No. 02-1632

In the Supreme Court of the United States

RALPH HOWARD BLAKELY, JR., PETITIONER

v.

STATE OF WASHINGTON

ON WRIT OF CERTIORARI
TO THE WASHINGTON COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

THEODORE B. OLSON
Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a fact (other than a prior conviction) that justifies an upward departure from a state statutory sentencing guidelines range must be found in accordance with the procedures required by *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

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INTEREST OF THE UNITED STATES

This case presents the question whether a fact (other than a prior conviction) that justifies an upward departure from a state statutory sentencing guidelines range must be found in accordance with the procedures required by *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Although the Washington sentencing guidelines system differs in significant respects from the United States Sentencing Guidelines, a decision invalidating judicial departure authority here could call into question the constitutionality of the federal Guidelines. The United States therefore has a substantial interest in the outcome of this case.

STATEMENT

A. The Washington Sentencing Guidelines

In 1981, the State of Washington became one of the first States in the nation to enact a sentencing guidelines system for the sentencing of felony offenders. See Sentencing Reform Act (Act) of 1981, Wash. Rev. Code §§ 9.94A.010 *et seq.*

(1997).[1] As the Act's introductory section explains, the purpose of the new sentencing system was "to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences." *Id.* § 9.94A.010.

The Washington Criminal Code establishes maximum prison sentences for felonies based on whether the crime is a class A, B, or C felony. Wash. Rev. Code § 9A.20.021(1). For a class A felony, the maximum punishment is life imprisonment; for a class B felony, the maximum punishment is ten years; and for a class C felony, the maximum punishment is five years. *Ibid.* The Act then establishes "presumptive sentencing ranges" for felony offenses based on the "seriousness level" of the offense and the defendant's "offender score." *Id.* § 9.94A.310(1) (Table 1). The offense seriousness level "is determined by the offense of conviction." *Id.* § 9.94A.350; see *id.* § 9.94A.320 (Table 2). The offender score is based on the offender's criminal history. *Id.* § 9.94A.360. The presumptive range is adjusted upward if the offender or an accomplice was armed with a deadly weapon when committing the crime. *Id.* §§ 9.94A.125, 9.94A.370.[2] "If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence." *Id.* § 9.94A.420.

The sentencing court is to impose a sentence within the presumptive sentencing range, unless it finds "that there are

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[1] After petitioner's sentencing, the Washington legislature amended and recodified portions of the Act. The amendments did not make any substantive change that affects the issues in this case. The citations in this brief, as in the state court opinions, are to the 1997 version of the Act.

[2] When there is a jury trial on the underlying offense, the deadly weapon finding must be made by the jury in a special verdict. Wash. Rev. Code § 9.94A.125.

substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code § 9.94A.120(1) and (2). The Act provides a list of "factors which the court may consider in the exercise of its discretion to impose an exceptional sentence." *Id.* § 9.94A.390. Those factors are "illustrative only and are not intended to be exclusive reasons for exceptional sentences." *Ibid.* "An exceptional sentence is appropriate when the circumstances of a particular crime distinguish it from other crimes within the same statutory definition," for example, because there is "extraordinarily serious harm or culpability." See *State* v. *Fisher*, 739 P.2d 683, 686, 688 (Wash. 1987). Therefore, "the sentencing judge's reasons for imposing a sentence outside the presumptive range must take into account factors other than those which are necessarily considered in determining the presumptive range for the offense." *Id.* at 686.

In determining the appropriate sentence (including whether an exceptional sentence is warranted), the court may consider facts proved at sentencing by a preponderance of the evidence. Wash. Rev. Code § 9.94A.370(2). In imposing an exceptional sentence, the outer boundary of the defendant's sentencing exposure is the statutory maximum. *State* v. *Gore*, 21 P.3d 262 (Wash. 2001).

B. The Present Controversy

1. On October 26, 1998, petitioner kidnapped his estranged wife, Yolanda Blakely, from her home in Grant County, Washington. Petitioner attacked his wife and bound and gagged her with duct tape. He said that he had guns, ammunition, and knives; told her he wanted her to dismiss pending litigation involving a trust they had created; and warned her to cooperate or he would kill her and their son, 13-year-old Ralphy. J.A. 3, 41-42.

Petitioner forced Yolanda to climb into the back of his truck, where he locked her in a coffin-like vented wooden

box that he had constructed. While retrieving items from the house, petitioner repeatedly opened the lid of the box and pressed a knife to Yolanda's neck or nose. J.A. 3, 42-43. When Ralphy arrived home from school, petitioner told him that his mother was in great danger and took him to the truck where he could hear Yolanda yelling from inside the wooden box. Petitioner ordered Ralphy to drive his mother's car and told him that if he "tried anything," petitioner would shoot the box with a shotgun. J.A. 3-4, 43.

Petitioner drove the truck toward the couple's home in Montana, and Ralphy followed in the car. When Ralphy tried to seek help at a truck stop, petitioner left him behind and drove on to Montana. During the drive, petitioner alternately let his wife sit in the front seat and forced her to ride in the wooden box. Petitioner and Yolanda arrived at the house of a friend, who secretly called the police. The police arrived and arrested petitioner. J.A. 4-5, 43-47.

2. The State of Washington charged petitioner with two counts of first degree kidnapping involving domestic violence. J.A. 5. After a pretrial competency hearing at which a jury found petitioner competent to stand trial, petitioner agreed to enter a plea under *North Carolina* v. *Alford*, 400 U.S. 25 (1970), to one count of second degree kidnapping involving domestic violence with a deadly weapon and one count of second degree assault involving domestic violence with a deadly weapon. J.A. 6-7, 24, 75-76. The plea agreement stated that the maximum term of imprisonment for each offense was ten years. J.A. 63. See Wash. Rev. Code §§ 9A.36.021, 9A.40.030; *id.* § 9A.20.021. The plea agreement also stated that the standard sentencing range for petitioner's offenses was 49-53 months for the kidnapping charge and 13-17 months for the assault charge. J.A. 63. Both the plea agreement and the court, at the plea hearing, advised petitioner that he could be sentenced above the standard range if the judge found compelling reasons, and petitioner

stated that he understood. J.A. 66; Verbatim Report of Proceedings, Vol. I (VRP I), at 549-550.

At sentencing, the court expressed the view that a sentence within the standard range would be "too lenient" because petitioner committed the kidnapping with "deliberate cruelty" and in the presence of his son. VRP II, at 41-42; see J.A. 7. The court stated that it intended to sentence petitioner to 90 months of imprisonment on the kidnapping count. VRP II, at 42-44. Because petitioner objected to the court's underlying factual findings, the court scheduled an evidentiary hearing as required by Washington law. VRP I, at 562-563; J.A. 8; see Wash. Rev. Code § 9.94A.370(2).

Before the evidentiary hearing, petitioner filed a motion arguing that the court was required to impose a sentence within the standard range. He argued that a determination that an upward departure was justified based on facts found by the court by a preponderance of the evidence would be unconstitutional under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). VRP I, at 566-570; see J.A. 13. The court denied petitioner's motion. J.A. 51-59.

Following the evidentiary hearing, the court imposed an exceptional sentence of 90 months of imprisonment on the kidnapping charge, to run concurrently with a standard sentence of 14 months on the assault charge. J.A. 8, 32. Based on detailed findings of fact, J.A. 40-50, the court concluded that petitioner's "[r]epeatedly and protractedly confining his victim in a coffin-like box manifested deliberate cruelty to the victim," as described in Washington Revised Code § 9.94A.390(2)(a). J.A. 49. The court further concluded that the kidnapping "involved domestic violence, * * * occurred within sight and sound of the victim and [petitioner's] minor child," and "manifested deliberate cruelty to, and intimidation of, the victim." *Ibid.* (citing Wash. Rev. Code § 9.94A.390(2)(h)). The court also concluded that, although petitioner's capacity to appreciate the wrongfulness of his

conduct was impaired by personality disorders, see *id.* § 9.94A.390(1)(e), the disorders "did not significantly impair [petitioner's] capacity to act with deliberate cruelty." J.A. 49. Considering the purposes of the Washington Sentencing Reform Act, the applicable presumptive sentencing range, and its factual findings and legal conclusions, the court determined that there were "substantial and compelling reasons justifying an exceptional, aggravated sentence." *Ibid.*

3. The Washington Court of Appeals affirmed. J.A. 2-23. As relevant here, the court rejected petitioner's claim that the upward departure violated *Apprendi*. J.A. 19. The court relied on *State* v. *Gore*, 21 P.3d 262 (Wash. 2001), in which the Washington Supreme Court held that, because the Washington sentencing statutes allow imposition of exceptional sentences only "within the maximum range determined by the Legislature," factual determinations that support a court's determination that an exceptional sentence is justified need not be submitted to a jury or proved beyond a reasonable doubt. J.A. 19 (citing *Gore*, 21 P.3d at 276-277).

The Supreme Court of Washington denied review. J.A. 60.

SUMMARY OF ARGUMENT

The findings underlying an upward departure from the presumptive sentencing range in the Washington Sentencing Reform Act are not subject to the jury-trial and reasonable-doubt guarantees that apply to facts that raise the maximum statutory sentence under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

A. Sentencing systems may constitutionally give a judge wide discretion to find facts by a preponderance of the evidence and to impose a particular punishment within the statutory range. *Williams* v. *New York*, 337 U.S. 241 (1949). There are, however, constitutional limits on the legislature's freedom to assign a fact-finding role to sentencing judges. In

order to prevent the legislature from circumventing the jury-trial and reasonable-doubt guarantees, this Court held in *Apprendi* that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Ring* v. *Arizona*, 536 U.S. 584 (2002), the Court applied *Apprendi* to Arizona's capital sentencing scheme, making clear that a "statutory maximum" under *Apprendi* must be actually available to the sentencing court without the finding of an additional legislatively specified fact.

Apprendi and *Ring* do not cast doubt on the proposition that judicial discretion to find facts and exercise judgment about the appropriate punishment within the statutory range is constitutional. The procedural requirements of *Apprendi* apply only when the finding of a legislatively specified fact is essential to increase the statutory maximum penalty. The limitation of *Apprendi* to legislatively designated facts that raise the statutory maximum penalty is consistent with *Apprendi*'s purpose: to ensure that the legislature does not evade the procedural protections applicable to the determination of crimes, but instead remains responsive to "structural democratic constraints" in fixing the maximum punishment that is proportionate to a crime. 530 U.S. at 490 n.16.

B. Under those principles, *Apprendi* does not apply to the determinations involved in making an upward departure from the presumptive sentencing range under the Washington guidelines. The statutory maximum sentence is not the guidelines sentence, but the maximum term set forth elsewhere in Washington law. The Washington legislature has not specified an exclusive set of facts that exposes the defendant to a greater punishment than the presumptive sentencing range. Rather, the statute gives the sentencing court discretion to identify facts that justify an "exceptional sen-

tence" based on "substantial and compelling reasons." Wash. Rev. Code § 9.94A.120(2). Although the legislature identified "illustrative" circumstances that may warrant a departure, *id.* § 9.94A.390, the statute leaves the sentencing court free to identify others. The power to depart upwards thus resembles the traditional discretion exercised by a judge in an indeterminate sentencing scheme, *i.e.*, the power to find facts that warrant a more or less severe sentence within the defined range. Washington law structures the exercise of that discretion, but the legislature recognized that it could not anticipate all of the facts that might warrant an exceptional sentence. The legislature thus preserved judicial discretion to identify such facts and impose a sentence up to the statutory maximum.

Reinforcing the conclusion that the legislature has left room for the exercise of traditional judicial discretion is that the ultimate exposure of the defendant to a sentence above the presumptive range turns not solely on facts, but on the sentencing court's qualitative judgment that those facts provide "substantial and compelling reasons" for an exceptional sentence. *Apprendi* applies when a legislature provides that proof of certain facts exposes the defendant to greater punishment. A judicial judgment that, based on the particular record, the defendant should face greater punishment is not a "fact."

For those reasons, this case involves an entirely different sentencing system from the capital regime involved in *Ring* v. *Arizona*. In *Ring*, the Arizona statute precluded a capital sentence absent the finding of a *legislatively specified fact*; that fact was therefore subject to the procedures of *Apprendi*. In this case, the sentencing judge retains authority to reach the statutory maximum based on the exercise of discretion to identify exceptional circumstances. The legislature thus remains accountable for fixing the maximum sentence to which defendants convicted of a particular offense

may be subject, and the scheme is therefore consistent with the constitutional values underlying *Apprendi*.

C. A ruling that *Apprendi* applies to the Washington Sentencing Guidelines could have serious ramifications, especially if the Court accepted petitioner's view that a defendant's maximum sentence under *Apprendi* must be determined "'according to the facts reflected in the jury verdict alone' or the guilty plea." Pet. Br. 16-17 (quoting *Apprendi*, 530 U.S. at 483). Such a ruling could apply to a host of determinations under the United States Sentencing Guidelines that depend on judicial fact-finding.

There are possible distinctions between the federal guidelines and state statutory systems. Most prominently, the federal guidelines are promulgated by an administrative commission, not by Congress. And the presumptive sentence under the federal guidelines does not turn exclusively on the offense of conviction and the offender's criminal history, as Washington's generally does. Rather, conduct outside the elements of the offense enters into federal guidelines calculations at every level, thus making it difficult to view the guidelines range as a "statutory maximum." But it is uncertain whether those distinctions would be sufficient if this Court applied *Apprendi* here, since the United States Sentencing Guidelines have the force and effect of law, and it is theoretically possible to calculate a guidelines sentence based on the facts reflected in the jury verdict alone (although that would distort the intended operation of the Guidelines).

D. The consequence of applying *Apprendi* to guidelines sentencing systems would be to impair, and likely render unworkable, a valuable sentencing reform effort. Requiring a jury determination of the multitude of facts that enter into a guidelines determination in the federal system would

prove impossibly cumbersome; would complicate indictments; could lead juries to skew their verdicts to avoid real or imagined sentencing consequences; and would sharply limit appellate review of sentences. If those consequences forced the abandonment of guidelines sentencing, it would end the most promising sentencing reform movement in recent years. State and federal guidelines systems arose to address recurrent issues of disparate treatment of similarly situated offenders, and they were designed to increase fairness, transparency, and proportionality in sentencing. *Apprendi* requires the legislature to take responsibility for establishing the maximum sentence that may be imposed for commission of a particular crime. That requirement does not require the end of legislative efforts to channel sentencing discretion through guidelines systems.

ARGUMENT

A SENTENCING COURT MAY CONSTITUTIONALLY MAKE AN UPWARD DEPARTURE DECISION UNDER THE WASHINGTON SENTENCING GUIDELINES

The State of Washington enacted its sentencing guidelines system to "structure[], but * * * not eliminate, discretionary decisions affecting sentences." Wash. Rev. Code § 9.94A.010. Integral to the operation of that scheme is a departure authority under which sentencing courts have discretion to take into account factors that provide "substantial and compelling reasons justifying an exceptional sentence" outside the presumptive sentencing range, but within the statutory maximum. *Id.* § 9.94A.120(2). In entrusting the sentencing court with those discretionary decisions and the fact-finding underlying them, Washington did not violate the Constitution.

A. *Apprendi* v. *New Jersey* Applies Only When A Defendant's Exposure To Increased Punishment Depends On The Finding Of A Fact Specified By The Legislature

1. *The sentencing court has broad authority to find facts and make judgments bearing on an appropriate punishment*

This Court has long approved sentencing schemes allowing the judge to find facts bearing on the appropriate sentence for a crime of which the defendant has been found guilty, and to make a qualitative judgment about the appropriate punishment within the authorized range. See *Williams* v. *New York*, 337 U.S. 241 (1949). In *Williams*, the sentencing judge concluded that a defendant who had been found guilty of first-degree murder had sufficient culpability to warrant the death penalty. The sentencing court made its judgment about the appropriate level of punishment based on facts contained in a presentence report that had not been presented in open court or found by the jury. See *id.* at 242-245. The Court held that this sentencing procedure complied with the requirements of due process. *Id.* at 252. The Court explained that there has been a long tradition in this country "under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.* at 246. The Court thus held that a sentencing judge should not be "denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Id.* at 247.

Since *Williams*, the Court has repeatedly reaffirmed that a trial judge may constitutionally be entrusted to make a judgment about what level of punishment is appropriate within the authorized range. In "making that determination, a judge may appropriately conduct an inquiry broad in scope,

largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). The judge may consider "a wide variety of factors in addition to evidence bearing on guilt." *Wisconsin* v. *Mitchell*, 508 U.S. 476, 485 (1993); see, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 157 (1997) (per curiam) (conduct of which defendant was acquitted); *Witte* v. *United States*, 515 U.S. 389, 397-401 (1995) (uncharged conduct); *United States* v. *Grayson*, 438 U.S. 41, 49-54 (1978) (defendant's false testimony at trial). The Court has also repeatedly confirmed that the sentencing judge may find the facts that support his assessment of the appropriate level of punishment by a preponderance of the evidence rather than proof beyond a reasonable doubt. *Watts*, 519 U.S. at 156; *Nichols* v. *United States*, 511 U.S. 738, 747 (1994); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 84-93 (1986).

2. *Constitutional limits on sentencing exist to preclude circumvention of Fifth and Sixth Amendment guarantees*

There are nevertheless constitutional limits on the role that a legislature may assign to judges at sentencing. The Constitution requires that a defendant's guilt of each element of a crime be found by a jury, based on proof beyond a reasonable doubt. *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995). A legislature cannot evade that requirement by redesignating the elements of crimes as facts that a judge must find at sentencing before the judge is authorized to impose particular types or levels of punishment. See *Apprendi* v. *New Jersey*, 530 U.S. 466 (2002); *Jones* v. *United States*, 526 U.S. 227, 243-244 (1999).

In *Apprendi*, this Court implemented that principle by holding 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." 530 U.S. at 490. The

Court explained that, when the legislature specifies a fact that, if found, triggers "an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.* at 494 n.19.

In *Ring* v. *Arizona*, 536 U.S. 584 (2002), the Court applied *Apprendi* to Arizona's capital sentencing scheme. Arizona law authorized imposition of the death penalty for murder, but a defendant found guilty by a jury of first-degree murder could not be sentenced to death unless the sentencing court made an additional factual finding on one of several, legislatively specified aggravating factors. *Id.* at 597, 603-604. *Ring* held that, under *Apprendi*, a finding on such a legislatively specified aggravating factor necessary to support a death sentence must be made by a jury. *Id.* at 609.

The Court reasoned that *Apprendi* requires that, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a 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. Absent the factual finding specified by the legislature, the defendant is not exposed to the higher punishment, except in a purely formal sense. See *id.* at 603-604. The fact, however labeled, is thus "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.* at 605 (quoting *Apprendi*, 530 U.S. at 494 n.19).

"Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" the Court held, "the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). *Ring* thus makes clear that, for purposes of the *Apprendi* rule, the "prescribed statutory maximum" is the maximum sentence that may be imposed without the finding of any additional legislatively specified fact.

3. Apprendi *is limited to statutorily required factual determinations*

Neither *Apprendi* nor *Ring* alters the principle, reflected in *Williams* and later cases, that a judge may make qualitative judgments about the appropriate level of punishment within the range prescribed by statute, and those judgments may be based on facts found by the judge himself by a preponderance of the evidence. To the contrary, *Apprendi* explained that it is not "impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." 530 U.S. at 481. Nor do *Apprendi* and *Ring* mean that the procedural requirements specified in *Apprendi* are mandated whenever the legislature places limits on the sentencing judge's discretion to impose punishment.

For example, when the legislature specifies that a particular factual finding triggers a mandatory minimum sentence, that fact may be found by the judge at sentencing based on a preponderance of the evidence, even though the finding requires the judge to impose a higher sentence within the statutorily authorized range. See *Harris* v. *United States*, 536 U.S. 545, 568-569 (2002). Similarly, a factual finding that mitigates the available punishment by requiring the judge to impose a lower sentence also may be made by the sentencing judge by a preponderance of the evidence. See *Apprendi*, 530 U.S. at 491 n.16. And the legislature may require a sentencing judge to consider certain facts when imposing a sentence within the authorized range, such as uncharged criminal conduct committed by the defendant, and still provide for the judge to determine the existence of those facts by a preponderance of the evidence. See *Witte*, 515 U.S. at 397-401. *Apprendi* applies only when the finding of a legislatively specified "fact" is essential to increase the "statutory maximum." See 530 U.S. at 494.

Imposing *Apprendi*'s requirements only when the legislature has made a defendant's exposure to increased punishment contingent on findings of facts that the legislature itself specifies vindicates *Apprendi*'s animating constitutional values. The Sixth Amendment right to trial by jury, and the due process right to insist on rigorous proof to establish guilt of an offense, are fully protected when there must be a jury finding beyond a reasonable doubt on the facts that establish the maximum punishment to which a defendant is exposed. If the legislature realizes that any defendant convicted of a particular offense may receive the maximum punishment associated with the jury's verdict, the democratic process itself will restrain the legislature from reducing the jury's role to "low-level gatekeeping." *Jones*, 526 U.S. at 244. "[S]tructural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of [a particular crime] to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime." *Apprendi*, 530 U.S. at 490-491 n.16.

B. *Apprendi* Does Not Apply To Upward Departure Determinations Under The Washington Guidelines System

1. *A defendant's exposure to a sentence above the presumptive range is not contingent on the court's finding of legislatively specified facts*

Apprendi does not apply to upward departure determinations under the Washington guidelines system because such departures are not conditioned on the finding of legislatively specified facts. Even without finding any particular fact identified by the legislature, a judge has discretion to impose a sentence up to the statutory maximum for the offense, when he identifies "substantial and compelling reasons." And no particular factual finding specified by the legislature automatically exposes the defendant to a sentence

above the standard range; the judge must always make a qualitative judgment that such a sentence is justified. The presumptive sentencing range under the Washington system thus does not set a "statutory maximum" for purposes of *Apprendi*.

a. Under Washington law, a sentencing court can support its decision to impose a sentence above the presumptive range—and up to the statutory maximum established by the offense of conviction—based on a virtually unlimited set of facts. As a result, the statute effectively gives the judge discretion to decide what facts might support a higher sentence, and to find those facts, in a fashion comparable to the discretion of the sentencing judge in *Williams* to find and consider facts bearing on an appropriate sentence. The outer boundary for the judge is not the presumptive sentencing range, but the statutory maximum specified for the offense in the Washington Revised Code.

The statute affords the judge sentencing discretion by giving the judge legal authority to impose a sentence above the presumptive range up to the maximum for the offense specified by Washington Revised Code Chapter 9A.20 if, in the court's judgment, there are substantial and compelling reasons that justify an exceptional sentence. Wash. Rev. Code § 9.94A.120(2), (13). The Washington legislature "recognized that 'not all exceptional fact patterns can be anticipated,' * * * and that the trial court must tailor the sentence to the facts of each case." *State* v. *Nordby*, 723 P.2d 1117, 1118 (Wash. 1986) (quoting State of Washington, *Adult Sentencing Guidelines Manual* (1997) (*Wash. Guidelines Manual*) § 9.94A.390, comment.) Therefore, although the legislature listed some "aggravating circumstances" that "the court may consider in exercising its discretion" to conclude that an exceptional sentence is justified, the listed facts "are illustrative only and are not intended to be

exclusive reasons for exceptional sentences." Wash. Rev. Code § 9.94A.390.

The statute does channel the judge's exercise of discretion. Because an exceptional sentence is reserved for atypical cases, the judge cannot rely on the elements of the offense or other facts that have already been taken into account in setting the presumptive range. See *Fisher*, 739 P.2d at 686. In addition, under the "real facts" rule, the judge generally may not rely on facts that establish the elements of a more serious or additional crime. See Pet. App. 16a; Wash. Rev. Code § 9.94A.370(2). But aside from those narrow restrictions, the facts that may support a sentence above the presumptive range are unlimited and largely unspecified.

The Washington scheme thus preserves the sentencing court's traditional discretion to fix an appropriate sentence within defined statutory maximum terms. When a legislature creates broad sentencing ranges for particular offenses, as Washington has done, it necessarily contemplates that a spectrum of cases will arise under a particular statute and that courts will sentence defendants according to their individual culpability in light of all of the varied circumstances of the case. A guidelines system with a departure mechanism, such as Washington's, structures the district court's actions and makes more explicit the legislature's expectation that harsher sentences are reserved for more serious offenders, while more lenient sentences are reserved for less serious offenders. But the system also respects the unique judicial capacity, borne of experience with a wide variety of cases, to assess at sentencing whether particular facts, not anticipated by the legislature, warrant a sentence different from the standard range.

Because the legislature has not itself specified the set of facts that expose a defendant to a sentence above the presumptive range, the presumptive range does not operate as a statutory maximum. That maximum remains the maxi-

mum established in the statutes grading the severity of the offense and specifying maximum terms for each grade. As a result, determinations to impose an exceptional sentence above the presumptive range are not subject to *Apprendi*.

b. Reinforcing the conclusion that the Washington scheme is designed to preserve the sentencing court's discretion is that a defendant is exposed to a sentence above the presumptive range not by factual findings themselves, but by the sentencing court's judgment that those facts justify an exceptional sentence. That qualitative judgment is not a "fact" within the coverage of *Apprendi*. See *Apprendi*, 530 U.S. at 482-483 (noting the "novelty of a legislative scheme that removes the jury from the determination of *a fact* that, if found, exposes the criminal defendant to a penalty exceeding the [otherwise-applicable] maximum") (emphasis altered); *id.* at 483 ("practice must at least adhere to the basic principles undergirding the requirements of trying to a jury *all facts* necessary to constitute a statutory offense") (emphasis added); *id.* at 490 ("[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.") (emphasis added).

The Washington Sentencing Reform Act authorizes the court to "impose a sentence outside the standard sentence range" when the court determines "that there are substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code § 9.94A.120(2). That conclusion is ultimately a qualitative judgment rather than a factual finding. After the judge determines that the facts that might support a departure have not already been taken into account in setting the presumptive range, see *Fisher*, 739 P.2d at 686, the judge must assess, taking into consideration the purposes of the Sentencing Reform Act, whether the overall circumstances are sufficiently "atypical" that they

provide "substantial and compelling" reasons "justifying" an "exceptional" sentence. Wash. Rev. Code § 9.94A.120(2); *Wash. Guidelines Manual* § 9.94A.390, comment. In so doing, the sentencing judge is making an intangible evaluation of the nature and significance of particular facts.[3]

Although the sentencing court must support its judgment that an exceptional sentence is justified with factual findings, those findings alone do not authorize the higher punishment. The Act makes clear that the determination whether substantial and compelling reasons justify an exceptional sentence is a discretionary one. The Act provides that the sentencing court "may consider" the listed aggravating circumstances and a wide range of unspecified factors "in the exercise of its discretion to impose an exceptional sentence." Wash. Rev. Code § 9.94A.390. See *State* v. *Perez*, 847 P.2d 532, 535 (Wash. Ct. App.) (noting that departure authority preserves "judicial discretion to fashion individualized sentences when the facts of a particular case demand it"), review denied, 863 P.2d 74 (Wash. 1993). The judge need not conclude that there are "substantial and compelling reasons justifying an exceptional sentence" merely because he finds a listed aggravating circumstance. The judge may still determine that the other circumstances of the case and the purposes of the Act lead to the conclusion that a sentence within the standard range is appropriate. See *State* v. *Armstrong*, 723 P.2d 1111, 1114 (Wash. 1986) (weighing aggravating and mitigating factors in reviewing whether exceptional

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[3] Recognizing that the determination whether "substantial and compelling" reasons "justify[]" an exceptional sentence involves a judgment and not a factual finding, the Washington courts review that determination de novo rather than under a clearly erroneous standard. See *Nordby*, 723 P.2d at 1119. In contrast, appellate courts review the underlying factual findings under the clearly erroneous standard, *Nordby*, 723 P.2d at 1119, and they review whether the exceptional sentence imposed is "clearly excessive or clearly too lenient" under an abuse of discretion standard. Wash. Rev. Code § 9.94A.210(4)(b); *Gore*, 21 P.3d at 277.

sentence was justified). The judge may also find compelling reasons justifying an exceptional sentence based on a group of facts, each of which considered alone would not justify a departure. See *Perez*, 847 P.2d at 535-536. In analyzing such diverse fact patterns, the sentencing court is making the sort of quintessentially discretionary judgments that have long characterized the sentencing process.

2. *Upward departure determinations are fundamentally different from the factual findings at issue in* Ring

Because an upward departure determination under the Washington guidelines is not conditioned on a factual finding specified by the legislature, petitioner is incorrect that a departure determination is "just like the procedure that this Court invalidated in *Ring*." Br. 17. *Ring*, unlike this case, involved the classic situation in which *Apprendi* is applicable —the Arizona legislature made a defendant's exposure to increased punishment contingent on the finding of legislatively specified facts.

In *Ring*, a defendant convicted of capital murder could not legally be sentenced to death unless the judge found one of the aggravating factors enumerated by the Arizona statute. Absent the judge's finding of one of those legislatively specified facts, the highest penalty that could legally be imposed was life imprisonment. In that circumstance, life imprisonment, rather than the death penalty, was the true statutory maximum for murder without an aggravating factor.

Here, in contrast, there is no legislatively specified set of facts one of which must be found before a defendant can be sentenced above the presumptive sentencing range. The Washington statute leaves room for judgment by the sentencing court that an unspecified fact exists that makes the case atypical. And there is no legislatively specified set of facts that *mandates* exposure to an increased sentence. In contrast to *Ring*, where the legislature itself had made the

judgment about what facts justified a higher punishment, and the judge was only finding whether one of those facts existed in the particular case, here, the determination whether a particular set of circumstances warrants a longer-than-usual sentence requires the judge to exercise his own judgment that the case involves substantial and compelling reasons justifying an exceptional sentence.

Put differently, in *Ring*, "Arizona's enumerated aggravating factors operate[d] as 'the functional equivalent of an element of a greater offense.'" *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19); see *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-112 (2003) (plurality opinion) ("The underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'"). The Arizona legislature itself had created a hierarchy of crimes that were differentiated by specific factual showings and that carried different punishments. There is no comparable hierarchy of crimes created by the Washington guidelines system. The many and unspecified bases for upward departure are not "elements" in an infinite series of "greater offenses" than the crimes subject to sentencing in the standard range.

3. *Upward departure determinations closely resemble the traditional role of judges in sentencing*

As this Court has noted in describing the departure process under the federal Sentencing Guidelines, a court's decision to depart from the Washington guidelines "embodies the traditional exercise of discretion by a sentencing court." *Koon* v. *United States*, 518 U.S. 81, 98 (1996); see *Perez*, 847 P.2d at 535. Upward departure determinations thus closely resemble the judicial role in sentencing that this Court approved in *Williams* and has repeatedly reaffirmed, including in *Apprendi*, 530 U.S. at 481.

The determinations made by sentencing judges under the Washington guidelines system differ from the *Williams* paradigm in certain respects. The legislature has to some degree constrained the judge's exercise of his judgment about what level of punishment is appropriate. The legislature has identified a narrower range within the broad range otherwise allowed by law that the judge must use as a starting point in selecting the appropriate sentence. And the legislature has required the judge to stay within that range unless he makes a judgment that substantial and compelling reasons make the case atypical enough to justify departure from that range. But not every limitation on the discretion of the sentencing court triggers the procedural requirements of *Apprendi*. *Apprendi*'s requirements apply only when the legislature has specified that one or more identified facts are necessary to authorize the judge to impose a higher punishment. See pp. 14-15, *supra*. *Apprendi*'s requirements do not apply when, as in this case, the legislature has left the judgment about which facts justify a more serious punishment with the sentencing judge, where that judgment has traditionally rested.

4. *Allowing judges to make departure determinations based on their own fact-finding does not undermine the constitutional values protected by* Apprendi

Petitioner makes three policy arguments to justify applying *Apprendi*'s procedures to upward departure determinations, but each of those arguments is mistaken. First, petitioner incorrectly contends that *Apprendi* requires that legislatures "treat every fact they deem essential to a given prison term with equal gravity." Br. 21. *Apprendi* does not impose a requirement of that breadth. The legislature may specify many effects that a certain fact shall have on punishment without triggering *Apprendi*'s requirements. Under *Harris*, the legislature may constitutionally assign to the

sentencing judge a factual finding that requires the judge to impose a certain minimum punishment. See 536 U.S. at 568-569. If the legislature prescribes that the minimum punishment triggered by the factual finding is the maximum punishment allowed by law, then that factual finding, made by the sentencing judge by a preponderance of the evidence, will dictate the precise extent of the defendant's punishment. And *Apprendi* itself indicates that the legislature may require that a certain fact mitigate the available punishment to a specified degree without providing a jury determination of that fact. See 530 U.S. at 491 n.16.

More fundamentally, the Washington legislature did not deem the facts that supported the departure decision here to be "essential" to the level of the defendant's punishment. The sentencing judge could have determined that a departure was justified without finding those facts or any other legislatively specified facts—the judge was free to rely on his own discretion in deciding which facts were decisive on the departure issue. And the factual findings alone were not sufficient to authorize the departure; what authorized the departure was the sentencing court's judgment that those facts—considered in light of all the circumstances, the presumptive sentencing range, and the purposes of the Sentencing Reform Act—provided substantial and compelling reasons justifying an exceptional sentence.

Second, petitioner contends that *Apprendi* is "designed to ensure that any finding that subjects a defendant to an additional loss of liberty must be made beyond a reasonable doubt." Br. 11. That contention too is mistaken. Factual findings made by the sentencing judge by a preponderance of the evidence, while exercising his discretion to impose sentence within the range specified by statute, can subject a defendant to a significantly greater loss of liberty than the defendant would have suffered absent those findings. Fac-

tual findings that trigger a mandatory minimum sentence can have the same effect.

To the extent that petitioner means that any factual finding must be made by a jury beyond a reasonable doubt if, by legislative mandate, the finding increases a defendant's maximum exposure, see *Apprendi*, 530 U.S. at 490, 494, that principle is honored in Washington's system. The findings that by law are necessary and sufficient to expose the defendant to the prescribed statutory maximum are the elements of the offense. The responsibility for finding the defendant guilty of those elements, and thus of the offense whose grade determines the sentencing range, rests with the jury.

Third, petitioner contends (Br. 25) that *Apprendi* is designed to guarantee that someone accused of a crime be able to predict with certainty the maximum punishment to which he is exposed by pleading guilty. That too is not really what *Apprendi* is about. Even when a sentencing judge may make a factual finding that authorizes increased punishment, the law puts the defendant on notice that he will be exposed to the higher punishment if the judge makes the required finding, and the standard guilty plea colloquy makes that consequence explicit. Petitioner, in particular, can make no claim that he was blindsided about the available punishment in this case. Both the plea agreement and the judge at the plea hearing informed petitioner that he could receive a sentence above the presumptive range if the sentencing judge found that compelling reasons justified an exceptional sentence. And, because of the nature of the departure authority, petitioner could not expect that the absence of any particular fact would insulate him from that higher punishment. He thus occupied the same position as a defendant who pleads guilty to a kidnapping offense carrying a maximum sentence of ten years of imprisonment and is aware that in the ordinary case the judge imposes sentences in the middle of that range, but in factually egregious cases the judge

imposes sentences at or near the maximum term. In that regime, as in the Washington system, the defendant is on notice at the time of his plea that the judge's authority to find facts and exercise discretion will determine how close to the maximum the sentence ultimately will be.

C. Applying *Apprendi* To Upward Departures Under The Washington System Would Raise Questions About The Extent To Which *Apprendi* Applies To Other Guidelines Systems

Many guidelines systems have upward departure provisions similar to those in the Washington system. See American Law Institute, Model Penal Code: Sentencing Report 52, 55-56 (2003) (*ALI Report*) (available at *www.ali.org* under ALI Projects Online). For example, under the United States Sentencing Guidelines (Guidelines), a sentencing judge may impose a sentence above the guidelines range if the judge finds "that there exists an aggravating * * * circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b)(1) (as amended Apr. 30, 2003). Like the Washington system, the Guidelines provide a list of factors that may warrant departure from the presumptive sentencing range but also expressly authorize the court to depart upward based on "a circumstance that the Commission has not identified in the Guidelines." Guidelines § 5K2.0(a)(2) (as amended Oct. 27, 2003).

A holding that *Apprendi* applies to the departure determination in this case would raise the question whether *Apprendi* also applies to departure determinations in other guidelines systems. Even more substantial questions would arise if the Court rules that *Apprendi* applies here based on petitioner's theory that the statutory maximum for purposes of *Apprendi* is the punishment that would be imposed

without any findings of fact other than the "'facts reflected in the jury verdict alone' or the guilty plea alone." Br. 17 (quoting *Apprendi*, 530 U.S. at 483). If the "facts reflected in the jury verdict alone" are the elements of the offense, petitioner's theory would mandate the application of *Apprendi* to any facts, other than the offense elements, that increase the defendant's punishment.

Such a rule would have profound consequences for the federal Guidelines. As explained more fully below, facts other than the elements of the offense enter into almost all of the calculations under the Guidelines, beginning with the most basic calculations for determining the offender's presumptive sentencing range. A decision in favor of petitioner could thus raise a serious question about whether *Apprendi* applies to myriad factual determinations under the Guidelines.

1. *The federal Sentencing Guidelines operate differently from the Washington system*

There are significant distinctions between the Washington system and the federal Guidelines that might justify treating them differently for purposes of *Apprendi*.

Most obviously, unlike the Washington system, the federal Guidelines are not enacted by a legislature but are promulgated by the Sentencing Commission, "an independent commission in the judicial branch of the United States." 28 U.S.C. 991(a); see *Mistretta* v. *United States*, 488 U.S. 361, 385 (1989). The Guidelines are thus not statutes but sentencing rules, the unique product of a special and limited delegation of authority to the Commission. "Congress granted the Commission substantial discretion in formulating guidelines." *Id.* at 377. Because Congress entrusted to the Commission the specification of the numerous facts that authorize differing punishments under the Guidelines, there is a strong argument that the Guidelines do not implicate the

concerns addressed by *Apprendi*. As described above, those concerns arise only when the legislature itself dictates the facts that control a defendant's increased exposure to punishment, thereby effectively creating enhanced crimes. See pp. 14-15, *supra*. There is thus good reason to conclude that the Guidelines "do not * * * establish[] minimum and maximum penalties" for crimes. *Mistretta*, 488 U.S. at 396.

Another significant difference between the Washington system and the federal Guidelines also suggests that the federal Guidelines do not establish statutory maxima for criminal offenses. The Washington system sets standard sentencing ranges based on the "actual crime of conviction" (and the defendant's criminal history). See *Wash. Guidelines Manual* § 9.94A.320 and comment. In the federal system, in contrast, the offense of conviction does not dictate a defendant's sentencing range. Instead, the district judge makes a wide variety of factual determinations taking into account not only the conduct that constitutes the offense but all of the defendant's conduct relevant to the offense. Those determinations result in an offense level, which, along with the defendant's criminal history score, produces the presumptive sentencing range. See *Nichols* v. *United States*, 511 U.S. 738, 740 n.3 (1994).

Although a defendant's offense of conviction determines the offense guideline that a court must initially consult, see Guidelines §§ 1B1.1(a) and 1B1.2(a), a cross-reference may require use of a different offense guideline if the underlying conduct so justifies. *E.g.*, *id.* § 2B3.1(c). The applicable guideline then prescribes a base offense level, which is adjusted up or down by specific offense characteristics, relating to the way in which the offense was carried out (*e.g.*, whether a weapon was used during a drug offense (*id.* § 2D1.1.(b)(1))). The offense level may be further modified based on the nature of the victim, the defendant's role in the

offense, and whether the defendant obstructed justice. *Id.* Ch. 3.

In making all of those adjustments to the offense level, the Guidelines require the sentencing court to consider conduct that is part of the "real" offense (*i.e.*, the defendant's actual conduct), even if not part of the charged offense of conviction. See Guidelines Ch. 1, Pt. A, intro. comment. 4(a) (Guidelines embody a "charge offense system" with a "significant number of real offense elements"). The "relevant conduct" guideline provides that, in determining a defendant's guidelines range, the court must consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" and "all reasonably foreseeable acts and omissions" of his confederates "that occurred * * * in preparation for [the] offense, or in the course of attempting to avoid detection or responsibility for that offense." *Id.* § 1B1.3(a)(1). In addition, for offenses for which the Guidelines "require grouping of multiple counts"—drug offenses, for example—"relevant conduct" includes all acts for which the defendant could be held responsible "that were part of the same course of conduct or common scheme or plan as the offense of conviction." *Id.* § 1B1.3(a)(2). Relevant conduct enters into the calculation of the offense level from the earliest stage—even the base offense level may vary depending on facts about how the offense was committed that are not elements of the offense. See *id.* § 1B1.3(a).

Thus, the presumptive sentencing range under the Guidelines is not derived from the offense of conviction; rather, it flows from a multitude of factors that have typically been considered in sentencing, such as the defendant's "role in the offense, the presence of a gun, or the amount of money actually taken." Guidelines Ch. 1, Pt. A, intro. comment. 4(a). Because the sentencing range under the Guidelines does not follow from the offense of conviction, the top of the

range does not function as a "statutory maximum" for the offense.

Rather than set statutory maxima, the Guidelines seek to channel sentencing judges' exercise of discretion within the statutory maxima prescribed by Congress in the United States Code. The Guidelines "do no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences within the broad limits established by Congress." *Mistretta*, 488 U.S. at 396. The Guidelines direct judges to consider factors that sentencing judges have always had discretion to consider and establish presumptive sentencing ranges based on those factors. See *Watts*, 519 U.S. at 152; *Witte*, 515 U.S. at 402. Indeed, in formulating the Guidelines, the Sentencing Commission canvassed prior sentencing practice and attempted to identify and to assign weights to all the factors that judges traditionally used in determining appropriate sentences. See United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16-17 (1987). Because it was not possible to identify and include in the Guidelines all the factors that might appropriately bear on sentencing in a particular case, the Commission also included a flexible departure authority. *Id.* at 17; Guidelines Ch. 1, Pt. A, intro. comment. 4(b). There is good reason to conclude that the Guidelines are not subject to *Apprendi*, in which the Court reaffirmed the authority of "judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." 530 U.S. at 481 (citing *Williams*, 337 U.S. at 246).

2. *A decision invalidating Washington's departure mechanism would raise questions about the federal Sentencing Guidelines' constitutionality*

It is nonetheless not certain that this Court would ultimately conclude that the differences between the Washing-

ton system and the federal Guidelines are of constitutional magnitude. The Sentencing Commission "is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit." *Mistretta*, 488 U.S. at 393-394. Congress has in fact exercised its authority to amend the Guidelines. See PROTECT Act, Pub. L. No. 108-21, § 401(b), (g), and (*i*), 117 Stat. 668-669, 671-673 (Apr. 30, 2003). Moreover, the Sentencing Commission exercises authority delegated by Congress, and the Guidelines are binding legislative rules. See *Stinson* v. *United States*, 508 U.S. 36, 42, 44-45 (1993). Thus, it is not entirely clear that the administrative nature of the Guidelines will insulate them from *Apprendi*.

In addition, although Guidelines sentencing ranges cannot be viewed as establishing statutory maxima, it is possible to identify the maximum punishment that would be permitted under the Guidelines if one could consider only those facts constituting the elements of a particular offense (and the defendant's criminal history). To do so would involve ignoring most of the Guidelines' provisions and applying the Guidelines differently from the way they were intended to work. But that artificially constructed sentencing range could theoretically be treated as establishing a statutory maximum for purposes of *Apprendi*. If this Court pursued that approach, however, almost all the factual findings required to apply the Guidelines according to their terms would be covered by *Apprendi*. As explained more fully below, that would create enormous practical problems for application of the Guidelines and could lead to their abandonment.

D. Application Of *Apprendi* To Guidelines Determinations Would Undermine Sentencing Reform Efforts

If this Court were to hold that *Apprendi* applies to the many factual determinations made under sentencing guidelines systems, the use of such systems would become cum-

bersome and potentially harmful to criminal defendants. Guidelines systems might well prove to be unworkable. Legislatures would then be forced to return either to determinate sentences that do not allow room for individualization of punishment or to indeterminate sentencing systems, which have serious shortcomings, including unjustified disparities in the treatment of similarly situated offenders.

1. *Applying* Apprendi *to guidelines sentencing would create significant problems*

There would be significant administrative difficulties if the myriad facts that enter into guidelines calculations had to be found by juries beyond a reasonable doubt (and, in federal cases, charged in indictments, see *United States* v. *Cotton*, 535 U.S. 625, 627 (2002)). Prosecutors would have to anticipate most guidelines adjustments and investigate the facts relevant to them before indicting, and juries would have to work through complex special verdict forms covering multiple issues.

The number of special findings that might be required would be enormous. For example, the basic federal sentencing guideline for robbery requires more than a dozen different factual determinations about the details of the offense, such as whether the property of a financial institution or post office was involved; whether a firearm was possessed, used, or discharged; whether people were injured and to what degree; and how great a financial loss was involved. See Guidelines § 2B3.1. After those factual findings are made, the Guidelines require a half dozen or more determinations about the victim, such as whether the defendant knew or should have known that the victim was vulnerable. See *id.* Ch. 3, Pt. A. The Guidelines then require another half dozen or so determinations about the defendant's role in the offense, such as whether he played a supervisory or leadership role, and, if so, to what degree, and whether the

defendant abused a position or trust or used a special skill in committing or concealing the offense. *Id.* Ch. 3, Pt. B. Further factual determinations are also required, such as whether the defendant obstructed justice and whether he recklessly endangered someone in seeking to avoid arrest. *Id.* Ch. 3, Pt. C.

Some of those findings would have to be made at a sentencing proceeding separate from the underlying trial because they involve conduct occurring at or after trial, such as perjury. Indeed, in the federal system, reliance on post-indictment conduct might have to be abandoned altogether since it is difficult to see how that conduct could be charged in the indictment. Even when bifurcated proceedings were not required by the nature of the facts involved, bifurcation might be thought advisable (even if not constitutionally required) out of fairness to the defendant. Otherwise, the jury's decision on guilt might be skewed by consideration of facts that bear only on the appropriate punishment. As this Court has noted, "[a] defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved." *Monge* v. *California*, 524 U.S. 721, 729 (1998). But the proliferation of bifurcated proceedings would impede the efficient use of judicial resources.

Other problems would also arise. Jurors might engage in compromise verdicts or nullification in an effort to control the sentence, even if they were not told of the sentencing consequences of their actions. And appellate review of guidelines determinations would be sharply restricted, thus depriving the system of the "greater degree of consistency in sentencing" that appeals can produce. See *United States* v. *DiFrancesco*, 449 U.S. 117, 143 (1980).[4]

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[4] Appeals by the defendant would probably be limited to the deferential review given to the jury's finding of guilt in criminal cases. See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (inquiry is whether, "after

2. *The undermining of guidelines systems would have substantial costs for sentencing reform*

The overall burdens on the judicial system of applying *Apprendi* would likely push guidelines systems past the breaking point. If so, legislatures would be forced to abandon guidelines as a sentencing option. That would be an extremely unfortunate and unwarranted result.

Guidelines systems were developed in the 1980s and 1990s in response to problems with the indeterminate sentencing regimes that dominated sentencing in the United States for most of the twentieth century. One of the most serious criticisms of indeterminate sentencing was that it resulted in significant disparities in the sentences imposed on similarly situated defendants, including disparities based on race, ethnicity, and gender. See Arthur W. Campbell, *Law of Sentencing* § 1:3, at 9-10 (2d ed. 1991). Critics not only assailed the lawlessness of indeterminate sentencing, but noted that it obscured the actual punishments being imposed, provided no mechanism to implement a systemic sentencing policy, and did not allow legislatures to control the need for prison resources. See *id.* at 10-12; *ALI Report* 64-65, 66-68, 72 & n.90, 74-75.

Indeterminate sentencing had once represented a valuable reform in response to the determinate sentences mandated for felony offenses early in the nation's history. Determinate sentencing does not allow for any individualization of punishment, despite major differences in the way crimes are committed. The nation's experience with determinate sentences showed that, in sentencing, "justice gen-

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viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). Appeals by the government of jury "acquittals" on guidelines factors would probably be barred by double jeopardy principles. Cf. *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-112 (2003) (plurality opinion).

erally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 55 (1937). Guidelines systems offer a mechanism for minimizing the disparities and discrimination inherent in indeterminate sentencing while providing the proportionality lacking in determinate sentencing.

Although guidelines systems have generated some criticism, most of that criticism has been directed at the federal guidelines and their particular characteristics; state guidelines systems have generally been favorably received. See *ALI Report* 47-48, 115. And guidelines systems (particularly those, like Washington's, based on the model developed in Minnesota in 1980, *id.* at 52) have been recognized as the most promising means to eliminate the problems associated with indeterminate sentencing without sacrificing individualized punishment. See *id.* at 46-48.

In addition to the federal government, fifteen States have adopted guidelines systems, and several more States are considering such systems. *ALI Report* 47. The guidelines approach has been endorsed by the American Bar Association and the Bureau of Justice Assistance of the United States Department of Justice. See *id.* at 47 n.59. A guidelines system is also the leading contender for the centerpiece of the ALI's planned revision to the sentencing provisions of the Model Penal Code. See *id.* at 4. Guidelines systems are thus a prominent and expanding component of legislative efforts to achieve order and fairness in sentencing. Protection of the constitutional values underlying *Apprendi* does not require the Court to call into doubt the constitutionality of that promising sentencing reform.

CONCLUSION

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

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
NINA GOODMAN
Attorney

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