No. 74964-7

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARTURO RECUENCO,

Petitioner.

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STATE OF WASHINGTON
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PETITIONER'S SUPPLEMENTAL BRIEF ON REMAND

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ORIGINAL

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A. ISSUES PRESENTED

1. Where this Court can no longer provide effective relief to either party, and the case does not present a public issue in need of an authoritative decision, should this Court dismiss the matter as moot?

2. In light of this Court's prior decision in this matter that no procedure exists to permit a jury to consider the imposition of a firearm enhancement, and the Sixth Amendment's bar on the judicial imposition of such an enhancement, can the error in this case be deemed harmless?

3. If in fact the Sentencing Reform Act (SRA) provides statutory authority to submit a firearm enhancement to a jury, does the separate violation of such a statute require remand?

4. Article I, § 21 and Article I, § 22 of the Washington Constitution provide a broader jury trial right than that guaranteed by the Sixth Amendment. Can the denial of the jury right of the state constitution ever be deemed harmless?

B. SUMMARY OF CASE

The relevant facts are set forth in the prior briefing and decisions in this matter and are thus not repeated here.

C. ARGUMENT

1. BECAUSE MR. RECUENCO'S CASE IS MOOT THIS COURT SHOULD DISMISS THE MATTER

This appeal originally arose from Mr. Recuenco's 2000 conviction of second degree assault with a deadly weapon enhancement. The only issue remaining is whether the trial court's unconstitutional imposition of a more onerous firearm enhancement was harmless. Mr. Recuenco has long since completed his 39 month term of confinement in this matter, including that portion attributable to the improperly imposed firearm enhancement.

Neither Mr. Recuenco nor the State will obtain any direct benefit from further litigation of this matter. In State v. Ross, this Court dismissed as moot an appeal regarding an offender score calculation where the appellant had completed his term of confinement saying "it is undisputed that this court cannot provide him with any effective relief, i.e., less confinement due to a lower offender score." 152 Wn.2d 220, 228, 95 P.2d 1225 (2004). Similarly this court can no longer provide Mr. Recuenco effective relief, i.e. less confinement.[1]

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[1] The State has urged this Court to dismiss as moot other pending cases involving Blakely claims. See State v. Marcus Hall, 77714-4.

The State might suggest, as it did in its briefing to the Untied States Supreme Court, that collateral consequences of convictions exist sufficient for this court to provide effective relief to Mr. Recuenco. In its briefing to the federal court, the State pointed to the fact that the firearm enhancement: (1) disqualifies Mr. Recuenco from future involvement in mental health and or drug court; (2) allows the offense to be counted as a "most serious" offense such that Mr. Recuenco could be deemed a persistent offender provided he committed two more most serious offenses; and (3) that it might similarly trigger the provisions of federal Armed Career Criminal Act should he commit another qualifying offense.

Cases which have found remote collateral benefits sufficient to overcome the perceived mootness of a case have focused on the benefits available to the party asking to continue the litigation; in this case the State. For instance, in State v. Turner, 98 Wn.2d 731, 658 P.2d 658 (1983), the State sought to dismiss as moot the appeals of several juveniles found in contempt, imprisoned and fined for truancy. The appeals centered on the question of whether the compulsory school attendance statute provided a juvenile court jurisdiction to sanction truants or whether the statute provided only jurisdiction of parents who failed to send their children to school.

Id. at 732. The Court reasoned the appellants still faced fines and their

> incarceration probably has collateral consequences of sufficient moment to make its validity a matter of more than academic interest. . . . This court can therefore supply effective relief by relieving appellants of their liabilities and cleansing the records.

Id. at 733 (Internal citations omitted).

Thus because relief was still available to the party requesting that the litigation go forward, the matter was not moot. See also, City of Sequim v. Malkasian, 157 Wn2.2d 251, 259, 138 P.3d 943 (2006) (concluding preelection challenge to initiative was not moot despite election because prevention of election was not only relief sought as petitioner also sought declaratory judgment on validity of subject matter of enacted initiative). But the flipside of this coin would seem to be that an appellant who does not wish to be relieved of such remote liabilities should not be required to continue, especially where he stands to increase his present liabilities by way of the imposition of cost on appeal.

Unlike Turner where the validity of the conviction itself was at stake or Malkasian where the validity of the subject matter of the initiative was at issue, the principal substantive claim in this case has long been resolved; i.e., that the imposition of a firearm

enhancement deprived Mr. Recuenco of his Sixth and Fourteenth Amendment rights. Thus, all that remains is the procedural question of whether that error requires the administrative correction of a sentence which was completed years ago. While such a correction may offer benefits to Mr. Recuenco, he should not be forced to continue the litigation on the mere possibility that some remote benefit may accrue. If the State wishes to continue, it should identify some particular and direct benefit that the State can obtain from this case. Nothing in the correction or affirmance of the sentence Mr. Recuenco has already served will provide a single benefit to the state. This Court cannot provide effective relief to either Mr. Recuenco or the State in this case.

This case is not the sort of public controversy that calls for a resolution by this court in spite of its mootness. See e.g., In re Harris, 98 Wn.2d 276, 278, 654 P.2d 109 (1982) (court may in its discretion reach moot issue if it is of continuing and public nature). In determining whether a matter is of continuing and substantial public interest, this Court looks to three factors: (1) whether the issue is of public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur. See Hart v.

D.S.H.S., 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). None of these criteria are present here.

This matter is before this Court first on the case-specific question of whether the error, which all agree occurred, can be deemed harmless in Mr. Recuenco's case. No matter how the Court resolves that question in this case, because it is case and fact specific, that resolution by definition will not determine the outcome of other cases.

Such a fact-specific resolution of the harmless-error question in this case is not necessary to guide future cases. The United States Supreme Court's decision in this case has already determined that harmless-error analysis can apply to this and other cases involving similar Sixth and Fourteenth Amendment violations, by application of the familiar standard announced in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). That determination was "desirable to provide future guidance." However, the results of a harmless-error analysis in a particular case is not.

The remaining question of whether Washington law will allow application of a harmless-error analysis is similarly not an issue calling for a final resolution. First, there cannot be but a handful of

cases remaining in the appellate courts of this state in which firearm enhancements were imposed in violation of the Sixth and Fourteenth Amendments, thus mitigating the need for determinative opinion on the matter. Second, this Court must assume that lower courts will follow its prior ruling that judicial imposition of such a sentence does violate the Sixth and Fourteenth Amendments and thus few if any new cases will arise.

The issue presented in this case is moot. Moreover, the nature of the issue is not the sort which this Court should reach in light of its mootness.

2. AS A MATTER OF WASHINGTON LAW THE ERROR IN THIS CASE CANNOT BE DEEMED HARMLESS[2]

a. Because this Court has concluded there is no procedure by which a jury can consider a firearm enhancement verdict, the error in this case cannot be harmless.

This Court has said:

> Because we held in [State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)] that we would not imply a

[2] In the Supplemental Brief originally filed in this Court, Mr. Recuenco argued that the provisions of Article I, §§21 and 22 of the Washington Constitution as interpreted by this Court precluded harmless-error analysis in this case. Additionally, he argued application of harmless-error analysis to a case such as his was contrary to double jeopardy principals. Because it rested its opinion on the federal harmless-error doctrine, this Court did not reach those claims. Rather than repeat those arguments, Mr. Recuenco incorporates them by reference into this second supplemental brief.

> 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.

State v. Recuenco, 154 Wn.2d 156, 164, 110 P.3d 188 (2005) overturned on other grounds, __ U.S. __, 126 S.Ct. 478, 163 L.Ed. 362 (2006). As this Court found there was no procedure by which a jury could impose a firearm enhancement, harmless-error cannot apply. If it were otherwise, an appellate court would be in a position of affirming a verdict that no jury could have reached at the time of Mr. Recuenco's trial or today.[3]

RCW 9.94A.602 provides:

> In a criminal case wherein there has been a special allegation and evidence establishing that the accused . . . was armed with a deadly weapon at the time of the commission of the crime, . . . the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant . . . was armed with a deadly weapon at the time of the commission of the crime.
> . . . The following instruments are included in the term deadly weapon: . . . pistol, revolver, or any other firearm . . . .

[3] Unlike the statutory amendments addressing the imposition of exceptional sentences and providing for jury determinations, there have been no amendments to the statutory provisions relative to firearm enhancements.

RCW 9.94A.602 establishes a procedure by which a deadly weapon enhancement is pled and proven to a jury, satisfying the defendant's constitutional right to a jury trial.

Another portion of the SRA outlines the punishment associated with a deadly weapon special verdict finding. In pertinent part, RCW 9.94A.533(4) provides that additional time "shall" be added to the standard sentence if the offender was armed with a deadly weapon other than a firearm during the offense – two years for a class A felony, one year for a class B felony, and six months for a class C felony.[4] RCW 9.94A.533(3) purports to establish the additional punishment to be imposed where an offender was armed with a firearm as defined in RCW 9.41.010 – five years for a class A felony, three years for a class B felony, and eighteen months for a class C felony. These enhancements are not insignificant – where the defendant has previously been sentenced for a deadly weapon enhancement, the enhancements listed above are doubled for the current offense. RCW 9.94A.533(3)(d), (4)(d).

Unlike the statutory procedure in place for obtaining a verdict on a deadly weapon enhancement, there is no corresponding

[4] RCW 9.94A.533 has replaced former RCW 9.94A.510, but the pertinent terms remain the same.

statutory procedure in place for a firearm enhancement. In 1995, the Legislature enacted, without amendment, Initiative 159, the "Hard Time for Armed Crime" ballot initiative intended to increase sentences for armed crime. State v. Brown, 139 Wn.2d 20, 25, 983 P.2d 608 (1999) (citing Laws 1995, ch. 129; In re Charles, 135 Wn.2d 239, 246, 955 P.2d 798 (1998); Washington Sentencing Guidelines Comm'n, Adult Sentencing Guidelines Manual, cmt. at II-67 (1997)). This new law sought to increase the punishment for armed crimes. Charles, 135 Wn.2d at 246. It also sought to differentiate between crimes committed with a firearm and those committed with some other deadly weapon. Id.; see also RCW 9.94A.533.

While the purpose of Initiative 159 was to increase punishment for armed crimes, the Legislature's failure to create a statutory procedure by which a jury could find a firearm special verdict precludes the imposition of the firearm enhancements prescribed in RCW 9.94A.533(3). See RCW 9.94A.602 (outlining procedure for deadly weapon special verdict). RCW 9.94A.602 provides a lawful avenue for the jury to make a finding as to whether the defendant was armed with a deadly weapon at the time of the offense, providing the defendant with due process of law,

including notice and a jury finding. RCW 9.94A.533(4), in turn, provides that "if the offender . . . was armed with a deadly weapon other than a firearm," additional time shall be added to his sentence. RCW 9.94A.533(3), which purports to add even more time to an offender who "was armed with a firearm" at the time of the offense, however, is not rooted in a statutory procedure permitting the jury to enter a special verdict form, such as that set forth in RCW 9.94A.602.

Following Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which largely undermined Washington's exceptional sentence provisions, this Court recognized

> Where the legislature has not created a procedure for juries to find aggravating factors and has, instead, explicitly provided for judges to do so, we refuse to imply such a procedure on remand.
>
> To create such a procedure out of whole cloth would be to usurp the power of the legislature.

Hughes, 154 Wn.2d at 151. The Court's recognition of the limits on its authority follows its precedent which

> "has consistently held that the fixing of legal punishments for criminal offenses is a legislative function." State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). "[I]t is the function of the legislature and not of the judiciary to

> alter the sentencing process." State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975).

Hughes, 154 Wn.2d at 149.

Recuenco echoed this conclusion. Upon reversing Mr. Recuenco's firearm enhancement, rather than simply remand the matter to allow the question to be submitted to the jury, the Court further concluded the question could never be submitted to the jury. Recuenco, 154 Wn.2d at 164. In concluding that the options on remand were limited solely to the imposition of the lesser enhancement, Recuenco recognized that, unlike the lesser deadly weapon enhancement, there is no statutory authority to submit a firearm enhancement to a jury. If there were statutory authority for a firearm enhancement there was no need to imply one and thus no need for the Court to cite to Hughes in declining to do so. Unlike the provisions of RCW 9.94A.602 pertaining to a deadly weapon enhancement, there is no provision in Washington law for submitting the firearm question to the jury.[5]

Subsequent to Recuenco, lower courts have concluded that the provisions of RCW 9.94A.602 pertaining to deadly weapon

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[5] It is axiomatic that even in the absence of statutory authority to submit the question to a jury the trial judge cannot make the finding herself as Recuenco held that procedure violates the Sixth and Fourteenth Amendments to the United States Constitution. Recuenco, 154 Wn.2d 162-63.

enhancements permit submission of a verdict of the greater firearm enhancement to the jury as well. State v. Nguyen, 134 Wn.App. 863, 869-71, 142 P.3d 1117 (2006). Such a conclusion is contrary to Recuenco's interpretation of the statute, contrary to pre-Blakely construction of the relevant statutes, and contrary to the plain language of RCW 9.94A.602.

As discussed, if such a procedure existed this Court was wrong to conclude as it did that nothing permitted the submission of the question on remand. But rather than say this Court was incorrect, Nguyen endeavored instead to artificially limit this Court's ruling, concluding Recuenco only concerned the question of what could occur on remand. Nguyen, 134 Wn.App. at 870-71 (citing Recuenco, 154 Wn.2d at 64). To accept such reasoning this Court would have to conclude that one procedure exists in the SRA for an initial trial and sentencing and a second procedure exists for case remanded from appellate courts. Yet there is no such a shadow procedure. Thus, there is either authority to submit the question to a jury or there is not. In any event, because this case concerns only the question of what could occur on remand it is unnecessary to resolve the correctness of the distinction Nguyen, as that distinction between the original trial and remand fully supports Mr.

Recuenco's argument here that harmless-error analysis cannot apply.

Nonetheless, prior to Recuenco, the relevant statutes were interpreted as expressly reserving the firearm finding for a judicial determination. In State v. Meggyesy the court concluded that the jury could be instructed on the lesser deadly weapon enhancement and the trial court in its discretion could make a finding that the deadly weapon was indeed a firearm. 90 Wn.App. 693, 707-10, 958 P.2d 319 (1998), review denied, 136 Wn.2d 1028 (1998). In State v. Rai, the court went further to conclude the unambiguous language of former RCW 9.94A.310(3), recodified as RCW 9.94A.533(3) reserved for the trial judge, not the jury, the ability to determine the evidence establishes the deadly weapon was a firearm, and required the judicial imposition of such a sentence. 97 Wn.App 307, 311-12, 983 P.2d 712 (1999).[6] Recuenco, did not alter this construction of the statute, it merely found it violated the Sixth Amendment.

[6] Because the procedure they created violated the Sixth and Fourteenth Amendments these cases were specifically overturned by Recuenco. Recuenco, 154 Wn.2d 162-63.

Further, the plain language of RCW 9.94A.602 undercuts the conclusion that it applies to firearm enhancements. RCW 9.94A.602 provides:

> In a criminal case wherein there has been a special allegation and evidence establishing that the accused . . . was armed with a deadly weapon at the time of the commission of the crime, . . . the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant . . . was armed with a deadly weapon at the time of the commission of the crime.

Where a term is unambiguous, its meaning must be taken from its plain language. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (citing Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991)). The only special verdict form contemplated by RCW 9.94A.602 is for a deadly weapon enhancement. This is readily explained by the fact that RCW 9.94A.602 was enacted well before the 1995 enactment of the firearm enhancement, and has not been amended to the incorporate the newer enactment. As there was no firearm enhancement at the time of its enactment, the statute plainly did not contemplate any special verdict form other than for a deadly weapon. Indeed, as illustrated by Meggyesy and Rai, the pre-

Blakely construction of this statute in no way contemplated submission of a firearm enhancement to a the jury.

As there is no procedure by which a jury could have returned a constitutionally sufficient verdict supporting a firearm enhancement in Mr. Recuenco's case this court cannot apply harmless-error analysis to the error. It seems commonsensical that harmless-error analysis is not a tool to permit an appellate court to do that which the trial court could not. Because this Court has previously concluded there is no procedure by which a jury could consider the firearm enhancement on remand, the error in this case cannot be harmless.

b. If a statutory procedure exists to submit the firearm question to jury, the failure to comply with that procedure precludes harmless error. Assuming for argument, that cases such as Nguyen correctly found that RCW 9.94A.602 provides statutory authority to submit the firearm question to a jury, the State must agree that statute was not complied with here, as a firearm special verdict form was not submitted to the jury. Thus, aside from the constitutional violation which occurred, a separate statutory violation would exist.

This Court has routinely held that where a sentencing court fails to comply with the procedures of the SRA, and in the absence of an express waiver by the defendant, the remedy is either to remand for resentencing, or where a proper objection was raised in the trial court a reduction of the sentence. State v. Ford, 137 Wn.2 472, 973 P.2d 452 (1999).

In those instances in which courts have applied something akin to harmless-error analysis of sentencing errors, they have simply concluded the resulting sentence did not or would not change as a matter of law, and did not reweigh the evidence or otherwise assess the facts supporting sentence imposed. See State v. Argo, 81 Wn.App. 552, 569, 915 P.2d 1103 (1996) (concluding remand for resentencing was unnecessary where even if correct appellant's challenge to offender score calculation would only result in reduction from 16 points to 13) It is one thing for a reviewing court to conclude that an error reducing an offender score from 16 to 13 points was "harmless" because as a matter of law the sentence does not change, but it is another for a court to say that despite some procedural error in the consideration of evidence the factfinder would have reached the same factual determination. In the former, the reviewing court is not assessing

the evidence to determine if the sentencing court would have or even could have reached the same decision, i.e., an offender score of 16. Instead by saying the answer to the question of whether the score was correctly calculated is irrelevant, such a court is avoiding harmless-error analysis in the traditional sense all together. But in the latter, a reviewing court is reweighing the factual rather than legal underpinnings of the sentence. This scenario does not find support in Washington law.

Instead, where sentencing errors have turned on factual errors or errors in the procedure by which the sentencing court considered the proof remand has always been required. State v. Beals, 100 Wn.App. 189, 997 P.2d 941, review denied, 141 Wn.2d 1006 (2000), provides an excellent example of this. In Beals the appellant challenged the trial court's determination of the comparability and of an out-of state offense and its reliance on that offense as a prior "most serious offense." Id. at 195. The state had provided and the trial court had considered the facts of the prior offense, but the state did not provide and the sentencing court failed to examine the actual language of the foreign statute. Id. The Court of Appeals concluded the failure to first consider the statutory language was error which required reversal saying:

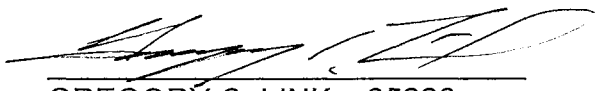
> While this court could locate the North Carolina statute then in effect and compare the elements of Beals' conviction with a potentially comparable Washington offense, we decline to do so. The proper forum for classification of out-of-state convictions is at the sentencing hearing, where the State can present necessary documentary evidence, the defendant can refute the State's evidence and arguments, and the court can then engage in the required comparison on the record to determine if the State met its burden of proof.

Id. at 196. If the State wishes to argue RCW 9.94A.602 provides authority to submit the firearm question to a jury and thus permits this Court to engage in harmless-error analysis of the constitutional violation, the separate violation of that statute demands remand to the trial court.

D. CONCLUSION

As set forth above, this Court should dismiss Mr. Recuenco's case as moot. Alternatively, this Court should determine that the error cannot be harmless under Washington law.

Respectfully submitted this 8th day of December, 2006.



GREGORY C. LINK – 25228
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	NO. 74964-7
	)	
v.	)	
	)	
ARTURO RECUENCO,	)	
	)	
PETITIONER.	)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 8TH DAY OF DECEMBER 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S SUPPLEMENTAL BRIEF ON REMAND** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

[X] KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104

[X] ARTURI RECUENCO
3502 NE 123RD ST.
SEATTLE, WA 98125

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF DECEMBER, 2006.

X_____