No. 05-83

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

ARTURO R. RECUENCO,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

PAMELA HARRIS
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

ROBERT N. HOCHMAN*
SIDLEY AUSTIN LLP
One South Dearborn St.
Chicago, IL 60603
(312) 853-7000

SHERYL GORDON MCCLOUD
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1301 Fifth Ave., Suite 3401
Seattle, WA 98101
(206) 224-8777

Counsel for Amici Curiae

* Counsel of Record

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QUESTION PRESENTED

The question presented in the State of Washington's petition for certiorari was as follows:

> Whether error as to the definition of a sentencing enhancement should be subject to harmless error analysis where it is shown beyond a reasonable doubt that the error did not contribute to the verdict on the enhancement.

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights, including the right to a trial by jury at issue in this case, and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. To promote these goals, NACDL has frequently appeared as *amicus curiae* before this Court in all manner of cases concerning substantive criminal law and criminal procedure, including *Blakely v. Washington,* 542 U.S. 296 (2004), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Neder v. United States*, 527 U.S. 1 (1999).

The Washington Association of Criminal Defense Lawyers ("WACDL") is an organization of more than 700 lawyers formed to improve the quality and administration of the criminal justice system. The organization works to protect and ensure the individual rights guaranteed by the Washington and Federal Constitutions, and to improve the professionalism of all lawyers practicing in the criminal

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[1] The parties have consented to the filing of this brief, and written letters of consent are on file with this Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation of this brief.

courts. WACDL has been granted leave to file *amicus* briefs on numerous occasions in the Washington courts.

SUMMARY OF ARGUMENT

In criminal trials, this Court has distinguished between "structural" error, for which reversal of a conviction is automatic, and ordinary "trial" errors, which are subject to review for harmlessness. Certain errors are structural because of the way they impact the development of the record that an appellate court would review were it to conduct harmless-error analysis. Specifically, if a defendant's constitutional right is violated in a way that discourages the defendant from bringing to bear all the evidence and legal arguments at his or her disposal, then harmless-error analysis is impossible. Under such circumstances, it would be misleading to review the record as a whole to determine whether the jury would have found the defendant guilty beyond a reasonable doubt, as required by *Chapman v. California*, 386 U.S. 18, 23-24 (1967): the evidence of guilt will be undisputed only because the constitutional error led the defendant to refrain from disputing the government's evidence.

The violation of the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004), is such a structural error. *Apprendi* and *Blakely* require that allegations that increase the potential punishment to which the defendant is exposed must be pled in the charging instrument and proved to the jury beyond a reasonable doubt. An *Apprendi/Blakely* violation distorts the entire factfinding process of the trial because the effects of such an error stretch from the outset of the criminal process through the jury instruction. The factual allegations of the charging instrument provide the elements of the offense at issue. The trial takes shape around the factual disputes with respect to those elements. If evidence of an aggravating fact that was not charged and will not be the subject of the jury's consideration is nonetheless introduced at trial, the defendant

has no incentive to dispute it. Indeed, in many circumstances the strategic best course is *not* to dispute such legally irrelevant facts. An appellate court reviewing such an "undisputed" record cannot judge the impact of the error on the trial because it cannot know what was left out of the record it is reviewing.

The error in *Neder v. United States*, 527 U.S. 1 (1999), — the submission of the question of materiality to the judge and not the jury — was a pure instructional error that did nothing to distort the trial record. Petitioner's and the United States' reliance on *Neder* is, therefore, misplaced. Both the defendant and the prosecution fully understood that materiality was an "element" of the offense, and the defendant thus had every incentive to bring to bear all of his evidence on the question. Because the trial record was unaffected by the subsequent instructional error, harmless-error review was possible. The same was also true in all of the cases on which *Neder* relied, in which this Court applied harmless-error review to purely instructional errors.

The *Apprendi/Blakely* error at issue here involves a far more fundamental breakdown of the criminal process. Applying harmless-error review would be indistinguishable from permitting a court to direct a verdict against a defendant with respect to an aggravated version of an offense proved to a jury beyond a reasonable doubt. But this Court has made clear that directed verdicts of guilt are never permitted and never subject to harmless-error review. To allow harmless-error review here would be inconsistent with that sound rule of law.

Further, in developing the rule of *Apprendi* and *Blakely*, this Court recognized the unique power of the jury to provide leniency and check the authority of judges to punish. Applying harmless-error analysis to *Apprendi/Blakely* errors would give judges a risk-free opportunity for an end-run around the jury's protective function. A judge who believed a defendant was undercharged could impose a harsher sentence

based on his or her view that an aggravating fact had been proved beyond a reasonable doubt. If the reviewing court were to agree, then the defendant would be convicted of an aggravated version of the crime charged without ever having had the opportunity for the jury to exercise its unreviewable power to choose a lesser-included offense.

Finally, there is no reason to undermine the values of the Sixth Amendment jury right by reviewing *Apprendi/Blakely* errors for harmlessness. Harmless-error analysis was developed in response to the perception that the criminal process was becoming bogged down with endless retrials as a result of seemingly insignificant and often technical errors. But recognizing that *Apprendi/Blakely* errors are "structural" will not result in any retrial. Whenever such an error occurs, the defendant will have necessarily been found guilty of a lesser offense and will be subject to the punishment authorized by that offense. No conviction based on a jury's findings will be undone as a result of vigorously protecting the rule of *Apprendi/Blakely* from erosion through harmless-error review.

ARGUMENT

I. *APPRENDI/BLAKELY* ERRORS ARE STRUCTURAL BECAUSE THEY AFFECT THE ENTIRE CONDUCT OF THE TRIAL AND THE FRAMEWORK WITHIN WHICH THE TRIAL PROCEEDS.

This Court has recognized that there exists a certain category of errors which are "structural" and hence "defy analysis by 'harmless-error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Such errors affect "the entire conduct of the trial from beginning to end" or alter the "framework within which the trial proceeds." *Id.* at 309-10.

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence ...." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Certain errors have been deemed "structural" because they pervade the entire trial process by altering the very manner in which the central factual issues are developed. *Gideon v. Wainright*, 372 U.S. 335 (1963) (denial of right to counsel, recognized as not subject to harmless error analysis in *Chapman*, 386 U.S. at 23 n.8; *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of right of self-representation at trial); *Holloway v. Arkansas*, 435 U.S. 475 (1978) (denial of effective assistance of counsel due to conflict of interest).[2] When such errors occur, harmless error analysis is not possible because the very record which an appellate court would review is an unreliable guide for determining whether the defendant is guilty beyond a reasonable doubt. *See Yates v. Evatt*, 500 U.S. 391, 404 (1991) (instructing that the first step in conducting harmless error review is to determine "what evidence the jury actually considered"), *disapproved on other grounds, Estelle v. McGuire*, 502 U.S. 62 (1991). When, for example, defense counsel is tainted by a conflict of interest because he also represents a co-defendant, the problem is that there are a variety of decisions that may *not* have been made, and hence did not make their way into the record. "[T]he evil — it bears

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[2] Certain of the errors this Court has deemed "structural" go to how the facts developed at trial have been evaluated. *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable doubt instruction); *Tumey v. Ohio*, 273 U.S. 510 (1927) (denial of right to impartial judge, recognized in *Chapman*, 386 U.S. at 23 n.8). Still others do not impact the manner in which the record is developed or evaluated at trial. They nonetheless are not subject to harmless error analysis for the distinct, but equally important, reason that they so distort the framework of the criminal process that affirmance of a conviction obtained through such a process is intolerable. *Gray v. Mississippi*, 481 U.S. 648 (1987) (improper exclusion of juror from death penalty case); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of individuals from grand jury on basis of race); *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (right to a public trial).

repeating — is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." *Holloway*, 435 U.S. at 490 (emphasis omitted). Certain errors distorting the creation of the record itself make it too "difficult to judge intelligently the impact" on the trial. *Id.* at 491.

Ordinary "trial errors" are different. They are subject to harmless error analysis because the record that was developed is a sufficiently reliable context against which an appellate court can evaluate the impact, if any, of the error. *Fulminante*, 499 U.S. at 307-08.

Apprendi/Blakely errors fundamentally alter the manner in which the factual issues are developed throughout a trial. When an *Apprendi/Blakely* error occurs, the trial record that has been developed is itself an unreliable guide to determine whether the jury would have found an aggravating fact to have been proved beyond a reasonable doubt because there is no reason to believe that an appellate court would be reviewing a record that includes all the evidence that the defendant could bring to bear in his defense. Such errors too, then, should be deemed "structural" and not amenable to harmless error analysis.

The impact of *Apprendi/Blakely* errors stretches from the outset of the criminal process through the verdict. As the State concedes, *Apprendi* and *Blakely* require the prosecution and the court to treat any fact that exposes the defendant to an increased maximum penalty as functionally equivalent to an element of the crime charged. Pet. Br. 10. The elements of the crime charged are the central points of contention in a criminal trial. They provide notice of precisely what facts the defendant must dispute if he is to escape conviction and precisely what is at stake in terms of the maximum punishment to which he is exposed. As this Court observed in *Apprendi*:

> As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, ... stated with such certainty and precision, that the defendant ... may be enabled to determine the species of offence they constitute, in order that he may prepare his defense accordingly ... and that there may be no doubt as to the judgment which should be given, if the defendant be convicted."

530 U.S. at 478 (omissions in original) (emphasis omitted) (quoting J. Archbold, *Pleading and Evidence in Criminal Cases* 44 (15th ed. 1862)); *United States v. Reese*, 92 U.S. 214, 232-33 (1875) (Clifford, J., dissenting) (stating that "the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted"). Ultimately, to obtain a verdict of guilt, the prosecution bears the burden of proving to a jury each element of the crime charged beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 227, 232 (1999); *United States v. Gaudin*, 515 U.S. 506, 511 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *Patterson v. New York*, 432 U.S. 197, 210 (1977); *In re Winship*, 397 U.S. 358, 364 (1970). When this Court stated that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt," *Jones*, 526 U.S. at 243 n.6, it was recognizing the overarching importance that the elements of the offense play in the criminal process.

An *Apprendi/Blakely* error thus casts a dark shadow over the entire trial. If the prosecutor or judge fails to articulate an element of the offense, then the defendant will not know that he must dispute that fact. Neither will the defendant know what precise degree of punishment he faces (which will substantially impact his decision whether to accept a plea bargain). Such an error truncates the presentation of evidence by the defendant in ways that render harmless error analysis

impossible. The record that an appellate court will review following a trial infected by *Apprendi/Blakely* error will look different than what it would have looked like had there been no such error.

A review of how the facts were developed in *Jones* reveals why harmless error cannot be applied to the *Apprendi/Blakely* error. In *Jones*, the defendant was charged with carjacking under the then-prevailing version of 18 U.S.C. § 2119. The statute set forth the offense of carjacking, which included a potential punishment of up to 15 years in prison. But two subsections increased the potential punishment, the first to 25 years if serious bodily injured resulted, and the second to life in prison if death resulted. *Jones*, 526 U.S. at 230 (reproducing text of statute). The indictment did not state that the government would be seeking the increased penalty for serious bodily injury, nor did the facts alleged in the indictment indicate that the government would present evidence that serious bodily injury occurred. *Id.* at 230-31. The jury was not asked to find that serious bodily injury occurred. *Id.* at 231.

Nonetheless, during the trial, the victim testified that his ear bled profusely as a result of the attack, and that "a physician had concluded that [the victim] had suffered a perforated eardrum, with some numbness and permanent hearing loss." *Id.* On the basis of this testimony, the judge found that serious bodily injury had occurred and sentenced Jones above the 15 year limit that would have applied had there been no finding of serious bodily injury. *Id.*

There is no question that the extension of Jones's sentence beyond 15 years, if it happened today, would violate the rule of *Apprendi*. And because of the error, an appellate court could not scour the record in an effort to determine, as the State and the United States suggest, whether the record indicates that the jury would have found serious bodily injury had it been asked. The record under review may well contain uncontroverted evidence that serious bodily injury occurred

(for example, permanent hearing loss), and hence support an appellate court's conclusion that the jury would have found serious bodily injury beyond a reasonable doubt. But there is no reason to believe that the record that the appellate court would be reviewing is the record that would have been developed in the absence of the error. Under the rule of *Apprendi*, defense counsel would have had no reason to cross-examine the victim concerning the extent of his injuries. There would have been no reason to explore, for instance, the medical basis of the physician's conclusion that he suffered "permanent" hearing loss. Defense counsel would have had no reason to believe that the evidence admitted (presumably) as part of the *res gestae* of the offense would later be seized upon for the entirely different, and in fact unlawful, purpose of enhancing his sentence beyond the 15 year limit. The question of serious bodily injury was not going to be the subject of jury deliberations. And defense counsel reasonably could conclude that it would be poor strategy, in light of the fact that those assertions are legally irrelevant, to attack the extent of the victim's injuries because of the risk of offending the jury. *Cf. Shepard v. United States*, 290 U.S. 96, 103 (1933) ("A trial becomes unfair if testimony ... may be used in an appellate court as though admitted for a different purpose, unavowed and as unsuspected."). Because the error itself contributed to the production of a less-than-complete record that supports the conclusion that the error was harmless beyond a reasonable doubt, harmless error analysis is inappropriate.

A similar distortion of the record on the aggravating fact occurred in this case. It is true that the information sheet alleged that the "deadly weapon" at issue in the case was a "handgun." J.A. 3, 5. But, as respondent points out, a "handgun" is always a deadly weapon, but a "handgun" is not always a "firearm." Resp. Br. 19. Washington law states that a "firearm" is an operable gun. Wash. Rev. Code § 9.41.010; *State v. Padilla*, 978 P.2d 1113 (Wash. Ct. App. 1999); *State*

v. Franklin, 704 P.2d 666, 671 n.3 (Wash. Ct. App. 1985). The prosecuting attorney insisted that the question of whether a firearm was used was not an "element" of the offense charged. J.A. 35 ("[T]here is no element[] of a firearm. The element is assault with a deadly weapon."). And trial counsel did not "develop[] evidence on [the firearm issue] because it wasn't in our interest to do so." J.A. 38. Indeed, it would have been strategically unwise for defense counsel to place in the record evidence challenging the operability of the firearm. Defense counsel was trying to win an acquittal. In light of the *Blakely* error, the jury was not going to be asked to determine whether the "handgun" under dispute was, in fact, a "firearm" under Washington law. So had defense counsel put in evidence that the "handgun" was not a "firearm" the jury would have (1) been puzzled as to why the defendant was trying to draw such a distinction, and (2) might have concluded that the defendant was conceding that a "handgun" was used. *See Monge v. California*, 524 U.S. 721, 729 (1998) ("A defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved."). It is sometimes a hard strategic question for defense counsel whether to dispute an aggravating element (like the "firearm" at issue here) at the risk of undermining a client's claim of innocence. But there is no question at all that counsel should not undermine his client's claim of innocence by disputing facts at trial that the jury is not being asked to consider.

In sum, *Apprendi/Blakely* errors contribute to the production of a limited trial record on the very factual allegation that an appellate court would be asked to review, if the errors were deemed potentially harmless. As a result, such errors leave an appellate court without a reliable and complete record to examine under the *Chapman* standard of harmless beyond a reasonable doubt. *Holloway*, 435 U.S. at 490-91. The consequences of the error are thus "necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 281-

82. Because no reviewing court, in light of the distorted record, can determine whether an *Apprendi/Blakely* error is harmless beyond a reasonable doubt, the error should be deemed "structural."

II. REVIEWING *APPRENDI/BLAKELY* ERRORS FOR HARMLESSNESS WOULD EXTEND *NEDER v. UNITED STATES* AND OTHER INSTRUCTIONAL ERROR DECISIONS, AND WOULD EFFECTIVELY EVISCERATE THE PROTECTIONS OF *APPRENDI* AND *BLAKELY*.

Petitioner contends that *Apprendi/Blakely* error is, contrary to the argument detailed above, quite narrow. Petitioner repeatedly characterizes *Apprendi/Blakely* error as nothing more than imprecision in a jury instruction or the outright failure to instruct the jury on an element — specifically, the aggravating element that increases the potential punishment — of the offense. Pet. Br. 8, 10, 11, 18. Based on that characterization of the error, petitioner claims that this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), controls here because the error in *Neder* — the failure to instruct the jury on a single element of the offense — was deemed subject to harmless-error review.

Because petitioner has mischaracterized the nature of the error, and ignored its full scope, its reliance on *Neder* is misplaced. Applying *Neder* here is, in fact, a dramatic extension of the case, one which would have the effect of undoing the protections that *Apprendi* and *Blakely* were designed to ensure.

A. Nothing In *Neder* Or Any Other Instructional Error Decision Requires That *Apprendi/Blakely* Errors Be Reviewed For Harmlessness.

Neder was a "narrow" decision that arose out of unusual circumstances. *Neder*, 527 U.S. at 17 n.2. Ellis Neder was charged with, *inter alia*, bank fraud and two counts of filing false income tax returns arising out of certain fraudulent real

estate transactions. *Id.* at 4-6. The parties understood that materiality was an element of these offenses.[3] *Id.* at 6. Nonetheless, the district court concluded that the question of materiality was one for the court, not the jury, and thus specifically instructed the jury *not* to consider whether the allegedly false statements were material. *Id.* This Court subsequently concluded in *Gaudin* that when materiality is an element of an offense, the defendant has the right to insist upon a jury finding that the prosecution established materiality beyond a reasonable doubt. *Neder*, 527 U.S. at 4 (specifically discussing tax charges) (citing *United States v. Gaudin*, 515 U.S. 506 (1995)).

It is clear, then, that the error in *Neder* simply concerned whether the instruction given to the jury was proper. This Court explicitly defined the error in *Neder* narrowly as "a jury instruction that omits an element of the offense." 527 U.S. at 8. This Court further emphasized the narrow nature of the ruling when it relied upon its prior application of harmless-error analysis "to cases involving improper instructions on a single element of the offense." *Id.* at 9-10 (citing cases).

Petitioner believes that *Neder* controls here only because Petitioner believes that this case involves a mere error in the jury instruction. Pet. Br. 18. That is wrong as a matter of both federal and state law.

First, as a matter of federal law, and as discussed above, an *Apprendi/Blakely* error infects the trial from start to finish, while the error in *Neder* did not come into play until the jury was instructed. Unlike an *Apprendi/Blakely* error, nothing about the error in *Neder* distorted the defendant's ability or incentive to present at trial his best evidence concerning materiality. Unlike an *Apprendi/Blakely* error, nothing about

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[3] The district court concluded that materiality was not an element of either the mail fraud or wire fraud statutes. This Court reversed that aspect of the decision, but did not itself review whether that error was harmless. *Neder*, 527 U.S. at 25.

the error in *Neder* would have left the defendant uncertain about precisely what punishment he was facing based on which facts the prosecution was submitting. Unlike an *Apprendi/Blakely* error, nothing about the error in *Neder* would have forced defense counsel to undermine his claim of innocence by challenging the government's evidence on a legally irrelevant factual assertion.

Second, as a matter of state law, the Washington Supreme Court specifically accepted that the instruction given to the jury in this case was "correct;" the problem was the improper imposition of an enhancement to Recuenco's sentence for use of a firearm in violation of "his due process and jury trial rights."[4] Pet. App. 7a-8a. Recuenco was charged with second degree assault with a "deadly weapon." His trial proceeded on the prosecution's view that the use of a "firearm" was not an element of the offense charged. His counsel recognized that it was not in his interest to dispute at trial whether the handgun at issue was, in fact, a "firearm" under state law. The jury was instructed to find only that Recuenco used a "deadly weapon" in connection with the assault. Yet in the end the judge convicted and sentenced Recuenco for an aggravated version of the offense — assault with a firearm. This is no mere "instructional" error.

Because this case involved far more than mere "instructional error," all of the other instructional error cases relied upon by petitioner are as inapposite as *Neder*. For example, in *Pope v. Illinois*, 481 U.S. 497, 499 (1987), the trial court in an obscenity prosecution erroneously instructed the jury that it should evaluate the accused material based on "how it would be viewed by ordinary adults in the whole

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[4] *Amici* agree with respondent's view that state law actually prohibits the State from imposing the firearm enhancement they are trying to obtain through harmless-error review. Resp. Br. 8-13. For that reason, *amici* also agree that state law prohibits this Court from ordering that harmless-error review be conducted in this case, and that it may be appropriate to dismiss the writ as improvidently granted on that ground. *Id.* at 40.

State of Illinois." This Court found that instruction erroneous because the jury should have been asked to evaluate the material based on an objective "reasonable person" standard rather than one linked to any community standards peculiar to Illinois. *Id.* at 500-01. As in *Neder*, the error in *Pope* was purely instructional and there is no reason to believe it had any effect on the development of the record that an appellate court would review to determine harmlessness. Whether the jury would apply an Illinois-adult standard or an objective reasonable-person standard, the defendant had every incentive to present evidence of the required "[l]iterary, artistic, political or scientific value" required by *Miller v. California*, 413 U.S. 15, 24 (1973).

The other instructional errors that this Court has held are subject to harmless error review all, likewise, did not infect the development of the record that the appellate court reviews. This Court flatly said as much in *Rose v. Clark*, 478 U.S. 570 (1986), where a jury was erroneously instructed that it should presume malice in a homicide. *Id.* at 579 n.7 (stating "the error in this case did not effect the composition of the record"). To the contrary, because the improper presumption placed the burden of producing evidence negating a finding of malice on the defendant, the record most surely included all the defendant had to offer on the issue. *See also Yates*, 500 U.S. at 404-05 (applying harmless-error analysis to erroneous jury instruction regarding presumption of malice). Similarly, the application of harmless error to erroneous instructions, including a conclusive presumption, *Carella v. California*, 491 U.S. 263 (1989) (per curiam), does no violence to the criminal process because the reviewing court examines the predicate facts relied upon in the instruction to determine whether they "'are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding the ultimate fact.'" *Yates*, 500 U.S. at 406 n.10 (quoting *Carella*, 491 U.S. at 271

(Scalia, J., concurring)); *see also California v. Roy*, 519 U.S. 2, 7 (1996) (per curiam) (Scalia, J., concurring).

In each case of true "instructional" error, harmless error can be applied because the trial took place under circumstances in which the defendant had the incentive and the opportunity to develop fully the facts that were the subject of the appellate court's review. That is not the case when a trial is infected by *Apprendi/Blakely* error. Therefore, harmless error review is not "susceptible of intelligent, evenhanded application." *Holloway*, 435 U.S. at 490.[5]

B. To Hold That *Apprendi/Blakely* Errors Can Be Harmless Would Fundamentally Alter The Framework Of The Criminal Process.

Once one lifts the fog of the petitioner's claim that *Apprendi/Blakely* error is mere "instructional" error, it becomes clear just how radical a change in the criminal process applying harmless error analysis to *Apprendi/Blakely* errors would produce. There was nothing wrong with how the trial court instructed the jury. There was nothing wrong with the verdict returned by the jury. The process employed produced a complete verdict on the crime charged: second degree assault with a deadly weapon. But *after* that process ran its course, the judge entered a judgment of conviction and

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[5] Petitioner, but notably *not* the United States, also claims that this Court's *per curiam* decision in *Mitchell v. Esparza*, 540 U.S. 12 (2003), also requires that *Apprendi/Blakely* errors be reviewed for harmlessness. Pet. Br. 17-18. *Mitchell* involved the failure of the prosecution to allege that the defendant was the "principal offender" in an aggravated murder case, which would make him eligible for the death penalty. 540 U.S. at 14. Because the issue came to this Court on *habeas corpus* review, all this Court was considering was whether the state courts had unreasonably applied this Court's prior decisions. *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (O'Connor, J.) (stating that an "unreasonable application of federal law is different from an incorrect application of federal law") (emphasis omitted). Therefore, it might have been wrong to have applied *Neder* in *Mitchell*, but not unreasonably so.

imposed punishment on a different and more severe offense: second degree assault with a firearm. To allow this error to be subject to review for harmlessness would alter the "framework within which the trial proceeds." *Fulminante*, 499 U.S. at 309-10.

1. Allowing Apprendi/Blakely *errors to be reviewed for harmlessness transforms the protections of those cases into a license for judges to direct a verdict on aggravated offenses.* To accept petitioner's position would be to allow a directed verdict of guilt, which this Court has squarely foreclosed. Consider the following alternative mechanism for arriving at the same result the State seeks here. Imagine the state actually charged both crimes — second degree assault with a deadly weapon and second degree assault with a firearm.[6] Imagine further that the judge submitted only the deadly weapon charge to the jury, stating that he had concluded that the firearm allegation had been proved beyond a reasonable doubt, and that he would order a directed verdict on the aggravated (firearm) charge if the jury returned a guilty verdict on the lesser deadly-weapon charge. After the jury returned its guilty verdict on the deadly-weapon charge, the judge entered a judgment of guilt on the firearm charge and sentenced him accordingly.

On appeal, respondent would have claimed that the directed verdict of guilt on the firearm charge was unlawful. There is no doubt that it would have been. "[R]egardless of how overwhelmingly the evidence may point" toward the defendant's guilt, a trial judge may not direct a verdict of guilt. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *United Bhd. of Carpenters v. United*

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[6] *Amici* acknowledge, along with respondent, that under state law, Recuenco could not have been charged with second degree assault with a firearm. Resp. Br. 11-13. But for purposes of exploring the consequences of permitting *Apprendi/Blakely* errors to be reviewed for harmlessness, one can hypothesize a statute that in fact permits both aggravating facts — deadly weapon and firearm — to be charged and proved to a jury.

States, 330 U.S. 395, 408 (1947) (stating "a judge may not direct a verdict of guilty no matter how conclusive the evidence"). Imagine the State acknowledged the error, but asked the appellate court to determine that it was harmless.

There is no doubt that the conviction on the aggravated firearm charge would have to be reversed. In *Carpenters* this Court refused to "enter into an analysis of the evidence that was relied upon to show the participation of the unions in the conspiracy.... No matter how strong the evidence may be ... there must be a charge to the jury ...." 330 U.S. at 408. That is, in *Carpenters* this Court held that harmless error review should not be undertaken on appeal following a directed verdict. Even as this Court allowed harmless error review of the instructional error in *Rose*, it acknowledged that "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury." 478 U.S. at 578.

The *Blakely* error that occurred during Recuenco's trial is indistinguishable from the directed verdict in the alternative discussed above. In both situations the defendant was found guilty by the jury of one offense, but was convicted and sentenced for an aggravated offense based solely on the judge's evaluation of the record. In both situations there is no dispute that the conviction for the aggravated offense was unlawful. The only difference is that the *Blakely* error is actually worse. In the directed verdict hypothetical, the defendant was at least placed on notice that he was subject to punishment for the firearm offense, and therefore had every incentive to create as strong a record as he could regarding the firearm allegation. As discussed above, *supra* at 4-11, *Blakely* error infects the entire trial and actually distorts the record that an appellate court would be reviewing. If anything, the case for applying harmless-error analysis to a directed verdict is *stronger* than the case for applying harmless-error analysis to *Apprendi/Blakely* error.

2. Allowing Apprendi/Blakely *errors to be reviewed for harmlessness would undo the protections those cases were designed to preserve.* This Court's decision in *Blakely* was an explicit acknowledgment that the jury right is a vital mechanism for restraining the power of judges. *Blakely*, 542 U.S. at 305-06 (stating that the jury right is "a fundamental reservation of power in our constitutional structure.... [so as to] ensure[] the people's ultimate control ... in the judiciary"). As this Court first began developing the robust view of the Sixth Amendment jury right that has prevailed in *Apprendi*, *Blakely* and *United States v. Booker*, 543 U.S. 220 (2005), it noted that by requiring a jury to find all facts essential to authorize punishment of a certain severity, juries "check[]" the power of judges to impose severe sentences by issuing "what today we would call verdicts of guilty to lesser included offenses." *Jones*, 526 U.S. at 245 (citing 4 Blackstone, *Commentaries* 238-39 (1769)). The jury is a reservation of the authority to be lenient in the people, and it operates without the need "to give any reason for an acquittal, and it faces no review by a court or a legislature." Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 61 (2003).

To allow *Apprendi/Blakely* errors to be subject to review for harmlessness would provide an end-run around the essential protection of the jury right. A prosecutor might refrain from charging and submitting to the jury any aggravating factors that could potentially increase a defendant's punishment. After the jury returns a verdict on the lesser offense that was charged, the prosecutor could ask the judge to find that the state submitted uncontroverted evidence of the aggravator, and so proved the existence of the aggravator beyond a reasonable doubt. If the trial judge concludes that the aggravating fact was proved beyond a reasonable doubt, and imposes the more severe sentence, under the harmless-error test that petitioner proposes, the

sentence would have to be affirmed if the reviewing court agreed that the aggravator was proved beyond a reasonable doubt. The more severe sentence would be imposed without the jury ever having had the opportunity to consider both the aggravated and lesser offense, and determine whether to exercise leniency toward the defendant.

Indeed, the judiciary's overtaking of the prerogatives of the jury are not even dependent on prosecutorial encouragement. Many state judges are elected, and it is no secret that some feel political pressure to demonstrate their toughness on crime. If such a judge thought a defendant had been undercharged, he might impose an enhancement based on a fact never submitted to the jury. Others might feel the need to go beyond the sentence authorized by the crime charged and proved to the jury in response to the families of victims and victims themselves who come forward seeking a tough penalty. These are not merely theoretical possibilities. In Washington, some judges are looking for authority to exercise greater control over sentencing than current law provides. *See Judges Eye More Say Over Penalties*, The Columbian News, Dec. 19, 2005, at C1, *available at* http://www.columbian.com. Indeed, the trial judge in *Blakely* reached out and determined that in his view the defendant had been undercharged and that he would impose, based on his own findings, an additional sentence above the range permitted. Br. for Pet'r at 6-7, *Blakely v. Washington*, No. 02-1632 (U.S. filed Dec. 4, 2003). Allowing *Apprendi/Blakely* errors to be reviewed for harmlessness will permit a judge to exercise greater sentencing control, whether in response to his or her own sense of justice or to an appeal from a victim, in the hopes that an appellate court will agree with his or her own evaluation of the record and affirm the sentence despite the unlawful manner in which it was attained.

A judge who enhances a sentence based on an uncharged aggravator with respect to which the jury was not instructed can rest assured that his legal error is risk-free. The worst

that happens is that the defendant will receive the maximum sentence that he could have received under the jury's findings. Put simply, the cost to the trial judge of meting out punishment based on his or her own sensibilities, without regard to the limitations imposed by the jury's findings, is low.[7] The adoption of rules of review of trial errors that make such errors "virtually risk free" is undesirable. *Fulminante*, 499 U.S. at 309.

In the end, permitting review of *Apprendi/Blakely* errors for harmlessness could effectively wind the clock back to what looks strikingly similar to the pre-*Apprendi* sentencing regime. Before *Apprendi*, *Blakely* and *Booker*, courts had to determine whether particular facts that could impact the legally permissible sentence were "elements" or "sentencing factors." If they were elements, as noted above they had to be charged, and proved to a jury beyond a reasonable doubt. But if they were sentencing factors, then there was no right to a jury and the facts could be proved to a judge by a mere preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 156 (1997) (per curiam); *McMillan v. Pennsylvania*, 477 U.S. 79, 91-93 (1986). *Apprendi* and the cases that followed it eliminated the distinction between sentencing factors and elements. The jury became the focal point and the necessary factfinder (under the beyond a reasonable doubt standard) for *any* fact that increased the potential punishment to which the defendant was exposed. *Apprendi*, 530 U.S. at 490. To allow harmless-error analysis to apply when *Apprendi* is violated is to allow judges to regain their position as finders of what are essentially sentencing factors. The only difference is that under *Chapman*'s standard, judges must find that the sentencing factors were proved beyond a reasonable

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[7] By contrast, the cost to the appellate courts will be high. They will carry the burden of reviewing such enhancements in light of the entire trial record to determine whether the jury, had it been asked to consider the fact, would have concluded that it had been established beyond a reasonable doubt.

doubt. Harmless-error analysis here thus does more than just determine whether there is any reasonable chance that the error changed the outcome. It rearranges power between the judiciary and jury right back to where matters stood before *Apprendi* and *Blakely*.

III. REVIEWING *APPRENDI/BLAKELY* ERROR FOR HARMLESSNESS DOES NOT SERVE THE VALUES OF APPLYING HARMLESS-ERROR ANALYSIS IN OTHER CONTEXTS.

There is no reason to do violence to the Sixth Amendment by permitting *Apprendi/Blakely* errors to be reviewed for harmlessness. Review of such errors for harmlessness would fail to advance the values of including a harmless-error safety valve in the criminal process.

The doctrine of harmless error grew out of the widespread sentiment that defendants were able to win reversal of otherwise valid convictions on the basis of mere technicalities. *Kotteakos v. United States*, 328 U.S. 750, 759-60 (1946). "So great was the threat of reversal, in many jurisdictions, that a criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained." *Id.* at 759. Harmless error rules "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22; 5 Wayne R. LaFave et al., *Criminal Procedure* § 27.6(a), at 933-34 & n.5 (2d ed. 1999) (discussing history of adoption of harmless error as reaction to criticism of appellate courts as "'impregnable citadels of technicality'") (quoting Kavanaugh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 222 (1925)).

Reviewing *Apprendi/Blakely* errors for harmlessness will not serve any useful purpose. There is no risk that, following an *Apprendi/Blakely* error, a conviction will be reversed and a

new trial will have to be had to authorize punishment of the defendant. The nature of the error is such that a perfectly valid conviction is always in place. The problem is that the prosecution (or the judge) is unsatisfied with the degree of punishment authorized by the crime charged and the jury's verdict. Recognizing *Apprendi/Blakely* errors as structural does not risk bringing the criminal process into disrepute by permitting individuals who have had an essentially fair trial to go free based on nothing more than any of the number of inevitable minor errors that will occur in any human endeavor as vast as the nation's criminal justice system. Nobody claiming an *Apprendi/Blakely* error has escaped conviction.

To the contrary, the risk to the criminal process is great not from failing to apply harmless-error analysis here, but rather from choosing to apply it. Defense counsel will come to recognize that their clients, charged with specific offenses that carry specific maximum penalties, nonetheless remain exposed to potentially increased punishment on the basis of facts that are not elements of the charged offense. In response, out of an abundance of necessary caution, counsel will vigorously dispute every fact upon which a judge might later base an enhanced sentence. Trials will cease to be the kind of orderly process focused on the jury's consideration of the elements of the offense. Jurors will sit through testimony and evidentiary presentations that have nothing to do with the matters they will be asked to consider. Trials will become unnecessarily longer and more confusing to jurors as they lose their focus.

Recognizing *Apprendi/Blakely* errors as structural will better ensure that the criminal process remains orderly and predictable, and that defendants will always know what facts are in dispute and what is at stake in terms of potential punishment. This Court should continue to give the Sixth Amendment the robust reading it deserves and conclude that *Apprendi/Blakely* errors are not subject to review for harmlessness.

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

PAMELA HARRIS
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

ROBERT N. HOCHMAN*
SIDLEY AUSTIN LLP
One South Dearborn St.
Chicago, IL 60603
(312) 853-7000

SHERYL GORDON MCCLOUD
WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1301 Fifth Ave., Suite 3401
Seattle, WA 98101
(206) 224-8777

Counsel for Amici Curiae

* Counsel of Record

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