

NO. 75800-0

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RONALD HALL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bruce W. Cohoe

No. 96-1-00042-8

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION.

1. Has Petitioner demonstrated he was prejudiced when the Washington v. Blakely error of which he complains, was harmless?

B. FACTUAL AND PROCEDURAL HISTORY.

The factual and procedural histories of petitioner's case are detailed in the State's original response to the petition, filed September 10, 2004. This Court granted the petition in August 2005. The Supreme Court of the United States vacated that judgment in June of this year. In doing so the Supreme Court of the United States remanded this case to this Court in light of Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed. 2d 466; __ U.S. __ (2006).

C. ARGUMENT.

1. THE PETITION MUST BE DISMISSED
BECAUSE PETITIONER CANNOT SHOW
ACTUAL PREJUDICE STEMMING FROM
ERROR OF CONSTITUTIONAL MAGNITUDE.

Personal restraint procedure has its origins in the State's habeas corpus remedy, guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A personal restraint petition, like a petition for a writ of habeas corpus, is not a

substitute for an appeal. In re Hagler, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. These are significant costs and they require that collateral relief be limited in state as well as federal courts. Id.

In order to prevail in a personal restraint petition, a petitioner must meet an especially high standard. A petitioner asserting a constitutional violation must show actual and substantial prejudice. In re Haverty, 101 Wn.2d 498, 681 P.2d 835 (1984). The rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. In re Mercer, 108 Wn.2d 714, 718-721, 741 P.2d 559 (1987); Hagler, 97 Wn.2d at 825. Mere assertions are insufficient in a collateral action to demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of the judgment and sentence and not against it. Hagler, 97 Wn.2d at 825-26.

“It is well-settled a personal restraint petition is a civil matter. Because a PRP involves collateral review, we held in In re Personal Restraint Petition of Hews, the petitioner has the burden of establishing the claimed error more likely than not caused actual prejudice”. In re

Pers. Restraint of Gentry, 137 Wn.2d 378, 409, 972 P.2d 1250 (1999)

(citations omitted).

[I]n a PRP, the burden shifts to the defendant to show prejudice:

On direct appeal, the burden is on the State to establish beyond reasonable doubt that any error of constitutional dimensions is harmless. On collateral review, we shift the burden to the petitioner to establish that the error was not harmless; in other words, to establish that the error was prejudicial. Whereas the State's burden on direct appeal is beyond reasonable doubt, the petitioner's burden on collateral review should be beyond the balance of probabilities. Thus, in order to prevail in a collateral attack, a petitioner must show that more likely than not he was prejudiced by the error.

[In re Personal Restraint of] Hagler, 97 Wn.2d [818] at 825-26 [650 P.2d 1103 (1982)] (citation omitted). Washington courts have consistently applied this standard even where, as here, a subsequent change in the law has held a particular jury instruction to be unconstitutional and the error impacts the trial's truth-finding function. In re Pers. Restraint of Haverty, 101 Wn.2d 498, 503-04, 681 P.2d 835 (1984). We have also applied this standard in previous PRPs based on the holdings of Cronin and Roberts.

To show prejudice, however, a defendant does not necessarily have to prove that he would have been acquitted but for the error. Rather, as courts have noted in other contexts, a defendant is prejudiced by a trial error if there is a "reasonable probability" that the error affected the trial's outcome and the error undermines the court's confidence in the trial's fairness. Thus, although the barrier to relief is greater than on direct appeal, we will still

reverse if we have a “grave doubt as to the harmlessness of an error.”

In re Pers. Restraint of Sims, 118 Wn. App. 471, 476-477, 73 P.3d 398

(2003) (citations omitted).

On direct appeal, the burden is on the State to establish beyond reasonable doubt that any error of constitutional dimensions is harmless. On collateral review, we shift the burden to the petitioner to establish that the error was not harmless; in other words, to establish that the error was prejudicial. Whereas the State’s burden on direct appeal is beyond reasonable doubt, the petitioner’s burden on collateral review should be beyond the balance of probabilities. Thus, in order to prevail in a collateral attack, a petitioner must show that more likely than not he was prejudiced by the error.

In re Hagler, 97 Wn.2d 818, 825-826, 650 P.2d 1103 (1982) (citations omitted).

The present petition falls well short of this demanding standard. Petitioner has demonstrated that an error occurred, but has failed to establish actual prejudice arising from that error. Petitioner failed to even assert the jury would have rejected the aggravating factors relied on by the trial court when it imposed the exceptional sentence. This alone calls for this Court to dismiss this petition without further analysis.

Even if petitioner had so asserted, the facts of this case make it almost embarrassing to allege that a jury would not have found that the petitioner “manifested deliberate cruelty to his victim,” or “inflicted multiple injuries on his victim.” This is particularly clear given that the

petitioner must prove by a preponderance of the evidence that such would have occurred, or that there is a “reasonable probability” that the jury would not have reached the same conclusions as the trial court with respect to the aggravating factors. Petitioner cannot meet this burden. As such, the petition must be dismissed.

2. UNDER WASHINGTON V. RECUENCO THIS COURT SHOULD FIND THAT ANY SENTENCING ERROR IS HARMLESS BEYOND A REASONABLE DOUBT WHERE THERE IS NO DOUBT THE PETITIONER MANIFESTED DELIBERATE CRUELTY TOWARDS THE VICTIM AND WHERE THE EVIDENCE IS UNCONTROVERTED THAT HE INFLECTED MULTIPLE INJURIES ON THE VICTIM.

The trial court based its exceptional sentence on two aggravating factors: deliberate cruelty and multiple injuries. The court noted in its findings that either of these factors alone supported the exceptional sentence. Both of these findings are supported by the record. The question presented to this Court is whether petitioner has demonstrated that he was prejudiced by this error, or, alternatively, whether it is harmless under the United States Supreme Court’s recent ruling in Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed. 2d 466; ___ U.S. ___

(2006).¹ Because this is a personal restraint petition, and not a direct appeal, it is petitioner's burden to demonstrate "actual prejudice." Supra.

An application of the constitutional harmless error standard in this case shows beyond a reasonable doubt that the error is harmless, and certainly demonstrates that petitioner cannot meet his burden.

a. The error in this case is harmless under Recuenco.

Blakely² errors are subject to harmless error analysis. Recuenco, supra at 2553.³ There is no distinction between a failure to submit a sentencing factor to a jury and omitting an element in a jury instruction. Recuenco, 126 S. Ct. at 2552 (citing Apprendi v. New Jersey, 530 U.S. 466, 483-84, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). A harmless error approach is permitted because the error is not structural and does "not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Recuenco, 126 S.

¹ The State briefed much of the harmless error analysis in its original response to petitioner's petition.

² Washington v. Blakely, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)

³ In State v. Recuenco, this court denied the State's request to find harmless error, where a three year firearm enhancement was imposed without a jury factual finding in violation of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and its progeny. 154 Wn.2d 156, 158, 110 P.3d 188 (2005). This court's ruling was based on its decision in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), issued the same day as Recuenco, where the court held that Blakely errors can never be deemed harmless because the error is a "structural error." 154 Wn.2d at 148. The United States Supreme Court granted certiorari to determine whether Apprendi/Blakely errors can ever be subject to harmless error analysis. Thus at issue before the Supreme Court in Recuenco was the court's underlying reasoning in Hughes.

Ct. at 2551 (quoting Neder v. United States, 527 U.S.1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1993)).

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 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967))). When applied to an element or factor not presented to the jury the error is harmless if that element is supported by uncontroverted evidence. Id. (Citing Neder, 527 U.S. at 18).

On remand in Neder the federal court concluded that the error in failing to submit the element of materiality to the jury was harmless. United States v. Neder, 197 F.3d 1122 (11th Cir. Fla 1998) cert. denied, Neder v. United States, 530 U.S. 1261, 120 S. Ct. 2717, 147 L. Ed. 2d 982 (2000). The court also rejected the defendant’s argument that the government can never show harmless error unless it shows that the defendant did not contest the omitted element. 197 F.3d at 1129. The court reasoned that this argument was contrary to the harmless error standard adopted in Neder. Id.

Here, the trial court based its exceptional sentence on two aggravating factors: deliberate cruelty and multiple injuries. The court

noted in its findings that either of these factors alone supported the exceptional sentence. Both of these findings are supported by uncontroverted evidence in the record.

Petitioner never asserted that he did not cause the injuries the victim suffered. Petitioner's defense, from opening statement, through cross-examination of the victim, to closing argument, was that he never had the intent to inflict great bodily harm, and that he did not intend to assault the victim. RP 12-14, 235-46, 300-14. The jury rejected his defense.

For a court, or a jury after Blakely, to find a defendant acted with deliberate cruelty, it must find that "the cruelty was 'of a kind not usually associated with the commission of the offense in question.'" State v. Payne, 45 Wn. App. 528, 531, 726 P.2d 997 (1986) (quoting State v. Schantzen, 308 N.W.2d 484, 487 (Minn. 1981)). There can be no doubt that the extensive beating inflicted by petitioner was not of a kind usually associated with the commission of an assault in the first degree. The beating was nothing short of horrific. In its unpublished opinion, the Court of Appeals summarized the injuries inflicted as follows:

On January 1, 1996, Robert Aaron and April Duckett spent the evening at Ronald Hall's and Kim Krapf's trailer home. After asking Duckett to leave, Krapf grew angry at Hall and threw her boots, an ashtray, and several other objects at him.

Hall responded by hitting and kicking Krapf. After throwing her to the floor, he kicked Krapf repeatedly in the

face, ribs, back and buttocks. He told Krapf to stay still so he could kick her. Hall also told Aaron, who was watching, to get a shovel so he could bury Krapf. Aaron left and did not return.

Hall then ordered Krapf to take a shower in the garage bathroom. Krapf couldn't see because her eyes were swollen shut, so she had to sit to go down the trailer steps. When she returned to the trailer, Hall refused to let Krapf sleep in the bedroom with him so she went out to the couch.

Duckett returned to the trailer and saw Krapf's condition. She went into Hall's bedroom and, after 15 or 20 minutes, came out to take Krapf to the hospital. Krapf's condition worsened, so Duckett called 911 dispatch from a neighbor's house and drove to a nearby gas station to meet the ambulance.

The ambulance took Krapf to an emergency room where an examination revealed that Krapf's upper jaw was broken in three places and that both eye sockets were fractured. Krapf also had a punctured lung, a broken nose, a broken cheek bone, and broken ribs. Further injuries included bruising and lacerations along her neck and down her back to the base of her spine.

Emergency room personnel surgically reinflated Krapf's lung, but her facial injuries required extensive reconstructive surgery at Harborview Hospital. Doctors repositioned her eyes because her right eye had sunken into her face, corrected her facial fractures, and removed two of her teeth. The doctors also inserted permanent plates and screws underneath Krapf's right eye, along her cheek, at the corner of her eye, and in her upper jaw. Krapf has permanent scars on her scalp and face, and her eyes are permanently misaligned.

Soon after the assault, Krapf gave a statement to police in which she identified Hall as her assailant. In her

statement, she said that Hall beat her with a rifle, as well as his hands and feet, and that he threatened her and Aaron with a pistol.

State v. Hall, No. 20934-9-II consolidated with No. 22194-2-II.

Given the nature of the defense, and the jury's rejection of that defense, the State proved beyond a reasonable doubt that petitioner acted with cruelty that was of a kind not usually associated with the commission of assault in the first degree. Petitioner beat the victim extensively, far more than necessary to accomplish any goal he had other than to deliberately inflict greater and greater injury. The victim testified that while she was lying on the ground, and trying to protect her head from the repeated blows, petitioner ordered her to stop moving around while he hit her. RP 199-201, 210-11. The overall depravity of the assault demonstrates petitioner acted with deliberate cruelty as he beat Ms. Krapf to the point where she had a punctured lung, numerous facial fractures, broken ribs, broken teeth, and bruising from her tailbone to the top of her skull. Petitioner cannot demonstrate a "reasonable probability" that the jury would have reached a different conclusion than the court with respect to the deliberate cruelty aggravating factor.

Alternatively, it was harmless error for the court, rather than the jury, to find the existence of the aggravating factor that multiple injuries were inflicted upon the victim. Where the multiple injuries are the result

of multiple acts on the part of a defendant, an exceptional sentence is permissible.

The infliction of multiple injuries can support an exceptional sentence, but this factor has only been approved where the infliction of multiple injuries was caused by multiple acts. See, e.g., State v. Armstrong, 106 Wn.2d 547, 550, 723 P.2d 1111 (1986) (defendant threw boiling coffee on child, then plunged child's foot in coffee); State v. McClure, 64 Wn. App. 528, 531, 827 P.2d 290 (1992) (stating that "focus is on acts which distinguish the crime" in a case involving repeated blows to the head); State v. Warren, 63 Wn. App. 477, 478, 820 P.2d 65 (1991) (victim shot five times), review denied, 118 Wn.2d 1030, 828 P.2d 564 (1992).

State v. Cardenas, 129 Wn.2d 1, 7-8, 914 P.2d 57 (1996).

In the present case, it is uncontroverted that the multiple injuries occurred by different acts of petitioner. Petitioner repeatedly struck and kicked the victim. If the jury had been asked, pursuant to Blakely, whether petitioner inflicted multiple injuries by committing multiple acts, there is no question it would have answered the question in the affirmative. The jury would not have been asked to find whether this in and of itself warranted an exceptional sentence that would remain the province of the trial court at sentencing. The jury would only have been asked whether petitioner inflicted multiple injuries caused by multiple acts. There is no question this was in fact the case. There was never a claim, nor could one be made, that all of the injuries incurred were the result of one punch or one kick. A review of the doctors' testimony and

the photographs admitted at trial demonstrate there were numerous injuries inflicted by numerous blows. RP 73-94, 97-113.

The deliberate cruelty and multiple injuries aggravating factors are supported by uncontroverted evidence. Under and Brown, the trial court's error in not submitting these factors to the jury was harmless. Worth noting is that the trial court observed that petitioner's sentence would be the same even absent one of the two aggravating factors. So long as this Court concludes that one of the factors was proven beyond a reasonable doubt, this petition must be dismissed.

As noted above, the State need not even prove this much. The petitioner has the burden of proving by a preponderance of the evidence that a jury would not have so found, or that there is a "reasonable probability" that the error affected the outcome.

It is hard to imagine a case more clear than the one presented to this Court where the absence of a formal jury finding is immaterial given the strength of the State's case on these factors. This case presents the very reason harmless error analysis exists. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Neder, 527 U.S. at 18 (quoting R. Traynor, *The Riddle of Harmless Error* 50 (1970)).

A missing aggravating factor in a special interrogatory or verdict form is akin to omitting an element from an instruction and nothing prevents a finding of harmless error as the court concluded in Recuenco.

Put another way, we concluded that the error in Neder was subject to harmless-error analysis, even though the District Court there not only failed to submit the question of materiality to the jury, but also mistakenly concluded that the jury's verdict was a complete verdict of guilt on the charges and imposed sentence accordingly. Thus, in order to find for respondent, we would have to conclude that harmless-error analysis would apply if Washington had a crime labeled "assault in the second degree while armed with a firearm," and the trial court erroneously instructed the jury that it was not required to find a deadly weapon or a firearm to convict, while harmless error does not apply in the present case. This result defies logic.

Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error.

Washington v. Recuenco, 126 S. Ct. at 2553 (footnote omitted) (emphasis added).

Because the facts in this case are uncontroverted the petition must be dismissed.

- b. Washington law follows federal harmless error analysis.

Petitioner may urge this Court to find that under Washington law no harmless error analysis should exist. At this stage of supplemental briefing, this Court should bar a state constitutional claim as ruled previously by this Court in State v. Hudson, 124 Wn.2d 107, 120, 874

P.2d 160 (1994). Even if this Court were to consider a separate state grounds argument, an examination of Washington law demonstrates that this Court has always adopted a harmless error standard consistent with the federal standard.

Because Blakely error involves a federal constitutional error, federal harmless error analysis should apply. See Chapman v. California, 386 U.S. 18, 21, 97 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (holding federal harmless error applies when the suffered error was a denial of federal constitutional rights as opposed to state procedure). In Chapman, the court noted that California had a separate statutory provision for harmless error and an “overwhelming evidence” test but the United States Supreme Court preferred the federal approach of harmless beyond a reasonable doubt. 386 U.S. at 23-24.

Washington law does not call for a different harmless error approach than that announced in Neder⁴ and Recuenco, *supra*. Washington adopted Neder in State v. Brown, *supra*. At issue in Brown was whether erroneous accomplice liability instructions were subject to harmless error analysis. 147 Wn.2d at 332. The court concluded “[w]e

⁴ In Neder, the jury was presented with evidence of materiality, but they were never given an opportunity to reach a decision because the element was omitted from the jury instructions. The court concluded that when applying harmless error analysis where the error is a missing or misstated element, the court must consider whether the element is supported by uncontroverted evidence. Neder, 527 U.S. at 18.

find no compelling reason why this Court should not follow the United States Supreme Court's holding in Neder.” 147 Wn.2d at 340.

Nor did this Court's decision announced in Hughes mark a departure from relying on federal harmless error analysis. Instead, the Hughes opinion rested entirely on federal law, citing Neder, supra, Sullivan v. Louisiana, 508 U.S. 275, 278-79, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) and United States v. Cotton, 535 U.S. 625, 631, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002). Hughes at 148.

Petitioner also cannot present this Court with a separate State constitutional provision for harmless error, and without this, there is no Gunwall⁵ argument to be made. Historically, Washington has always engaged in an harmless error analysis in a variety of contexts, including errors involving jury determinations. See RCW 4.36.240 (harmless error statute dating back to territorial days); State v. Conahan, 10 Wash. 268, 38 P. 996 (1894) (harmless error found where an erroneous jury instruction placed the burden on the defendant to prove he acted in self-defense); State v. Courtemarch, 11 Wash. 446, 39 P. 955 (1895) (the failure to instruct on a lesser offense and an improper presumption instruction held

⁵ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) (in order for a court to find that the Washington Constitution affords greater protection than the federal constitution, the court must consider six factors).

A Gunwall issue always requires briefing by the party seeking a review on independent State grounds. See In re Gronquist, 138 Wn.2d 388, 406 n. 12, 978 P.2d 1083 (1999).

to be harmless); State v. Thompson, 38 Wn.2d 774, 779, 232 P.2d 87 (1951) (harmless error applied to an error in the jury instruction that omitted the element of force from the definition of burglary); State v. Martin, 73 Wn.2d 616, 623-27, 440 P.2d 429 (1968) (error in the jury instructions that relieved the State of proving knowledge was harmless); State v. Bailey, 114 Wn.2d 340, 349, 787 P.2d 1378 (1990) (even where constitutional error occurs in setting forth the elements of the crime the error is harmless beyond a reasonable doubt); State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) (error in defining the knowledge element of accomplice liability could be harmless).

Also, long before Blakely and Neder, *supra*, this Court applied harmless error analysis where the court failed to present the age of the victim in a special interrogatory but the age of the victim was uncontradicted at trial. State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961); *see also*, State v. Braithwaite, 34 Wn. App. 715, 725-26, 667 P.2d 82 (1983) (harmless error that jury was not instructed that it needed to find firearm enhancement beyond a reasonable doubt given uncontroverted evidence that firearm was used); *accord* State v. Cook, 31 Wn. App. 165, 175-76, 639 P.2d 863 (1982).

Moreover, when asked to adopt a more stringent state right to trial by jury in sentencing proceedings, this Court declined in State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003), finding that historically juries had nothing to do with sentencing in Washington.

It also makes sense that this Court would accept the Supreme Court of the United States's approach in this area, where it was that Court, and not this Court, that struck down a sentence imposed as violative of the Sixth Amendment in Blakely. The rationale for treating Blakely errors like Neder originates in Apprendi:

The only difference between this case and Neder is that in Neder, the prosecution failed to prove the element of materiality to the jury beyond a reasonable doubt, while here the prosecution failed to prove the sentence factor . . . to the jury beyond a reasonable doubt. Assigning this distinction constitutional significance cannot be reconciled with our recognition in Apprendi that elements and sentencing factors must be treated the same for Sixth Amendment purposes.

Recuenco, 126 S. Ct. at 2552. In other words, it would seem incongruous to hold that the state sentence *must* be reversed for federal error, even though the same type of sentence, if reversed by the federal court, would be subject to harmless error analysis. Nothing in this Court's cases, Washington statutes, or the Washington constitution compels such a strange result.

- c. The absence of a procedure to impanel a jury at the time of this case does not prohibit a finding of harmless error.

Petitioner may also argue that because there was no mechanism to present a jury with the aggravating factors, harmless error analysis is

impossible. But this was the very argument rejected by the United States Supreme Court in Recuenco, supra.

In Recuenco, the defendant argued that because this Court in Hughes refused to “create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure,” it is impossible to conduct a harmless error analysis. 126 S. Ct. at 2550, citing Hughes, 154 Wn. 2d at 151. The Supreme Court correctly noted that this Court was only expressing an opinion as to procedures on remand: “we are presented only with the question of the appropriate remedy on remand – we do not decide here whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial.” Recuenco, 126 S. Ct. at 2550 (citing Hughes, at 149). The Supreme Court concluded that Hughes does not “appear to foreclose the possibility that an error could be found harmless because the jury which convicted the defendant would have concluded, *if given the opportunity*, that a defendant was armed with a firearm.” 126 S. Ct. at 2550, emphasis added.

Instead, when there is no procedure for a jury to make a finding, it may only demonstrate that the Blakely violation “*in this particular case* was not harmless.” Recuenco, 126 S. Ct. at 2550, emphasis added (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)) (adopting the harmless beyond a reasonable doubt standard for analyzing constitutional errors). Thus, for example, if because there was

no procedure in place the State presented no evidence of the aggravating factor or the existence of the firearm, then in that *particular case* the court cannot conclude the error is harmless. However, if the evidence was presented, but the jury was just never given an opportunity to make a finding on this evidence, then the court may conclude the error was harmless beyond a reasonable doubt. This conclusion follows traditional harmless error logic which only rejects a finding of harmless error if the “appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court.” State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968).

This Court in Hughes was correct to leave open the opportunity for allowing juries to be given special verdict forms or interrogatories to determine aggravating factors at trial. Hughes, at 149. Indeed, Washington trial practice shows it is entirely possible for the court to present a special interrogatory or special verdict with or without statutory authority. See, RCW 10.95.060(4) (requiring a special verdict on the question of whether there are mitigating circumstances in a death penalty case); State v. Mills, 154 Wn.2d 1, 109 P3.3d 415 (2005) (allowing special verdicts for elements that elevates a base crime from a misdemeanor to a felony); State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002) (permitting the use of a special verdict form in a felony violation of a domestic violence no-contact order in order for the jury to find that the defendant had two or

more prior convictions); RCW 69.50.435 (1)(a) (allowing a sentence twice the maximum if committed in a school zone but the statute is silent as to who makes the finding, judge or jury); RCW 26.50.110(5) (elevating violation of a protection order to felony if offender has at least two previous convictions for violation of a protection order).

Most recently in State v. Davis, Division III adopted this approach, affirming a trial court's submission of special interrogatories on aggravating factors to a jury. 133 Wn. App. 415, 138 P.3d 132 (2006) (citing RCW 2.28.150,⁶ CrR 6.16(b)⁷). It was entirely possible for the court in this case to submit special interrogatories to the jury on aggravating factors. Given that possibility, this Court may conduct a traditional harmless error analysis and conclude that the error was harmless beyond a reasonable doubt.

d. Alternatively this Court should remand for a jury determination of aggravating factors.

In the alternative, this Court should allow the court to impanel a jury on remand to hear and consider evidence of aggravating factors and

⁶ RCW 2.28.150 provides, "if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws."

⁷ CrR 6.16(b) provides:
Special Findings. The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict.

reach a jury finding as argued in the State's original response to the petition.⁸

D. CONCLUSION.

This Court should dismiss this petition because petitioner cannot demonstrate "actual prejudice." This Court should also find under Washington v. Recuenco, that the Blakely error is harmless where it is uncontroverted that petitioner acted with deliberate cruelty and inflicted multiple injuries.

DATED: NOVEMBER 15, 2006

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⁸ This issue is currently before the court in the consolidated matters of State v. Pillatos, and State v. Butters, S. Ct. No. 75984-7 and 75989-8.

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/5/06
Date Signature