No. 02-1632

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

ON WRIT OF CERTIORARI TO THE WASHINGTON COURT OF APPEALS, DIVISION III

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Washington is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus* curiae. Because this case calls into question the meaning and scope of the jury trial right, both as a means to protect against arbitrary government action and to preserve public confidence in the criminal justice system, it raises questions of fundamental importance to the ACLU and its members.

STATEMENT OF THE CASE

Petitioner Ralph Blakely pled guilty in state court to one count of second degree kidnapping while armed with a deadly weapon and one count of second degree assault. He was sentenced to 90 months in prison, 37 months longer than the maximum sentencing range authorized for his crimes by the Washington State legislature.

Under Washington's Sentencing Reform Act of 1981 (the "Act"), the legislature has established a "standard" sentencing range for every felony conviction. The standard sentencing range reflects the legislature's judgment regarding the seriousness of both the offense and the offender's criminal

[1] Pursuant to Rule 37.6, letters of consent to the filing of this brief are on file with the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the *amici* themselves, made a monetary contribution to the preparation or submission of this brief.

history. See RCW 9.94A.310 (recodified as RCW 9.94A.505).[2]

The Act therefore provides that a sentencing court "shall impose" a sentence within the standard range unless the court finds substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.120(1)-(2). The Act contains an illustrative list of aggravating factors that may supply a legal basis for an exceptional sentence above the standard range. However, the court may also rely on factors not listed in the statute to impose an exceptional sentence above the range. The sentencing judge, without a jury, determines by a preponderance of the evidence whether the facts support an aggravating factor. RCW 9.94A.120(2)-(3) and RCW 9.94A.370. An upward departure may not exceed the maximum for the class of felony involved. RCW 9.94A.120(14). Both second degree kidnapping and second degree assault are Class B felonies that carry a maximum sentence of ten years. RCW 9A.20.121.

Petitioner Blakely's standard range for the kidnapping offense was 49 to 53 months, and the standard range for the assault offense was 12 to 14 months. Under Washington law these sentences presumptively run concurrently. RCW 9.94A.400. In exchange for Blakely's guilty pleas, the prosecution recommended a sentence at the high end of the standard range. The sentencing judge rejected this recommendation, added an additional 37 months to the top of the standard range, and imposed an exceptional sentence of 90 months on the kidnapping charge, to run concurrently with a 14 month sentence on the assault charge. This upward departure was based upon judicial findings that the following two statutory aggravating factors were present: "deliberate

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[2] Many of the provisions of the Sentencing Reform Act were recodified by the Laws of 2001, ch. 10, § 6. This *amicus curiae* brief employs the old statutory section numbers, as did the courts below.

cruelty," and "domestic violence plus deliberate cruelty and commission within the sight or sound of the victim's minor child." RCW 9.94A.390(2)(a) and RCW 9.94A.390(2)(h)(ii) and (iii).

Blakely contended that this increased sentence violated the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the judge's factual findings exposed him to a penalty greater than he could lawfully receive if punished according to the facts established by his guilty plea. Accordingly, Blakely claimed he was entitled to a jury trial at which the additional facts would have to be established by proof beyond a reasonable doubt. The Washington courts disagreed, relying on the Washington Supreme Court decision in *State v. Gore*, 143 Wn.2d 288, 21 P.3d 252 (2001), which held that *Apprendi* did not apply to exceptional sentences above the standard range.

This Court granted review to decide whether a fact (other than a prior conviction) necessary for an upward departure from a statutory standard sentencing range must be proved according to the procedures mandated by *Apprendi*.

SUMMARY OF ARGUMENT

Washington State courts have held that the rule of *Apprendi v. New Jersey*, 530 U.S. 466, does not apply in a significant class of cases where the severity of punishment above the statutorily prescribed range hinges on the presence or absence of a disputed fact. In Blakely's case, the facts encompassed in his guilty plea (or that a jury would have been required to find in order to convict) permitted a sentence of between 49 and 53 months, but the sentence that Blakely actually received was two-thirds longer, based upon proof of additional facts that were found by a judge not a jury, and by a preponderance of the evidence rather than beyond a reasonable doubt. This result fundamentally misreads *Apprendi* and is

irreconcilable with this Court's post-*Apprendi* decision in *Ring v. Arizona,* 536 U.S. 584 (2002).

Blakely was sentenced to a longer term in prison than the relevant statute otherwise allowed based on his guilty plea. Washington's sentencing scheme is therefore indistinguishable from the New Jersey sentencing scheme struck down in *Apprendi.* Following *Apprendi,* any facts (other than a prior conviction) that subject a defendant to a longer sentence than provided by statute in the absence of such facts must be found by a jury beyond a reasonable doubt. A state cannot sidestep these constitutional safeguards merely by re-labeling them as sentencing factors. As the Court stressed in *Apprendi:* "We have made clear beyond peradventure that *Winship's* due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Id.* at 484. Blakely does not ask this Court to expand *Apprendi*, only to apply it.

Reversing Blakely's exceptional sentence is consistent with the constitutional values that motivated the Sixth Amendment right to jury trial and the decisions in *Apprendi* and *Ring.* Denial of the right to a jury trial was one of the Framers' chief complaints. "Royal interference with the jury trial was deeply resented." *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968). The Declaration of Independence itself voiced objections to the King's practice of "depriving us in many cases, of the benefits of Trial by Jury." The decision that juries should have a major responsibility for criminal justice was broadly conceived by the Framers, who believed that "the common people should have as complete a control over the judiciary as over the legislature." 2 The Works of John Adams 253 (C. Adams ed. 1850) (diary entry, Feb. 12, 1771). Incidents where English judges had acceded to tyranny were noteworthy not only for their wrongful findings of guilt, but for the severe consequences of those guilty verdicts. The Framers

concluded that such punishments should not be imposed based upon the arbitrary action of a single judge. The jury trial provision of the Sixth Amendment thus reflects a fundamental "reluctance to entrust plenary powers over the life and liberty of citizens to one judge or to a group of judges." *Duncan*, 391 U.S. at 156. In addition, citizen participation as jurors is essential for the maintenance of public confidence in the judicial branch of government. The Framers considered the jury to be an important institution for instilling republican and political virtues in a self-governing people. A system where a jury finds only a portion of the facts that the legislature deems significant to the length of the sentence represents an incursion into the democratizing role of the jury.

Insisting that Washington Courts adhere to *Apprendi* will not place unmanageable burdens on the state. Exceptional sentences above the standard statutory range are rare, so complying with *Apprendi* would not open the floodgates to thousands of sentencing trials. It would, however, correct a deprivation of jury trial rights that has severe consequences for defendants when it arises. In numerous cases, Washington's elected judges have single-handedly imposed exceptional sentences that multiply the statutorily-established sentence many times over, for years of additional incarceration.

These departures are particularly unjust because Washington State is already well-equipped to handle jury findings beyond a reasonable doubt on facts which increase the sentence beyond the standard range. Cases applying different Washington criminal statutes are already consistent with *Apprendi*. Indeed, 20 years before *Apprendi,* the Washington Supreme Court held, "our cases involving other enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish the facts which, if proved, will increase a defendant's penalty." *State v. Tongate*, 93 Wn.2d 751, 754, 613 P.2d 121 (1980) (interpreting firearms enhancement statute). The *Apprendi* concept is plainly not

alien to Washington criminal law. The practical impact of this case would be to apply its reasoning across the board to all facts (other than a prior conviction) which increase the punishment above the statutory range, rather than the current system where *Apprendi* procedures are used only in a seemingly random selection of criminal statutes. The formalities of statutory labeling cannot contravene the important constitutional principle that such facts must be found by a jury and must be established by proof beyond a reasonable doubt. As stated in *Ring*, the *Apprendi* rule must not be "reduced to a 'meaningless and formalistic' rule of statutory drafting." 536 U.S. at 604.

ARGUMENT

I. THIS CASE FALLS SQUARELY WITHIN THE RULE OF *APPRENDI* AND *RING*

In Blakely's case, the facts encompassed in his guilty plea (or that a jury would have been required to find in order to convict) permitted a sentence of between 49 and 53 months. RCW 9.94A.310. The sentence that Blakely actually received was two-thirds longer. Under Washington law, this increased sentence could be imposed only upon proof of additional facts. As this case illustrates, however, those facts can be found by a judge not a jury, and by a preponderance of the evidence rather than beyond a reasonable doubt. The Washington State courts have held that *Apprendi* does not apply in these circumstances. That conclusion fundamentally misreads *Apprendi*. It is also irreconcilable with this Court's post-*Apprendi* decision in *Ring v. Arizona,* 536 U.S. 584.

Because petitioner's brief will discuss *Apprendi* at length, we will not repeat that discussion here. For present purposes, it is sufficient to note that Washington continues to approach Blakely's jury trial claim by elevating form over substance, while this Court has taken precisely the opposite

approach in both *Apprendi* and *Ring*. Thus, Washington places great weight on the fact that the 90 month sentence that Blakely received was less than the 10 year sentence authorized for Class B felonies, including second degree kidnapping and second degree assault. But that simple assertion obscures the fact that the legislature also established a standard sentencing range that capped Blakely's maximum sentence at 53 months absent a separate finding of aggravated circumstances.[3]

Blakely, like Apprendi, was therefore sentenced to a longer term in prison than the relevant statute otherwise allowed based on his guilty plea. Washington's decision to allow a longer sentence based on additional findings does not resolve the constitutional problem, it merely frames it. Indeed, on this critical issue, Washington's sentencing scheme is indistinguishable from the New Jersey sentencing scheme struck down in *Apprendi.* Following *Apprendi,* any facts that subject a defendant to a longer sentence than provided by statute in the absence of such facts must be found by a jury beyond a reasonable doubt. Nor can a state sidestep these constitutional safeguards – that *Apprendi* described as "constitutional protections of surpassing importance," 530 U.S. at 476 – merely by re-labeling them as sentencing factors. As the Court stressed in *Apprendi:* "We have made clear beyond peradventure that *Winship's* due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length

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[3] As Blakely's petition for certiorari also points out, Washington's sentencing guidelines are set by the legislature. By contrast, the federal sentencing guidelines are established by a sentencing commission that is part of the judicial branch. See *Mistretta v. United States*, 488 U.S. 361 (1989). Thus, an upward departure under the federal guidelines can still remain with the sentencing parameters set by Congress. Washington, in effect, has created two sentencing ranges and the jump from one to the other necessarily depends on the finding of additional facts. At the very least, therefore, Washington's sentencing scheme raises different Sixth Amendment questions than the federal sentencing scheme.

of his sentence." *Id.* at 484.[4] Indeed, the history behind cases interpreting the right to a jury trial compelled the *Apprendi* Court to require that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

The importance of having a jury determine aggravating facts beyond a reasonable doubt when those facts permit a sentence beyond the statutorily-prescribed range was reaffirmed in *Ring v. Arizona,* 536 U.S. 584. As in *Apprendi*, the Court in *Ring* found that the Sixth Amendment right to a jury trial was violated when the judge alone determined the facts used to increase the sentence beyond the facts reflected in the jury verdict. 536 U.S. at 602. *Ring* explained why it was essential for a jury to perform this factfinding role:

> Arizona suggests that judicial authority over the finding of aggravating factors 'may... be a better way to guarantee against the arbitrary imposition of the death penalty.' The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be 'an admirably fair and efficient scheme of criminal justice designed for

[4] The qualifications on that general principle have no bearing here. For example, in *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986), the Court held that the factual findings necessary to impose a mandatory minimum need not be submitted to a jury after a guilty plea because they fall within an "already available" range set by the legislature. Here, by contrast, the increased sentence given to Blakely was not within the range of statutory alternatives that was "already available" to the sentencing court based solely on his guilty plea. *See also Harris v. United States,* 536 U.S. 545 (2002). Nor can the factual findings in this case be compared to a prior conviction, which is a matter of public record.

> a society that is prepared to leave criminal justice to the State… The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.'

Ring, 536 U.S. at 607 (citations omitted). Blakely does not ask this Court to expand *Apprendi*, only to apply it to the portions of Washington's sentencing scheme that fail to conform to it.

II. REVERSAL OF THE SENTENCE IS CONSISTENT WITH THE CONSTITUTIONAL VALUES ANIMATING *APPRENDI* AND *RING*

Denial of the right to a jury trial was one of the Framers' chief complaints. "Royal interference with the jury trial was deeply resented." *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968). Thomas Jefferson complained that Parliament had "extended the jurisdiction of the courts of admiralty beyond their ancient limits thereby depriving us of the inestimable right of trial by jury in cases affecting both life and property and subjecting both to the arbitrary decision of a single and independent judge." 2 *Journals of the Continental Congress (Ford ed.)* 132. And, the Declaration of Independence voiced objections to the King's practice of "depriving us in many cases, of the benefits of Trial by Jury."

The decision that juries should have a major responsibility for criminal justice was broadly conceived by the Framers. For example, the "Federal Farmer," the leading Anti-Federalist essayist of the ratification period, wrote that it was through juries "frequently drawn from the body of the people... [that] we secure to the people at large, their just and rightful controul in the judicial department." *Letters from The Federal Farmer (IV)* in 2 The Complete Anti-Federalist, at 249 (H.

Storing ed. 1981). John Adams asserted that "the common people should have as complete a control over the judiciary as over the legislature." 2 The Works of John Adams 253 (C. Adams ed. 1850) (diary entry, Feb. 12, 1771). Jefferson considered the importance of citizen participation in government as jurors *more* important that citizen participation in the legislative branch of government: "Were I called upon to decide whether the people had best be omitted in the Legislative or Judicial department, I would say it is better to leave them out of the Legislative." *Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789),* reprinted in 15 J. Boyd, The Papers of Thomas Jefferson at 282-83 (1958).

The Framers were quite aware of the fact that English judges had all too often acceded to instances of government tyranny, as the cases of William Prynne[5] and John Wilkes[6] graphically illustrated. These cases were noteworthy not only for their findings of guilt, but for the severe consequences of those guilty verdicts. The celebrated jury acquittal of the printer John Peter Zenger, tried for seditious libel, was well known to the Framers, and was cherished as an example of the way in which juries acted as a check against government oppression. During the debate on the adoption of the Constitution, one essayist wrote: "If I use my pen with the boldness of a freeman, it is because I know that the liberty of

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[5] Convicted of the crime of writing seditious books and pamphlets, Prynne's "ears were first cut off by court order and . . . subsequently, by another court order . . . his remaining ear stumps [were] gouged out while he was on a pillory." H. Black, *The Bill of Rights*, 35 N.Y.U.L.REV. 865, 870 (1960). *See* 1 J. Stephen, A History of the Criminal Law of England 340-341 (1883).

[6] A member of Parliament, Wilkes had written pamphlets criticizing George III's ministry and majesty. The government reacted by issuing general warrants to seize his books and pamphlets, and had Wilkes seized and imprisoned in the Tower of London. *See Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), and *Rex v. Wilkes*, 95 Eng. Rep. 737 (C.P. 1763).

the press yet remains unviolated, and juries yet are judges." *Letters of Centinel (I)* in 2 The Complete Anti-Federalist, *supra* at 136.

More recently, Justice Scalia observed in *Apprendi*, that judges "are part of the State," and "[t]he founders of the American Republic were not prepared to leave [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights." 530 U.S. at 498 (Scalia, J., concurring). The *Apprendi* majority expressed a similar view.

> '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that '*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours....' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter Blackstone) (emphasis added).

Id. at 477.

Duncan v. Louisiana, 391 U.S. 145, likewise recognized that the Sixth Amendment right to a jury trial was intended to protect criminal defendants against judges who might be "too responsive to the voice of higher authority." *Duncan, supra,* 391 U.S. at 156. Guaranteeing the right of the accused to be tried by a jury of his peers gave the accused a safeguard against the arbitrary action of "the compliant, biased, or eccentric judge." *Id.* The jury trial provision of the Sixth

Amendment thus reflects a fundamental "reluctance to entrust plenary powers over the life and liberty of citizens to one judge or to a group of judges." *Id*. *Accord Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (purpose of jury is "to make available the commonsense judgment of the community . . . in preference to the professional or perhaps overconditioned or biased response of a judge.").

Washington elects its judges, Washington Const., Art. IV, §§ 3, 5, 29, 30, and being tough on criminals is often politically popular. As Justice O'Connor noted in *Republican Party of Minnesota v. White,* 536 U.S. 765, 788-89 (2002)(concurring opinion): "We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects." By adopting the Sixth Amendment, the Framers insisted that "[i]f the defendant preferred the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge, he was to have it." *Duncan,* 391 U.S. at 16.

Citizen participation as jurors, moreover, is essential for the maintenance of public confidence in the judicial branch of government. "Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). The right to trial by jury "preserves in the hands of the people, that share which they ought to have in the administration of justice." *Letters of Centinel (II)* in 2 The Complete Anti-Federalist, *supra* at 149. The Framers also considered the jury to be an important institution for instilling republican and political virtues in a

self-governing people. Alexis de Tocqueville, a keen observer of the American constitutional system, observed that "the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well." A. De Tocqueville, Democracy in America 297 (Vintage ed. 1945). A system where a jury finds only a portion of the facts that the legislature deems significant to the length of sentence represents an incursion into the democratizing role of the jury.

The right to trial by jury has always been concerned with both the finding of guilt and the severity of sentence. Certain minor or petty offenses may be prosecuted summarily without a jury. *Apprendi,* 530 U.S. at 480, n.7; *Callan v. Wilson*, 127 U.S. 540 (1888) (jury trial right does not apply to a "fine only, or imprisonment in the county jail for a brief and limited period."). However, once a threshold of severity is crossed, full jury trial rights are demanded. *Duncan*, 391 U.S. at 162 (requiring jury trial for any offense carrying a possible penalty above six months imprisonment). As this Court stated in *Ring*, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." 536 U.S. at 609. In precisely the same fashion, the right to trial by jury would be senselessly diminished if it encompassed factfinding necessary to impose a sentence of six months under *Duncan*, but not the factfinding necessary to increase the defendant's sentence 37 months beyond the statutorily prescribed range.

III. APPLYING *APPRENDI* AND *RING* TO THIS CASE WILL AVOID SEVERELY INCREASED SENTENCES BASED SOLELY UPON JUDICIALLY FOUND FACTS WITHOUT IMPOSING UNMANAGEABLE BURDENS ON THE STATE

While exceptional sentences are not common in Washington, when they are imposed they are often extremely large. Upward departures of several years are not at all unusual. For example, in *State v. Oxborrow*, 106 Wn.2d 525, 723 P.2d 1123 (1986), the defendant pled guilty to first degree theft and willful violation of a cease and desist order concerning the sale of securities. The standard range sentences for these crimes were 0-3 months and 0-12 months respectively. The sentencing judge found several aggravating factors and imposed consecutive prison sentences of 10 years and 5 years for a total term of 15 years. *Id*. at 528. The facts established by Oxborrow's guilty plea only authorized a sentence of at most one year in jail; the facts found by the sentencing judge led to the imposition of an additional 14 years of imprisonment. Although Oxborrow argued for adoption of a rule that would presumptively limit an upward exceptional sentence to no more than twice the top of the standard range, the Washington Supreme Court declined to adopt such a rule, 106 Wn.2d at 531, and affirmed a sentence that was fifteen times the top of the standard range.

Other examples of large upward departures based upon judicially found facts abound.

- *State v. Branch*, 129 Wn.2d 635, 919 P.2d 1228 (1996) (4 year prison sentence imposed by judge for first degree theft where top of standard range was 3 months)

- *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995) (75 year sentence for murder imposed on defendant

Scott where top of standard range was 26-2/3 years; 26 year sentence for first degree rape of a child imposed on defendant Ritchie where top of standard range was 5-2/3 years; 7 year sentence for second degree assault imposed on defendant Hamrick where top of standard range was 9 months)

- *State v. Stewart*, 125 Wn.2d 893, 890 P.2d 457 (1995) (20 year sentence imposed for attempted kidnapping where top of range was 10 years)

- *State v. Handley*, 115 Wn.2d 275, 796 P.2d 1266 (1990) (6 years 9 months imposed for conspiracy to commit robbery where top of the range was 3 years and four and a half months)

- *State v. Mejia*, 111 Wn.2d 892, 766 P.2d 454 (1989) (30 month sentence imposed for possession of cocaine with intent to deliver where top of standard range was 14 months)

- *State v. Armstrong*, 106 Wn.2d 547, 723 P.2d 1111 (1986) (5 year sentence imposed for second degree assault where top of standard range was 14 months)

- *State v. Lindahl*, 114 Wn. App. 1, 56 P.3d 589 (2002) (27-1/2 year sentence imposed for second degree felony murder where top of standard range was 18-1/3 years)

- *State v. Burkins*, 94 Wn. App. 677, 973 P.2d 15 (1999) (60 year sentence imposed for first degree murder where top of standard range was 27-3/4 years)

- *State v. Smith*, 82 Wn. App. 153, 916 P.2d 960 (1996) (100 year sentence imposed for attempted murder, rape, robbery and kidnapping was 3.1 times the top of the standard range)

- *State v. Argo*, 81 Wn. App. 552, 915 P.2d 1103 (1996) (10 year sentence imposed for securities fraud where top of standard range was 4 years, ten months)

- *State v. Negrete*, 72 Wn. App. 62, 863 P.2d 137 (1993) (5 year sentence for delivery of cocaine imposed where top of standard range was 2 years, 10 months)

- *State v. Ross*, 71 Wn. App. 556, 861 P.2d 473 (1994) (70 year sentence for second degree murder where top of standard range was 24 years)

- *State v. Caldera*, 66 Wn. App. 548, 832 P.2d 139 (1992) (4 year sentence imposed for delivery of cocaine where top of standard range was 2 years, 3 months)

- *State v. Creekmore*, 55 Wn. App. 852, 783 P.2d 1068 (1989) (60 year sentence imposed for second degree felony murder where top of standard range is 16 years).

It should be noted that while some upward departures like the ones listed above are extremely long, the frequency with which exceptional sentences outside the standard range are imposed in Washington State is actually quite low. In *Ritchie,* the majority pointed to statistics indicating that exceptional sentences above the range were only imposed in 2.05% of all adult felony cases. *Id*. at 397. [7] Echoing this point, the dissenting justices in *Ritchie* observed that there were only 298 exceptional sentences imposed statewide in 1994. *Id.* at 413-14. Thus, complying with the requirements of *Apprendi* would not open the floodgates to thousands of sentencing trials. Moreover, many cases would be resolved by plea bargaining in light of the correct constitutional standard.

[7] *Ritchie* held that sentencing judges were not required to articulate reasons for the length of their upward departures. 126 Wn..2d at 394-95.

In any event, Washington State is already well-equipped to handle jury findings beyond a reasonable doubt on facts that increase the legislatively prescribed sentence beyond the standard range. The statutes involved in Blakely's case gave a single judge the power to extend Blakely's sentence beyond the legislatively prescribed range. However, other comparable sentencing statues in Washington function in a manner that is consistent with *Apprendi*. For example, under Washington law a judge can impose an increased sentence if the defendant or an accomplice was armed with a gun or other deadly weapon, but the defendant has a right to have a jury determine those facts beyond a reasonable doubt. RCW 9.94A.310. Indeed, 20 years before *Apprendi,* the Washington Supreme Court held, "our cases involving other enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish the facts which, if proved, will increase a defendant's penalty." *State v. Tongate*, 93 Wn.2d 751, 754, 613 P.2d 121 (1980) (interpreting firearms enhancement in RCW 9.95.040).

The same jury trial right applies to the facts used to increase the sentence range for commission of a drug offense in a school zone or within certain other protected areas. RCW 9.94A.310 and RCW 69.50.435. *See e.g., State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997) (jury, not judge, should determine whether a GED program in an office building is a "school"). In a case involving an enhanced sentence if a sale of narcotics was to a minor, Washington's rule is that "where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, the issue of whether that factor is present must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty." *State v. Nass*, 76 Wn.2d 368, 370, 456 P.2d 347 (1969) (interpreting RCW 69.33.410).

The *Apprendi* concept is plainly not alien to Washington criminal law. The practical impact of this case would be to apply its reasoning across the board to all of Washington's sentencing enhancement statutes where punishment beyond the statutory range depends on the existence of facts (other than the fact of prior conviction). This consistency in application of the law is one of *Apprendi*'s many merits.

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentencing enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

530 U.S. at 476. As stated in *Ring*, the *Apprendi* rule must not be "reduced to a 'meaningless and formalistic' rule of statutory drafting." 536 U.S. at 604. Washington currently calls some penalty lengthening facts "aggravating factors" and others "enhancements." It uses *Apprendi* procedures for some facts but not others, even though all trigger additional punishment above and beyond that authorized by the statutorily established top of the standard range. *Apprendi* demands that all such facts be proven the same way. The formalities of statutory labeling cannot contravene the important constitutional principle that such facts must be found by a jury and must be established by proof beyond a reasonable doubt.

CONCLUSION

For the reasons stated above, the judgment of the Washington Court of Appeals should be reversed.

Respectfully submitted,

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Dated: December 4, 2003