IN THE SUPREME COURT OF THE UNITED STATES

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WASHINGTON, :

Petitioner :

v. : No. 05-83

ARTURO R. RECUENCO. :

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Washington, D.C.

Monday, April 17, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

JAMES M. WHISMAN, ESQ., Senior Deputy Prosecuting Attorney, Seattle, Washington; on behalf of the Petitioner.

PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

GREGORY C. LINK, ESQ., Seattle, Washington; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Washington v. Recuenco.

Mr. Whisman.

ORAL ARGUMENT OF JAMES M. WHISMAN

ON BEHALF OF THE PETITIONER

MR. WHISMAN: Mr. Chief Justice, and may it please the Court:

When a judge, rather than a jury, decides a fact that increases the defendant's punishment above the applicable standard range, the Sixth Amendment's jury trial right is violated. This is true regardless of whether the fact is called an element or whether it is called a sentencing factor because elements and sentencing factors are functionally equivalent under the Sixth Amendment of the United States Constitution.

It follows that the same harmless error rule that applies to missing or misdescribed elements should also apply to missing or misdescribed sentencing enhancements.

In a series of Washington decisions, the Washington Supreme Court has held that harmless error analysis may never be conducted as to a missing or misdescribed sentencing enhancement simply because it

is called a sentencing enhancement. This rule of absolute prohibition is inconsistent with this Court's jurisprudence and should be corrected.

Before I go on, however, to explain the legal basis and the flaws in the legal reasoning of the Washington State Supreme Court, I would like to take a brief moment to address a few State law issues that have been raised by the Respondent's brief.

The first is the question of whether or not at all in Washington we can, at present, seek deadly weapon enhancements or, more specifically, firearm enhancements. It was alleged in the Respondent's brief that we cannot, and I'd just point out to the Court that there is no authority in Washington for that proposition. And so asking this Court to simply affirm the -- the firearm enhancement that was originally imposed in this case does not constitute imposing a sentence that would any way be inconsistent with Washington law.

JUSTICE KENNEDY: On -- on that point, I have -- I have one question. At page 3a of the petition appendix, the Washington Supreme Court's opinion is set forth, and in the course of that opinion, it says, to the contrary, when defense counsel argued the definition should have been submitted to the jury, the

prosecutor explicitly stated that the method under which the State is alleging and the jury found assault was committed was by the use of a deadly weapon. And then he goes on to say, in the crime charged in the enhancement, the State alleged there is no element of a firearm. The element is assault with a deadly weapon.

I don't -- this was at the sentencing proceeding, I take it?

MR. WHISMAN: I believe that's correct, Your Honor.

JUSTICE KENNEDY: Yes, because I couldn't find it in the sentencing proceeding.

MR. WHISMAN: In the -- in a subsequent or nearly subsequent breath, the prosecutor then asked for the enhancement, the 36-month enhancement, that applies for firearms. I think what you're seeing there is that the prosecutor was responding to the -- to defense counsel's use of the term element. And in -- in the year 2000, before Apprendi, before Blakely, we never would have used that term as applied to a sentencing enhancement. We just didn't think of it that way. Now, we have since changed our thinking, obviously, after Apprendi.

But I think if you -- on the -- on the overall point, if you look at defense counsel's

comments beginning with the comments pretrial, where he notes that I can see no relevance to -- to the admission of a different gun. Then he comments, Ms. Recuenco was threatened with a 380 automatic with a clip. Regarding the charge in particular, counsel at JA, page 30 says, the allegation and the basis on which this case was tried was under a theory of firearm. At JA 37, counsel said, the firearm is an element of this offense as it has been pleaded and argued to the jury and evidently, perhaps, obviously proven to the jury. So --

JUSTICE KENNEDY: It does sound as if he thinks there was -- the prosecutor thought there was no error. A deadly weapon is a deadly weapon, and then --

MR. WHISMAN: That's right. And -- and I think, Your Honor, that stems from the -- from the way the statutes are structured. Beginning many, many years ago, in Washington we had what we called a deadly weapon enhancement. And so there was no distinction made between any kind of weapon. In 1995, the law changed. There was a distinction made as to firearms. The -- the penalty was increased as to firearms. And so beginning that time, there was a material distinction depending on the weapon that was used. But I think that --

JUSTICE SCALIA: Was deadly weapon still an enhancement at that point, or was deadly weapon part of the definition of a new crime?

MR. WHISMAN: Deadly weapon was still called an enhancement, Your Honor, under the statute. And so the statute defined deadly weapon very generally, and then in the punishment section, the punishment provisions, which specifically were formerly under section 310 of the Sentencing Reform Act -- now it's been renumbered to be 533. Under that provision -- you have two provisions, one which provides the punishment for deadly -- for firearms, and under this -- for this case, that would be 3 years. And then as to the rest, it says if someone was armed with a deadly weapon other than a firearm, you have a lesser penalty.

So as I say, I think that for a long time we have treated -- in Washington, we've treated all of these things as deadly weapons, but recognized that if it was a firearm, the penalty was greater than if it were something other than a firearm.

JUSTICE GINSBURG: I thought the deadly weapon -- the definition of deadly weapon -- that that could include a revolver or a pistol. You -- you seem to be describing now deadly weapon. That's one thing, and that excludes guns. And then firearm, a discrete

category. But I thought that deadly weapon includes at least pistols and revolvers.

MR. WHISMAN: A firearm includes pistols and revolvers because a firearm is something -- anything from which a projectile is fired. So --

JUSTICE GINSBURG: But -- but didn't the deadly weapon -- definition of deadly weapon include firearms?

MR. WHISMAN: That's the way it was defined to the jury in this case. That's correct, Justice Ginsburg. It was -- it was -- the -- the jury instructions went to the jury to find deadly weapon as a firearm. And over and over, the court reiterated, especially in the instructions conference, that the -- there's no question but that the only weapon here is a firearm, and so they used the simplified version of the instructions.

JUSTICE SOUTER: Wasn't --

JUSTICE GINSBURG: But with a 1 -- 1-year enhancement or -- I thought that that could apply in a case where the deadly weapon was a gun.

MR. WHISMAN: No. Our -- our position, Your Honor, is that it cannot, that if -- you either have a firearm or you have no enhancement whatsoever. If -- the only way that a -- that a gun could be a -- it's -- it's because of the language, other than a firearm.

So, in other words, you have either a firearm and a 3-year enhancement, or you have, as I say, no -- no weapon enhancement at all. So, in other words --

JUSTICE KENNEDY: Well, would it be either proper or required by the Washington trial court to tell the jury, ladies and gentlemen of the jury, the charge is assault? There is also the possibility of a sentence enhancement. It's a 1-year enhancement if it's a deadly weapon. It's a 3-year enhancement if it's a firearm and a pistol is a firearm. Would the judge err if he did that? Or another way of putting the same question, would it be proper for the judge to leave out the 1-year deadly weapon instruction and just instruct you can -- you must determine whether it's an assault and you must determine whether there's a 3-year enhancement for the use of a firearm?

MR. WHISMAN: We believe that's exactly what the court did in this case, Your Honor, by -- by instructing the jury that deadly weapon is firearm. In Washington, we never tell the jury --

JUSTICE KENNEDY: No, no. My hypothetical is he says it's a 3-year enhancement if the deadly weapon is a firearm. That's -- what I'm asking is, in effect, under Washington law, is it error if the judge allows the definition of deadly weapon also to go to the jury

so it can find a lesser included offense.

MR. WHISMAN: Well, there -- there are two parts to the answer. Let me answer that one first.

There -- our position is there is no lesser included offense of a firearm that's still a deadly weapon. And if you look at State v. Olney, O-l-n-e-y, that was one of the cases reversed in the Recuenco case, you'll see that -- that they explain why that's the case. In other words, it's either a firearm or there's no enhancement whatsoever.

The -- the other part of the question I wanted to just clarify is that in Washington, we would not be telling the jury the length of time that -- that the defendant would face --

JUSTICE KENNEDY: Well, then you're saying the instruction here was proper.

MR. WHISMAN: I'm saying that the instructions that went to the jury, correct, were -- were proper.

What was improper in this case is that the special verdict form did not sufficiently or specifically enough preserve the jury's verdict so that, in other words, when the jury passed on this case and returned a verdict form that said deadly weapon, that did not expressly encompass the firearm. And so

-- and that was -- that was the -- the mistake that was made in this case. We should have submitted a verdict form to the jury that would -- that would let a jury expressly describe what the verdict was.

JUSTICE STEVENS: Could you -- could you clarify one thing for me? I just want to be sure I have it in mind correctly. Is it correct that the firearm has to be an operable firearm?

MR. WHISMAN: That portion of the Washington law, Your Honor, isn't -- isn't crystal clear, but what I can say is that that's not in this case because trial counsel at -- at trial in more than one occasion specifically said it was irrelevant to this case. What we have to prove is that the firearm was a real gun, and --

JUSTICE STEVENS: But is -- just again, I'm not trying to find out the answer to what happened here, but just as a matter of what the law provides. Is it conceivable that a -- a gun which was not operable could nevertheless be a deadly weapon because it can be used as a club?

MR. WHISMAN: In that circumstance, yes, Your Honor.

JUSTICE STEVENS: It could be.

MR. WHISMAN: But -- but obviously, as

counsel -- on page JA 31 and at JA 38, counsel very specifically said the State tries to say that the nonworking firearm would also be the basis for this offense, and certainly it can be. And then at -- at page 38, they say, obviously, the question of whether it actually worked or not would be irrelevant under the law. So the -- strictly speaking, the question of operability wasn't before the jury.

We did have to prove that it was real. And, of course, there was never any dispute about that. The defendant's -- by the defendant's own testimony, for example, in the -- in the transcript at page 677 -- that would be volume 8, on 1/24/2000, page 677 -- the defendant spoke at some length about the fact that he was worried about his children getting a hold of this gun. There were significant safety concerns. At page 680, he talked about how he locks it up all the time.

JUSTICE GINSBURG: Would you explain again why it was irrelevant whether the gun was operable or not?

MR. WHISMAN: Operability, Your Honor, is -- is -- there were a series of cases that -- that arose in Washington having to do with -- with a gun that was basically a real gun, but that there was something technically wrong with it. And those series of cases

discussed how soon it could be rendered operable to make it still constitute a real gun. But I think that's really kind of an esoteric area of the law.

JUSTICE GINSBURG: But to be a real gun, it has to be operable.

MR. WHISMAN: Well, that's what the -- what the cases have said is that it only has to be ready -- could be made ready to -- to fire in a short amount of time, yes. As I say, that's simply not in this case because counsel conceded this gun -- that operability wasn't an issue here. All we had to prove was that it was a real gun.

JUSTICE SOUTER: Now, did you have to prove that because, as -- as I have assumed, the charge included the statement that he had used a handgun? Was that the term used?

MR. WHISMAN: Yes, Your Honor.

JUSTICE SOUTER: Okay.

MR. WHISMAN: The charging document said the defendant was armed with a deadly weapon, which establishes the general category, and then, to wit, a handgun. As I say, there -- there was no issue either -- either pretrial or throughout the course of the trial that counsel knew precisely what he was facing.

JUSTICE GINSBURG: But all that the jury

found was deadly weapon because that's all they were asked to find.

MR. WHISMAN: That's right. They only used the terms, deadly weapon, Your Honor, and that's why in the Washington State Supreme Court, we conceded that, technically speaking, the jury's verdict didn't encompass the firearm finding. The express verdict didn't encompass the firearm finding. But under the facts and circumstances of this case, it's our -- our view that that error, even though it could be an error, is harmless.

JUSTICE SCALIA: Well, you -- you could -- it could be argued that it not only didn't encompass the firearm finding, but it excluded the firearm finding. If, as you tell us, there are two categories, one being deadly weapon, which does not include firearm, and the other being firearm, wouldn't you say that the jury verdict positively contradicted?

MR. WHISMAN: I think, Your Honor, Justice Scalia, if you imagine a situation, as Justice Kennedy was posing, where the jury was presented with two options and they were going to choose one or the other, you might be able to make that argument.

But here, the jury was presented only with the definition saying deadly weapon is a firearm,

whether loaded or not. And under those circumstances and under the circumstances where the only weapon associated with this assault is a firearm, the only thing that they could have premised their decision on was the firearm.

So, as I say, it's not as though they were choosing either or. In Justice Kennedy's hypothetical, you might have had that situation.

CHIEF JUSTICE ROBERTS: Is the jury given a copy of the information?

MR. WHISMAN: They are ordinarily read a copy of the information, Your Honor, at the start of the case. I don't recall that being transcribed in the -- in the transcript as -- as the court has it. That is the ordinary course of proceedings.

In -- in the Respondent's brief, there is a fair amount of time spent on distinguishing this case or -- or trying to analogize this case actually to charging defects. And as I've indicated already for the past few minutes, I believe that this case simply doesn't present that issue because it was readily apparent that this defendant was fully advised of what he was facing.

Now, if there were other defects -- if there were true defects in the charging document or if the

defendant was surprised by the sentence that the judge ultimately imposed, then we would have to analyze, separately analyze, whether or not the charging document was sufficient. And under this Court's jurisprudence and under Washington law, that is a separate analysis, a separate analysis --

JUSTICE GINSBURG: Why was deadly weapon put in by the prosecutor at all? If -- if you're right that this is not a deadly weapon case, this is strictly a firearm case, it's not a lesser included, here the prosecutor charged deadly weapon --

MR. WHISMAN: Correct.

JUSTICE GINSBURG: -- to wit, a handgun. And then the special verdict form doesn't say one word about firearm. So couldn't the defendant expect, well, they charged the main thing? They charged me with deadly weapon, and they asked the jury to find deadly weapon.

MR. WHISMAN: And -- and I think to answer that question, Your Honor, again we have to step back to the year 2000 and -- pre-Apprendi, et cetera. At that time, there were a series of cases, Meggyesy, Olney and Rai, R-a-i, that -- that are overturned, quite frankly, by the Recuenco opinion, where the appellate courts had quite expressly said that it was

sufficient to submit the deadly weapon verdict form in that form to a jury where it's clear that the only weapon at issue was a firearm. In each one of those cases, that was what was done. And in fact, in at least one of them, the victim was shot, so there couldn't be any question. So there was -- there was a well-established practice in Washington law at the time of proving that sort of thing.

Now, it's true that the more thorough practice, the more precise practice would have been to submit a verdict form that said firearm, but that wasn't done in this case, but it wasn't done, I believe, pursuant to those cases.

Unless the Court has any additional questions, I'd like to reserve the rest of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Millett.

ORAL ARGUMENT OF PATRICIA A. MILLETT

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MS. MILLETT: Mr. Chief Justice, and may it please the Court:

In Neder, this Court held that the failure to submit an element to a jury -- an element of a crime to

a jury is subject to harmless error analysis because it is a nonstructural trial error.

In Apprendi and Blakely, this Court held that the Sixth Amendment right to trial by jury recognizes no distinction between elements that set a maximum punishment, sentencing elements, and elements of the underlying offense.

For that reason, the failure to submit an element that sets the sentence to the maximum sentence available should be subject to exact same harmless error analysis that was applied in Neder. The exact same constitutional value and constitutional right is at stake. The exact same analysis of the effects of the error will be applied by the court, and it's the same sort of discrete error in time that you had in Neder. There's no functional distinction between Neder.

In addition, in Schriro v. Summerlin, this Court held that the failure to submit a sentencing element to a jury is not the type of error that calls into question the fairness, accuracy, or reliability of the underlying proceeding.

In Cotton, this Court held that that same type of error does not impugn the integrity, public reputation, or fairness of judicial proceedings.

And in Mitchell --

JUSTICE STEVENS: Ms. Millett, can I ask you this one question? Would there ever be a case where it was not harmless error when the judge makes the finding? Isn't it -- wouldn't it be reasonable for the appellate court to assume, well, if the judge made the finding, it's probably supported by the evidence and presumably the jury would have come out the same way?

MS. MILLETT: No, I don't -- I don't think that's true, Justice Stevens, that there will be times -- I don't think this is one of those cases, but there will be --

JUSTICE STEVENS: But there might be a rare case, but in about 95 percent of the cases, wouldn't it be true that the fact the judge made the finding is pretty good evidence that the jury would have made the same finding?

MS. MILLETT: I think it will depend on whether the evidence was disputed before the judge in a -- in a -- in the Federal system would have been sentencing hearing. And remember, sometimes --

JUSTICE SCALIA: The judge doesn't have to find it beyond a reasonable doubt, does he?

MS. MILLETT: Exactly. Exactly, Justice Scalia. There's not only -- there may be disputed evidence, but the standard may be different. It's not

clear whether it was here, but at least as to some factors. It's clearly not enough that there's sufficient evidence to support the judge's determination. The question would be whether there's any -- a jury could have found any doubt or when it's clear beyond a reasonable doubt, that the outcome would have been the same.

But I do think in a case like this, it's important to keep in mind that it's -- this case illustrates that these things are not categorically or necessarily unamenable to harmless error review. And in fact, what would happen in cases like this and a lot in the Federal system, where you have undisputed, uncontested facts -- and we know that because they had the incentive to contest them at a sentencing proceeding.

And so to hold that automatic reversal is required would mean it would go back for a retrial that would have nothing to do -- nothing to do with the element that was not decided by the jury. That would be undisputed. There's not going to be any contest back here that the firearm, the semi-automatic that was handed to the jury loaded and passed around to the jury, was a firearm. It would just be a second bite at the apple to contest things that were decided properly

and beyond a reasonable doubt by the jury, consistent with the defendant's constitutional rights.

JUSTICE SOUTER: What -- what do we do about the problem that is raised by -- by counsel on the other side, that Washington law is such -- or at least at the time the briefs were written, Washington law is such, as they understand it, that the -- that the issue could never properly have been submitted to the jury, and -- and therefore, if -- if Washington courts are going to follow Washington law, in every case in which a firearm is an issue, the case is going to be handled exactly like this? It's not -- the firearm issue is not going to the jury. The firearm determination will be made by the judge.

If the State of Washington decides not to amend its law, we would have a situation in which, in effect, Apprendi is read out of the -- the constitutional law simply by State procedure. And in every case, the -- the response would have to be harmless error analysis on your theory. That is a pretty neat way to undercut Apprendi. Is that not a good reason to say we shouldn't have harmless error analysis?

MS. MILLETT: No, it's not, Justice Souter. First of all, the Hughes opinion on which they rely is

crystal clear that the only thing the court found was that there was no procedure to re-empanel a jury on remand. And I point the Court to page 208 -- that's a P.3d citation and 149 in the Washington Reporter citation -- where the court specifically said, we are only talking about remand and not deciding whether these things could ever be submitted to a jury in the first instance.

JUSTICE SOUTER: So you're -- I'm sorry. You're saying their argument is wrong, in effect, as a -- as a statement of Washington law.

MS. MILLETT: I think that's right, but even if it weren't, if -- if you had some State that decided not to fix its law, in light of Apprendi and Blakely, I expect that what would happen is defendants would bring sort of -- there would be a facial constitutionality problem with any attempt to prosecute under that. And that may be the way to deal with it.

There's no question of willfulness here. This is decided at a time when, in good faith, pre-Apprendi even -- this isn't even the Apprendi/Blakely window -- that it was acceptable to have this sort of two-tier proceedings much like we are used to in sort of a death penalty context. And there's -- there's been no -- I'm sorry.

JUSTICE SCALIA: I don't understand what -- what you meant by a facial unconstitutional -- facially unconstitutional problem. You mean a Federal court would enjoin the criminal prosecution because it's unconstitutional on its face? We wouldn't do that, would we?

MS. MILLETT: I can't imagine the Federal court would intervene in an ongoing State proceeding.

JUSTICE SCALIA: Neither can I.

MS. MILLETT: But State courts are perfectly capable of -- of applying and we assume that they would apply and adhere to constitutional law from this Court.

JUSTICE SCALIA: So that -- that's not really an adequate answer, that it would be facially unconstitutional.

MS. MILLETT: Well, my understanding was that the Washington law -- Washington legislature didn't amend its law to say that this could be submitted to a jury. And then every defendant at the outset of the case, would say you need to, you know, strike the indictment, dismiss this charge --

JUSTICE SOUTER: A motion in limine kind of --

MS. MILLETT: Right. I think there would be a way -- I'm -- I'm confident there would be a way to

deal with it. And I don't think the way to deal with it is to assume that that's a reason to make harmless error not available to these types of errors across the board.

CHIEF JUSTICE ROBERTS: The assumption of the hypothetical is, I take it, that the Washington State judges would deliberately violate our holding of a matter of constitutional law in imposing the enhancement.

MS. MILLETT: They would, and I think that's not a fair assumption and it's certainly not the way to decide whether harmless error analysis should apply. I mean, Blakely has been on the books for a couple of years. Neder has been out there for 7 years, and we haven't seen people deliberately trying to get around people's Sixth Amendment rights.

JUSTICE KENNEDY: Do you agree in this case that the court did have the obligation to submit a special verdict form indicating that the defendant -- asking whether the defendant was armed with a deadly weapon?

MS. MILLETT: Yes, that's required by Washington law. The jury --

JUSTICE KENNEDY: No. As a matter -- a constitutional matter.

MS. MILLETT: That --

JUSTICE KENNEDY: Suppose the -- suppose the judge didn't ask about deadly weapon at all, just -- just asked whether there's an assault.

MS. MILLETT: Well, the -- it's assault in the second degree which requires -- itself requires use of a deadly weapon. So it wouldn't even be assault in the second degree under Washington law without the jury finding a deadly weapon.

JUSTICE KENNEDY: But you -- so -- so there had to be an instruction that there was an assault in the second degree?

MS. MILLETT: There had -- there had to be a deadly weapon to have assault in the second degree, and then -- and I may not get all the nuances of Washington law, but then the jury had to have the sentencing enhancement, had to make a separate finding that the defendant was armed with a deadly weapon at the time. I'm not sure, again, if it's essentially redundant in second degree assault cases or not. It's a little confusing.

But the -- the law required that you find a deadly weapon but it wasn't which deadly weapon. It was just a baseline eligibility, and then it was up to the court to decide which deadly weapon which would

then dictate the sentence.

And one other point I'd like to make clear is there's been some argument that this case is different from Neder because you have a completed defense. That is no different at all. You had a completed verdict for a non-offense in Neder, and the distinction between a judge making findings that make a verdict that support a non-offense into offense is not one that makes a structural difference.

And in Carella v. California, Rose v. Clark, you had elements that stood on the fault line between lesser included offenses and greater included offenses. And now, there they weren't missing -- they weren't technically missing elements, but they were elements that were subject to mandatory presumptions by the jury. And yet, this Court said that they're subject to harmless error analysis.

Now, obviously, the type of the element is going to affect the government's ability to prevail under harmless error analysis, and there may well be times when the government will not succeed in that process, especially as you get elements that are more central to, you know, the -- the crime and -- and traditional elements like the intent issues that were at issue in both Carella and in Rose v. Clark.

The other point I wanted -- I wanted to make is that the fact that the jury verdict form here came back consistent with -- with the -- or the jury verdict form in Neder came back with the completed crime shouldn't make a difference. The change in the -- that jury verdict only came back because of a second mistake. The jury was wrongly and mistakenly told that if it found elements A, B, and C, it would -- it would establish a -- a completed crime.

The fact that in this case you don't have that second error isn't again a difference that makes one error structural and the other nonstructural.

The important thing is that the right is the same. The cost -- the right to the same, the ability of courts to analyze this error is the same. And on the other hand, a rule of automatic reversal will impose an enormous cost on victims and the public.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Millett.

Mr. Link.

ORAL ARGUMENT OF GREGORY C. LINK

ON BEHALF OF THE RESPONDENT

MR. LINK: Mr. Chief Justice, and may it please the Court:

The Washington Supreme Court correctly held that as a matter of Federal and State law, the error in this case, as in Blakely cases generally, could not be subjected to harmless error analysis.

I think it's important to clarify that as a matter of State law and -- and as recognized by the Washington Supreme Court in its decision in Recuenco, the deadly weapon enhancement and the firearm enhancement are, in fact, lesser and greater offenses of one another. We know that based on -- on what -- what action the court took on remand. It didn't dismiss the -- the enhancement altogether. It said the only thing that could be done on remand was imposition of the lesser enhancement.

JUSTICE SCALIA: How could it be lesser included when, as we've heard, firearm does -- I'm sorry -- deadly weapon does not include firearm? If deadly weapon included firearm, then certainly -- I'm sorry -- deadly weapon would -- would -- could be a lesser included offense somehow. But the two are exclusive categories, aren't they?

MR. LINK: Under Washington law -- it's important to understand that under Washington law, a handgun is -- is a deadly weapon per se, but that handgun is only a firearm if the State establishes the

additional fact that it has the capacity to fire, which is -- which is why the statute, the deadly weapon statute, and the definition of deadly weapon in -- in the statutory provision specifically includes handguns, revolvers, and other guns.

JUSTICE SCALIA: But if it has the capacity --

JUSTICE KENNEDY: But the statute does say deadly weapon other than a firearm.

MR. LINK: The definition statue of -- of deadly weapon doesn't. It's --

JUSTICE KENNEDY: But the enhancement section does.

MR. LINK: It's a separate provision on the enhancement -- or excuse me -- as to the length of the enhancement that would be imposed does.

JUSTICE KENNEDY: Well, do you think in this case you'd be entitled to a lesser included offense instruction as a matter of law?

MR. LINK: I believe that as a matter of Washington law, the answer would be yes. And again, I think it turns on the fact that there's this additional factor, additional element, of capacity to fire that differentiates a handgun from a firearm.

JUSTICE KENNEDY: Well, was there any

evidence that it didn't have the capacity to fire?

MR. LINK: There was no evidence, I think, to suggest that it did.

JUSTICE KENNEDY: You're not entitled to -- you're not entitled to a lesser included offense instruction for which there's no evidence.

MR. LINK: Under Washington law, a defendant gets a lesser included instruction so long as the evidence, viewed in the light most favorable to him, would support the fact that the lesser was -- was included.

Now, it can't turn on whether or not the State -- or whether the jury simply disbelieves the State's proof, but it can -- when looking at the -- the evidence in the light most favorable to the defendant, look at holes in the State's evidence, such as the fact that there is no evidence before this jury about this gun's capacity to fire.

JUSTICE SOUTER: No, but there -- there is evidence from which the jury could find that it was a real gun, and in the absence of any indication to the contrary, that is competent evidence for the jury to use in concluding that it would function like a real gun. It's not -- they didn't have to put in further technical evidence. An issue might have been raised.

I mean, your -- the -- the defendant might have come up and -- and presented evidence to the effect that it was only a starter pistol, in which case, okay, there would be a real issue. But in the absence of any reason to doubt that the handgun was what it purported to be, there would be no reason to -- there would be no requirement of further evidence about functionality, would there be?

MR. LINK: As a matter of Washington law and as of the fact that this is, indeed, an element of a greater offense, there is a requirement on the State to come forward with additional proof of the capacity to fire.

JUSTICE SOUTER: What's -- what's your authority? I mean, that doesn't seem -- as a matter of factual common sense, that doesn't seem required. Is -- is there a Washington case that requires that?

MR. LINK: There is not. It's the statutory language of the deadly weapon enhancement itself.

JUSTICE SOUTER: And what exactly in the language is it that you hang your hat on?

MR. LINK: The fact that the deadly weapon enhancement can apply specifically to a handgun regardless of the manner in which it's used. For instance, it -- a -- a handgun that does not have the

capacity to fire could be used to -- to strike an individual, and in that context would be a deadly weapon regardless of whether it was likely to cause a serious bodily harm.

JUSTICE SOUTER: No -- no question. But if there -- but if there is no reason to question its apparent functionality, I mean, you know, it's a handgun. It looks like a handgun. Somebody is holding it like a handgun -- there -- there is no reason, it seems to me, as a matter of fact or based on the statute to doubt that it would be functional. And therefore, it would seem to me that the proof would be competent that it was a functioning handgun in the absence of any question raised.

MR. LINK: Again, if we compare the definition of a deadly weapon under Washington law with the definition of a firearm under Washington law, a handgun is by definition a deadly weapon. But a handgun is not by definition a firearm.

CHIEF JUSTICE ROBERTS: Counsel, you asked for an instruction on the lesser offense of aiming a firearm. Under that provision of Washington law, does the firearm have to be operable as well?

MR. LINK: It would seem that the -- the same definition of firearm would apply.

CHIEF JUSTICE ROBERTS: So you ask for an instruction assuming that the firearm at issue in this case was operable.

MR. LINK: No. Again, I believe that he -- he asks -- an individual could ask for an instruction in that case and still maintain that the State hasn't met the proof of -- of establishing even the lesser. And there's nothing tactically contradictory about doing so. If -- if one -- if an attorney can convince the court to -- to allow the jury to consider a lesser, and then still challenge that -- the proof of that lesser --

CHIEF JUSTICE ROBERTS: But if the firearm were not operable, you would not have been entitled to a jury instruction on the lesser offense of aiming a firearm. Correct?

MR. LINK: If the firearm -- if looking at the evidence in the light most favorable to the State, he may not have been entitled under the -- the factual prong that -- that the Washington courts use on lesser and greater offenses.

JUSTICE ALITO: Let's say a new case comes up tomorrow and the person is charged in an information with assault in the second degree, and it's clearly alleged in the information that a firearm was used.

But then when the case is submitted to the jury, the judge just forgets to charge on the firearm factor or element. Would that -- could that be harmless error? Is that any different from the case that's before us?

MR. LINK: I think that if the parties litigate the question of whether or not it was an assault with -- with a firearm, as opposed to litigate the offense of assault with a deadly weapon, and then there's merely an omission from the elements, I think that's a different case. But I don't --

JUSTICE ALITO: Well, it's a different -- is it a materially different case?

MR. LINK: I think it's a materially --

JUSTICE ALITO: Is it just like Neder, or is it different from Neder?

MR. LINK: I think that scenario would be closer to Neder, but I think that's a different scenario than what we have here. And I think the reason why it's different here is because the jury returned -- under Washington law, returned a complete verdict. There is no -- there was no error in either the verdict or in the jury instructions as a --

JUSTICE BREYER: Take Justice Alito's case, and nobody litigated it because nobody doubted that it was a loaded gun. Now, what's the result?

MR. LINK: In that scenario, if the evidence is overwhelming as -- as perhaps it was in Neder, one might assume that the error is uncontroverted. But --

JUSTICE BREYER: All right. So -- so, therefore, it's harmless. So, therefore, we use harmless error analysis. So what's the difference between that case and this case?

MR. LINK: Because I think unlike Neder this case involves a jury -- or excuse me -- the -- a -- the wrong entity has determined the defendant's guilt not on the crime at issue --

JUSTICE BREYER: Yes, I quite -- I quite agree with you that there is the difference that in the Alito case as amended, it all happened before the jury got its verdict. In our case, it happened after the jury reached a verdict. Now, absolutely true.

And my question, of course, is why does that matter.

MR. LINK: Because in a scenario where the jury has been properly instructed and has returned a complete verdict --

JUSTICE BREYER: No, no. It was improperly instructed. The judge forgot to give this instruction about the nature of the firearm. I take it -- at least my case -- the judge forgets to instruct about the

firearm. He just forgets. All right? And then the jury goes out. It comes back and the lawyer says, Judge, I handed you the instruction. Why didn't you give it? He says, oh, my God, I forgot. Now, does harmless error apply to that case?

MR. LINK: I think that scenario is closer to Neder than it is to this case.

JUSTICE BREYER: And I want to know why that matters because the only thing I've tried to create the hypothetical to matter is the one thing happens before the jury goes out, and the other happens after. And why does that matter?

MR. LINK: I think it matters because in a scenario like this, as opposed to either Neder or -- or the hypothetical, the only offense that has ever been litigated to the parties -- or by the parties to the jury was the lesser offense. The parties understood that only the lesser offense was at issue, and we know that because in response to Mr. Recuenco's motion to vacate, the State told the judge you aren't required to give the firearm instruction because that's not an element of either the substantive charge or the enhancement.

JUSTICE SOUTER: No. But it's also the case, as I understand it, and as counsel on the other side

confirmed a few moments ago, that the charge specifically specified that a handgun had been used. So this is not a case, as I think you were suggesting, in which there has never been a charge of the offense plus the enhancement they now claim. The -- the problem was in the jury verdict, not in the charge, not in notice to the defendant. And if that's the case, why isn't it just like Neder?

MR. LINK: Because, again, I go back to Washington law. And the fact that handgun is alleged in the information does not establish that it's a firearm because a handgun --

JUSTICE SOUTER: Well, a -- a firearm, as I understand it, is defined to include a pistol or a revolver. Is that correct?

MR. LINK: It is.

JUSTICE SOUTER: All right. Isn't the natural reading of -- or understanding of the word handgun that it's a pistol or a revolver? I mean, isn't that what people would normally take it to mean?

MR. LINK: That may be, but as a matter of Washington law, that's not the case. And it may defy common sense, but that's what it does.

JUSTICE SOUTER: Yes, but you're asking for a -- you're asking for a Federal constitutional ruling,

and right now, if I understand you correctly, you're arguing that you ought to win because if you don't win, as a matter of Federal constitutional law, we would be condoning a verdict for an offense that was never charged.

But if, in fact, handgun is properly read, properly understood to mean a pistol or a revolver, and that's what a firearm -- that's -- that's what a firearm is -- is defined to include under Washington law, then in fact the offense has been charged. The enhancement has been charged. And as a matter of Federal constitutional law, it seems to me that ought to be enough to bring it within Neder regardless of what the quirks of Washington law may be.

MR. LINK: If, in fact, the allegation of handgun is sufficient to bring it in the context of Neder, then there -- there was no error at all. There would not have been a Blakely violation in this case. And the wrong -- the State was wrong all along to concede that there was because Apprendi doesn't just involve -- doesn't just say that sentencing elements are the equivalent of elements in the traditional sense. It says they're the equivalent of elements of a greater offense. And the State concedes and the Washington Supreme Court has found that, in fact, there

was a Blakely violation in this case.

JUSTICE SOUTER: And that's because it -- it didn't go to the jury.

MR. LINK: That's because the judge, as opposed the jury --

JUSTICE SOUTER: Yes.

MR. LINK: -- decided Mr. Recuenco's guilt on a greater offense.

JUSTICE SOUTER: Right.

MR. LINK: So -- so as a matter of Washington law, Mr. Recuenco's jury was properly charged and properly returned a verdict on the only offense litigated and that was the lesser offense of assault two with a deadly weapon.

JUSTICE SOUTER: Well, when you say it's not litigated, do you mean simply that nobody, none of the witnesses, none of the counsel in argument, disputed that a handgun was there? In other words, it was just one of those things everybody understood. Is that what you mean when you say it wasn't litigated?

MR. LINK: What I mean by saying it wasn't litigated is that it was the understanding of the parties at trial that the firearm element was not at issue because that had not been charged, that that was not the charge in front of the jury.

JUSTICE SOUTER: And -- and what do you -- what do you base that statement on? In other words, I -- I think you're now arguing that the understanding was that although it looked as though the -- the most serious enhancement had been charged, the understanding of the parties was that it had not been. If that's your argument, what is your basis for saying that?

MR. LINK: Again, I could point to the -- the prosecutor's response in the motion to vacate. I can point to the court's judgment and sentence, which I don't have the cite for right off the -- my head, but it is in the joint appendix. On that form, as is common in Washington, there are two boxes for the court to check. One says that a verdict regarding a deadly weapon -- or excuse me -- that a firearm other than a deadly weapon was returned. The other says that a -- a -- excuse me. One says that a verdict form for finding that the person was armed with a firearm was returned. The other says that it was merely the verdict form for being armed with a deadly weapon other than the firearm. The trial --

CHIEF JUSTICE ROBERTS: Counsel, what your trial counsel said was that the -- I'm quoting from the joint appendix, page 30 -- the allegation and the basis on which this case was tried was under the theory of

firearm. It seems inconsistent with your representation that nobody had an idea that they were trying this under the theory of a firearm.

MR. LINK: I think it's -- it would be equally inconsistent with the State's current position if we look at JA 35 where the prosecutor's response was we didn't need that instruction because firearm was not an element of the crime charged.

JUSTICE KENNEDY: Do you think it would have been error in this case based on the evidence presented and the way the -- the case was argued -- would it have been error for the judge to instruct the jury that if they found that there was a firearm involved, they should make a -- they could make a -- a finding on that?

MR. LINK: Well, it's interesting because post Recuenco, after the Washington Supreme Court's ruling in this case, yes, that would be an error because after the Washington Supreme Court's decision in this case, what they said is that --

JUSTICE KENNEDY: But as a constitutional matter, would it have been error for the judge to instruct the jury in this case, based on this evidence, that they could return a verdict that a firearm was used as part of the assault?

MR. LINK: As a matter of constitutional error, no, I don't believe it would have been. But as -- but under Washington law, it was a verdict they couldn't -- as we know from Recuenco now, it's a verdict they couldn't have returned.

CHIEF JUSTICE ROBERTS: Ms. Millett tells us that that only applies on remand under -- under the Hughes case.

MR. LINK: Under Washington law, when a court -- as I think is common under Federal law, whenever a court interprets a statute, determines what it means, that is what the statute has always mean -- means, and -- and that is what that statute will mean in the future until such time as the legislature amends it.

As of this date, while the -- the legislature has amended the statutes at issue in Hughes, it has done nothing with respect to this statute. So, as it stands now, based on the recognition of the Washington Supreme Court that at the time of the entry of that decision, there was no provision to submit that question to a jury in Mr. Recuenco's case. There was also no provision to submit it to a jury in another case because prior to Recuenco, the only means by which the firearm enhancement could be obtained was pursuant to the decisions in Meggyesy, Rai, and Olney. And that

was the very manner that was used here, and that was the very procedure that the Washington Supreme Court found violative of Blakely.

JUSTICE STEVENS: Mr. Link, will you just -- maybe I -- I should know this, but the information charges an assault in the second degree using the deadly weapon. If they had charged use of a firearm rather than a deadly weapon, what would the crime have been? Would that also have been assault in the second degree?

MR. LINK: Well, that's an interesting twist under Washington law because the deadly weapon is -- is actually two elements of assault two. Under the substantive offense, it's a component of -- of assault, and also an element of the -- but to allege a firearm, it is possible that the substantive offense could have been elevated to assault one. It's also possible that it could have simply been an assault two with a firearm enhancement. So --

JUSTICE STEVENS: The firearm enhancement itself would not covert it from second degree to first degree.

MR. LINK: No.

And -- and I think this illustrates a point. Under Washington law, the State could charge assault three with a firearm enhancement in -- in a case in

which a person used a gun. There's nothing under Washington law that requires the prosecutor to charge the greatest offense. There's nothing under Federal constitutional law that even if that greater offense is charged, that the jury must return a verdict on that greater offense. In fact, the jury, as the circuit breaker in the system, has always -- always has the right, regardless of the strength of the evidence and regardless of -- of what the trial court might view as the correctness of the charge, to return the verdict on the lesser.

JUSTICE KENNEDY: You say regardless of the strength of the evidence. How about no evidence at all?

MR. LINK: I think this Court's jurisprudence on -- on questions of -- of lenity and interpreting jury verdicts would allow a jury to return a verdict that -- that isn't necessarily supported by the evidence. It's the understanding that it's their --

JUSTICE KENNEDY: Well, the question is whether or not it requires it.

MR. LINK: I don't think this Court requires that the jury -- but I think what -- what I'm trying to say, I guess, is that it requires -- not requires. It -- it imposes deference on the trial courts that they

cannot second-guess the jury, that because the jury is always free to return a verdict on the lesser offense, there simply cannot be a situation in which the trial court, based on its own assessment of the facts, gets to enter the greater.

CHIEF JUSTICE ROBERTS: Well, doesn't -- isn't that true in Neder as well?

MR. LINK: I think in Neder -- Neder is a different case and for a number of reasons. Unlike Neder, there has never been a claim that there's any incorrectness in either the verdict in the charge or in the jury instructions. In fact, Mr. Recuenco from the outset had no reason to suggest that there was anything wrong because the State was free to charge him with the lesser offense, and they did. There would be no motive on his part to say, excuse me, Your Honor, I think I'm really guilty of a greater offense. Please ask the State to amend its information.

JUSTICE ALITO: You keep saying a lesser offense and a greater offense, but under Washington law, there's just one offense. Isn't that right? It's second -- it's assault in the second degree.

MR. LINK: It's assault in the second degree with the additional deadly weapon enhancement.

JUSTICE SOUTER: And if we accept -- going

back to our earlier exchange, if we accept the proposition that charging that he used a handgun was sufficient to charge a firearm, then the charge against him was assault in the second degree with the maximum enhancement for use of a firearm.

MR. LINK: Again, had --

JUSTICE SOUTER: You -- you and I may disagree on -- on how to read -- how to understand firearm, but if you read it the way I just suggested, then the charge was assault two with the maximum enhancement. Isn't that correct?

MR. LINK: I think if the information and -- and the instructions were read in that manner, the State was wrong to concede that there was Blakely error here at all because, if as a matter of law, a handgun is automatically a firearm, there would have been no Blakely violation at all. But that's not the case.

JUSTICE SOUTER: Well, I thought the -- I thought the reason they conceded the Blakely violation was that in the instructions to the jury, the instruction only went to deadly weapon and the instruction did not specifically refer to firearm. I thought that's why they -- they stipulated that there was a Blakely error. As a matter of the fact about the instruction, is -- is my description correct?

MR. LINK: I'm not sure I can answer right -- I believe the instruction mentioned handgun. The instruction --

JUSTICE SOUTER: All right. And it didn't -- it didn't use the -- let's put it this way. it didn't use the word firearm. Right?

MR. LINK: No, it did not.

JUSTICE SOUTER: That's -- that's why they conceded a Blakely error.

MR. LINK: But again, if -- if under Washington law, a handgun were automatically a firearm, the instruction wasn't erroneous at all.

CHIEF JUSTICE ROBERTS: Well, but the special verdict form still was.

MR. LINK: But the instructions for use of the special verdict form would not have been. And -- and it's because of that -- that quirk in Washington law -- and the State offered us some suggestion of why that quirk exists. The deadly weapon provisions have been a part of the Washington sentencing scheme since its enactment in the mid-'80's. It was only about 10 years later that the additional enhancements for firearm were added, and -- and they were enacted by -- by a citizens initiative. And there's very little reference between the two of them.

But they still exist together because there's nothing that suggests, again, that the State couldn't allege the lesser offense even where a handgun is -- is involved because it is the difference between a handgun with nothing more and a handgun that has the capacity to fire. And it's that additional component of capacity to fire that truly creates the greater and lesser offense in this case.

JUSTICE STEVENS: May I just clarify one other thing? Capacity to fire doesn't mean it had to be loaded, though.

MR. LINK: Capacity to fire does not mean per se operability. It -- it means that this instrument has the capacity to fire whether or not --

JUSTICE STEVENS: An unloaded gun could be a firearm.

MR. LINK: An -- an unloaded gun could be a firearm so long as it has the capacity to fire.

JUSTICE KENNEDY: In the charging document, where it says that he was armed with a deadly weapon, to wit, a handgun, and then it cites the Washington statutes, those citations include the 3-year enhancement provision?

MR. LINK: The -- the citation to what is now --

JUSTICE KENNEDY: It cites RCW 9.994A.125 and 9.94A.310. Is one of -- is one of those the 3-year enhancement?

MR. LINK: .310 is -- is the definition of deadly weapon. The other one -- excuse me -- .125 --

JUSTICE KENNEDY: 9.94A.125.

MR. LINK: That includes both the firearm -- the additional time for firearm enhancement, as well as the time for the deadly weapon enhancement.

JUSTICE KENNEDY: So it includes the 3 years.

MR. LINK: It -- it cites both, depending on what subsection it's citing. So it doesn't necessarily identify one as opposed to the other.

JUSTICE KENNEDY: But it does include it.

MR. LINK: It is in that -- that statute, yes.

CHIEF JUSTICE ROBERTS: And do you know if the information went to the jury in this case?

MR. LINK: As is consistent with Washington law, it's read to the jury at -- at the outset, but it -- it would be inconsistent, I think, with practice in Washington to have actually submitted the -- the information to the jury.

In a situation like this, where the wrong entity has determined a person's guilt, despite the

jury's complete verdict on a lesser offense, the application of harmless error simply eviscerates what Blakely sought to draw as the limits -- or excuse me -- as the -- as the outer boundaries of the jury's right. And in fact, it -- it's the equivalent of a second Sixth Amendment violation because in each instance, the jury's complete verdict on the lesser offense is being set aside. In the first instance, it's based on the trial court's review of -- of the strength of the evidence, and in the second instance, it's based on the -- the appellate court's review of the strength of the record to support not the jury's verdict, but instead the trial court's assessment of the proper charge.

CHIEF JUSTICE ROBERTS: Well, the other way of looking at it is it's based on trying to understand what the jury meant when it said deadly weapon when the only evidence of a deadly weapon they were presented was a firearm.

MR. LINK: It assumes, I think, that -- that the -- it assumes the correctness of the judge's -- of the trial court's assessment of the facts rather than simply accept the -- the jury's verdict for what it was because, again, as a matter of Washington law, Mr. Recuenco could be found guilty of assault two with a deadly weapon even if he used what appeared to be a

handgun, absent some proof of capacity.

And again, as a matter of -- of Sixth Amendment jurisprudence, even had the State put together evidence establishing the capacity of the instrument to fire, the jury would have been free to return a verdict on the lesser offense of deadly weapon, even if it were to contradict Washington law on that point. The jury would --

CHIEF JUSTICE ROBERTS: And in Neder, even if the jury had been asked to rule on materiality, it could have decided not to rule according to the evidence. The same argument applies in Neder.

MR. LINK: But -- but, again, in Neder, the jury returned a verdict of guilty on the offense that was litigated to it and based on the parties' understanding of what offense was at issue. In this case, that doesn't happen. And, again, it's illustrated by the prosecutor's response to Mr. Recuenco's motion to vacate, and it's illustrated by the court's judgment and sentence, which is at page 14 of the joint appendix, where it specifically finds that the only verdict -- and -- and again, doesn't question the verdict -- that the only verdict returned was deadly weapon other than a firearm. It doesn't assume that the jury found that it was the firearm verdict.

It doesn't make that assumption. It recognizes that verdict for what it was. But based on then-existing Washington law, which Recuenco overturned, it concluded it had to impose the firearm enhancement.

So there's no suggestion by either the parties or the trial court or the Washington Supreme Court, for that matter, that there was anything wrong with the jury returning a verdict of deadly weapon because, as a matter of Washington law and as recognized by each of those -- those entities, the jury -- the jury could do that, and they did.

Refusing to apply harmless error in this case doesn't require a single retrial of a single individual. Unlike the normal case, unlike Neder itself, in -- in those cases, had harmless error not applied, the defendants would have been entitled to a new trial. That's not true after Blakely. At best, what would happen is -- is defendants would be remanded back to -- to the various trial courts for the reentry of the sentence that's supported by the -- the jury's verdict. There will be no need to conduct new trials. There will be no need to do anything, other than that simple ministerial act. There simply is no prudential reason. There won't be the flood of -- of retrials or -- or the prison doors thrown open for -- for people to

walk free with no convictions.

JUSTICE KENNEDY: Well, I -- I take it Washington wouldn't have the option -- suppose that you prevail. Washington doesn't have the option to give him a whole new trial, do they, because there's been double jeopardy, I take it.

MR. LINK: As it exists now and based on the Washington Supreme Court's decision in Hughes and Recuenco, those individuals sentenced before the Washington legislature amended the act would simply be entitled to have their cases remanded back for entry of a conviction based on the jury's verdict.

JUSTICE KENNEDY: What I'm saying, you don't concede, do you, that Washington would have the option to retry him to try to obtain the 3-year enhancement.

MR. LINK: I -- I certainly don't.

JUSTICE KENNEDY: I wouldn't think so.

MR. LINK: And both as a matter of double jeopardy and as a matter of Washington law, I don't think that -- that would -- could occur.

The Washington Supreme Court correctly held that harmless error analysis could not apply where the trial court has set aside the jury's complete verdict on a lesser offense in favor of a judgment on the greater, both as a matter of State and Federal law.

And Mr. Recuenco would ask this Court to affirm that decision.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Whisman, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF JAMES M. WHISMAN

ON BEHALF OF THE PETITIONER

JUSTICE SCALIA: Mr. Whisman, can I -- can I ask you a hypothetical which I think puts in starker form what the -- what your colleague here says this case involves?

Suppose that -- that you have a statute, a murder statute, which applies to the murder of a single individual, but -- but you have another statute with a death penalty called aggravated murder. And it's a different crime and it -- it requires the -- the killing of more than one person in -- in the same -- in the same event.

Let's assume a trial in which somebody came into a bank with a machine gun. Only one person came in, and five people were killed. But the prosecution only brought a prosecution for simple murder. Okay? And the jury comes back with a verdict for -- for simple murder.

Certainly a judge would not be able to say, well, no jury could possibly have found simple murder

here without also thinking that this person was guilty of -- of this greater offense of -- of aggravated murder and, therefore, I'm going to enter a judgment of aggravated murder.

That's what the -- the defense says happened here, that there was just a verdict of -- of the lesser offense. That's all the jury found. It could have found more and maybe -- maybe in finding that, it -- it must have thought that the greater offense also existed, but it never came in with a verdict for the greater offense.

Now, tell me why what happened here is different from -- from the hypothetical.

MR. WHISMAN: I think the key difference is the charging part of your hypothetical. Your hypothetical assumes this defendant was never put on notice that he was facing aggravated murder, and if that were true, then under your cases and under -- under our Washington law, we would analyze that as a failure of notice. The -- and it could have any number of implications for a defendant, including the evidence that they marshal at trial, but also including perhaps his interest in negotiating a plea agreement if a defendant doesn't know that he's facing aggravated murder at the end. So --

JUSTICE KENNEDY: Well, suppose under Justice Scalia's hypothetical, aggravated murder is -- is in the charging documents, but the judge doesn't say aggravated murder when he submits it to the jury.

MR. WHISMAN: Then I think that is susceptible to harmless error analysis, Your Honor. And it would be -- there would be an open question as to whether or not, of course, it is harmless, but then I think that we're back to the Neder situation.

JUSTICE STEVENS: But then we'd have Justice Scalia's case if this information left out the words, to wit, a handgun.

MR. WHISMAN: You would be closer to Justice Scalia's case, Justice Stevens, yes. Although under Washington law, we analyze the charging document and the sufficiency of it and ask whether or not it was -- the words used sufficiently appraised the defendant. But I think the defendant would have a stronger argument for the fact that he didn't know what he was facing if you had that hypothetical.

CHIEF JUSTICE ROBERTS: And those are the sort of considerations that can be taken into account under harmless error analysis. Right? The absence of notice, the prejudice. I would have put on this evidence if I had known I was accused of using a

handgun.

MR. WHISMAN: They can be a component of the harmless error analysis. Ordinarily in Washington, we would handle that as a charging document challenge. In other words, the defendant would say I was never charged with this crime and therefore I didn't marshal my evidence, et cetera. It's a due process violation. Either way, I don't think that the -- the conviction stands much chance of surviving.

I did want to answer, first, a question that had been raised by pointing the Court to JA 18 where the defendant says, my proposed instruction makes clear that the deadly weapon in question is the firearm, that -- not that some other kind of weapon might have been deadly. So I think that focuses the issue appropriately.

I also wanted to point out that Justice Alito's hypothetical is really the State v. Williams case that we cited at page 14 in our reply brief where the defendant was expressly charged firearm and the victim was shot during the course of the crime. And the issue didn't go -- the -- the same verdict form as we have here -- in other words, it said only deadly weapon -- was given to the jury, and the Washington court of appeals, feeling itself bound by Recuenco,

reversed that finding.

So I think that the opinion of the Washington Supreme Court is unduly broad and should be overturned.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. WHISMAN: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)