

IS WASHINGTON v. RECUENCO A BIG FAT DUD?

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I respect Jeffrey Fisher. After clerking for Associate Justice John Paul Stevens, he entered private practice and promptly argued and won two cases in 2004 that significantly altered the Supreme Court's Sixth Amendment jurisprudence. But in the latest case in which he appears as co-counsel for the respondent, Mr. Fisher and counsel of record Gregory Link, Esq. suggest that the U.S. Supreme Court should decline to resolve a question of immense importance to prosecutors and defense attorneys alike. I think their argument is fundamentally misguided, as I endeavor to explain below.

On October 17, 2005, the Supreme Court granted *certiorari* in *Washington v. Recuenco*, 126 S. Ct. 478 (2005). *Recuenco* presents the question whether a sentence enhanced in violation of the Sixth Amendment principle articulated in *Blakely v. Washington*, 542 U.S. 296 (2004), is amenable to harmless-error analysis under *Chapman v. California*, 386 U.S. 18 (1967), or, rather, constitutes "structural error" under *Sullivan v. Louisiana*, 508 U.S. 275 (1993). *Recuenco* seems to be a perfect vehicle for resolving that question, for the Washington Supreme Court there vacated a sentence enhanced in violation of *Blakely* even though (1) the evidence on the omitted sentence-enhancing fact (firearms possession) was overwhelming, and (2) the jury may have implicitly determined the firearms issue in finding that

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Recuenco had possessed a deadly weapon during his offense.

Essential to the Washington Supreme Court's judgment in *Recuenco* was its reliance on an earlier decision, *State v. Hughes*, 110 P.3d 192 (Wash. 2005). In *Hughes*, the court first held, as a matter of federal law, that *Blakely* errors are structural (*i.e.*, not amenable to harmless-error analysis). It then concluded, as a matter of state law, that it could not "constitutionalize" the enhancement statute by writing a jury-trial requirement into it. Accordingly, the court remedied the Sixth Amendment violations in both *Hughes* and *Recuenco* by vacating the illegal sentence enhancements and remanding for resentencing within the range authorized by the juries' verdicts.

Recuenco has seized on the remedial aspect of *Hughes* to claim that he would be entitled to the very remedy the Washington Supreme Court afforded him even were the Supreme Court to resolve the structural-error question in Washington's favor and hold that *Blakely* errors can be reviewed for harmless-ness. Recuenco's argument appears to proceed as follows:

1. relying on state-law severability principles, the *Hughes* Court refused to write a *Blakely*-compliant procedure into the enhancement statute;
2. Washington law, therefore, does not (and never did) contain a statutory or judge-made procedure for obtaining the sentence enhancement Recuenco received;
3. as a result, the trial court on remand could not convene a jury to secure the beyond-a-reasonable-doubt findings necessary to sustain the enhancement; and
4. thus, an appellate court cannot meaningfully ask the *Chapman* question (*i.e.*, whether the sentence would have been the same had

Recuenco received a *Blakely*-compliant procedure) because state law actually precludes Washington from affording Recuenco with the jury trial to which *Blakely* entitles him.

There are two basic flaws with this argument, one procedural and the other merits-based. First, it puts the proverbial (state-law) cart before the (federal) horse. Washington would have no need to impanel a jury on remand to secure the findings necessary to sustain Recuenco's enhanced sentence if (1) *Blakely* errors were amenable to *Chapman*-style harmless-error analysis, and (2) the record in *Recuenco* were sufficient to convince an appellate court beyond a reasonable doubt that a properly instructed jury would have found the omitted sentence-enhancing fact of firearms possession. The Washington Supreme Court never conducted the latter inquiry because it concluded that *federal* law precluded it from doing so: "Because we hold [as a matter of federal law] that harmless error analysis is inapplicable to these [*Blakely*] violations, we [invoke state law to] remand for sentencing within the standard range." *Hughes*, 110 P.3d at 211 (alterations added). This proves that the judgment in *Hughes* (and, thus, in *Recuenco*) depended on the answer to a federal-law question.

Second, to the extent Recuenco argues that an appellate court cannot engage in *Chapman*-style harmless-error analysis in these circumstances – *i.e.*, where state law prevents the trial court from affording defendant the jury trial he should have received – that argument, whatever its merits, surely presents a substantial federal question for the Supreme Court's resolution. Because the Supreme Court promulgated the constitutional harmless-error standard in *Chapman*, it should

have the final say on whether a state appellate court, applying *Chapman*, may ask whether the same sentence would have been imposed had the defendant received a jury trial not otherwise available under state law. Although Recuenco vociferously insists that the answer to that question is “no,” that does not mean that the Supreme Court ought to sidestep the issue it granted *certiorari* to decide.

In sum, the Washington Supreme Court might have affirmed Recuenco’s exceptional sentence under the harmless-error doctrine had it not been for *Hughes*’s holding that *Blakely* errors are structural. Further, the Washington Supreme Court’s refusal to afford the enhancement statute a saving construction simply raises a question about the proper application of *Chapman* in cases raising *Blakely*-type errors. This demonstrates that the Washington Supreme Court’s judgment rested on federal-law grounds, and it explains why (contrary to Recuenco’s principal argument) the Supreme Court should not hesitate to address whether *Blakely* errors are “structural defects” as a matter of federal constitutional law.