SUPREME COURT OF THE UNITED STATES

No. 02–1632

RALPH HOWARD BLAKELY, JR., PETITIONER *v.* WASHINGTON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON, DIVISION 3

[June 24, 2004]

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins, and with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join as to all but Part IV–B, dissenting.

The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries. The Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you—dearly. Congress and States, faced with the burdens imposed by the extension of *Apprendi* to the present context, will either trim or eliminate altogether their sentencing guidelines schemes and, with them, 20 years of sentencing reform. It is thus of little moment that the majority does not expressly declare guidelines schemes unconstitutional, *ante*, at 12; for, as residents of "*Apprendi*-land" are fond of saying, "the relevant inquiry is one not of form, but of effect." *Apprendi* v. *New Jersey,* 530 U. S. 466, 494 (2000); *Ring* v. *Arizona*, 536 U. S. 584, 613 (2002) (SCALIA, J., concurring). The "effect" of today's decision will be greater judicial discretion and less uniformity in sentencing. Because I find it implausible that the Framers would have considered such a result to be required by the Due Process Clause or the Sixth Amendment, and because the practical consequences of today's decision may be disastrous, I respectfully dis-

sent.

I

One need look no further than the history leading up to and following the enactment of Washington's guidelines scheme to appreciate the damage that today's decision will cause. Prior to 1981, Washington, like most other States and the Federal Government, employed an indeterminate sentencing scheme. Washington's criminal code separated all felonies into three broad categories: "class A," carrying a sentence of 20 years to life; "class B," carrying a sentence of 0 to 10 years; and "class C," carrying a sentence of 0 to 5 years. Wash. Rev. Code Ann. §9A.20.020 (2000); see also Sentencing Reform Act of 1981, 1981 Wash. Laws, ch. 137, p. 534. Sentencing judges, in conjunction with parole boards, had virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range, including probation—*i.e.*, no jail sentence at all. Wash. Rev. Code Ann. §§9.95.010–.011; Boerner & Lieb, Sentencing Reform in the Other Washington, 28 Crime and Justice 71, 73 (M. Tonry ed. 2001) (hereinafter Boerner & Lieb) ("Judges were authorized to choose between prison and probation with few exceptions, subject only to review for abuse of discretion"). See also D. Boerner, Sentencing in Washington §2.4, pp. 2–27 to 2–28 (1985).

This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories. Boerner & Lieb 126–127; cf. S. Rep. No. 98–225, p. 38 (1983) (Senate Report on precursor to federal Sentencing Reform Act of 1984) ("[E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. . . . These disparities, whether they occur at the time of

the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence"). Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race. Boerner & Lieb 126–128. See also Breyer, The Federal Sentencing Guidelines and Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 5 (1988) (elimination of racial disparity one reason behind Congress' creation of the Federal Sentencing Commission).

To counteract these trends, the state legislature passed the Sentencing Reform Act of 1981. The Act had the laudable purposes of "mak[ing] the criminal justice system accountable to the public," and "[e]nsur[ing] that the punishment for a criminal offense is proportionate to the seriousness of the offense . . . [and] commensurate with the punishment imposed on others committing similar offenses." Wash. Rev. Code Ann. §9.94A.010 (2000). The Act neither increased any of the statutory sentencing ranges for the three types of felonies (though it did eliminate the statutory mandatory minimum for class A felonies), nor reclassified any substantive offenses. 1981 Wash. Laws ch. 137, p. 534. It merely placed meaningful constraints on discretion to sentence offenders within the statutory ranges, and eliminated parole. There is thus no evidence that the legislature was attempting to manipulate the statutory elements of criminal offenses or to circumvent the procedural protections of the Bill of Rights. Rather, lawmakers were trying to bring some much-needed uniformity, transparency, and accountability to an otherwise "'labyrinthine' sentencing and corrections system that 'lack[ed] any principle except unguided discretion.'" Boerner & Lieb 73 (quoting F. Zimring, Making the Punishment Fit the Crime: A Consumers' Guide to Sentencing Reform, Occasional Paper No. 12, p. 6 (1977)).

II

Far from disregarding principles of due process and the jury trial right, as the majority today suggests, Washington's reform has served them. Before passage of the Act, a defendant charged with second degree kidnaping, like petitioner, had no idea whether he would receive a 10-year sentence or probation. The ultimate sentencing determination could turn as much on the idiosyncracies of a particular judge as on the specifics of the defendant's crime or background. A defendant did not know what facts, if any, about his offense or his history would be considered relevant by the sentencing judge or by the parole board. After passage of the Act, a defendant charged with second degree kidnaping knows what his presumptive sentence will be; he has a good idea of the types of factors that a sentencing judge can and will consider when deciding whether to sentence him outside that range; he is guaranteed meaningful appellate review to protect against an arbitrary sentence. Boerner & Lieb 93 ("By consulting one sheet, practitioners could identify the applicable scoring rules for criminal history, the sentencing range, and the available sentencing options for each case"). Criminal defendants still face the same statutory maximum sentences, but they now at least know, much more than before, the real consequences of their actions.

Washington's move to a system of guided discretion has served equal protection principles as well. Over the past 20 years, there has been a substantial reduction in racial disparity in sentencing across the State. *Id.,* at 126 (Racial disparities that do exist "are accounted for by differences in legally relevant variables—the offense of conviction and prior criminal record"); *id.*, at 127 ("[J]udicial authority to impose exceptional sentences under the court's departure authority shows little evidence of disparity correlated with race"). The reduction is directly traceable to the constraining effects of the guidelines—

namely, its "presumptive range[s]" and limits on the imposition of "exceptional sentences" outside of those ranges. *Id.,* at 128. For instance, sentencing judges still retain unreviewable discretion in first-time offender cases and in certain sex offender cases to impose alternative sentences that are far more lenient than those contemplated by the guidelines. To the extent that unjustifiable racial disparities have persisted in Washington, it has been in the imposition of such alternative sentences: "The lesson is powerful: racial disparity is correlated with unstructured and unreviewed discretion." *Ibid.*; see also Washington State Minority and Justice Commission, R. Crutchfield, J. Weis, R. Engen, & R. Gainey, Racial/Ethnic Disparities and Exceptional Sentences in Washington State, Final Report 51–53 (1993) ("[E]xceptional sentences are not a major source of racial disparities in sentencing").

The majority does not, because it cannot, disagree that determinate sentencing schemes, like Washington's, serve important constitutional values. *Ante*, at 12. Thus, the majority says: "[t]his case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Ibid*. But extension of *Apprendi* to the present context will impose significant costs on a legislature's determination that a particular fact, not historically an element, warrants a higher sentence. While not a constitutional prohibition on guidelines schemes, the majority's decision today exacts a substantial constitutional tax.

The costs are substantial and real. Under the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense. Thus, facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range—such as drug quantity, role in the offense, risk of bodily harm—all must now be charged in an indictment and submitted to a jury, *In re Winship*, 397 U. S. 358

(1970), simply because it is the legislature, rather than the judge, that constrains the extent to which such facts may be used to impose a sentence within a pre-existing statutory range.

While that alone is enough to threaten the continued use of sentencing guidelines schemes, there are additional costs. For example, a legislature might rightly think that some factors bearing on sentencing, such as prior bad acts or criminal history, should not be considered in a jury's determination of a defendant's guilt—such "character evidence" has traditionally been off limits during the guilt phase of criminal proceedings because of its tendency to inflame the passions of the jury. See, *e.g.*, Fed. Rule Evid. 404; 1 E. Imwinkelried, P. Giannelli, F. Gilligan, & F. Leaderer, Courtroom Criminal Evidence 285 (3d ed. 1998). If a legislature desires uniform consideration of such factors at sentencing, but does not want them to impact a jury's initial determination of guilt, the State may have to bear the additional expense of a separate, full-blown jury trial during the penalty phase proceeding.

Some facts that bear on sentencing either will not be discovered, or are not discoverable, prior to trial. For instance, a legislature might desire that defendants who act in an obstructive manner during trial or post-trial proceedings receive a greater sentence than defendants who do not. See, *e.g.*, United States Sentencing Commission, Guidelines Manual, §3C1.1 (Nov. 2003) (hereinafter USSG) (2-point increase in offense level for obstruction of justice). In such cases, the violation arises too late for the State to provide notice to the defendant or to argue the facts to the jury. A State wanting to make such facts relevant at sentencing must now either vest sufficient discretion in the judge to account for them *or* bring a separate criminal prosecution for obstruction of justice or perjury. And, the latter option is available only to the extent that a defendant's obstructive behavior is so severe

as to constitute an already-existing separate offense, unless the legislature is willing to undertake the unlikely expense of criminalizing relatively minor obstructive behavior.

Likewise, not all facts that historically have been relevant to sentencing always will be known prior to trial. For instance, trial or sentencing proceedings of a drug distribution defendant might reveal that he sold primarily to children. Under the majority's approach, a State wishing such a revelation to result in a higher sentence within a pre-existing statutory range either must vest judges with sufficient discretion to account for it (and trust that they exercise that discretion) *or* bring a separate criminal prosecution. Indeed, the latter choice might not be available—a separate prosecution, if it is for an aggravated offense, likely would be barred altogether by the Double Jeopardy Clause. *Blockburger* v. *United States,* 284 U. S. 299 (1932) (cannot prosecute for separate offense unless the two offenses both have at least one element that the other does not).

The majority may be correct that States and the Federal Government will be willing to bear some of these costs. *Ante*, at 13–14. But simple economics dictate that they will not, and cannot, bear them all. To the extent that they do not, there will be an inevitable increase in judicial discretion with all of its attendant failings.[1]

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[1] The paucity of empirical evidence regarding the impact of extending *Apprendi* v. *New Jersey,* 530 U. S. 466 (2000), to guidelines schemes should come as no surprise to the majority. *Ante*, at 13. Prior to today, only one court had ever applied *Apprendi* to invalidate application of a guidelines scheme. Compare *State* v. *Gould*, 271 Kan. 394, 23 P. 3d 801 (2001), with, *e.g.*, *United States* v. *Goodine*, 326 F. 3d 26 (CA1 2003); *United States* v. *Luciano*, 311 F. 3d 146 (CA2 2002); *United States* v. *DeSumma*, 272 F. 3d 176 (CA3 2001); *United States* v. *Kinter*, 235 F. 3d 192 (CA4 2000); *United States* v. *Randle*, 304 F. 3d 373 (CA5 2002); *United States* v. *Helton*, 349 F. 3d 295 (CA6 2003); *United States* v.

III

Washington's Sentencing Reform Act did not alter the statutory maximum sentence to which petitioner was exposed. See Wash. Rev. Code Ann. §9A.40.030 (2003) (second degree kidnaping class B felony since 1975); see also *State* v. *Pawling,* 23 Wash. App. 226, 228–229, 597 P. 2d 1367, 1369 (1979) (citing second degree kidnapping provision as existed in 1977). Petitioner was informed in the charging document, his plea agreement, and during his plea hearing that he faced a potential statutory maximum of 10 years in prison. App. 63, 66, 76. As discussed above, the guidelines served due process by providing notice to petitioner of the consequences of his acts; they vindicated his jury trial right by informing him of the stakes of risking trial; they served equal protection by ensuring petitioner that invidious characteristics such as race would not impact his sentence.

Given these observations, it is difficult for me to discern what principle besides doctrinaire formalism actually motivates today's decision. The majority chides the *Apprendi* dissenters for preferring a nuanced interpretation of the Due Process Clause and Sixth Amendment jury trial guarantee that would generally defer to legislative labels while acknowledging the existence of constitutional constraints—what the majority calls the "the law must not go too far" approach. *Ante*, at 11 (emphasis deleted). If

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Johnson, 335 F. 3d 589 (CA7 2003) *(per curiam); United States* v. *Piggie*, 316 F. 3d 789 (CA8 2003); *United States* v. *Toliver*, 351 F. 3d 423 (CA9 2003); *United States* v. *Mendez-Zamora*, 296 F. 3d 1013 (CA10 2002); *United States* v. *Sanchez*, 269 F. 3d 1250 (CA11 2001); *United States* v. *Fields*, 251 F. 3d 1041 (CADC 2001); *State* v. *Dilts*, 336 Ore. 158, 82 P. 3d 593 (2003); *State* v. *Gore*, 143 Wash. 2d 288, 21 P. 3d 262 (2001); *State* v. *Lucas*, 353 N. C. 568, 548 S. E. 2d 712 (2001); *State* v. *Dean*, No. C4–02–1225, 2003 WL 21321425 (Minn. Ct. App., June 10, 2003) (unpublished opinion). Thus, there is no map of the uncharted territory blazed by today's unprecedented holding.

indeed the choice is between adopting a balanced case-by-case approach that takes into consideration the values underlying the Bill of Rights, as well as the history of a particular sentencing reform law, and adopting a rigid rule that destroys everything in its path, I will choose the former. See *Apprendi,* 530 U. S., at 552–554 (O'CONNOR, J., dissenting) ("Because I do not believe that the Court's 'increase in the maximum penalty' rule is required by the Constitution, I would evaluate New Jersey's sentence-enhancement statute by analyzing the factors we have examined in past cases" (citation omitted)).

But even were one to accept formalism as a principle worth vindicating for its own sake, it would not explain *Apprendi*'s, or today's, result. A rule of deferring to legislative labels has no less formal pedigree. It would be more consistent with our decisions leading up to *Apprendi*, see *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998) (fact of prior conviction not an element of aggravated recidivist offense); *United States* v. *Watts*, 519 U. S. 148 (1997) *(per curiam)* (acquittal of offense no bar to consideration of underlying conduct for purposes of guidelines enhancement); *Witte* v. *United States*, 515 U. S. 389 (1995) (no double jeopardy bar against consideration of uncharged conduct in imposition of guidelines enhancement); *Walton* v. *Arizona*, 497 U. S. 639 (1990) (aggravating factors need not be found by a jury in capital case); *Mistretta* v. *United States,* 488 U. S. 361 (1989) (Federal Sentencing Guidelines do not violate separation of powers); *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) (facts increasing mandatory minimum sentence are not necessarily elements); and it would vest primary authority for defining crimes in the political branches, where it belongs. *Apprendi*, *supra*, at 523–554 (O'CONNOR, J., dissenting). It also would be easier to administer than the majority's rule, inasmuch as courts would not be forced to look behind statutes and regulations to determine whether a

particular fact does or does not increase the penalty to which a defendant was exposed.

The majority is correct that rigid adherence to such an approach *could conceivably* produce absurd results, *ante*, at 10; but, as today's decision demonstrates, rigid adherence to the majority's approach *does and will continue* to produce results that disserve the very principles the majority purports to vindicate. The pre-*Apprendi* rule of deference to the legislature retains a built-in political check to prevent lawmakers from shifting the prosecution for crimes to the penalty phase proceedings of lesser included and easier-to-prove offenses—*e.g.*, the majority's hypothesized prosecution of murder in the guise of a traffic offense sentencing proceeding. *Ante,* at 10. There is no similar check, however, on application of the majority's "'any fact that increases the upper bound of judicial discretion'" by courts.

The majority claims the mantle of history and original intent. But as I have explained elsewhere, a handful of state decisions in the mid-19th century and a criminal procedure treatise have little if any persuasive value as evidence of what the Framers of the Federal Constitution intended in the late 18th century. See *Apprendi,* 530 U. S., at 525–528 (O'CONNOR, J., dissenting). Because broad judicial sentencing discretion was foreign to the Framers, *id.*, at 478–479 (citing J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862)), they were never faced with the constitutional choice between submitting every fact that increases a sentence to the jury or vesting the sentencing judge with broad discretionary authority to account for differences in offenses and offenders.

IV

A

The consequences of today's decision will be as far

reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government. See, *e.g.*, Alaska Stat. §12.55.155 (2003); Ark. Code Ann. §16–90–804 (Supp. 2003); Fla. Stat. §921.0016 (2003); Kan. Stat. Ann. §21–4701 *et seq*. (2003); Mich. Comp. Laws Ann. §769.34 (West Supp. 2004); Minn. Stat. §244.10 (2002); N. C. Gen. Stat. §15A–1340.16 (Lexis 2003); Ore. Admin. Rule §213–008–0001 (2003); 204 Pa. Code §303 *et seq*. (2004), reproduced following 42 Pa. Cons. Stat. Ann. §9721 (Purden Supp. 2004); 18 U. S. C. §3553; 28 U. S. C. §991 *et seq*. Today's decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments. Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy. And, despite the fact that we hold in *Schriro* v. *Summerlin, post*, p. ___, that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack. See *Teague* v. *Lane*, 489 U. S. 288, 301 (1989) (plurality opinion) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final").[2]

The practical consequences for trial courts, starting

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[2] The numbers available from the federal system alone are staggering. On March 31, 2004, there were 8,320 federal criminal appeals pending in which the defendant's sentence was at issue. Memorandum from Carl Schlesinger, Administrative Office of the United States Courts, to Supreme Court Library (June 1, 2004) (available in Clerk of the Court's case file). Between June 27, 2000, when *Apprendi* was decided, and March 31, 2004, there have been 272,191 defendants sentenced in federal court. Memorandum, *supra*. Given that nearly all federal sentences are governed by the Federal Sentencing Guidelines, the vast majority of these cases are Guidelines cases.

today, will be equally unsettling: How are courts to mete out guidelines sentences? Do courts apply the guidelines as to mitigating factors, but not as to aggravating factors? Do they jettison the guidelines altogether? The Court ignores the havoc it is about to wreak on trial courts across the country.

B

It is no answer to say that today's opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines. See *ante*, at 9, n. 9 ("The Federal Guidelines are not before us, and we express no opinion on them"); cf. *Apprendi, supra,* at 496–497 (claiming not to overrule *Walton*, *supra,* soon thereafter overruled in *Ring*); *Apprendi, supra*, at 497, n. 21 (reserving question of Federal Sentencing Guidelines). The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning. The Guidelines have the force of law, see *Stinson* v. *United States*, 508 U. S. 36 (1993); and Congress has unfettered control to reject or accept any particular guideline, *Mistretta*, 488 U. S., at 393–394.

The structure of the Federal Guidelines likewise does not, as the Government half-heartedly suggests, provide any grounds for distinction. Brief for United States as *Amicus Curiae* 27–29. Washington's scheme is almost identical to the upward departure regime established by 18 U. S. C. §3553(b) and implemented in USSG §5K2.0. If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack. The provision struck down here provides for an increase in the upper bound of the presumptive sentencing range if the sentencing court finds, "considering the purpose of [the Act], that there are substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code Ann.

§9.94A.120 (2000). The Act elsewhere provides a nonexhaustive list of aggravating factors that satisfy the definition. §9.94A.390. The Court flatly rejects respondent's argument that such soft constraints, which still allow Washington judges to exercise a substantial amount of discretion, survive *Apprendi*. *Ante*, at 8–9. This suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate. See, *e.g.*, USSG §2K2.1 (increases in offense level for firearms offenses based on number of firearms involved, whether possession was in connection with another offense, whether the firearm was stolen); §2B1.1 (increase in offense level for financial crimes based on amount of money involved, number of victims, possession of weapon); §3C1.1 (general increase in offense level for obstruction of justice).

Indeed, the "extraordinary sentence" provision struck down today is as inoffensive to the holding of *Apprendi* as a regime of guided discretion could possibly be. The list of facts that justify an increase in the range is nonexhaustive. The State's "real facts" doctrine precludes reliance by sentencing courts upon facts that would constitute the elements of a different or aggravated offense. See Wash. Rev. Code Ann. §9.94A.370(2) (2000) (codifying "real facts" doctrine). If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would.

* * *

What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy. *Apprendi*, 530 U. S., at 549–559 (O'CONNOR, J., dissenting); *Ring*, 536 U. S., at 619–621 (O'CONNOR, J., dissenting). I respectfully dissent.