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

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR REHEARING ON BEHALF OF THE RESPONDENT STATE OF WASHINGTON

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To the Honorable Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Respondent State of Washington hereby prays for a 30-day extension of time to file a Petition for Rehearing regarding this Court's merits decision and judgment issued in this case on June 24, 2004. The 25-day period provided by this Court's Rule 44 for filing a Petition for Rehearing will expire on Monday July 19, 2004. Rule 44.1 provides that the Court or a Justice may extend the time for the filing of a Petition for Rehearing, and Rule 30.3 directs that an application for such an extension be made to an individual Justice. The June 24 decision arises out of a matter before the Washington State Court of Appeals, which lies within the geographic bounds of the Ninth Circuit. Hence, this Application is made to Justice O'Connor in her capacity as the Circuit Justice for the Ninth Circuit. Rule 22.3

After due consideration, the State of Washington believes that a Petition for Rehearing is appropriate in this case. It will be presented in good faith and not for any purposes of delay. There is no prejudice to Petitioner Blakely, as he was released from custody on his sentence in

the underlying prosecution on July 8, 2004, although he remains in custody on other charges. We seek an extension of time for filing such a Petition for two primary reasons:

1. First, by statute (Wash. Rev. Code § 36.27.020(4)), the State of Washington is represented in this matter for the Prosecuting Attorney for Grant County, where the underlying criminal prosecution arose. The staff of that office is neither large (only 10 attorneys) nor primarily devoted to Supreme Court or federal constitutional litigation. Yet the Blakely decision is an earthshattering development in the constitutional, and practical, law of criminal sentencing. (Even if some may have seen it as a logical extension of Apprendi v. New Jersey, 530 U.S. 466 (2000), every federal Circuit to have considered the question after Apprendi had failed to so perceive the question.) Thus, it has taken the Respondent some time to assimilate the decision and determine that rehearing responsibly should be requested. Respondent came to this decision only late in the day on Friday, July 9, 2004.

Washington candidly recognizes that rehearing in this matter is legitimately viewed by many as unlikely. However, we believe the case merits the fullest possible attention at this juncture. This Court seems certain to soon grant merits hearings to other jurisdictions on the validity of their own sentencing regimes under Apprendi and the reasoning in Blakely. *See* United States v. Pineiro, No. 03-30437 (July 12, 2004), slip op. at 11, 20 (noting Circuit split that has already resulted, and expressing hope that it "will soon receive a more definative answer from the Supreme Court"), We do not believe that the State of Washington fairly should be compelled to suffer the first blow as other jurisdictions continue to argue the implications of this Court's closely-decided cases in this area. Rather, Washington should be permitted to participate in what will apparently be the definitive re-argument of the issues.

Thus, also late on Friday, July 9, 2004, the Respondent engaged new counsel to assist it

in the preparation of its Petition for Rehearing (Professor Rory K. Little of San Francisco, California). Professor Little, however, has unavoidable professional engagements on three of the seven days that remain until the July 19 deadline for a Rehearing Petition (including a presentation regarding the impact of Blakely at the Judicial Conference for the United States Court of Appeals for the Ninth Circuit on July 19, 2004). Even if this were not so, he would fairly need more than the seven days remaining to fully develop and finalize an adequate and responsible Petition for Rehearing.

2. The impact that the Blakely decision is already having on both state and federal sentencing practices appears to be more dramatic even than this Court appreciated, even granting the Court's clear understanding that the decision might have significant impact. *Compare, e.g.*, Blakely, slip op. at 9 n.9 (majority expresses "no opinion" regarding the constitutionality of the federal sentencing guidelines) *with* United States v. Booker, No. 03-4225 (7th Cir. July 9, 2004), slip op. at 2 (Blakely "dooms the [federal] guidelines" and noting an "avalanche of motions for resentencing" in the Seventh Circuit alone) *and* id. at 17 (Easterbrook, J., dissenting) (entire criminal docket is "discombobulate[d]" and "I trust that our superiors will have something to say about this. Soon."). Similarly, while the Court appears to have understood that possibly nine States' sentencing regimes would be threatened by Blakely, *see* id., slip op. at 11 (O'Connor, J., dissenting), current evaluations indicate that the number will be much greater. Counsel is informed that the Vera Institute in New York has determined that the actual number of States adversely affected by Blakely is likely to be double what the Court estimated, or more.

Moreover, federal legislation to impose minimum sentences that will be mandatory upon conviction, rather than discretionary and dependent on sentencing fact-finding, has already reportedly been proposed in reaction to Blakely. Thus, contrary to some early impressions, the

news post-Blakely does not appear to be entirely favorable to criminal defendants; mandatory minimum sentences are a harsh reaction not anticipated by many. Finally, the United States Senate is holding an expedited hearing to address the impact of Blakely on Tuesday July 13, 2004, further demonstrating the epochal status of the 5-4 ruling. *See generally* Joan Biskupic, "High Court Ruling Sows Confusion; Decision Has Cast Doubt on State, Federal Sentencing Guidelines," U.S.A. Today (July 12, 2004), at 3A.

In order to fully assimilate all these developments and present the strongest and most responsible grounds for rehearing, and based upon the entire record in this matter, the State of Washington respectfully requests that its time for filing a Petition for Rehearing be extended to and including Wednesday, August 18, 2004.

Respectfully submitted,

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July 12, 2004

_____

Rory K. Little
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CERTIFICATE OF SERVICE

The undersigned certifies that he has, on this ___ day of July, 2004, caused a copy of the foregoing Application for Extension of Time to File a Petition for Rehearing on Behalf of the Respondent State of Washington was mailed, first-class postage prepaid, to Jeffrey L. Fisher, 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington, 98101-1688, counsel for the Petitioner herein, and further certifies that all parties required to be served have been served.

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RORY K. LITTLE
Professor of Law

July 13, 2004

The Honorable William K. Suter
Clerk, United States Supreme Court
1 First Street, NE
Washington DC 20543

BY HAND-DELIVERY

Re: Blakely v. Washington
No. 02-1632

Dear General Suter,

Please find enclosed in the above case an original and two copies of an Application for an Extension of Time to File a Petition for Rehearing on Behalf of the Respondent State of Washington, which is addressed to Justice O'Connor, and a Certificate of Service. Also enclosed is an additional copy of the Application and Certificate, to be date-stamped and returned with the messenger making this filing.

Thank you very much for your attention and service.

Sincerely,

Rory K. Little
Professor of Law
Counsel for Respondent

cc: Jeffrey Fisher, Counsel for Petitioner