

NO. 78166-4

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN WOMAC, APPELLANT

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STATE OF WASHINGTON
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Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 02-1-05575-5

SUPPLEMENTAL BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO REVIEW 1

 1. Has defendant failed to show a violation of double jeopardy where the jury returned a verdict on multiple counts and where the judgment and sentence reflects only one conviction?..... 1

 2. Should this court find the Blakely sentencing error harmless beyond a reasonable doubt under Washington v. Recuenco where the uncontroverted evidence establishes that a father killed his premature four month old son and the court imposed an exceptional sentence based on extreme youth, particular vulnerability of the victim, and abuse of a position of trust? 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 2

 1. THIS COURT SHOULD REVERSE THE COURT OF APPEALS FINDING THAT DOUBLE JEOPARDY IS IMPLICATED WHERE A COURT ALLOWS A JURY VERDICT TO STAND ON TWO COUNTS OF MURDER BASED ON ONE ACT BUT ENTERS A JUDGMENT AND SENTENCE ON ONE COUNT. 2

 2. UNDER WASHINGTON V. RECUENCO THIS COURT SHOULD FIND THAT ANY SENTENCING ERROR IS HARMLESS BEYOND A REASONABLE DOUBT WHERE THERE IS UNCONTROVERTED EVIDENCE THAT THE BIOLOGICAL FATHER KILLED HIS PREMATURE FOUR MONTH OLD SON. 8

D. CONCLUSION..... 20

Table of Authorities

Federal Cases

| | |
|--|-----------------------------|
| <u>Apprendi v. New Jersey</u> , 530 U.S. 466, 483-84, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... | 9, 16 |
| <u>Ball v United States</u> , 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)..... | 6 |
| <u>Blakely v. Washington</u> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... | 1, 8, 9, 13, 15, 16, 17, 20 |
| <u>Chapman v. California</u> , 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)..... | 9-10, 13, 17 |
| <u>Neder v. United States</u> , 527 U.S.1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1993)..... | 9, 10, 11, 13, 15, 16 |
| <u>Sullivan v. Louisiana</u> , 508 U.S. 275, 278-79, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)..... | 14 |
| <u>United States v. Cotton</u> , 535 U.S. 625, 631, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)..... | 14 |
| <u>United States v. Neder</u> , 197 F.3d 1122 (11 th Cir. Fla 1998) <u>cert. denied</u> , <u>Neder v. United States</u> , 530 U.S. 1261, 120 S. Ct. 2717, 147 L. Ed. 2d 982 (2000)..... | 10 |
| <u>Washington v. Recuenco</u> , 126 S.Ct.2546; 165 L.Ed.2d 466; - U.S. – (2006) | 1, 8, 9, 12, 13, 16, 17, 20 |

State Cases

| | |
|--|-----------|
| <u>In re Address</u> , 147 Wn.2d 602, 56 P.3d 981 (2002) | 4, 5 |
| <u>In re Gronquist</u> , 138 Wn.2d 388, 406 n. 12, 978 P.2d 1083 (1999) | 14 |
| <u>State v. Bailey</u> , 114 Wn.2d 340, 349, 787 P.2d 1378 (1990) | 15 |
| <u>State v. Braithwaite</u> , 34 Wn. App. 715, 725-26, 667 P.2d 82 (1983)..... | 15 |
| <u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002)..... | 9, 13, 15 |

| | |
|---|-----------------------|
| <u>State v. Butters</u> , S. Ct. No. 75989-8..... | 19 |
| <u>State v. Calle</u> , 125 Wn.2d 769, 776, 888 P.2d 155 (1995) | 4, 5 |
| <u>State v. Conahan</u> , 10 Wash. 268, 38 P. 996 (1894) | 14 |
| <u>State v. Cook</u> , 31 Wn. App. 165, 175-76, 639 P.2d 863 (1982)..... | 15 |
| <u>State v. Courtemarch</u> , 11 Wash. 446, 39 P. 955 (1895)..... | 14 |
| <u>State v. Davis</u> , 133 Wn. App. 415, 138 P.3d 132 (2006)..... | 19 |
| <u>State v. Freeman</u> , 153 Wn.2d 765, 771, 108 P.3d 753 (2005)..... | 3 |
| <u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986) | 14 |
| <u>State v. Hudson</u> , 124 Wn.2d 107, 120, 874 P.2d 160 (1994) | 12 |
| <u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005)..... | 9, 13, 14, 16, 17, 18 |
| <u>State v. Johnson</u> , 113 Wn. App. 482, 54 P.3d 155 (2002), <u>review denied</u> , 149 Wn.2d 1016, 69 P.3d 874 (2003)..... | 4, 6, 7 |
| <u>State v. Martin</u> , 73 Wn.2d 616, 623-27, 440 P.2d 429 (1968)..... | 14, 18 |
| <u>State v. Michielli</u> , 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997)..... | 3 |
| <u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005) | 18 |
| <u>State v. Mode</u> , 57 Wn.2d 829, 360 P.2d 159 (1961)..... | 15 |
| <u>State v. Oster</u> , 147 Wn.2d 141, 52 P.3d 26 (2002) | 18 |
| <u>State v. Pillatos</u> , S. Ct. No. 75984-7 | 19 |
| <u>State v. Recuenco</u> , 154 Wn.2d 156, 158, 110 P.3d 188 (2005) | 9 |
| <u>State v. Schwab</u> , - Wn.2d – 141 P.3d 658 (2006)..... | 4, 5, 7 |
| <u>State v. Schwab</u> , 98 Wn. App. 179, 180, 988 P.2d 1045 (1999) | 5, 6 |
| <u>State v. Smith</u> , 150 Wn.2d 135, 156, 75 P.3d 934 (2003) | 15 |

| | |
|---|---------|
| <u>State v. Thompson</u> , 38 Wn.2d 774, 779, 232 P.2d 87 (1951)..... | 14 |
| <u>State v. Ward</u> , 125 Wn. App. 138, 104 P.3d 61 (2005) | 4, 6, 7 |
| <u>State v. Womac</u> , 130 Wn. App. 450, 459, - P.3d - (2006)..... | 7 |
| <u>Winchester v. Stein</u> , 135 Wn.2d 835, 845, 959 P.2d 1077 (1998) | 3 |

Constitutional Provisions

| | |
|--|----|
| Article I, section 9, Washington State Constitution..... | 3 |
| Sixth Amendment, United States Constitution | 16 |
| Fifth Amendment, United States Constitution..... | 3 |

Statutes

| | |
|----------------------------|----|
| RCW 10.95.060(4)..... | 18 |
| RCW 2.28.150 | 19 |
| RCW 26.50.110(5)..... | 18 |
| RCW 4.36.240 | 14 |
| RCW 69.50.435 (1)(a) | 18 |

Rules and Regulations

| | |
|-------------------|----|
| CrR 6.16(b) | 19 |
|-------------------|----|

Other Authorities

| | |
|---|----|
| R. Traynor, The Riddle of Harmless Error 50 (1970)..... | 11 |
|---|----|

A. ISSUES PERTAINING TO REVIEW.

1. Has defendant failed to show a violation of double jeopardy where the jury returned a verdict on multiple counts and where the judgment and sentence reflects only one conviction?
2. Should this court find the Blakely sentencing error harmless beyond a reasonable doubt under Washington v. Recuenco where the uncontroverted evidence establishes that a father killed his premature four month old son and the court imposed an exceptional sentence based on extreme youth, particular vulnerability of the victim, and abuse of a position of trust?

B. STATEMENT OF THE CASE.

A detailed statement of the case may be found in the opening briefs filed below. The following information is relevant for the issues presented on review.

The defendant was charged with one count of homicide by abuse, one count of murder in the second degree (felony murder with the predicate felony of criminal mistreatment in the first or second degree) and one count of assault in the first degree. CP 5-11.

The jury returned a guilty verdict on all counts but the court entered a judgment and sentence only on the homicide by abuse conviction. CP 14, 15, 46.

At sentencing the State sought an exceptional sentence alleging the aggravating factors of (1) extreme youth and vulnerability of the victim, and (2) abuse of a position of trust. CP 73-81. The court agreed with the State and imposed an exceptional sentence of 480 months, concluding both of the aggravating factors cited by the State were applicable. CP 39-43.

C. ARGUMENT.

1. THIS COURT SHOULD REVERSE THE COURT OF APPEALS FINDING THAT DOUBLE JEOPARDY IS IMPLICATED WHERE A COURT ALLOWS A JURY VERDICT TO STAND ON TWO COUNTS OF MURDER BASED ON ONE ACT BUT ENTERS A JUDGMENT AND SENTENCE ON ONE COUNT.

The multiple punishment prong of the double jeopardy clause is not implicated where a jury returns a verdict on two murder charges and an assault for one homicidal act, but the judgment and sentence reflects only one conviction and one punishment. To require dismissal of the jury's verdict under these circumstances, or even "conditional dismissal," as the Court of Appeals found is contrary to double jeopardy principles. It is only when a judgment and sentence is entered on two murder charges

for one act that a *vacation* of the judgment, as opposed to a *dismissal* of a verdict, is required. The double jeopardy clause also protects against multiple punishments for the same offense.

The double jeopardy clause of the federal constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. And article I, section 9 of the Washington Constitution states: "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." "[T]he double jeopardy clause in constitution article I, section 9 is given the same interpretation the Supreme Court gives to the double jeopardy clause in the Fifth Amendment." Winchester v. Stein, 135 Wn.2d 835, 845, 959 P.2d 1077 (1998).

A double jeopardy claim is reviewed de novo. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). "The State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding." Id. (citing State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997)). "Court may not, however, *enter* multiple convictions for the same offense without offending double jeopardy." Id. (*citations omitted*) emphasis added.

The approach in Washington is consistent with the trial court's ruling in this case: let the jury verdict stand but not enter judgment and sentence on the conviction. It is only when the court enters a judgment

and sentence that double jeopardy issues arise and vacation is required. See State v. Ward, 125 Wn. App. 138, 104 P.3d 61 (2005); State v. Schwab, - Wn.2d – 141 P.3d 658 (2006); State v. Johnson, 113 Wn. App. 482, 54 P.3d 155 (2002), review denied, 149 Wn.2d 1016, 69 P.3d 874 (2003); State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

In Ward, the defendant was convicted of second degree felony murder and alternatively, first degree manslaughter as a lesser included offense. The trial court entered a judgment and sentence solely on the second degree felony murder conviction and denied the defendant's motion to vacate the first degree manslaughter conviction. The court also did not mention the jury's finding of guilt on the manslaughter conviction in the judgment and sentence. 125 Wn. App. 138. The defendant appealed his sentence on the second degree felony murder conviction, predicated on assault in the second degree pursuant to In re Address, 147 Wn.2d 602, 56 P.3d 981 (2002). 125 Wn. App. at 141. The court of appeals agreed that vacation of his felony murder conviction was proper but defendant further argued that the court had no authority to sentence him for first degree manslaughter by reviving the first degree manslaughter verdict. Id. The defendant further argued that the trial court originally violated double jeopardy by not "vacating" the manslaughter conviction and that "once vacated, the verdict is no longer available to the State now that the felony murder is vacated." Id. The court rejected this argument, finding:

. . . that Ward was not convicted and sentenced to both second degree felony murder and first degree manslaughter. Instead, the judge entered judgment and sentenced Ward only on the second degree felony murder charge; therefore there was no violation of double jeopardy. Because there was no violation of double jeopardy, the court was not required to vacate the manslaughter charge.

125 Wn. App. at 144.

In Schwab a defendant was both *convicted* and *sentenced* on second degree felony murder and first degree manslaughter. State v. Schwab, 98 Wn. App. 179, 180, 988 P.2d 1045 (1999). The defendant prevailed on appeal on double jeopardy grounds. The court of appeals ruled that the remedy was to affirm the sentence on second degree felony murder and vacate his conviction and sentence for first degree manslaughter. Id. at 190.

Years later, Schwab, returned before the court under Andress, supra. With his second degree felony murder conviction vacated, the court was now faced with whether the State could revive his previously vacated manslaughter conviction. 141 P.3d at 659. The court concluded that the double jeopardy doctrine does not preclude reinstatement of the manslaughter conviction because it was “vacated solely to prevent double punishment for the same crime, not because the jury’s verdict was somehow in error.” Id. at 663. The court reasoned that double jeopardy is not violated when a jury convicts on multiple charges, but rather only when a judgment and sentence is entered on more than one crime. When a

court vacates a conviction on double jeopardy grounds, the “validity of the *jury’s verdict* of guilty on the vacated charge remains unimpaired.” Id.

Finally in Johnson, *supra*, the defendant was tried and convicted of alternative means of murder: second degree felony murder and second degree intentional murder. 113 Wn. App. at 485. The court entered a judgment and sentence for only one crime but the defendant challenged his sentence on double jeopardy grounds. Id. In the judgment and sentence the court reflected all guilty verdicts in its findings, but found that the two counts constituted one conviction and reflected only one conviction in the judgment and sentence portion of the document. Id. at 488. In this circumstance, the court concluded that double jeopardy principles were not violated because the court entered only one conviction on the judgment and sentence. 113 Wn. App. at 159.

Under Schwab, Ward, and Johnson, the question for this court is under what authority is the defendant seeking to have a jury verdict dismissed. A jury verdict does not implicate double jeopardy. Defendant is unable to cite to this court any authority for “dismissal of charges.” Instead, every case brought to this court’s attention involves vacation of a judgment and sentence. See Opening Petition for Discretionary Review, (citing, State v. Schwab, *supra*, Ball v United States, 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985) (holding remedy for double jeopardy violation is to vacate one of the underlying convictions”).

The court of appeals opinion below conflicts with Schwab, Ward, and Johnson, supra and does not explain why double jeopardy principles are implicated in this case. The decision also lacks any analysis or citation to authority for the proposition that there are four possible alternatives in this situation: (1) immediately dismiss the lesser charge and verdict unconditionally, (2) immediately dismiss the lesser charge and verdict conditionally, (3) delay dismissal, (4) not to dismiss at all. State v. Womac, 130 Wn. App. 450, 459, - P.3d - (2006). It is also unclear whether the court of appeals decision rests on double jeopardy grounds at all. The court withheld applying this right to “conditional dismissal” to all defendants and instead limited it to those who raise it at trial:

Nothing herein requires the trial court to dismiss if the defendant does not so request. . . Our discussion here is limited to the facts before us, one of which is that Womac moved for immediate dismissal.

Womac, 130 Wn. App. 460, f.n. 30.

In sum, there is no support for the novel approach of the defendant and the court of appeals. A verdict standing alone does not raise double jeopardy concerns. This court should allow the jury’s verdict to stand. This conclusion avoids presenting the legal quandary of whether a jury’s verdict could be resurrected should the defendant’s homicide by abuse conviction be overturned on any grounds. This conclusion is also consistent with double jeopardy jurisprudence.

2. UNDER WASHINGTON V. RECUENCO THIS COURT SHOULD FIND THAT ANY SENTENCING ERROR IS HARMLESS BEYOND A REASONABLE DOUBT WHERE THERE IS UNCONTROVERTED EVIDENCE THAT THE BIOLOGICAL FATHER KILLED HIS PREMATURE FOUR MONTH OLD SON.

In this case the court imposed an exceptional sentence based on aggravating factors (extreme youth/particular vulnerability of victim and abuse of trust) without a jury finding in violation of Blakely v.

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

The question presented by this court is whether this error 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). An

application of the constitutional harmless error standard in this case shows beyond a reasonable doubt that the error is harmless.

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

Blakely errors are subject to harmless error analysis. Recuenco, supra at 2553.¹ 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. 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.

¹ In State v. Recuenco, this court denied the State’s request to find harmless error, where a three year firearm enhancement was imposed without 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.

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). After a thorough examination of the record this court must be convinced beyond a reasonable doubt that the jury verdict would have been the same absent the error. Id.

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. This argument the court reasoned went against the harmless error standard adopted in Neder. Id.

Here, the trial court found that the aggravating factors were(1) extreme youth and vulnerability of the victim, and (2) abuse of position of trust, however no jury verdict was entered on these findings. CP 39-43. The judge's determination was based on the uncontroverted evidence that: (1) defendant was the father of infant Aiden whom he killed (RP 249-51), (2) Aiden was born two months premature and was four months old at the time of his death (RP 251-52, 516), (3) defendant was the sole adult taking care of Aiden at the time of his death (RP 206), (4) Aiden suffered

fractures to the left posterior aspect of his skull and a subdural hematoma with swelling on the left side of the brain (RP 197-98), (5) there was evidence of recent and separate prior subdural injury (RP 506-510), (6) the cause of death was the result of the head injuries (RP 514-518), (7) at the time of death, Aiden was unable to walk, crawl, roll over, or sit up on his own. (RP 266-267).

Based on the evidence that was presented at trial, *if the jury were given an opportunity*, they would have concluded beyond a reasonable doubt that the following aggravating facts existed (1) extreme youth and vulnerability of the victim, and (2) abuse of position of trust. CP 39-43. 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. What is more vulnerable than a newborn infant, born prematurely into this world; and, if a parent does not define the ultimate position of trust in a child's life, then whom? There is no place for second guessing where the jury would have placed their verdict if properly instructed in this case. The age of the child and the position of the father are immutable characteristics that by nature are irrefutable. "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. As stated in Recuenco, it makes little sense to adopt an approach that would allow for a finding of harmless error in this case if the charge were “murder in the second degree to a particularly vulnerable victim,” and the court inadvertently omitted the particularly vulnerable element to the jury, but not where the factor is part of sentencing. 126 S. Ct. at 2553. Because the facts in this case are uncontroverted there is no need for reversal.

b. Washington law follows federal harmless error analysis.

The defense may urge this court to find that under Washington law no harmless error analysis should exist. Because this court ordered supplemental briefing in this case without a prior opportunity for briefing below, the State is put in the difficult position in this case of anticipating, rather than responding, an opposing position. 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 Neder² 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 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*,

² 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.

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.

The defense also cannot present this court with a separate State constitutional provision for harmless error, and without this, there is no Gunwall³ 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 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);

³ 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).

State v. Bailey, 114 Wn.2d 340, 349, 787 P.2d 1378 (1990) (even where constitutional error occurs in setting for 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 has applied harmless error analysis where the court failed to present the age of the victim in a special interrogatory where 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 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's approach in this area, where it was the U.S. Supreme 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.

Defendant 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 P.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 2.28.150,⁴ CrR 6.16(b)⁵). 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 reach a jury finding as argued in our briefing below.⁶ (Opening Brief of Respondent at 46-58).

⁴ 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."

⁵ 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.

⁶ 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.

D. CONCLUSION.

This court should reverse the court of appeals finding that conditional dismissal of a jury verdict is necessary in order to avoid a double jeopardy problem. This court should also find under Washington v. Recuenco, that the Blakely error is harmless where it is uncontroverted that the defendant was in a position of trust and killed a particularly vulnerable four month old infant.

DATED: OCTOBER 6, 2006.

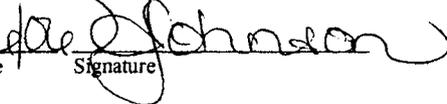
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Certificate of Service:

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.

10/06/06 
Date Signature

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