A Closer Look at *Washington v. Recuenco*

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Last year, the Supreme Court granted *certiorari* to decide whether violations of the Sixth Amendment's jury-trial right, as articulated in *Blakely v. Washington*,[1] are structural error, requiring automatic reversal.[2] In an earlier article I explain why *Recuenco* presents a substantial federal question for the Supreme Court's resolution.[3] That article also suggests that *Recuenco* presents a "perfect vehicle" for resolving the question presented because the Washington Supreme Court would be free to affirm Recuenco's enhanced sentence were the U.S. Supreme Court to conclude that *Blakely* errors do not require automatic reversal. This article elaborates on that critical assumption and highlights an issue that, although not addressed by the parties, may require the Supreme Court to fine-tune its harmless-error jurisprudence to accommodate *Blakely*-type claims.

Arturo Recuenco pointed a loaded .380 automatic handgun at his wife. The responding officer recovered the weapon and removed the clip, discovering in the process that there was no bullet in the chamber. Recuenco did not deny handling the weapon but disputed that his wife saw him do so. The State of Washington charged Recuenco with second-degree assault with a deadly weapon, "to wit, a handgun," and a jury found him guilty, specifying on a special verdict form that Recuenco had committed the assault while armed with a "deadly weapon." Although the jury's "deadly weapon" finding qualified Recuenco for an additional one year's imprisonment, the sentencing judge (relying on pre-*Apprendi* procedure) enhanced Recuenco's sentence by an additional two years because he determined that the deadly weapon in question was a "firearm."

This judicial fact-finding at sentencing violated the Sixth Amendment as the Supreme Court interpreted it in *Blakely*. At first blush, it appears that the jury necessarily found that the "deadly weapon" in question was a "firearm." But a closer look reveals that the trial court had instructed the jury only that a "firearm" *could* qualify as a deadly weapon; it did not define the term "firearm" under Washington law, nor did it ask the jury to return a special verdict indicating that the deadly weapon in question was a "firearm."[4] That said, if an appellate court applying *Chapman v. California*[5] could conclude beyond a reasonable doubt that Recuenco would have received the same three-year enhancement even had the trial court complied with the Sixth Amendment, then *Recuenco* is, in fact, a perfect vehicle for addressing whether *Blakely* errors are structural.

But first things first: if the proper question is whether the same sentence enhancement would have been imposed had the trial court complied with the Sixth Amendment, then the Supreme Court will have to confront what role, if any, the substantive law defining the sentence-enhancing fact plays in the harmless-error analysis. *Recuenco* implicitly raises this issue because the *Blakely* error there (as in most cases) actually has two related components: the failure to include the term "firearm" on the verdict sheet, and the trial court's concomitant failure to instruct the jury on the meaning of that term under Washington law (i.e., "a weapon or a device from which a projectile may be fired by an explosive such as gunpowder"). As the Washington Court of Appeals explained in a post-*Recuenco* case, "verdicts incorporate the instructions on which they are grounded, and reflect the facts required to be found as a basis for decision."[6] Suppose Recuenco had pointed a BB gun at his wife. It makes little sense to analyze the failure to include the term "firearm" on the verdict sheet without any regard for Washington's statutory definition of that term, since it would allow an appellate court to find overwhelming and uncontroverted evidence that Recuenco possessed something that appeared to be a firearm when, in fact, he merely possessed a weapon that is not a "firearm" as a matter of Washington law.[7]

The Supreme Court has not squarely addressed this issue. But two cases have come quite close. In *Neder v. United States* the Court applied a *Chapman*-style harmless-error analysis to a trial court's erroneous failure to submit an essential element of an offense to a jury.[8] The offense in question was the federal crime of tax evasion, and decisional law had defined the omitted element—"materiality"—to mean information that would be important to a reasonable observer. Given the amount of income Neder had failed to report, and given that the "reasonable observer" was the Internal Revenue Service, the Court had no trouble concluding beyond a reasonable doubt that a jury properly instructed on the element of materiality still would have

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found Neder guilty (especially since he did not contest that issue at trial).

In *Mitchell v. Esparza* the indictment did not allege, and the jury instructions did not require a finding on, a fact essential to the imposition of the death penalty in Ohio: i.e., that Esparza was a "principal" in the murder.[9] Although those errors violated the Supreme Court's holding in *Ring v. Arizona*,[10] the Ohio Court of Appeals deemed them harmless beyond a reasonable doubt and affirmed Esparza's death sentence. On federal *habeas* review, both the district court and the Sixth Circuit concluded that the errors were automatically reversible. The Supreme Court, however, summarily reversed and chided the Sixth Circuit for failing to determine whether the Ohio court's analysis "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[11] Applying that standard of review, the Court noted that the proper question was whether "the Ohio Court of Appeals applied harmless-error review in an 'objectively unreasonable' manner." Answering that question negatively, the Supreme Court concluded that

> The Ohio Supreme Court has defined a "principal offender" as "the actual killer," and in this case, the jury was instructed on the elements of aggravated murder, "defined as purposely causing the death of another while committing Aggravated Robbery[.]" The trial judge further instructed the jury that it must determine "whether the State has proved beyond a reasonable doubt that the offense of Aggravated Murder was committed while the Defendant was committing Aggravated Robbery." In light of these instructions, the jury verdict would surely have been the same had it been instructed to find as well that the respondent was a "principal" in the offense. After all, he was the only defendant charged in the indictment. There was no evidence presented that anyone other than respondent was involved in the crime or present at the store.[12]

Thus, critical to the conclusion that the Ohio Court of Appeals had applied harmless-error review in an objectively reasonable manner was the Supreme Court's consideration of how Ohio defined the term "principal offender."

Recuenco presents the Supreme Court with its first opportunity to address the proper application of *Chapman* to *Blakely*-type errors on direct appeal from a state court criminal conviction. If the Sixth Amendment principles animating *Blakely* are to have real teeth, then the Court should use *Recuenco* to make explicit what is already implicit in *Neder* and *Esparza*: that appellate courts conducting harmless-error analysis of a trial court's failure to submit a sentence-enhancing fact for jury findings must apply *Chapman* with due regard for what the underlying substantive law actually required the jury to find.

Such a holding from the Supreme Court, while salutary, would be of no assistance to Arturo Recuenco (who, in any event, has already finished serving his illegally enhanced sentence). As set forth above, the evidence at trial showed that Recuenco pointed a loaded automatic handgun at his wife. The responding officer recovered the weapon and removed the clip, discovering in the process that there was no bullet in the chamber. Moreover, the weapon was admitted into evidence at trial and, presumably, published to the jury. The jury found beyond a reasonable doubt that Recuenco had used a deadly weapon, and the weapon the officer recovered (the only weapon involved in the offense) was indisputably a firearm under Washington law.

Under the strictest application of *Chapman*, the Sixth Amendment error in *Recuenco* was clearly harmless beyond a reasonable doubt. The Washington Supreme Court, however, felt compelled to afford *Recuenco* a remedy because it held that *Blakely* errors are structural. If the Supreme Court disagrees with that holding, it should use *Recuenco* to make clear that appellate courts must conduct harmless-error analysis under *Chapman* with due regard for what a jury, properly instructed under the applicable substantive law, would have found. Such a clarification will prevent lower courts from honoring *Blakely*'s Sixth Amendment principles only in their breach.

Notes

* The opinions expressed here are the author's, not the firm's or the Association's.

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1 542 U.S. 296 (2004).

2 *Washington v. Recuenco*, No. 05-83 (argued Apr. 17, 2006).

3 Steven G. Sanders, *Is* Recuenco *Sentencing Case a Big Fat Dud?*, N.J. LAWYER 7 (Apr. 24, 2006).

4 *Compare State v. Pharr*, 126 P.3d 66 (Wash. Ct. App. 2006) (distinguishing *Recuenco* and finding no *Blakely* error where the verdict form merely specified a "deadly weapon" but where the jury instructions explicitly required the jury to find that the "deadly weapon" constituted a "firearm").

5 386 U.S. 18 (1967).

6 *Pharr*, 123 P.3d at 69.

7 *See, e.g., State v. Taylor*, 982 P.2d 687, 689 (Wash. Ct. App. 1999) (noting that "[a] BB gun is not a firearm and thus is not a deadly weapon *per se*"); *cf. People v. Duncan*, 610 N.W.2d 551 (Mich. 2000) (noting that the jury's verdict on two murder counts did not "cure" the trial court's erroneous failure to instruct the jury on separate "felony-firearms" offenses arising out of the homicides).

8 126 U.S. 1 (1999).

9 540 U.S. 12 (2003) (*per curiam*).

10 536 U.S. 584 (2002).

11 28 U.S.C. § 2254(d)(1).

12 *Esparza*, 540 U.S. at 18 (citations and internal quotation marks omitted).