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

PETITION FOR REHEARING ON BEHALF OF THE STATE OF WASHINGTON

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> "The Court has rightly been parsimonious in ordering rehearings, but the occasions on which important and difficult cases have been reargued have, I believe, enhanced the deliberative process." *City of Detroit v. Murray Corp.*, 357 U.S. 913, 915 (1958) (Frankfurter, J., dissenting from denial of rehearing).

In dissent to this Court's June 24, 2004, ruling in this case (*Blakely* "Slip Op."), Justice Breyer proposed that this case be scheduled for "further argument." Slip Op. at 21 (Breyer, J., dissenting). In addition to the serious concerns Justice Breyer raised, Washington State now provides to the Court significant historical evidence not considered in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or in this case. *See* Slip Op. at 6 ("we compiled the relevant [historical] authorities in *Apprendi* . . . and need not repeat them here"). This evidence bears directly on the Framers' intent regarding indeterminate sentencing statutes. It indicates that an historical assumption that was centrally relied upon in *Apprendi* (and incorporated in *Blakely*) was erroneous. Consideration of this new, precept-altering historical evidence merits rehearing. *See Reid v. Covert*, 352 U.S. 901 (1956) (granting rehearing in right to jury trial case, in part to consider "historical evidence" bearing on Framers' intent).

In addition, the unprecedented turmoil and confusion that this Court's June 24 decision engendered was not fully appreciated when the ruling was issued. *See* Stern, Gressman, *et al.*, *Supreme Court Practice*, (8th ed. 2002) at 729. For example, although the Court referenced possible effects on the sentencing structures of nine States (*see* Slip Op. at 11, O'Connor, J., dissenting), it is now clear that the number of States that will be adversely affected is at least *double* that number.[1] It is also becoming increasingly clear

[1] Email from Jon Wool, The Vera Institute of Justice, to Rory Little (July 23, 2004) (copy on file with Clerk). For example, on July 22, 2004, the Governor of Tennessee appointed a Commission to address the

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that the effects of this Court's opinion will be adverse to the long-term interests of criminal defendants.

Finally, since June 24, 2004, two expedited certiorari petitions have been filed by the United States, requesting "guidance" about the federal sentencing guidelines. *See* Petitions for Certiorari in *United States v. Booker*, No. 03-104 and *United States v. Fanfan*, No. 03-105 (filed July 21, 2004). It seems clear that this Court will very soon be re-addressing the constitutional underpinnings of its June 24 decision. Rather than being narrowly limited to the federal regime, the upcoming arguments will surely have to address the "deep structure" of *Blakely* and *Apprendi*, and will directly impact the interests of dozens of States.

For all these reasons, Washington hereby respectfully requests that rehearing be granted in its case and (by an accompanying Motion) that reargument be scheduled in tandem with the upcoming federal cases.

I. The Historical Evidence the Court Has Relied On to Interpret the Meaning of the Fifth and Sixth Amendments is Inaccurate and Incomplete.

Underlying both the *Blakely* majority opinion and the principal dissent was an assumption that the Framers were unfamiliar with judicial discretion in criminal sentencing, *i.e.*, indeterminate sentencing schemes. The *Blakely* majority merely incorporated what *Apprendi* said on this point. *Blakely* Slip Op. at 6; *see, e.g.*, *Apprendi*, 530 U.S. at 481 (asserting that at the time of the framing of the Constitution and the Bill of Rights, "statutes provid[ed] fixed-term sentences"). The dissenters here also accepted this assumption, *see* Slip Op. at 10 (O'Connor, J., dissenting) ("Because broad judicial sentencing discretion was foreign to the Framers, ...").

However, the Court was in error insofar as the Framers themselves were concerned. Historical records confirm

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disruption. *See generally* Douglas Berman, "Sentencing Law and Policy Blog," http://sentencing.typepad.com.

that, whatever may have been the situation in English courts or at common law, the Framers themselves *wrote* discretionary, indeterminate criminal sentencing provisions.[2] In 1789-90, the First Congress – the same legislators who contemporaneously adopted the Bill of Rights, *see* 1 Stat. 97 (Sept. 1789), – enacted numerous indeterminate sentencing provisions.[3] For example, that legislation (endorsed by influential Framers who were in that Congress such as James Madison) defined the following federal crimes and yoked them to the following indeterminate punishments:

- Misprision of treason, "shall be imprisoned not exceeding seven years" (1 Stat. 112, Sec. 2), thus creating a sentencing range of zero to 84 months;
- Misprision of felony, "shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars" (1 Stat. 113, Sec. 6), thus creating a fine range and an imprisonment range of zero to 36 months;
- Stealing or falsifying court records, "shall be . . . imprisoned not exceeding seven years, and whipped not exceeding 39 stripes" (1 Stat. 115-116, Sec. 15), thereby creating a range of zero to 84 months and recognizing alternative sanctions.

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[2] In this sense the Framers themselves were progressive sentencing reformers, making it even harder to imagine that they would have thought unconstitutional the progressive "guided discretion" sentencing reforms of the past 25 years.

[3] The bill, entitled "An Act for the Punishment of Certain Crimes Against the United States," 1 Stat. 112-119, was under consideration from May 13, 1789, when a Senate Committee was appointed to "report a bill defining the crimes and offences that shall be cognizable under the authority of the United States, *and their punishment*" (1 *Annals of Congress* 36, emphasis added), until passage by both Houses of Congress in April 1790, *see id.* at 999, 1001; 2 *Annals of Congress* 1522.

Similar indeterminate sentencing ranges were enacted for an additional 13 federal crimes.[4] Rather than being "foreign" to the Framers, it was the consistent pattern of their legislation.

The erroneous notion that precise criminal sentences were "invariabl[y] link[ed]" with the statutory definition of the crime "during the years surrounding our Nation's founding" (*Apprendi*, 530 U.S. at 478), was not expressed merely in passing. Rather, it was repeated over and over in the Court's six-page historical discussion.[5]

This historical error takes on great significance, when one compares the questions presented in *Apprendi* and

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[4] *See* 1 Stat. 113, Sec. 5 (rescue of executed body, "not exceeding twelve months") and Sec. 7 (manslaughter on federal property, "not exceeding three years"), *id.* at 114, Sec. 11 (accessory after the fact to piracy or robbery, "not exceeding three years"), *id.* at 115, Sec. 12 (confederacy to piracy, or ship's revolt, "not exceeding three years") and Sec. 13 (maiming, "not exceeding seven years"); *id.* at 116, Sec. 16 (larceny, "fine not exceeding the four-fold value of the property . . . and be publically whipped, not exceeding thirty-nine stripes"), Sec. 17 (same for receipt of stolen goods); and Sec. 18 (perjury, "not exceeding three years"), *id.* at 117, Sec. 21 (bribery, "shall be fined and imprisoned at the discretion of the court"), Sec. 22 (obstruction of process, "not exceeding twelve months"), Sec. 23 (rescue of federal offenders, "not exceeding one year"), *id.* at 118, Sec. 26 ("violators of the laws of nations, . . . not exceeding three years"), Sec. 28 (violation of ambassador, "not exceeding three years"). *See also* 1 Stat. 83, Sec. 19 (emphasis added) ("it shall be the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause *the facts on which they found their sentence* or decree, fully to appear upon the record. . . ."); 1 Stat. 175 (customs bribery or false entry, "fine or imprisonment or both, in the discretion of the court . . . not [to] exceed twelve months").

[5] *See* 530 U.S. at 478 (sanction-specific statutes were the "general rule;" "The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from *the invariable linkage of punishment with crime*") (emphasis added); 479 (English judges "had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific") (quoting Langbein); 481 ("statutes providing fixed-term sentences"); 482 n.9 ("legislation ordinarily fixes the penalties") (quoting Bishop); 483 ("historic link between verdict and judgment"); 483 n.10 (referencing "the evidence we describe that punishment was, by law, tied to the offense").

Blakely. In *Apprendi*, the erroneous historical assumption may have gone unexplored because it could be viewed as inconsequential to the question of facts directed by a legislature to *increase* the statutory range tied to a crime. Indeed, the *Apprendi* Court stressed this distinction immediately after canvassing common law – not federal – history. *See* 530 U.S. at 481 (stressing that *Apprendi* did not involve "imposing a judgment *within the range* prescribed by statute") (emphasis in original).[6] However, when *Blakely* directly presented the question of legislatively-directed sentencing *within* a prescribed statutory range, the erroneous historical assumption was simply incorporated by reference without analysis.

Because the history that Washington now presents bears directly on the Framers' understandings as they wrote the Fifth and Sixth Amendments, and has never been examined by this Court, rehearing is appropriate. *Reid v. Covert*, *supra*, 352 U.S. at 901; *accord Flora v. United States*, 362 U.S. 145, 167 (1960) (granting rehearing because a factual assertion in the Court's prior opinion was shown to have been erroneous).[7]

This Court has recognized that giving interpretive content to Bill of Rights provisions should be "guided by the meaning ascribed to [the words] by the Framers of the Amendment[s]." *Wilson v. Arkansas*, 514 U.S. 927, 931

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[6] Thus, every Circuit to consider the *Blakely* issue after *Apprendi*, and even after *Ring v. Arizona*, 536 U.S. 584 (2002), concluded that legislatively-directed sentencing systems, directing judges how to sentence *within* statutory ranges, were constitutional. *See Booker* Cert. Pet., *supra*, at 10 n.3.

[7] Washington has not previously brought this evidence to the Court's attention. However, "acquir[ing] new wisdom," particularly in the still-evolving *Apprendi* era, is to be encouraged. *Ring v. Arizona*, 536 U.S. at 611 (Scalia, J., concurring). This Court may consider grounds not previously raised by a respondent defending its judgment. *United States v. Estate of Romani*, 523 U.S. 517, 526 (1998). The Court should do so here, where the questions are so important, the evidence of historical error is so clear, and the constitutional precepts have been so fluid since *Apprendi*.

(1995). But in this case, direct evidence of the Framers' understandings about criminal sentencing, contemporaneous with their consideration of the Fifth and Sixth Amendments, has been overlooked by the Court. It simply is not accurate that the Framers were relying on a practice of "fixed-term sentences" when they enshrined the constitutional right to jury trial. Rather, the Bill of Rights' authors wrote *indeterminate* criminal sentencing provisions. Yet they said nothing to suggest that the jury trial right they were simultaneously advocating would apply to facts relevant to such sentences.

It cannot be ignored that the Framers were Legislators as well as Constitution-writers. While venerating the right to trial by jury, they also strongly believed in the authority of legislation. It is difficult to imagine that the same legislators who wrote the Sixth Amendment *as well as* many indeterminate criminal sentencing statutes would have, at the same time, thought unconstitutional legislative directions given to judges as to how to sentence *within* the ranges they wrote. Rather, it seems likely that the Framers would have *approved* of giving legislative direction to sentencing judges, had they seen any need for it.

The Court's June 24 opinion took Justice O'Connor to task for an absence of "*any* [historical] evidence." Slip Op. at 6 n.6 (emphasis in original). But it now appears that, in fact, the Court's own historical account was incomplete and erroneous. Moreover, silence can sometimes "speak volumes:" it can be powerful evidence of the *absence* of definitive constitutional or legislative intent.[8] Had the Framers believed that aggravating facts relevant to sentencing within the ranges they wrote would be required, under any scenario, to be the special province of

[8] *See*, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 741 (1999) ("We believe . . . that the founders' silence is best explained by the simple fact that no one . . . suggested the document might strip the States of the immunity."). *See also Seminole Tribe v. Florida*, 517 U.S. 44, 70 (1996); *Chisolm v. Roemer*, 501 U.S. 380, 396 & n.23 (1991); *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 294 (1989).

the jury, one imagines that they might have said *something* about it.[9]

It must be emphasized, however, that the Court need not decide now what bearing its historical misunderstanding in *Apprendi* has on the ultimate issues presented here. Rather, this new historical evidence is sufficient to counsel rehearing. *Reid v. Covert*, *supra*. The appropriate occasion for full investigation and evaluation should be a rehearing, not merely the glimpse this Petition provides. The issues are too weighty, and the impact on the States too disruptive, not to merit the fullest and fairest hearing opportunity.

II. Because this Court Will Soon Again Hear Arguments About *Apprendi*, Fairness to the State of Washington Supports Reargument in this Case.

Since *Almendarez-Torres v. United States*, 523 U.S. 224, 250-260 (1998) (Scalia, J., dissenting), the law of criminal sentencing in the United States has been in

[9] As for providing a "coherent alternative meaning for the jury-trial guarantee," Slip Op. at 6 n.6, it would be merely the simple one with which the Framers were familiar: the Legislature defines the crime, and the defendant has the right to ask a jury whether the facts prove him or her guilty. Thus here, Blakely was charged with kidnaping, a simple common-law crime, and he pled guilty, thereby authorizing a sentence of up to 10 years imprisonment. All the facts "essential" to a punishment up to 10 years were encompassed by his plea: Washington's legislature has declared that only the elements of kidnaping simpliciter are "essential" to authorize that full punishment. *Cf.* Slip Op. at 5, 7 (facts "essential to the punishment" must be found by the jury). The rest is merely legislative direction about the details of within-range sentencing, transmitted directly to sentencing judges. As this Court recognized in *Apprendi*, the Framers designed "structural democratic constraints" that would block extreme abuses of these principles. 530 U.S. at 490 n.16.

Given the relatively small number of crimes extant in 1790 and the clarity and simplicity of their elements, the Framers had no need to consider, or intend, more meaning than this. Their simple understanding ought to control interpretation of the Sixth Amendment here.

turmoil. Six years later – and four weeks after this court's June 24 opinion – the situation is no better. Unprecedented turmoil and uncertainty in theory and in practice reign. It is inevitable that this Court will soon have to confront again the underlying constitutional theory of the *Apprendi* line of cases. *See Booker* and *Fanfan* Petitions, *supra*.

The Fall arguments this Court is likely to allow cannot, however, realistically be restricted to the narrow question of "does *Blakely* invalidate the federal guidelines?" Instead, the Court will be compelled to analyze the roots of *Apprendi*, to address the question whether various distinctions presented by the United States make any *constitutional* difference.

Accordingly, not just the federal sentencing guidelines, but also the guideline systems in at least 19 states (*see* n.1, *supra*), will be at issue in this Court's Fall arguments. Many unanswered questions – including severability of guidelines, facts that initially establish sentencing guideline ranges, prior convictions, consecutive sentences, mandatory minimums, retroactivity, and harmless error doctrines – will be pressed upon the Court. These issues are vital to the 19 affected States and are present in Washington State's case. If the Court does not revise its initial ruling in this case – although the new historical evidence presented above provides ample occasion to do so – reargument would present a full and fair opportunity to address these issues as they affect the States.

Washington is a sovereign jurisdiction no less than the federal government. So too are the 18 other States whose chosen sentencing systems are now affected. "Fair federalism" should not countenance Washington's system being condemned, in a decision that changed common understanding of the law in a way surprising even to seasoned observers, while all other systems are still being considered and the constitutional theory is being reexamined.

If, as seems certain, the Court is going to reconsider the theoretical underpinnings of *Apprendi* as applied to legislatively-directed sentencing within indeterminate ranges, then Washington should be allowed to reargue this

case as part of that enterprise. If any change in analysis is accepted by even one Justice in the majority, the effect could be a significantly different ruling for Washington's statutes. Washington's system should be kept alive rather than condemned before all others.[10] Washington can fully represent the interests of many States as this Court further develops its thinking.

Finally, although this Court earlier stated that its decisions in this area "would in no way hinder the States (or the National Government) from choosing to pursue policies aimed at rationalizing sentencing practices." *Jones v. United States*, 526 U.S. 227, 251 n.11 (1999), it is now apparent that the practical difficulties in complying with the Court's June 24 decision will, in fact, prevent many States from pursuing the sentencing regimes their legislatures prefer. Indeed, it seems increasingly likely that Legislatures will adopt statutory responses that are less favorable to the overall interests of criminal defendants. Thus some Members of Congress responded immediately to *Blakely* by advocating more "mandatory minimum" imprisonment statutes. Brent Kendall, "Bill Adds, Increases Mandatory Minimums," *The Daily Journal*, at 3 (July 6, 2004) (Rep. Coble: "mandatory minimums may well take on added importance . . . as a result of the Supreme Court's action"). While *Blakely* will produce short-term windfall benefits to some criminal defendants, many experts are coming to agreement that its long-term will include many adverse consequences for that group, including increasing sentencing ranges to the statutory maxima, rolling back sentencing "transparency" and effective appellate review, increasing prosecutorial power, and placing prejudicial facts before juries deciding

[10] For this reason, even if the Court does not grant rehearing, we entreat the Court to "hold" this Petition for Rehearing until the results in *Booker* and *Fanfan* are announced. Allowing final judgment to issue against Washington now, while a major examination of the area is scheduled for the coming Fall, is simply unfair.

guilt or innocence.[11] If members of the June 24 majority harbored the view that their ruling would lead to more fairness or other benefits for criminal defendants, they ought to vote for rehearing now.

CONCLUSION

This Court now knows two things it did not know on June 24, 2004: (1) it has proceeded in this area based on a significant historical misunderstanding about the Framers; and (2) its June 24 decision has produced greater disruption, and more adverse consequences for defendants, than the majority had anticipated. The issues are too important to over a third of the States not to permit full consideration of the accurate historical record, and to permit a well-represented State to participate in the expedited consideration that is forthcoming.

Thus the State of Washington respectfully requests this Court to grant it rehearing and expedited scheduling of argument in tandem with the federal cases (or, in the alternative, "hold" this Petition, *see* n.10 *supra*).

Respectfully submitted,

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[11] For articles and testimony detailing the impacts of, and proposed responses to, this Court's June 24 decision, *see, e.g.*, Mark Osler, "The 3x Solution;" Stephanos Bibas, "*Blakely's* Federal Aftermath;" and King & Klein, "Beyond *Blakely,*" all forthcoming in 16 *Fed. Sent. Rep.* (Summer 2004) and available at the Berman website, *supra* n.1; and Frank Bowman, "Memoranda to U.S. Sentencing Commission" (June 27 and July 16, 2004), also available on the Berman website.

RULE 44.1 CERTIFICATE

Undersigned Counsel for the State of Washington hereby certifies that the foregoing Petition for Rehearing in *Blakely v. Washington*, No. 02-1632, is presented in good faith and not for delay.

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