhurst's dissenting opinion, with which three other justices concurred, concludes that harmless error analysis applies to the failure to submit a sentencing factor to a jury. *Recuenco II*, 163 Wn.2d at 443. In reaching this conclusion the opinion establishes that the state constitution's jury trial right does not prohibit applying harmless error analysis to the failure to submit an element to the jury, and thus, does not prohibit such analysis for the analogous error of the failure to submit a sentencing factor to the jury. *Id.* at 445 (citing *McClaine v. Territory*, 1 Wash. 345, 351-53, 25 P. 453 (1890); *State v. Conahan*, 10 Wash. 268, 268-69, 38 P. 996 (1894); *State v. Courtemarch*, 11 Wash. 446, 39 P. 955 (1895)). It then concludes that "[c]ontrolling precedent [that] dictates that the failure to submit a sentencing factor to a jury is subject to

harmless error analysis by relying on *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). *Recuenco II*, 163 Wn.2d at 445. Also, the opinion properly notes that the courts in *State v. Jackson*, 137 Wn.2d 712, 976 P.2d 1229 (1999) and *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000), applied harmless error analysis to the failure to properly instruct the jury on an element of the crime. *Recuenco II*, 163, Wn.2d at 446-47.

Thus, it is clear from controlling precedent that under Washington law, the failure to submit a sentencing factor to a jury is subject to harmless error. It would make little sense for this court to refuse to apply harmless error to the failure to submit a sentencing factor to a jury, when it is well established that failure to submit an element of a crime to a jury is subject to harmless error analysis under Washington law. This conclusion, if not warranted under the circumstances of *Recuenco*, certainly should apply to the facts of this case in which the error occurred in the jury's determination of guilt, and to which the holding of *Recuenco II* does not apply.

A. Any Blakely error in this case should be deemed harmless under a harmless error analysis

If the trial committed *Blakely* error by not introducing the proper "firearm" instruction, such error is harmless. Under a proper

harmless error analysis, the error of referring to a “deadly weapon” instead of a “firearm” in the special verdict for Count III is also harmless. Such error is harmless because the overwhelming evidence at trial demonstrated, beyond a reasonable doubt, that the defendants’ were in possession of a “firearm.” Because the only evidence of a deadly weapon presented at trial was evidence of a “firearm,” the jury *necessarily* found, beyond a reasonable doubt, that the Defendants’ were in possession of a firearm when it found that they were in possession of a deadly weapon. As such, the jury verdict would have been the same absent the *Blakely* error.

A Constitutional error is harmless if “it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002) (quoting *Neder*, 527 U.S. at 15). The *Neder* Court stated more specifically, that an erroneous instruction may be deemed harmless “where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error.” *Neder v. United States*, 527 U.S. 1, 17 (1999); *See also Brown*, 147 Wn.2d at 340. The doctrine of harmless error promotes “public respect for the criminal process by

focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.” *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

In this case, the only evidence of a deadly weapon presented at trial was evidence of a firearm. See Appendix H of State’s Response to PRP at 3.³ Furthermore, the evidence demonstrated that Meza fired the gun into the air, and then shot the victim in the shoulder. *Id.* Evidence presented at trial also established that the firearm found in the Defendant’s residence was the firearm which fired the shell casing in the vacant lot where the victim was shot in the shoulder. *Id.* at 4.

The Defendants contend that the trial court erred in not giving the jury the WPIC 2.10.01. That instruction states that a “weapon is a device from which a projectile may be fired by an explosive such as gunpowder.” The instruction given to the jury in this case defined a deadly weapon as “[a] pistol, revolver, or any other firearm, whether loaded or unloaded.” Appendix E of State’s Response to PRP, Instruction No. 32. If the trial court erred in not giving the jury WPIC 2.10.01, such error is harmless. Because a pistol and a revolver are also devices “from which a projectile may

³ Summary of facts in the decision of the Court of Appeals Commissioner in the direct appeal.

be fired by an explosive....,” the only material difference between the instruction given to the jury and the WPIC 2.10.01 is the requirement that the gun be operable. In this case, overwhelming evidence that the gun was operable, including the fact that the victim was shot in the shoulder, proves beyond a reasonable doubt, that the gun was operable. Thus, the evidence shows, beyond a reasonable doubt, that the jury would have reached the same verdict had the operability requirement been included in the jury instruction.

Similarly, the failure to allege that Defendant Meza was armed with a “firearm” instead of a “deadly weapon” in Special Verdict Form DD is harmless. Because the jury found, beyond a reasonable doubt, that the Defendants were in possession of a firearm in the other special verdict forms, and because the only deadly weapon alleged at trial was a firearm, the jury necessarily found that Defendant Meza was in possession of a “firearm.”

C. CONCLUSION

This court should affirm Meza and Delgado’s sentencing. The holding of *Recuenco II* does not apply to this case because any *Blakely* error took place in the jury’s determination of guilt. Under Washington law, such *Blakely* error should be subject to

harmless error analysis. Any error in this case should be, as argued in the State's Response to the defendants' Personal Restraint Petition, deemed harmless by this court.

Respectfully submitted this 21st of July, 2008.



Brian Peterson, ID# 9106980
Rule 9 Intern for the Respondent



Carol La Verne, WSBA# 19229
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A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on July 21, 2008.

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Attorney for Christopher Delgado and Ernesto Meza

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: 7/21/08

Signature: 

APPENDIX A

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PROSECUTING ATTORNEY
MAR 15 2004
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TIME _____

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

STATE OF WASHINGTON,
Plaintiff,
vs.
CHRISTOPHER DELGADO,
Defendant.

COPY

No. 03-1-00051-9
Appeal No. 30662-0-II

VERBATIM REPORT OF PROCEEDINGS
SENTENCING HEARING

BE IT REMEMBERED that on the 17th day of July, 2003,
the above-entitled and numbered cause came on for hearing
before the Honorable Daniel J. Berschauer, Judge, Thurston
County Superior Court, Olympia, Washington.

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I N D E X

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1 July 17th, 2003

Olympia, Washington

2 AFTERNOON SESSION

3 Honorable Daniel J. Berschauer, Presiding

4 APPEARANCES:

5 The Defendant, Christopher Delgado, with his
6 Counsel Ann Stenberg, Attorney at Law;
7 Jack Jones, Deputy Prosecuting Attorney
of Thurston County, representing the State
of Washington.

8 Kathryn A. Beehler, Official Reporter

9 --o0o--

10 THE COURT: Please be seated. For the
11 record, these are the cases of State of
12 Washington versus Christopher Delgado and
13 Ernesto Meza. The defendants are present with
14 counsel of record. Mr. Jack Jones is here
15 representing the State of Washington.

16 I have received requests from media for
17 photography and for audio recording. Are there
18 any objections from counsel?

19 MR. JONES: No objection from the
20 State.

21 MR. DIXON: I didn't hear Mr. Jones'
22 response, Your Honor.

23 THE COURT: No objections from the
24 State.

25 MS. STENBERG: No objection from

1 Mr. Delgado.

2 MR. DIXON: No objection.

3 THE COURT: Then media are authorized,
4 without disrupting the court proceedings, to take
5 photographs and/or record these proceedings.

6 Are there any preliminary issues for the
7 court to address prior to proceeding with any
8 arguments prior to sentence?

9 MR. JONES: No, Your Honor.

10 MS. STENBERG: No, Your Honor.

11 MR. DIXON: Not for Mr. Meza,
12 Your Honor.

13 THE COURT: Counsel may proceed.

14 MR. JONES: Your Honor, how do you wish
15 to proceed with the defendants, one at a time, or
16 have me talk about both of them?

17 THE COURT: I assume it is probably
18 appropriate that you can speak about both of
19 them, and if there are individual issues, of
20 course, we can address them individually at that
21 time.

22 MR. JONES: Thank you, Your Honor. I
23 will start with Mr. Meza. He was convicted by
24 jury verdict of Attempted Murder in the First
25 Degree While Armed With a Firearm, Kidnapping in

1 the First Degree While Armed With a Firearm, and
2 two counts of Intimidating a Witness While Armed
3 With a Firearm. The first two counts are serious
4 violent offenses, and so the Sentencing Reform
5 Act requires that they run consecutive to each
6 other. However, the second count or lesser
7 count, in this case the kidnapping, is directed
8 to have zero points attached to it, and so he
9 would have no points in regard to the kidnap
10 charge.

11 All of the -- otherwise, Count 1 and
12 Count 2, the Attempted Murder and Kidnap 1 are
13 required to run consecutive to each other. And
14 the firearm enhancements, 60 months on each of
15 the first two counts, 36 months on each of the
16 second two counts, are required to run
17 consecutive to each other and to all other
18 aspects of sentence.

19 The sentence range that is available to
20 the court, I think, is best summarized on the
21 sheet that has the deadly weapon enhancement
22 calculations on it, 192.75 to 260.25 for the
23 Attempted Murder, and that is 75 percent of the
24 standard range for the completed offense, Murder
25 in the First Degree. Then it is 51.68 for the

1 Kidnap 1. The Intimidating a Witness counts
2 would run concurrently, so they are not listed
3 there. However, all four of the firearm
4 enhancements are listed, because each one of
5 those would apply.

6 The bottom line, if you will, in terms of
7 a standard range for this defendant, Mr. Meza, is
8 435.75 months to 520.25 months.

9 In regard to Mr. Delgado, his situation is
10 a little different. He does have a prior
11 conviction for Assault in the Second Degree, so
12 these offenses would constitute his second
13 strike, if you will. He was convicted of Assault
14 in the First Degree With a Firearm and Kidnapping
15 in the First Degree With a Firearm. These are
16 also serious violent offenses, and they are
17 required to run consecutive, one to the other.
18 However, the second count or lesser count in this
19 case, the Kidnapping, again, would be scored zero
20 points, and then the two firearm enhancements
21 would be 60 months each.

22 So, his standard range is 111 to 147 for
23 the Assault, 51 to 68 on the Kidnap, and then the
24 two 60-month firearm enhancements for each, for a
25 total standard range of 282 months to 335 months.

1 I will not go into the facts very much.
2 The court was sitting at the trial and heard the
3 evidence, and when it did, it clearly heard that
4 Mr. Meza was involved in some drug dealing of
5 some substantial nature and for some period of
6 time, and that Mr. Delgado was his partner in
7 crime, if you will, in that regard. Toward the
8 end of accomplishing their tasks, they enlisted,
9 among others, perhaps, but at least Mr. Kravis
10 and Mr. Waslawski, and of course both of them
11 became victims in this crime.

12 Mr. Meza was obsessed with the idea that
13 one of the people that worked for him may
14 cooperate with the police and snitch on him, if
15 you will, and toward that end he had previously
16 threatened Mr. Waslawski, and also when
17 Mr. Waslawski left his employment because his
18 mother wanted him to work a real job rather than
19 hang out with Mr. Meza, Mr. Meza took offense.

20 Also, you should note that during
21 Mr. Waslawski's testimony, he testified how he
22 had been stopped, completely unrelated to any of
23 these events, by the police the night before this
24 happened, and that these two defendants drove by,
25 saw him in the back of the police car. I believe

1 he was receiving a citation for some traffic
2 offense or another. So, I also believe that that
3 played into the back of his mind that perhaps
4 Mr. -- Mr. Meza's mind that perhaps Mr. Waslawski
5 was indeed snitching on him, although that was
6 not the case.

7 At any rate, Mr. Meza came up with the
8 idea of taking Mr. Waslawski out into the woods
9 and shooting him -- "executing" him was the word
10 that he himself used in the letter that he sent
11 to Mr. Green who testified, and that information
12 came into evidence during the trial of this
13 matter. He also discussed the fact that he was
14 involved in drug dealing. These are facts that
15 throughout this trial, the drug portion, at any
16 rate, were never disputed.

17 Your Honor, Mr. Meza's conduct was
18 despicable. It was not justified in any way,
19 shape, or form, either factually or morally, and
20 it is only by happenstance, I believe, that we
21 are here for an attempted murder sentencing and
22 not a murder sentencing.

23 I would ask you to impose the top of the
24 standard range on Mr. Meza, as well as a number
25 of other requirements of sentence. I would ask

1 you to impose attorney's fees on him. I would
2 ask you to impose a \$500 crime victim assessment,
3 \$110 court costs, a \$100 DNA fee, and I would
4 also ask that you direct that he have no contact
5 with William Kravis or Ron Waslawski or Mr. Green
6 for the period of his life. All have contacted
7 me or I have contacted them and have requested
8 that. They are frightened of him.

9 I would ask that the firearm in evidence
10 in this case be forfeited. I would ask you
11 impose 24 to 48 months of community custody for
12 Count 1, 24 to 48 months of community custody for
13 Count 2, and 9 to 18 months of community custody
14 on Counts 3 and 4 and that the conditions include
15 no contact with those folks that I have just
16 requested you direct them to have no contact
17 with, as well as the usual drug conditions that
18 would require him to have an evaluation and
19 treatment. There was also testimony throughout
20 this trial that not only was he involved in the
21 sale of drugs, but also the ingestion of alcohol
22 and the cocaine.

23 THE COURT: Can I interrupt you for one
24 second? Counsel, do you want chairs?

25 MR. DIXON: No thanks.

1 THE COURT: Are you okay?

2 MS. STENBERG: Fine, Your Honor.

3 THE COURT: Okay. I thought maybe this
4 was some special punishment.

5 MR. DIXON: No.

6 MR. JONES: Your Honor, in regard to
7 Mr. Delgado, I would ask you -- again, the range
8 that you have to deal with is 282 months to
9 335 months. I would ask you to impose the top of
10 the standard range in that case, as well. I
11 believe that the jury came back with Assault in
12 the First Degree, perhaps because they thought
13 that that was the crime that Mr. Delgado had
14 agreed to be an accomplice with. But, at any
15 rate, he was involved in both of these crimes.

16 He has a prior Assault in the Second
17 Degree. He was involved in this business just as
18 much as Mr. Meza, although of course he was not
19 the shooter, and he was not involved in the
20 intimidating enough to be charged or convicted
21 with those offenses. So, I would also ask you to
22 impose the same legal financial obligations in
23 regard to Mr. Delgado and the same no contact and
24 the same period of community custody on Counts 1
25 and 2, which is 24 to 48 months, and the same

1 conditions in regard to no contact and drug
2 evaluation and treatment.

3 Thank you.

4 THE COURT: Before I turn to defense
5 counsel, Mr. Jones, I would like to ask you a few
6 questions.

7 MR. JONES: Yes.

8 THE COURT: First, as you have
9 calculated the standard ranges, have you taken
10 into consideration the doctrine of merger, in the
11 sense that some of these offenses are included in
12 and incorporated in one manner of criminal
13 conduct?

14 MR. JONES: Your Honor, what I have
15 done is looked to see if the -- I don't believe
16 they do merge. But I have also looked to see if
17 they are the same criminal conduct, and I don't
18 believe that they are, because -- if for no other
19 reason than that the Kidnapping in the First
20 Degree appeared to be directed to both
21 Mr. Waslawski and to Mr. Kravis in order to keep
22 him from having any ideas about being involved in
23 trying to withdraw from the drug trade.

24 In addition, they did not take place in
25 the same time and place. The Kidnapping charge

1 took place starting in one county, winding all
2 over the place, going to another. And then the
3 shooting occurred just at the point in
4 Thurston County. So, I don't believe that these
5 are the same criminal conduct and that the
6 scoring that the State has provided to the court
7 is correct.

8 THE COURT: And obviously you had
9 thought about that issue, and all I was doing was
10 just raising the issue to make sure that you had
11 at least analyzed it and believe that these
12 offenses do not merge as the same criminal
13 conduct.

14 MR. JONES: Yes. Yes, Your Honor.

15 THE COURT: The second issue I want to
16 raise is something that came up actually during
17 the time that the jurors talked with the court.
18 Clearly the jurors found Mr. Meza guilty of the
19 Attempted Murder charge. Clearly they found
20 Mr. Delgado guilty as an accomplice, but they
21 found him guilty of the other alternative charge
22 of Assault in the First Degree.

23 Is there any issue, as far as the State is
24 concerned, with inconsistent verdicts?

25 MR. JONES: There is not. And I

1 immediately looked into that, and the concept of
2 inconsistent verdicts is virtually nonexistent in
3 the State of Washington anymore. Mr. Delgado was
4 merely the beneficiary of the jury's whim or more
5 likely their just giving him a break in regard to
6 these charges. But there are no legal issues in
7 that regard. But certainly they would be
8 preserved if there were any by the appeal rights
9 that you will give the defendants before they
10 leave today. But there is none. And I have
11 discussed the matter with both Mr. Sherman, who
12 is our appellate deputy, and I have also briefly
13 discussed the matter with Mr. Dixon.

14 THE COURT: Okay.

15 As far as defense counsel are concerned,
16 are there any issues with regard to the standard
17 sentencing ranges as Mr. Jones has outlined them?

18 Mr. Dixon?

19 MR. DIXON: Is your question with
20 respect to the calculation of the range,
21 Your Honor?

22 THE COURT: Yes.

23 MR. DIXON: Then, the answer is no. I
24 concur that the range is properly calculated.

25 THE COURT: Okay.

1 Ms. Stenberg? Do you concur, as well?

2 MS. STENBERG: I do.

3 THE COURT: Do either of you have any
4 arguments you want to put forth with respect to
5 the two issues I raised? And I did so just out
6 of an abundance of caution, because potentially
7 one could, at least, look at these verdicts and
8 say, well, they are not consistent. Somebody's
9 acting as an accomplice, and why isn't he
10 convicted of the same charge as a person who is
11 convicted as a principal.

12 Mr. Jones said there's no legal issue;
13 it's simply a matter of the jury, perhaps, giving
14 him a break, or I assume perhaps thinking that he
15 was involved in this crime, but he may not have
16 been involved to the extent of knowing exactly
17 what his brother was going to do, as far as
18 attempted murder.

19 Ms. Stenberg, I guess the inconsistent
20 verdict issue applies just to Mr. Delgado. Is
21 there any issue with respect to that, as far as
22 you are concerned?

23 MS. STENBERG: Your Honor, it's my
24 impression that because the count was charged in
25 alternatives, that there is not, in fact, an

1 MS. STENBERG: No.

2 MR. DIXON: No.

3 THE COURT: Mr. Meza, Mr. Delgado, good
4 luck to both of you. Court's in recess.

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6 (Conclusion of the July 17, 2003, Proceedings.)
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1 SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF THURSTON

3 Department No. 1 Hon. Daniel J. Berschauer, Judge

4 STATE OF WASHINGTON,)

5 Plaintiff,)

6 vs.)

7 CHRISTOPHER DELGADO,)

8 Defendant.)

No. 03-1-00051-9
REPORTER'S CERTIFICATE

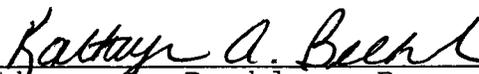
9
10 STATE OF WASHINGTON)

11 COUNTY OF THURSTON)

) ss

12 I, Kathryn A. Beehler, Official Reporter of
13 the Superior Court of the State of Washington, in
14 and for the county of Thurston, do hereby certify:

15 That the foregoing pages, 1 through 47,
16 inclusive comprise a true and correct transcript
17 of the proceedings held in the above-entitled
18 matter, as designated by Counsel to be included in
19 the transcript, reported by me on the 17th day of
20 July, 2003.

21
22
23
24 

25 Kathryn A. Beehler, Reporter
C.C.R. No. BEEHLKA412KG