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 FOR PETITIONER

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QUESTION PRESENTED

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 v. New Jersey*, 530 U.S. 466 (2000).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authority:

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Washington Court of Appeals is reported at 111 Wn. App. 851, 47 P.3d 149 (2002), and is reprinted at J.A. 2-23. The order of the Washington Supreme Court denying discretionary review of that decision is published at 148 Wn.2d 1010, 62 P.3d 889 (2003), and is reproduced at J.A. 60. The trial court's pertinent sentencing orders are unpublished and are reproduced at J.A. 24-58.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its order denying Petitioner's petition for review on February 4, 2003. J.A. 60. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

Relevant provisions of the Revised Code of Washington are reproduced at Pet. App. 51a-68a.

STATEMENT OF THE CASE

A. Washington's Sentencing Reform Act

Washington's "sentencing guidelines," in contrast to the federal guidelines, are a statutory enactment, known as the Sentencing Reform Act. The Washington Legislature passed the Act to implement "a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences." Wash. Rev. Code § 9.94A.010.[1] Under the State's prior indeterminate sentencing law, punishment was not always proportional to the severity of the offense; a "severe sentence," for example, "could be imposed for minor offenses, which was a waste of resources." 13B Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 3406, at 275-76 (2d ed. 1998). The core of the Sentencing Reform Act, therefore, is a grid of relatively narrow "standard ranges," or "presumptive sentences," calculated according to the seriousness of the offense and the criminal history of the offender. *See* Wash. Rev. Code § 9.94A.310(1). (The relevant portions of the Sentencing Reform Act appear at Pet. App. 51a-64a).

The Act provides, subject to exceptions not relevant here, that when a person is convicted of a felony, a court "shall impose" a sentence within the standard range unless "it finds . . . substantial and compelling reasons justifying an exceptional sentence." §§ 9.94A.120(1)-(2). The Act then sets forth several "aggravating circumstances," such as manifesting deliberate cruelty and knowingly harming a vulnerable victim, §§ 9.94A.390(2)(a) & (b), that may supply a substantial and

[1] The Washington Legislature has recodified and amended various provisions of the Sentencing Reform Act since the trial court proceedings in this case. *See* Wash. Rev. Code §§ 9.94A.505-35 (2002). None of these changes alter the substantive Washington law relevant to this case in any relevant respect. For purposes of simplicity, this brief refers, as the courts below did, to the old statutory section numbers.

compelling reason to impose an exceptional sentence upward. Although these enumerated factors are "illustrative" rather than exclusive, § 9.94A.390, "[a] reason offered to justify an exceptional sentence can be considered *only if* it takes into account factors *other than those which are used in computing the standard range sentence for the offense*." *State v. Gore*, 143 Wn.2d 288, 315-16, 21 P.3d 262 (2001) (emphasis added); *accord State v. Pittman*, 54 Wn. App. 58, 61-62, 772 P.2d 516 (1989). In other words, a court may deviate upward from the standard sentencing range only on the basis of factual findings beyond those required by the elements of the underlying offense.[2] If a trial court imposes an exceptional sentence on the basis of a fact subsumed within the elements of the underlying offense or an otherwise improper aggravating factor, an appeals court will invalidate the exceptional sentence and require a sentence in the standard range. *See, e.g., State v. Dunivan*, 57 Wn. App. 332, 339, 788 P.2d 576 (1990); *State v. Pittman*, 54 Wn.2d 58, 61-62, 772 P.2d 516 (1989).

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[2] This is one way in which Washington's statutory guidelines differ from the federal sentencing guidelines. The federal guidelines permit courts to depart upward from a presumptive range based on a fact subsumed within an element of an offense if that fact is present "to an exceptional degree." *Koon v. United States*, 518 U.S. 81, 96 (1996). The federal guidelines also frequently direct courts to "double count" an element of an offense, even if it is not present to an exceptional degree, by enhancing a defendant's "offense level" (and, thereby, his ultimate sentence) on the basis of a fact that is already subsumed within the offense of conviction. *See, e.g., United States v. Parker*, 136 F.3d 653 (9th Cir. 1998) (defendant convicted of failure to surrender for service of a sentence; upholding enhancement for committing offense under a criminal justice sentence); *United States v. Duran*, 127 F.3d 911, 916-19 (10th Cir. 1997) (defendant convicted of assault with a dangerous weapon; upholding enhancement for use of a dangerous weapon). In permitting double counting in this manner, the federal courts of appeal have reasoned that Congress intended to allow the Federal Sentencing Commission to calibrate sentencing rules however it wishes, so long as the ultimate sentences are below or equal to the statutory maximums. *See, e.g., United States v. Gonzales*, 996 F.2d 88, 93-94 (5th Cir. 1993); *United States v. Bigelow*, 897 F.2d 160, 161-62 (5th Cir. 1990).

If the State decides to seek an exceptional sentence upward in a particular case, it need not make factual allegations supporting that request in the charging instrument. In fact, even if the State never requests an exceptional sentence at all, the trial judge is still free to impose one *sua sponte* at sentencing. *See, e.g., State v. Falling,* 50 Wn. App. 47, 52, 747 P.2d 1119 (1987). But whether the State requests an exceptional sentence upward or the trial court raises the issue on its own, judges (not juries) find the aggravating facts supporting such heightened punishment. *See* §§ 9.94A.120(2)-(3). Such findings need be made only "by a preponderance of the evidence." § 9.94A.370(2); *Gore,* 143 Wn.2d at 315. Furthermore, when a court holds a sentencing hearing to determine whether to impose an exceptional sentence upward, the usual rules of evidence "need not be applied." Wash. R. Evid. 1101(c)(3). The court may admit hearsay and other evidence that would normally be excluded during a trial, so long as it perceives "some basic level of reliability of what is presented." Report of Proceedings at 595; *see generally State v. Handley*, 115 Wn.2d 275, 281, 796 P.2d 1266 (1990).

If a Washington court imposes an exceptional sentence upward, the Act also caps the extent to which the court may deviate from the standard range. "A court may not impose a sentence providing for a term of confinement . . . which exceeds the statutory maximum for the crime as provided in [§ 9A.20.021]." § 9.94A.120(14). The "statutory maximum," as defined in § 9A.20.021, sets upper limits depending on whether the offense of conviction is a class A felony (life in prison), class B felony (ten years), or class C felony (five years).

B. Petitioner's Case

1. Petitioner Ralph Howard Blakely, Jr. "has been diagnosed at various times since 1972 as suffering from schizophrenia." J.A. 5; *see also* J.A. 47 ¶¶ 26-27. He and his wife, Yolanda, separated in 1995, and later that year she filed

for divorce. Over the next two years, Yolanda sought to terminate the family trust and to terminate Petitioner's control over certain jointly held properties. J.A. 40 ¶ 2.

In 1998, according to factual findings later made by the trial court, Petitioner, while armed with a knife, abducted his wife from their home in Washington and drove her toward another of the family's properties in Montana. Petitioner ordered their teenage son, Ralphy, to follow them in another car. Petitioner told Ralphy that he had a gun in his car and that if Ralphy "tried anything," he would use it. J.A. 43 ¶ 13. During parts of the drive Petitioner forced his wife to ride in a wooden box in the bed of his pick-up truck; at other times she rode in the passenger seat.

Petitioner told his wife during these actions that he was doing this because he wanted her to dismiss the divorce action and the litigation over the trust. J.A. 41-42 ¶ 7. To that end, he called his daughter while in transit and told her to call "the lawyers" and to direct them to stop the divorce and trust litigation. J.A. 46 ¶ 24. The ordeal ended the next day when Petitioner stopped at a friend's house, and the friend surreptitiously telephoned the police. J.A. 46 ¶¶ 23-24.

The State filed an information charging Petitioner with two counts of first degree kidnapping. It later amended the information to charge Petitioner with second degree kidnapping with a deadly weapon and second degree assault with a deadly weapon, both of which are class B felonies. (Deadly weapon enhancements in Washington are not separate crimes, but they must be pleaded in the information and proved to a jury beyond a reasonable doubt. *See* Wash. Rev. Code § 9.94A.125; *State v. Tongate*, 93 Wn.2d 751, 613 P.2d 121 (1980).) The body of the amended information reads in full:

> COUNT 1: That the said HOWARD RALPH BLAKELY in the County of Grant, State of Washington, on or about October 26, 1998, did intentionally abduct Yolanda Blakely, a human being. The defendant being at said time armed with a deadly weapon, under provision [Wash. Rev. Code. §] 9.94A.125.
>
> COUNT 2: That the said HOWARD RALPH BLAKELY in the County of Grant, State of Washington, on or about October 26, 1998, did assault Ralphy Blakely, a human being, with a deadly weapon, to-wit: a gun.

J.A. 75-76.

On July 18, 2000, Petitioner entered an *Alford* plea of guilty in the Superior Court of Washington for Grant County to second degree kidnapping with a deadly weapon and to second degree assault. J.A. 2, 61-74.[3] The plea did not contain any elaboration regarding the circumstances surrounding the offenses; Petitioner merely acknowledged that, at a trial, the State could prove the elements of the crimes to which he was pleading. *See* J.A. 72 ¶ 11. As part of the plea agreement, the State agreed to recommend a sentence in the high end of the standard range. J.A. 7, 28, 66. The standard range for the kidnapping charge (including a 36-month deadly weapon enhancement, *see* Wash. Rev. Code § 9.94A.310(3)(b)) is 49 to

[3] Petitioner's guilty plea also acknowledged that his crimes involved domestic violence because his wife was the victim. J.A. 24; Wash. Rev. Code § 10.99.020(3)(b) & (p) (requiring a finding of "domestic violence" when the victim of a kidnapping or assault is a member of the defendant's family). A "domestic violence" plea does not affect the length of offender's sentence but rather allows a sentencing court to issue directives such as "no contact" orders and orders requiring the offender to participate in a domestic violence perpetrator program. *See* Wash. Rev. Code §§ 9.94A.505(11) & 10.99.040; J.A. 31 ¶ 4.3 (issuing no contact order here).

53 months, and the standard range for the assault charge is 12 to 14 months. J.A. 7, 27 ¶ 2.3; § 9.94A.310(1) (grid boxes 2-V and 2-IV). Under Washington law, such sentences presumptively run concurrently. *See* § 9.94A.589.

Before imposing a sentence, the trial court asked Petitioner's wife to describe the circumstances underlying the crimes. The court also reviewed three psychological evaluations, one of which stated that Petitioner had abducted his wife as an "honest attempt" – misguided though it was – "to renew his family." Pet. App. 44a; *see also* J.A. 48 ¶ 31. After considering these presentations, the court noted that "[t]here has always been, in this case, a great deal of dispute about such things as [Petitioner's] mental condition at the time that these offenses occurred [and Petitioner's] motivation for doing what he did." Pet. App. 46a.

At the close of the sentencing hearing, the court *sua sponte* rejected the recommended sentence as "too lenient," Pet. App. 47a, and stated that it intended to deviate upward 37 months from the top of the standard range and impose an exceptional sentence of 90 months. The court stated that this upward deviation would be based on findings of (i) deliberate cruelty, which is a statutorily enumerated aggravating factor, § 9.94A.390(2)(a), and (ii) "domestic violence plus deliberate cruelty and commission within the sight or sound of the victim's minor child," which likewise is enumerated at § 9.94A.390(2)(h)(ii) & (iii). J.A. 7-8; *see also* Pet. App. 47a-50a (trial judge's oral explanation). Neither of these factors is subsumed within the elements of second degree kidnapping with a deadly weapon or second degree assault. Nor, as noted above, was either mentioned in the information.

Petitioner objected to the court's intended sentence. The Sentencing Reform Act provides that "[w]here the defendant disputes material facts, the court must either not consider the facts or grant an evidentiary hearing on the point."

§ 9.94A.370. The court thus continued the sentencing hearing and stated that it would hold an evidentiary hearing regarding whether to impose an exceptional sentence upward.

In response to the trial court's announced sentencing inclination and a subsequent brief from the State stating that an exceptional sentence upward would, in fact, be supported by law, Petitioner moved to withdraw his guilty plea. The court, however, denied that motion. Report of Proceedings 583-86. The court further held that the State's participation in the exceptional-sentence proceedings would not breach the plea agreement, since the State was not actually asking the court to reject the recommended standard-range sentence. J.A. 12-15.

Before the evidentiary hearing, Petitioner also filed a motion requesting a standard-range sentence and arguing that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), prohibited the court from imposing an exceptional sentence upward without submitting the factual bases for the proposed aggravators to a jury and requiring these facts to be proved beyond a reasonable doubt. J.A. 13. The court rejected the *Apprendi* argument and went ahead with the evidentiary bench hearing. J.A. 51-58.

Following a three-day hearing involving several witnesses and medical experts, the trial court entered an order making factual findings and reaching legal conclusions. J.A. 40-50. The court found that Petitioner's "motivation to commit the kidnapping was complex, contributed to by his mental condition and personality disorders, the pressures of divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children." J.A. 48 ¶ 31. The court further determined that Petitioner's "capacity to appreciate the wrongfulness of his conduct . . . was impaired by his personality disorders, but not significantly so." J.A. 49 ¶ 1. Turning to the statutory aggravating factors, the court concluded that Petitioner's "personality disorders did not significantly impair his capacity

to act with deliberate cruelty." *Id.* Accordingly, the court (again acting *sua sponte*) imposed the 90-month exceptional sentence for the kidnapping offense, to run concurrently with a 14-month standard sentence for the assault offense. J.A. 8, 32 ¶ 4.5, 49 ¶ 5.

2. The Washington Court of Appeals affirmed Petitioner's convictions and sentence. Addressing the exceptional sentence that the trial court imposed on the kidnapping charge, the court noted that a technicality in state law may have prevented the trial court from relying on bare "deliberate cruelty" as an aggravating factor. J.A. 17. But it ruled that this potential error was irrelevant because "the alternate basis of domestic violence with deliberate cruelty supports the exceptional sentence here." J.A. 18 n.4; *see also* Pet. App. 50a (trial court's indication that this factor "on its own" would justify exceptional sentence).

The court of appeals then rejected Petitioner's *Apprendi* argument. The court noted the Washington Supreme Court had held in *State v. Gore*, 143 Wn.2d 288, 21 P.3d 262 (2001), that "*Apprendi* does not apply to factual determinations that support reasons for exceptional sentences upward." J.A. 19. The *Gore* decision, therefore, foreclosed Petitioner's contention.

3. Petitioner sought discretionary review of this decision in the Washington Supreme Court. He argued, *inter alia*, that the procedures the trial court used in imposing the exceptional sentence on the kidnapping charge contravened *Apprendi*. Pet. App. 69a-70a. The Washington Supreme Court denied review without comment. J.A. 59.

4. This Court granted certiorari. 124 S. Ct. 429 (2003).

SUMMARY OF ARGUMENT

I. The procedures in Washington's Sentencing Reform Act for finding the "aggravating facts" necessary to impose an exceptional sentence upward violate the plain terms of the *Apprendi* rule. In *Apprendi*, this Court held that any fact that, "if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the [guilty] verdict alone" must be proved to a jury beyond a reasonable doubt. 530 U.S. 466, 483 (2000). Aggravating facts under the Act have this precise effect. By finding such a fact, a sentencing court may impose a sentence that is longer than the top of an otherwise mandatory statutory standard sentencing range. Yet the Act permits judges (not juries) to find aggravating facts, and the applicable standard is a preponderance of the evidence (not beyond a reasonable doubt).

In Petitioner's particular case, Wash. Rev. Code §§ 9.94A.310(1) & (3)(b) subjected him to a standard range of 49-53 months based on the facts encompassed in his guilty plea to second degree kidnapping with a deadly weapon. The trial court, however, found an aggravating fact – the commission of domestic violence with deliberate cruelty – that enabled it to impose a sentence that was 37 months longer than this 53-month statutory limit. In direct violation of *Apprendi*, this aggravating fact was neither pleaded in the information nor proved to a jury beyond a reasonable doubt.

In *State v. Gore*, 143 Wn.2d 288, 21 P.3d 262 (2001), the Washington Supreme Court advanced two justifications for upholding the State's exceptional sentence procedure, but neither withstands scrutiny. First, the Court asserted that because Washington law uses the term "statutory maximum" to describe the longest permissible *exceptional sentence* – instead of the longest permissible standard-range sentence – the presence of aggravating facts do not increase the "maximum"

allowable sentence for purposes of triggering *Apprendi*. But this argument ignores this Court's admonition that labels are irrelevant in the context of the constitutional inquiry required here. Rather, as this Court emphasized in *Ring v. Arizona*, 536 U.S. 584 (2002), the dispositive question is a functional one: what is the maximum penalty to which the defendant is subject if punished according to the facts reflected in the guilty verdict alone? That penalty in Washington is indisputably the upper limit in the applicable statutory standard range.

Second, the Washington Supreme Court stated that factual determinations underlying exceptional sentences upward are more like the determination at issue in *McMillan v. Pennsylvania,* 477 U.S. 79 (1986), than those covered by *Apprendi*. But *McMillan* applies only to facts necessary to impose a certain *minimum* sentence, and the aggravating facts at issue here – as in all exceptional sentences upward in Washington – do not dictate any minimum sentence. Rather, they allow the imposition of a sentence more severe than the statutory maximum for the offense established by the guilty verdict. As such, they are covered by *Apprendi,* not *McMillan.*

II. Even apart from a technical application of the *Apprendi* rule, several practical and structural aspects of the proceedings below show why it is vital that this Court hold firm to *Apprendi*'s insistence that any fact necessary to increase a defendant's sentence be alleged in advance and proven to a jury beyond a reasonable doubt. As an initial matter, *Apprendi* is designed to require that legislatures treat every fact they deem essential to a given prison term with equal gravity. Yet here, the finding of domestic violence plus deliberate cruelty accounted for the *largest* portion of Petitioner's sentence, while the Washington Legislature rendered that finding subject to the *slightest* procedural protections. *Apprendi* also is designed to ensure that any finding that subjects a defendant to an additional loss of liberty is made beyond a reasonable doubt – a standard that excludes as nearly

as possible the potentiality of an erroneous judgment. Yet here, the trial judge practically conceded that reasonable doubt existed as to whether Petitioner acted with deliberate cruelty and, thus, as to whether he deserved the 37-month increase in his sentence. Finally, *Apprendi* is designed to guarantee that someone accused of committing a crime be able to predict with certainty the punishment to which he is exposing himself by pleading guilty to an offense charged in an indictment. Yet here, the trial court, without even the State's backing, imposed a sentence more than three years longer than the statutory limit for the facts encompassed in the indictment and Petitioner's guilty plea, based on additional circumstances that Petitioner hotly disputed.

The central thrust of *Apprendi* is that it is wrong to convict someone of a certain crime and then to sentence him as if he actually committed a more serious transgression. Enforcing the *Apprendi* rule here will ensure that courts may not increase a defendant's punishment based on allegedly aggravating facts that he did not have fair notice of, and that he was not allowed to contest before a jury.

ARGUMENT

I. Washington's Procedures for Imposing Exceptional Sentences Upward Contravene the Plain Terms of the *Apprendi* Rule.

In *Apprendi v. New Jersey*, this Court held that any fact that subjects a defendant to a longer sentence than that "prescribed by the legislature," or the "statutory limit[]," must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt. 530 U.S. 466, 481-82 (2000). This holding conformed to "the principle by which history determined what facts were elements" of crimes – namely, any "fact . . . legally essential to the punishment to be inflicted." *Harris v. United States*, 536 U.S. 545, 561 (2002) (quoting *United States v. Reese*, 92 U.S. 214, 232 (1876) (Clifford, J., dissenting)); *see also Apprendi*, 530 U.S. at 502 ("common law understanding" was that "a fact that is by law the basis for imposing or increasing punishment is an element"); 1 J. Bishop, New Criminal Procedure 50 (2d ed. 1872) ("whatever in law is essential to the punishment sought to be inflicted" is an element).

This Court reaffirmed the *Apprendi* rule in *Ring v. Arizona*, 536 U.S. 584 (2002), in which it invalidated Arizona's method for finding "aggravating facts" that subjected offenders to the death penalty. Any fact that a state deems necessary for an increase in a defendant's punishment, this Court made clear, must be proved according to the procedures mandated by *Apprendi*. *Ring*, 536 U.S. at 588-59.

Washington's statutory scheme for finding the aggravating facts necessary for exceptional sentences upward has exactly the same infirmities as the Arizona scheme this Court invalidated in *Ring*. Wash. Rev. Code §§ 9.94A.120(1) & (2) direct sentencing courts to impose a sentence "within the sentence range for the offense" unless they find an aggravating

fact to be present. An aggravating circumstance, the Washington Supreme Court has explained, can be considered "only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." *State v. Gore*, 143 Wn.2d 288, 315-16, 21 P.3d 262 (2001); *State v. Pittman*, 54 Wn. App. 58, 61-62, 772 P.2d 516 (1989) ("The reasons for imposing an exceptional sentence cannot include the factors inherent in the offense . . . ."; vacating exceptional sentence on this basis). In other words, just as in the Arizona scheme, the presence of an aggravating fact beyond the elements of the crime of conviction subjects the defendant to more severe punishment than otherwise is legally permissible. A court, rather than a jury, may find such a fact. And unlike even the aggravating facts necessary in *Ring*, aggravators in Washington are determined only "by a preponderance of the evidence," instead of beyond a reasonable doubt. Wash. Rev. Code § 9.94A.370(2); *Gore*, 143 Wn.2d at 315.

In Petitioner's particular case, Wash. Rev. Code §§ 9.94A.310(1) & (3)(b) subjected him to a presumptive sentencing range of 49-53 months – a legislatively prescribed statutory maximum of 53 months. J.A. 7, 16. Yet Petitioner's sentencing court found that an aggravating fact – "domestic violence plus deliberate cruelty and commission within the sight or sound of the victim's minor child," J.A. 15 (citing § 9.94A.390(2)(h)(ii) & (iii)) – that is not an element of Petitioner's offenses of conviction was present. Based on that factual finding, the court imposed, and the Court of Appeals affirmed, a sentence 37 months longer than the maximum that could be imposed for Petitioner's guilty plea to the elements of second degree kidnapping with a deadly weapon. J.A. 8.

This procedure constitutes a paradigmatic *Apprendi* violation. The court (rather than a jury) found certain facts by a preponderance (rather than beyond a reasonable doubt) that exposed Petitioner to a sentence exceeding that prescribed by

the Washington Legislature for the bare offense to which he pled guilty. *Apprendi* itself, in fact, noted that increasing a sentence based on a "second *mens rea* requirement" without submitting the issue to a jury is a classic violation because "[t]he defendant's intent in committing a crime is perhaps as close as one might come to a core criminal offense 'element.'" 530 U.S. at 493. The trial court's finding that Petitioner acted with deliberate cruelty plus domestic violence, J.A. 18 n.4, found a second *mens rea* fact (deliberate cruelty) that is not required for a violation of the second degree kidnapping statute. *See* Wash. Rev. Code § 9A.40.030 (kidnapping statute). It also found an additional *actus reus* fact (domestic violence in the presence of a child) that is not encompassed in that statute. Br. in Opp. at 14 (acknowledging this point); *compare Jones v. United States*, 526 U.S. 227 (1999) (fact such as inflicting serious bodily injury that increases maximum sentence must be treated as element of offense).

Despite the apparent clarity of the *Apprendi* infirmity in Washington's exceptional sentence system, the Washington Supreme Court ruled in *State v. Gore* that the system was constitutional for two reasons. First, the Court noted that Wash. Rev. Code § 9A.20.021 sets forth what the provision calls "maximum sentences" for the various classes of felonies, and that § 9.94A.120(14) prohibits courts from imposing an exceptional sentence "which exceeds th[ose] statutory maximum[s]." *Gore*, 143 Wn.2d at 313-14. Ergo, according to the Court, the procedures for finding aggravating facts do not violate *Apprendi* because the exceptional sentences they lead to do not exceed what Washington law has labeled the "statutory maximum." *Id.* at 314. Second, the Washington Supreme Court stated that factual determinations leading to exceptional sentences upward are more like the determination upheld in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which dictated a mandatory minimum sentence, than those

covered by *Apprendi*. *Gore*, 143 Wn.2d at 314. Neither justification withstands scrutiny.

A. The Way that Washington's Exceptional Sentence System Operates, Not the Labels It Uses, Is Dispositive.

Washington cannot avoid the mandates of *Apprendi* simply by saying that the upper limit for an *exceptional sentence* is the only "statutory maximum" in its sentencing scheme. Constitutional protections, particularly in the context of *Apprendi*, do not turn based on where name tags are placed. As this Court recently explained:

> The dispositive question [under *Apprendi*] "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – *no matter how the State labels it* – must be found by a jury beyond a reasonable doubt.

Ring, 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 494) (emphasis added); *see also Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("[A]ll facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt."); *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975) (a state's "characteriz[ation]" of factors bearing on punishment does not control constitutional inquiry).

For this same reason, labeling makes no difference in determining whether a certain provision sets forth a "statutory maximum" for purposes of *Apprendi*. Rather, the dispositive question is a functional one: what is the maximum penalty to which the defendant is subject if punished "according to the

facts reflected in the jury verdict alone" or the guilty plea alone? *Apprendi*, 530 U.S. at 483[4]; *accord Ring*, 536 U.S. at 597. That penalty in Washington – as in other states with similar guideline systems – is indisputably "the maximum sentence *in the applicable grid box*." *State v. Gould*, 23 P.3d 801, 812-13 (Kan. 2001) (emphasis added). It does not matter that Washington uses the term "statutory maximum" to describe the longest permissible exceptional sentence instead of the longest permissible standard-range sentence.

In this regard as well, Washington's exceptional sentence procedure is just like the procedure that this Court invalidated in *Ring*. The Arizona first-degree felony murder statute "authorize[d] a maximum penalty of death . . . in a formal sense" because it noted that death was the maximum sentence available for that crime. 536 U.S. at 604 (quotation omitted); *see also id.* at 592. But "[b]ased solely on the jury's verdict finding [a defendant] guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. [citations omitted]. This was so because, in Arizona, a death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist." *Id.* at 597 (quoting *State v. Ring*, 25 P.3d 1139, 1151 (Ariz. 2001)). This Court thus held that *Apprendi* governed the procedures for finding such an aggravating factor because otherwise, "*Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting." *Id.* at 604.[5]

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[4] The defendant in *Apprendi*, like Petitioner here, pled guilty to the underlying offense. *See* 530 U.S. at 469-70.

[5] Justice Thomas used similar reasoning in *Apprendi* itself in explaining that case's rule: "[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if a legislature defines some core crime and then provides for increasing the punishment of that crime *upon a finding of some aggravating fact* – of whatever sort . . . – the core crime and the aggravating

Precisely the same analysis applies here. As the *Ring* Court itself explained, "[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. *We hold that the Sixth Amendment applies to both.*" 536 U.S. at 609 (emphasis added); *see also id.* at 607 ("We see no reason to differentiate capital crimes from all others in this regard."); *Apprendi*, 530 U.S. at 544-51 (O'Connor, J., dissenting) (recognizing that *Apprendi* rule applies to facts necessary to impose death penalty as well as to impose an additional term of years). Indeed, the noncapital nature of the heightened sentence here makes this case, if anything, easier than *Ring*. As Justice Scalia noted in *Ring*, there was some doubt there, in light of this Court's Eighth Amendment jurisprudence, as to whether the Arizona Legislature voluntarily had made the imposition of the death penalty dependent on the finding of an aggravating fact. *See* 536 U.S. at 610-12 (Scalia, J., concurring). But here, there is no question that the Washington Legislature voluntarily created a statutory scheme under which defendants' sentences cannot exceed the top of the standard range unless an aggravating fact is present.

In short, because Washington courts may not legally deviate upward from the top of the sentencing range dictated by a guilty verdict alone "unless at least one aggravating factor is found to exist," *Ring*, 536 U.S. at 597, the procedures for finding such a factor must comply with *Apprendi*.

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factor together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime" and must be submitted to the jury and proved beyond a reasonable doubt. 530 U.S. at 501 (Thomas, J., concurring) (emphasis added).

B. *McMillan v. Pennsylvania*'s Analysis Regarding Mandatory Minimum Sentences Does Not Apply Here.

The Washington Supreme Court's reliance on *McMillan v. Pennsylvania* is equally unavailing. *McMillan* – which this Court reaffirmed after *Apprendi* in *Harris v. United States*, 536 U.S. 545 (2002) – held that a factual finding necessary to impose a "mandatory minimum" sentence need not be submitted to a jury or proved beyond a reasonable doubt. Thus, as the Washington Supreme Court correctly noted, *Apprendi* does not apply to factual findings that merely dictate a certain sentence "within a range already available" to a sentencing court based on the elements of the offense of conviction. *Gore,* 143 Wn.2d 312 (quoting *McMillan*, 477 U.S. at 88).

But the exceptional-sentence system at issue here, unlike a situation involving a mandatory minimum, leads to sentences that are *not* already available to sentencing courts. Under Washington statutory law, at the moment a defendant pleads or is found guilty of a crime, the standard range is the only sentencing range that is legally available to a Washington court. Wash. Rev. Code §§ 9.94A.120(1) & (2). Imposing an exceptional sentence upward is not an option unless and until a court finds an aggravating fact not encompassed in the elements of the underlying crime. *Gore*, 143 Wn.2d at 315.

That being so, Washington's procedures for finding aggravating facts are covered by *Apprendi*, not *McMillan.* In *Apprendi* itself, in fact, this Court expressly "limit[ed] [*McMillan*'s] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury verdict." 530 U.S. at 487 n.13. The aggravating facts at issue here – as in all exceptional sentences upward in Washington – allow the "imposition of a sentence more severe than the statutory

maximum for the offense established by the jury verdict." *Id*. They do not dictate any minimum sentence within an otherwise available range.

In fact, the Washington Supreme Court's *McMillan* rationale essentially repeats the same contention that the State of Arizona unsuccessfully advanced in *Ring* – namely, that a certain sentence is available to a sentencing court, regardless whether additional findings are necessary to impose it, so long as a provision of state law says that the sentence is a permissible punishment for the crime of conviction. But, as this Court explained in rejecting that argument: "The Arizona first-degree murder statute authorizes a maximum penalty of death only in the formal sense, . . . for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before the imposition of the death penalty." *Ring*, 536 U.S. at 604 (internal quotations and citation omitted). The necessity of finding such additional facts, not any cross-referencing in the statutory scheme, controls the constitutional analysis. *Id.*

Washington statutory law permitted a maximum sentence of 53 months for Petitioner's kidnapping offense, in the absence of aggravating facts not encompassed in his guilty plea. As such, the procedures for finding any such facts had to conform to the requirements of *Apprendi*. Washington law's "formal" permission to sentence Petitioner to more than 53 months *if aggravating facts were found* does not affect the result here.

II. The Exceptional Sentence Imposed Here Highlights the Practical and Structural Concerns Underlying *Apprendi.*

The *Apprendi* rule, of course, is more than a mechanical formula designed to separate criminal offense elements from other factual issues; it is the embodiment of "constitutional protections of surpassing importance." *Apprendi*, 530 U.S. at 476. Three aspects of the proceedings below demonstrate why it is vital that this Court hold firm to its insistence that any fact necessary to increase a defendant's sentences be alleged in advance and proven to a jury beyond a reasonable doubt.

First, the procedures that led to Petitioner's punishment underscore the need to require legislatures to treat every fact they deem essential to a given prison term with equal gravity. This Court explained in *Apprendi* that:

> 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.

Washington did not follow this elementary principle here. The Washington Legislature threatened Petitioner with certain pains if he kidnapped his wife; certain pains if he did so with a deadly weapon; and additional pains if he did so with

deliberate cruelty. But the Washington courts permitted the latter issue to be treated differently simply because the Legislature has designated it an "aggravating factor" instead of an element or sentencing enhancement. This reasoning allows the Legislature, through mere labeling, to mandate increases in defendants' sentences based on factual determinations that it has removed from the purview of the jury and that are not otherwise subject to the ordinary procedural protections governing statutory elements. In this case, in fact, Washington's system allowed the *largest* portion of Petitioner's sentence to turn on the factual finding that was subject to the *slightest* procedural protections: While the standard range for second degree kidnapping was 13-17 months, and the deadly weapon enhancement was 36 months, the deliberate-cruelty upward deviation that the trial court imposed was 37 months.

Legislatures, to be sure, have considerable discretion in defining crimes in the first instance – that is, in deciding which facts are essential to which kinds of punishment. But here, the Washington Legislature has decreed that the maximum sentence that it will permit for a defendant such as Petitioner committing the bare offense of second degree kidnapping with a deadly weapon is 53 months. Wash. Rev. Code §§ 9.94A.310(1) & (3)(b); *see also State v. Pascal*, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987) ("The presumptive sentences established for each crime represent the *legislative judgment* as to how these interests [protection of the public, the need for rehabilitation, and the need to make frugal use of the state's resources] shall best be accommodated.") (emphasis added); *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719 (1986) (Sentencing Reform Act allows courts sentencing discretion only within boundaries "given by the Legislature," which in the absence of aggravating or mitigating factors encompass only the standard range). The Legislature, in other words, has decided that it will not condone a sentence longer than 53

months in this context in the absence of an aggravating fact such as deliberate cruelty.

Apprendi holds that in such a situation – *i.e.*, when "a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others" – "it necessarily follows that the defendant should not – at the moment the State is put to the proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached." 530 U.S. at 484. The Washington Legislature's exceptional sentence system unconstitutionally deprived Petitioner of these critical protections against an erroneous loss of liberty and an unwarranted additional stigma.[6]

Second, Petitioner's sentencing proceedings underscore the unfairness in allowing a judge to make a finding necessary to increase a defendant's punishment by only a preponderance of the evidence. The Sixth Amendment right of the accused to have a jury of his peers determine "the truth of every

[6] Because standard sentencing ranges in Washington, unlike those in the federal sentencing guidelines, are "prescribed by the legislature," *Apprendi*, 530 U.S. at 481, a decision invalidating Washington's procedures for imposing exceptional sentences upward would not necessarily nullify the comparable provisions in the United States Sentencing Guidelines. The federal sentencing grid is promulgated by a Sentencing Commission that resides in the Judicial Branch. Accordingly, as this Court noted in *Mistretta v. United States*, 488 U.S. 361 (1989), presumptive sentencing ranges under the federal guidelines are not legislative acts. Rather, they are "court rules" derived from "judicial rulemaking." *Id.* at 386 & 391. *Apprendi*'s prohibition against exceeding the "statutory" maximum based on facts that were not submitted to the jury or proved beyond a reasonable doubt arguably pertains only sentencing limits set by legislatures. *See Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., concurring) (noting the "unique status" of the federal guidelines in light of *Mistretta*); *cf. supra* at 3 n.2 (noting other differences between Washington and federal guidelines).

accusation" is designed in part to guard against arbitrary, biased, or eccentric judicial decisions. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (quoting 4 William Blackstone, Commentaries on the Laws of England *349 (1768)). The Due Process Clause similarly requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt because "the interests of the defendant are of such magnitude" that they must be protected by a standard of proof "designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Addington v. Texas*, 441 U.S. 418, 423 (1979); *see also In re Winship*, 397 U.S. 358, 363-64 (1970) (beyond a reasonable doubt standard is "a prime instrument for reducing the risk of convictions resting on factual error"). As this Court noted in *Winship*, "a person accused of a crime . . . would be at a serious disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." 397 U.S. at 363 (quotation and citation omitted); *see also People v. Reese*, 258 N.Y. 89, 101 (1932) (Cardozo, J.) ("The genius of our criminal law is violated when punishment is enhanced in the face of reasonable doubt as to the facts leading to the enhancement.")

But that is exactly what happened here. Petitioner was sentenced to more than three additional years in prison on the basis of a factual finding (deliberate cruelty) that the trial judge practically conceded was not proven beyond a reasonable doubt. The trial judge acknowledged that Petitioner's *mens rea* in committing his crimes presented a "complex" issue because his "personality disorders influence and direct . . . his behavior" and because, in kidnapping his wife, he "mis-guidedly intended to forcefully reunite his family" and to convince his wife "to terminate lawsuits and modify title ownerships to his benefit." J.A. 48 ¶¶ 29, 31. After an evidentiary hearing, in fact, the trial judge concluded only that "[d]efendant's personality disorders did not *significantly* impair

his capacity to act with deliberate cruelty." J.A. 49 ¶ 1 (emphasis added). Under these circumstances, a jury surely might have found reasonable doubt as to whether Petitioner acted with deliberate cruelty.

Third, this case implicates *Apprendi*'s core concern that someone accused of committing a crime have the "ability to predict with certainty the judgment from the face of the felony indictment" or the four corners of his guilty plea. *Apprendi*, 530 U.S. at 478. Under the facts alleged in Petitioner's information and thus encompassed in his guilty plea, the longest sentence that Washington law allows is 53 months. But the trial court, without even the State's backing, imposed a sentence 37 months longer than this statutory limit, based on additional facts that Petitioner hotly disputed. When Petitioner learned of the court's inclination to impose this increased sentence, he moved to withdraw his plea. But the trial court ruled against him. J.A. 8; Report of Proceedings 583-86.

"[T]he premise of *Apprendi* is that it is wrong to convict someone of one crime, and sentence [him] for another." David E. Rovella, *A Looming* Apprendi *Tsunami?*, Nat. LJ., Jan 8, 2001, at A1 (quoting Professor Erwin Chemerinsky). Yet that is essentially what the trial court did in this case. It accepted Petitioner's guilty plea to second degree kidnapping with a deadly weapon and then sentenced him for a more serious transgression: second degree kidnapping with a deadly weapon plus deliberate cruelty and domestic violence. Enforcing the *Apprendi* rule here will prevent defendants such as Petitioner from being blindsided by court-imposed sentences longer than they could have predicted from the facts charged in their indictments or acknowledged in their guilty pleas.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Washington Court of Appeals and hold that the procedures in Washington's Sentencing Reform Act for finding the aggravating facts necessary to impose exceptional sentences upward are unconstitutional.

Respectfully submitted,

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