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IN THE SUPREME COURT OF THE UNITED STATES

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RALPH HOWARD BLAKELEY, JR. :

:

Petitioner :

V. : No. 02-1632

WASHINGTON. :

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Washington, D.C.

Tuesday, March 23, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

JEFFREY L. FISHER, ESQ., Seattle, Washington; on behalf of the Petitioner.

JOHN D. KNODELL, JR., ESQ., Grant County, Ephrata, Washington; on behalf of the Respondent.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Washington, D.C.; on behalf of United States, et al., as amicus curiae.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in number 02-1632, Ralph Howard Blakely, Junior, versus Washington.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

The sentencing system at issue here contains exactly the same infirmities that the system -- that this de-validated two years ago, in Ring versus Arizona. Once a defendant's convicted of a felony, Washington law sets a statutory cap to that a sentencing Judge may not exceed unless there are facts present that are not accounted for in the guilty verdict. These are called aggravating facts.

Yet in Washington, just like Arizona, a Judge makes these findings. And in Washington, it's even worse than Arizona in that the standard of proof is a preponderance of the evidence, rather than beyond a reasonable doubt.

QUESTION: But it's still within the statutory maximum.

MR. FISHER: Well, Mr. Chief Justice, the statutory

1 maximum as Apprendi defines that term, as Apprendi and Ring  
2 define that term, is the highest sentence that is allowable  
3 based on the facts and the guilty verdict. That -- that  
4 sentence in this case, is the top end of the standard range,  
5 it would be 53 months for Mr. Blakely. You're correct that  
6 Washington law labels an additional cap as what Washington law  
7 calls the statutory maximum which is the ultimate exceptional  
8 sentence, or the ultimate enhancement that could be put  
9 forward. But that is simply a second cap.

10 The question that this Court in Apprendi and Ring  
11 asked was what is the maximum sentence to which the defendant  
12 can be subjected to, based on the facts in the guilty verdict.  
13 And that is the top of the standard range.

14 QUESTION: Well, I assume that if your position were  
15 adopted it would invalidate the Federal sentencing scheme that  
16 we have.

17 MR. FISHER: I don't think so, Justice O'Connor.

18 QUESTION: Why not?

19 MR. FISHER: Well, the big difference, the biggest  
20 difference between the Federal system and Washington, is the  
21 Federal system is a system of court rules. Not a system of  
22 Legislative mandates. So when Apprendi and Ring use the term  
23 the highest penalty authorized by the legislature, or the  
24 statutory maximum that is easily applied to this case, because  
25 all of the

1           QUESTION: Two wrongs -- two wrongs make a right, I  
2 would say right.

3           MR. FISHER: That can sometimes be the case.  
4 Because the sentencing system that is at issue here, is fully  
5 legislated. However, when it

6           QUESTION: I can't see much difference. Your point  
7 is that if the same scheme that Washington has were adopted by  
8 courts, it's okay.

9           MR. FISHER: Well, that may well be the case,  
10 Justice O'Connor, I don't think you have to decide the Federal  
11 -- that issue in this case. But this Court's clearly held  
12 Williams and lots of other cases that if a legislature leaves  
13 it up to individual judges to decide what kinds of facts they  
14 want to consider in meting out sentences that is fully  
15 constitutional.

16           And as this Court described the Federal guideline  
17 scheme is Mistretta, this Court in pages 395 and 396 of that  
18 opinion said what we really have is just an aggregation of  
19 that same individualized discretion. Just make it a little  
20 bit more formal in the Federal scheme.

21           QUESTION: We did think a big deal in Mistretta, did  
22 we not, about the fact that the sentencing commission is in  
23 the judicial branch.

24           MR. FISHER: Absolutely. That was the crux of the  
25 holding, Justice Scalia. I realize there was some

1 disagreement on that issue. However, Justice O'Connor, to get  
2 back to your question, the critical distinction is, if the  
3 legislature is content to leave it up to judges, or the  
4 judicial branch to decide what factors matter and where lines  
5 should be drawn, then Apprendi is not triggered in the same  
6 way that it is when a legislature steps in and says -- as it  
7 has done in this case. We are not prepared to allow a court  
8 to go above a certain threshold unless it finds additional  
9 facts. Unless additional facts are present.

10 QUESTION: But if the guarantee of jury trial for a  
11 finding of fact in Apprendi, it is to be logical, why should  
12 it make any difference whether the court or the legislature  
13 sets out the scheme?

14 MR. FISHER: Well, Mr. Chief Justice, there are two  
15 parts of Apprendi, one is -- footnote 16 of Apprendi, this  
16 Court talked about the democratic constraints that operate on  
17 legislatures vis-a-vis courts. And when a legislature steps  
18 in and says we're not prepared to let a sentence go above a  
19 certain level unless certain facts are present, that's a very  
20 different system, than when a legislature steps in and says we  
21 will let courts operate however they like underneath a certain  
22 -- underneath a certain system.

23 QUESTION: So are you here to say if Washington  
24 State's legislature said that for a burglary conviction that a  
25 judge can sentence anywhere from 10 to 20 years. Based on the

1 judge's discretion, that's perfectly okay.

2 MR. FISHER: Yes, Justice O'Connor, I believe that  
3 that's what the holding in Apprendi and Ring would dictate.

4 QUESTION: What about the other half. You talked  
5 about one half of Apprendi, what about the other half. I  
6 mean, the other half in effect says, when you allow fact  
7 finding by judges to convert crime A into more serious crime  
8 B, you're making an end run around the right to jury trial,  
9 isn't the same thing going on here?

10 MR. FISHER: Well, I think that is what's happening  
11 in this case, Justice Souter. And what happens is, and it  
12 takes us back to Apprendi

13 QUESTION: Why isn't the same -- I mean, no matter  
14 whether it's happening under the -- under the immediate  
15 authorization of legislation setting up the guidelines or  
16 legislation that sets up, or that authorizes a component of  
17 judiciary set guidelines, isn't the same thing going on?

18 MR. FISHER: Well, from the defendant's point of  
19 view you might say that it is, but there is a difference in  
20 that Apprendi talks -- the baseline of Apprendi is deciding  
21 what are elements. And elements -- the wellspring of elements  
22 and the definition of a crime has to flow from a legislative  
23 function, a legislature or the person who makes the laws sets  
24 out what facts matter, or what facts don't matter.

25 So it's absolutely the case of course that Winship

1 and the Sixth Amendment apply to courts just as much as they  
2 apply to legislatures, however we need a baseline for where  
3 those rights kick in, and I think that the proper baseline, or  
4 a proper baseline would be the facts that the legislative body  
5 or the lawmaker has set out that matter for punishment.

6 QUESTION: I guess the tough question is whether the  
7 sentencing guidelines, or rather the Sixth Amendment are  
8 unconstitutional, right?

9 MR. FISHER: I think the Sixth Amendment is  
10 constitutional, Justice

11 QUESTION: I just wonder what is the statute in the  
12 guidelines case, says to the judge, Judge, you must impose a  
13 sentence that the commission has written unless you depart for  
14 certain reasons. The Washington statute says, you must impose  
15 the sentence, da, da, da. Unless and it has similar kinds of  
16 things, special aggravating circumstances, for example.

17 In neither case can you go beyond the outer limit in  
18 the one case, 25 years, or 10 years in the other case, the  
19 statutory max in the statute. What again is the difference?

20 MR. FISHER: The difference is, in the Washington  
21 scheme the legislature has in effect -- the legislature has  
22 caught it by the sentencing grid. The legislature has enacted  
23 itself, all of the standard sentencing ranges.

24 Whereas in the Federal scheme, the legislature, or  
25 the Congress has left it up to courts to decide where the



1 standard sentencing ranges ought to fall, so long as they're  
2 under an open

3 QUESTION: You know the reason -- the difference is  
4 that in sentence -- the Federal statute says, Judge, you must  
5 apply the grid of sentence. And in Washington it says you  
6 must apply the word eight years, unless three years, unless --  
7 in the other words, apply what the commission said. That's  
8 the difference, right?

9 MR. FISHER: I'm not sure I

10 QUESTION: In the Washington statute, it says,  
11 Judge, if you have an ordinary case, you must sentence the  
12 person to three years. But if it's not ordinary go to 10, no  
13 more than 10. In a Federal case, it says, Judge, if you have  
14 an ordinary case, you must apply the sentence, now the  
15 commission fills in that blank. But if it's not ordinary, go  
16 to eight years.

17 So the blank is filled by the commission in one  
18 case, by the legislature in the other. The first stage blank.  
19 Why does that make a difference constitutionally?

20 MR. FISHER: The reason it makes a difference is  
21 because in the Washington system, in the state system the  
22 legislature has, as a policy choice with democratic  
23 constraints operating upon it, selected a maximum that it's  
24 not prepared to let judges go above. So it's constraining the  
25 discretion of judges.

1           In the Federal system, Congress is -- you're right,  
2 Congress is telling judges, we want you to come up with rules  
3 and follow them. But it's leaving it up to the judges, the  
4 judicial branch, to come up with what the rules are. So the  
5 only significant difference that comes out of the briefing,  
6 between this case and the Ring Case, is that -- is the state  
7 points to the fact that unlike Ring, where you had 10  
8 aggravating factors, here Washington sets out a general  
9 standard, and leaves -- and says 11 -- 11 suggested  
10 aggravators, but it calls those aggravators illustrative  
11 rather than exclusive. However, we believe that under a  
12 proper application of Apprendi that distinction makes no  
13 difference.

14           QUESTION: You can -- isn't the one -- isn't that  
15 Washington prescription, that we talked about in the Williams  
16 case, leaving it almost completely up to the judge?

17           MR. FISHER: It's not, Mr. Chief Justice. You are  
18 correct but if they did leave it completely up to the judge  
19 that would be the Williams case, it would be a very different  
20 case than this one. However, the way that the Washington law  
21 is written, and the way it's been interpreted by the  
22 Washington courts is that the eleven factors are illustrative,  
23 and so therefore if a court is going to depart on a factor  
24 that is not one of them on the list, it has to be analogous,  
25 or fairly closely tied into the factors that are on the list.

1           So in the Ammons case for example which is one of  
2 the first Washington State Supreme Court cases interpreting  
3 their guideline system. They said very bluntly that the whole  
4 purpose of this system was to take away the unfettered  
5 discretion that we had in the past and to significantly  
6 constrain it.

7           QUESTION: So if you prevail the jury gets the list  
8 of -- of all the 11 factors, plus whatever else the judge  
9 thinks might come up? During the trial do you have to prepare  
10 them for that as well?

11           MR. FISHER: Well, in a typical system, Justice  
12 Kennedy, there are one, two, maybe three aggra proposed  
13 aggravating factors. So what we'd be proposing is that yes,  
14 during the trial the prosecutor would charge an aggravated  
15 crime, and simply -- just like the deadly weapon in this case,  
16 they would have charged deliberate cruelty. And the judge  
17 would instruct the jury on what deliberate cruelty means.

18           QUESTION: Most -- most of these cases like this one  
19 come up on pleas. They don't -- they were trials, yes. And  
20 the jury would be instructed, but how would -- how would it  
21 affect the typical case, where there's a plea? Is the bottom  
22 of your argument that if you enter a plea you're home free,  
23 from any enhancement, there's been no jury. You entered a  
24 plea before the judge, and just as in here the prosecutor says  
25 I'm going to recommend the top of the guidelines 29 to 53

1 months. And you say fine I'll plead to that, and the Judge  
2 says I think you deserve more, is the terminal point of your  
3 argument that with a guilty plea, for the system to be  
4 constitutional, no jury now, just a judge, there can't be any  
5 enhancement.

6 MR. FISHER: So long as the guilty plea does not  
7 include any stipulation to an aggravating fact, yes, the top  
8 would be the standard range. However

9 QUESTION: So the defendant would have to say, yeah,  
10 I stipulate to 31 more. Otherwise it couldn't be given.

11 MR. FISHER: Well, I'm not sure it would work  
12 exactly that way, Justice O'Connor. I think what would work  
13 would be that the defendant in this case

14 QUESTION: Justice Ginsburg, yeah.

15 MR. FISHER: I'm sorry. Justice Ginsburg, is that  
16 in this case for example the defendant would have pled guilty.  
17 And he could have said I agree that I committed deliberate  
18 cruelty in this case, which would raise the cap and the judge  
19 would be able to do a sentence anywhere under that cap.

20 QUESTION: Well, if he didn't agree to that, there  
21 wouldn't be a plea. I mean, if the prosecutor says, look, I'm  
22 claiming an aggravator here and I want the range increased  
23 that would have to be part of that stipulation, the deliberate  
24 cruelty would have to be part of the plea agreement. If it  
25 wasn't, there wouldn't be a plea.

1 MR. FISHER: Absolutely, Justice Souter.

2 QUESTION: Do judges typically impose the higher  
3 penalty where there's been a plea. It seems to me it's pretty  
4 hard to do that when you haven't had a trial. What does the  
5 judge have in front of him to, you know, to enable him to make  
6 the fact finding that justifies the aggravator?

7 MR. FISHER: Well, the way it works right now in  
8 Washington, is that if the defendant enters a plea, there's a  
9 presentence report that goes to the judge. The judge can  
10 also, as the judge should in this case, have the victim  
11 testify for example.

12 However, Washington law specifically provides that  
13 if the judge wants to impose an exceptional sentence, based on  
14 aggravating facts, and the defendant disputes the presence of  
15 those facts, Washington law already provides in Section 370,  
16 the Judge has to hold a hearing. And that's exactly what the  
17 judge -- I'm sorry.

18 QUESTION: Are you saying that that hearing -- you'd  
19 have to convene a jury specially -- in this case it was a  
20 guilty plea, and the prosecutor was satisfied with 49, 53  
21 months. The judge said I'm not satisfied. Is it your view  
22 when the prosecutor is willing to make that deal, doesn't want  
23 the 30 extra months, but the judge wants it, once the guilty  
24 plea is made, then can the judge say, never mind, prosecutor,  
25 I don't like that bargain.

1           And this -- do you have to convene a jury specially  
2 then, just this jury specially to hear the evidence on whether  
3 there should be -- or the

4           MR. FISHER: Well, Justice Ginsburg, certainly my  
5 case doesn't stand or fall on the fact that the judge is the  
6 one that did this hearing. However, I think that in that  
7 circumstance it seems a sensible result that if the prosecutor  
8 isn't asking for an aggravated factor and nobody's contesting  
9 it, then the judge ought to either be bound by the deal, or  
10 the judge in the interest of justice, as he always has, can  
11 say I don't think this is a fair plea.

12           QUESTION: That's right, he can turn down the deal.

13           MR. FISHER: Yeah.

14           QUESTION: I mean, and does he only get the  
15 presentence report after the plea is accepted? `Or does he get  
16 it before the plea is accepted?

17           MR. FISHER: I think it varies, Justice Scalia.

18           QUESTION: Well, so long as he has it in front of  
19 him, before he rules on the plea, he can effectively achieve  
20 what Justice Ginsburg is concerned about by simply refusing to  
21 accept the plea, unless the defendant is willing to confess to  
22 one of the aggravating factors.

23           MR. FISHER: That's right, Justice Scalia.

24           QUESTION: So this moves the entire system. I mean  
25 I am now -- the light has dawned slightly -- the reason I

1 guess, I'd like your view, but the defense thought like  
2 Apprendi and pursues these cases because 95 percent of the  
3 people in prison are not there pursuant to a jury trial.  
4 Rather they're there because of plea bargaining. And it will  
5 work in the plea bargaining context, though it won't work at  
6 all in the trial context.

7           You'd have to go and argue, my client was in  
8 Chicago, but by the way I'd like to point out that he only hit  
9 the person lightly not heavily as the -- so that wouldn't work  
10 at all. But you don't mind because your job everyday is plea  
11 bargaining. If I'm right about that, I want to know if I am  
12 right?

13           MR. FISHER: Well, I think that you're right that  
14 Apprendi works in plea bargaining, but with all due respect  
15 I'm not sure that I accept that doesn't work in`

16           QUESTION: Okay. Then let's go to the trial. The  
17 person, as you know, robbed a bank. Used a gun, took a  
18 million dollars and not just a thousand. Brandished another  
19 gun, and hurt an old lady. All that's charged. You want to  
20 say, my client was asleep at home, yeah. Now, how do you  
21 defend yourself against all those aggravators.

22           MR. FISHER: Well, Justice Breyer, the same thing  
23 happens for example when there's a lesser included offense in  
24 the case.

25           QUESTION: Of course it does, but they're very

1 limited numbers and you can work with a few. What you can't  
2 work with is five or 10, or particularly a very important one,  
3 but anyway, you explain it.

4 MR. FISHER: Well, as I said, the typical situation  
5 in Washington is more like two or three aggravators. I  
6 understand the Federal system is more complicated, but in the  
7 state system, there's typically two or three aggravators and  
8 in fact Washington itself proves that this works. Because  
9 Washington has already singled out several factors they call  
10 sentence enhancements. Such as using a deadly weapon, selling  
11 drugs within a 1000 feet of a school zone and some other ones  
12 on the list that they already require to be treated exactly in  
13 this fashion. And then things -- and I've never seen anyone  
14 complain, and with certain

15 QUESTION: You know, but I'm just curious. I  
16 understand that that must be so, because you have the  
17 experience. But what I'm -- what I want to know is why is  
18 that a fact. If my client wanted to say he basically wasn't  
19 guilty of the offense, then I want to say and also he wasn't  
20 near the school, or also he only used, you know, the ones you  
21 say. How do you present that to a jury?

22 MR. FISHER: Well, Justice Breyer, one other point  
23 is important here because, in many cases it's not going to be  
24 such a big problem. However, in the one state that we've seen  
25 that has adopted this system essentially the fix that we think



1 would be the proper fix here in the State of Kansas, they've  
2 said that if a defendant contests aggravating factors that not  
3 -- they have to be proved to a jury beyond a reasonable doubt.

4           However, the statute also provides that in the  
5 interest of justice the judge can sever the guilt phase and  
6 the sentencing phase, and so if -- it puts the defendant.....

7           QUESTION: I don't see the problem -- I don't see  
8 the problem of challenging it. It is up to the prosecution to  
9 introduce the evidence of the aggravators, right?

10           MR. FISHER: That's correct.

11           QUESTION: So the prosecution puts on one of the  
12 customers in the bank who says, you know, he was using a gun.  
13 The defendant is not going to be testifying anyway, unless  
14 it's a very strange criminal trial. It seems to me what would  
15 happen is exactly what would happen in a normal trial. The  
16 defense counsel would seek to break down the story of the  
17 witness that this person was carrying a gun. How far away  
18 were you, what kind of a gun was it, what color was it. The  
19 same thing that would happen in any trial it seems to me.

20           MR. FISHER: Well, I think that's generally the  
21 case, and that's why I said it's just like what might happen  
22 for example in a lesser included case, when murder and  
23 manslaughter was charged and it was the defendant's position  
24 that it wasn't him. He wasn't around.

25           QUESTION: Yeah, put on the witness that says I want

1 to tell you -- they say he hit her with a gun and your witness  
2 wants to say, oh no he only he brandished a gun, he didn't hit  
3 her. That's quite a good witness to put on at the time that  
4 you're claiming that he was across the room.

5 MR. FISHER: Right. Well as I said, there are

6 QUESTION: Well, sometimes works, sometimes not?

7 MR. FISHER: Right.

8 QUESTION: The bizarre thing about this, which of  
9 course I said I'm in the minority here. The bizarre thing is,  
10 it's hard for me to believe that the Constitution of the  
11 United States requires, not that it doesn't permit. But  
12 requires a sentencing commission should Congress wish to take  
13 discretion, total discretion away from the judge, which of  
14 course your distinction leads to.

15 It's also very hard for me to believe that the  
16 Constitution of the United States prohibits Congress from --  
17 prohibits it from saying, you know, I don't want to leave that  
18 up -- to each judge to decide whether having a gun is worth  
19 two years, or five years more. I want to regularize this.

20 So those are the two dilemmas because you have to  
21 chose A or B, if there's something unconstitutional about  
22 this.

23 MR. FISHER: Well, Justice Breyer, I think the  
24 Constitution doesn't prevent Congress or any legislature at  
25 all from regularizing criminal sentencing.

1 QUESTION: True.

2 MR. FISHER: Sentencing guideline systems are fine,  
3 and Apprendi says nothing about whether legislatures can come  
4 in, and regiment out and separate all the factors. The only  
5 thing Apprendi says, is that if a sentence is conditioned on a  
6 certain finding of fact, and there is a dispute about that  
7 finding of fact, the defendant should have the right to have  
8 the jury make that finding beyond a reasonable doubt rather  
9 than have to judge.

10 QUESTION: Transfer that whole -- your rationale to  
11 the Federal system and you have the grand jury first indict us  
12 to the aggravators?

13 MR. FISHER: Well

14 QUESTION: Why not?

15 MR. FISHER: Well, assuming the Federal system -- if  
16 you're assuming the Federal system was covered by Apprendi. I  
17 think that

18 QUESTION: I'm saying, assuming we apply your rule  
19 to the Federal system, I don't know how we couldn't, quite  
20 frankly. You can get a grand jury indictment for all the  
21 aggravators.

22 MR. FISHER: Well, to whatever extent a grand jury  
23 needs to charge aggravated crimes I think they would need to  
24 charge it and then apply

25 QUESTION: Well, didn't Apprendi say that all the

1 elements had to be charged?

2 MR. FISHER: Yeah. Apprendi says that under fair  
3 notice principles -- I'm going to stumble here a little bit.

4 QUESTION: Why don't you just say yes, what's so  
5 outrageous about that. The man's going to be sent to jail,  
6 for another five years, you're saying he has a right to have a  
7 jury find beyond a reasonable doubt that he did the additional  
8 fact -- act which justifies the five years. What's so  
9 outrageous that that needs to be

10 QUESTION: Can the grand juries indict him for that?

11 MR. FISHER: I'm stumbling over the grand jury  
12 because this is a state case, and not a Federal one.

13 QUESTION: Yes. But the question was, in the  
14 Federal system.

15 MR. FISHER: Right.

16 QUESTION: Obviously we've never held the Seventh  
17 Amendment grand jury requirement applied to the state.

18 MR. FISHER: Right. But to the extent the grand  
19 jury requirement applied it would -- the grand jury would need  
20 to charge the aggravator just like anything else. And as  
21 Justice Scalia

22 QUESTION: It seems to me you're -- you may not be  
23 defendant friendly in all instances. In this case, if the  
24 defendant really wants to bargain for the lesser offense,  
25 kidnaping II instead of kidnaping I, I suppose the prosecutor

1 would say that part of the bargain is that you stipulate to A,  
2 B, and C. And then he doesn't have the opportunity to argue  
3 before the judge that he wasn't guilty of the aggravators. In  
4 other words, it could work both ways.

5 MR. FISHER: Well, it can, but I think it's  
6 important to look at the injustice in this case, Justice  
7 Kennedy. He made a deal to get kidnaping II, and didn't plead  
8 to any aggravators, however he got a sentence that was more in  
9 line with kidnaping I, based on facts that he never  
10 acknowledged and he disputed.

11 QUESTION: Well, the cap for the kidnaping I, was  
12 much higher, and judges so often when they see aggravating  
13 circumstances get close to whatever the cap is that they're  
14 applying. So I'm not sure

15 QUESTION: Mr. Fisher, if you're -- if you are  
16 correct here, I suppose all 50 states have sentencing schemes  
17 that would fall as a result, isn't that right?

18 MR. FISHER: By my study, Justice O'Connor, I don't  
19 think that is correct.

20 QUESTION: Why not?

21 MR. FISHER: Well, there are only about 17 states  
22 that have guideline systems right now. By my count, only  
23 about 10 of them have a system like the State of Washington's.  
24 The other seven have systems where they do create standard  
25 sentencing ranges, but then they leave it up to the judge to

1 depart from those ranges whenever they want to based on any  
2 reason. Those systems I think are just fine no matter what  
3 this Court says today. So I think we're only talking about  
4 those 10 systems like the State of Washington's.

5 QUESTION: Setting the systems for States does not  
6 seem to trouble us in other areas. Such as capital  
7 punishment, for example.

8 MR. FISHER: That's right, Justice Scalia, and  
9 obviously this Court has thought a lot about that issue  
10 already in the prior Apprendi case, as to what -- what the  
11 effects of its rulings are going to be.

12 QUESTION: I guess I'd be afraid the effect is going  
13 to be enshrine the plea bargaining system forever. Because  
14 that will be the only practical thing. Or to say there's a  
15 constitutional requirement that you have to have a sentencing  
16 commission and the legislature can't do the work itself, which  
17 is both undemocratic, a little hard to see why that's so --  
18 and produces just as much unfairness of the kind you're  
19 complaining about. Disabuse me, if you can, of these  
20 pessimistic views.

21 MR. FISHER: I'll try.

22 QUESTION: You agree that it's undemocratic?

23 MR. FISHER: What is undemocratic -- leaving it up  
24 to judges? Yes, but that's the whole point of Apprendi is  
25 that the democratic constraints operate on a legislature, and

1 then when a legislature steps in, that different things apply.  
2 And when the legislature says something, as footnote 16 in  
3 Apprendi mentioned, it's a different force than when leaving  
4 it up to the judges. If it's all right with the Court, I'll  
5 reserve the remainder of my time.

6 QUESTION: Very well, Mr. Fisher.

7 Mr. Knodell, would you -- am I pronouncing your name  
8 correctly?

9 MR. KNODELL: You are, Your Honor.

10 ORAL ARGUMENT OF JOHN D. KNODELL, JR.

11 ON BEHALF OF THE RESPONDENT

12 MR. KNODELL: Mr. Chief Justice, and may it please  
13 the Court:

14 Whether the statutory maximums in the State of  
15 Washington is what the legislature says it is, or the upper  
16 end of the standard range, established only for the purposes  
17 of enforcing legislative limitations of judicial discretion is  
18 at the heart of this case. And I would suggest to this Court  
19 that the answer to that question lies in the examination in  
20 the way that the statute works.

21 In Washington, the legislature of course like all  
22 States, initially defines the elements of a crime, and sets  
23 statutory maximums. And I think if we look at the elements of  
24 the crime, and look at the way they work, you will see that  
25 they are substantially different, the kind of sentencing

1 factors that are dealt with in reaching aggravating, or  
2 mitigating sentences under the Sentence Reform Act. The  
3 criminal elements apply equally in every case. They are  
4 necessary and sufficient I think, as was put in the General's  
5 brief, in each and every case.

6 They are mandatory, and forced to consider each and  
7 every one of them, the fact finder. And there's only one  
8 result. Conviction -- conviction or acquittal. There's no  
9 weighing of competing interests, there is no discretion.

10 Now, I offer doing this -- the Washington  
11 legislature then created the Sentencing Reform Act. The  
12 Sentencing Reform Act, I would submit to you created a  
13 situation in the State of Washington where we have three  
14 zones. There's first a standard range and I would suggest to  
15 you that the word standard in the sense that it's used by the  
16 Washington legislature, it's used in defense as a basis of  
17 measurement.

18 The standard range is a baseline. It is a zone in  
19 which the sentencing court has absolute discretion, as you  
20 will see in the guidelines themselves, and provisions, that a  
21 sentence within these guidelines is not reviewable. That  
22 there's absolute discretion. Then in addition, in that

23 QUESTION: Excuse me. The sentence is not mandated  
24 in the standard zone?

25 MR. KNODELL: Not



1           QUESTION: Just -- you can give them up to 10 years,  
2 but if you want to give them two years, that's okay. And  
3 that's not reviewable?

4           MR. KNODELL: That's exactly right. There is no  
5 review. And I would just -- you know, I would just to -- try  
6 to impress upon you, Justice Scalia, that the -- there is a  
7 range then between the upper end of the sentencing -- of the  
8 standard range, and the statutory maximum, which is the zone  
9 where the limitations -- the very minor limitations I submit  
10 to the Court that are imposed upon the sentencing court or  
11 enforced, that's the zone of limited discretion.

12           This limited discretion is limited only in two ways.  
13 The court cannot -- cannot impose a sentence beyond the range  
14 for reasons that the legislature considered in defining the  
15 crime in the first place, and the court cannot -- cannot up  
16 the statutory maximum - cannot impose a sentence because he  
17 believes that the defendant committed a more serious crime  
18 than the crime of which he was convicted.

19           One of the primary purposes of the Sentencing Reform  
20 Act is to -- is to ensure that the defendant, the criminal  
21 defendant is punished only for the crime of conviction. The  
22 standard range is a baseline, the statutory maximum is a  
23 borderline. The baseline and the requirement that the court  
24 enunciate reasons for departure are simply -- they are not a  
25 hurdle.

1           QUESTION: But may I ask you this. You point out  
2 that he has to enunciate reasons. Don't the reasons have to  
3 have -- don't they have to cover basically two components.  
4 First, they have to cover the component that you've alluded to  
5 and that is some kind of the reasoning for engaging in the act  
6 of discretion of going -- going above. It's got to be clear  
7 that this is not just, you know, more prejudice or anything  
8 like that.

9           Doesn't it also have to have as a component the  
10 identification, the finding of facts upon which this  
11 discretion can be exercised. Take this case as an example.  
12 The basis for going above was cruelty. Unusual cruelty,  
13 whatever it was. He would have to articulate the facts I  
14 suppose that a gun was used, that the woman was kept in this  
15 box a great deal of the time and so on. Which would make it  
16 sensible to say, well, yeah, there's cruelty here and that's a  
17 reason for doing what I'm doing.

18           It's a distinction in the case in which somebody  
19 kidnaps a woman, forced her into a mink coat in the back of a  
20 limousine that wouldn't -- that wouldn't do it. So there --  
21 isn't there a fact finding component, even though the statute  
22 does not set out in advance what those facts must be or limit  
23 what they must be. They simply must be relevant to the act of  
24 discretion, but there is a fact component, isn't there?

25           MR. KNODELL: There is a fact component, but if we

1 look only at the fact component, Justice Souter, we will be  
2 taking a very impoverished view of what this statute does.  
3 Obviously any sentencing decision, any discretionary decision  
4 is based in some degree on facts.

5 But look what happens under the Washington  
6 Sentencing Reform Act. The court has a list of illustrative  
7 factors from the legislature, it's true, but the court can  
8 regard -- the court can select them, cannot select them, can  
9 disregard some, can regard some. It's an entirely  
10 discretionary procedure.

11 QUESTION: But whatever it does select, they've got  
12 to be facts which at least would morally justify going above  
13 the ceiling. The -- the guideline ceiling. Absent those kind  
14 of facts, as well as a reasoned judgment based on them, the  
15 ceiling governs.

16 MR. KNODELL: I disagree with that.

17 QUESTION: Well, I don't think I understand what  
18 you're talking about. No, I mean I'm missing something in the  
19 description of the system, that's what I need to have.

20 MR. KNODELL: Well

21 QUESTION: Can he be reversed if there's nothing in  
22 the record that shows the fact -- I mean he says I'm giving  
23 him another 10 years, because he used a gun. There's nothing  
24 in the record that shows that he used a gun. You mean he  
25 cannot go up on appeal and get that additional penalty

1 removed?

2 MR. KNODELL: He could.

3 QUESTION: Of course. Because it depends on a fact  
4 finding.

5 MR. KNODELL: No, I disagree with you, Judge, but he  
6 would be reversed for two reasons. It would be an abuse of  
7 discretion to base the sentence -- it doesn't make it any less  
8 discretionary. It's an abuse of discretion to overturn --  
9 excuse me, to impose a sentence that has absolutely no basis  
10 in the record.

11 QUESTION: You call it an abuse of discretion, call  
12 it whatever you like. You know, call it piggy back. But the  
13 fact is if his judgment is not supported by the facts in the  
14 record, he is reversed. So he is making a fact finding.

15 MR. KNODELL: Two -- let me make two points about  
16 that. Discretion lies at the heart of this case. Discretion  
17 is the difference between a crime element and a sentencing  
18 factor. I believe that that, when you take a look at how the  
19 statute works, that's what is at heart -- at issue here.

20 If the -- if the judge makes a decision that's not  
21 based upon the record, that's simply pure whim, that's a due  
22 process violation. That's an abuse of discretion. The second  
23 point is, I

24 QUESTION: It wasn't pure whim. He just made a  
25 mistake. He got this record mixed up with another. In fact

1 there's not enough evidence to support that fact. The  
2 defendant is entitled to get that judgment reversed, because  
3 that fact is essential to his being given the additional  
4 penalty. And as I understand what we said in Apprendi, and as  
5 I understand the Constitution, when you're sent to jail for an  
6 additional amount of time, on the basis of a fact that is  
7 required to be found before you can be sentenced, that has to  
8 be found by a jury.

9 MR. KNODELL: Well, no particular fact is entitled  
10 -- is required to be found. It doesn't make

11 QUESTION: No particular fact is entitled to be  
12 found, but a fact which the judge can select from among, but  
13 he has to select a fact. And whichever one he selects,  
14 whether it's carrying a gun, or cruelty to the woman, or  
15 whatever else. That fact has to be found by the judge and  
16 there has to be support for it.

17 MR. KNODELL: That process that you're describing  
18 where the judge takes a look at the case -- at the individual  
19 before him, and selects what facts are going to be relevant,  
20 and decides what weight to give them, and weighs that fact  
21 against competing interests in sentencing is exactly the kind  
22 of process that the judge went on -- went through in Williams.  
23 That is a constitutional process that is not rendered  
24 unconstitutional

25 QUESTION: Yes, but in Williams there was no

1 intermediate level that he couldn't go above. There is here,  
2 isn't there? Under the standard sentencing system, are they  
3 -- did the other side misrepresenting this? I understood that  
4 given what the man admitted in the guilty plea he could be  
5 sentenced to what, 53 months. And not above that.

6 MR. KNODELL: I disagree with that, very  
7 respectfully.

8 QUESTION: Without additional procedure before the  
9 judge?

10 MR. KNODELL: There's always going to be an  
11 additional procedure before the judge. There's always going  
12 to be a sentence hearing.

13 QUESTION: Which require the judge to find a fact  
14 that had not been established previously.

15 MR. KNODELL: Yes. And I think that that what you  
16 have to remember is that fact finding process, is not like  
17 finding the criminal element because the judge is

18 QUESTION: But why not, if it increases the sentence  
19 by five years. Why isn't it exactly the same thing?

20 MR. KNODELL: That is -- it is alike only in the  
21 superficial sense, Justice Stevens, because you're -- it  
22 ignores the process that leads to the selection of that fact  
23 and the way that fact is weighed, and the way it's used.

24 QUESTION: But Martin -- did Martin? I thought that  
25 in the Washington system, if the defendant disagrees, the

1 judge says I think you did this cruelly, in the presence of a  
2 child, the defendant is then entitled to have a hearing at  
3 which evidence is presented and the judge has to make that  
4 decision about the additional time on the basis of a record.

5 And he has to -- he applies it, it's true, not  
6 beyond a reasonable doubt, but preponderance of the evidence.  
7 But it is based on a finding of fact.

8 MR. KNODELL: That's correct. It's based on a  
9 finding of fact, but the finding of fact is not the whole  
10 picture. After selecting the fact, making the finding, then  
11 the judge has to determine whether it's substantial and  
12 compelling. Whether this crime is atypical, whether it  
13 differs substantially from other crimes of the same type.  
14 That is

15 QUESTION: Whatever else he does, the fact is,  
16 you're being sent up the river for an additional three years,  
17 on the basis of a fact finding by a judge that more likely  
18 than not you were carrying a gun. More likely than not you  
19 were cruel to this woman. That doesn't trouble you?

20 MR. KNODELL: It -- it's the same process, Justice  
21 Scalia, that you went through in Williams. In Williams, you  
22 had the judge making the determination of fact finding that  
23 went beyond the -- what was

24 QUESTION: But the legislature hadn't put an  
25 intermediate level on what he could do without the additional

1 finding, which you have here.

2 MR. KNODELL: That's right. What I want to  
3 emphasize to you, is that that limited -- that limited  
4 jurisdiction is for the purpose only of ensuring that the  
5 reasons that are multi-varied, which could be anything, do not  
6 violate the principles of Apprendi, which do not lead to the  
7 defendant being punished for some crime that he wasn't  
8 convicted of.

9 QUESTION: But it is correct that that intermediate  
10 limit is something he cannot go above, unless he makes an  
11 additional finding of fact? It's not been established at that  
12 point.

13 MR. KNODELL: That's true. And I would simply add  
14 he has to make a finding of fact, he has to select which fact  
15 is relevant and then he's got to find that fact is substantial  
16 and compelling. In the same way that a sentencing judge in an  
17 indeterminate would do. The

18 QUESTION: This is a pretty hefty -- I mean if we  
19 look at it in practical terms, on the night of incarceration,  
20 this was 30 months added on, right? So it was about a third  
21 of the total sentence?

22 MR. KNODELL: That's correct. By my computation  
23 however, under kidnaping, if this had been kidnaping I, it  
24 would have been more in the nature of 150 months. It would  
25 substantially exceed the sentencing cap.



1                   QUESTION: But he didn't plead to -- he pled to  
2 kidnaping II.

3                   MR. KNODELL: He pled and he was specifically told,  
4 Justice Ginsburg, that he could receive up to 10 years, and  
5 that the court had the right to go up to that amount if the  
6 court found aggravating circumstances. And he knew that there  
7 would be a hearing.

8                   So I -- I think what's important there, is not so  
9 much what the number was, but how it was reached. If it was  
10 reached in a way that basically -- and I don't think mimic,  
11 but was similar to the traditional sentencing process, but it  
12 was simply structured by the -- structured by the legislature  
13 and require the judges to enunciate a reason solely for  
14 purpose, not as a hurdle to it, not as a prerequisite to the  
15 exercise of jurisdiction beyond the standard range, but more  
16 as a way for reviewing courts to make sure that the trial  
17 court was not infringing upon the very limited limitations of  
18 the Sentencing Reform Act.

19                   And I think it's substantially different than  
20 Apprendi. And it does not violate the Sixth Amendment and  
21 that is the way that our supreme court described -- describes  
22 this and interprets the Sentencing Reform Act. I think that's  
23 due -- due some deference by this Court.

24                   If you take a look at Baldwin, for example, you see  
25 Baldwin describing the process -- excuse me, as one where the

1 only restriction on the court's discretion is a requirement to  
2 articulate a substantial compelling reason for the imposing a  
3 sentence. That the guidelines are intended only to structure  
4 discretionary decisions affecting sentences that they don't  
5 specify any particular result.

6 And that makes this, I think, substantially  
7 different from the kind of enhancements that we're involving  
8 -- or even the firearm enhancement that Mr. Blakely received  
9 here.

10 QUESTION: Are there any states, or many states,  
11 where juries hear as many as 10 factors as part of their  
12 determination, and then make special findings in the matters?

13 MR. KNODELL: I don't know of any and I would  
14 suggest to Your Honor that that kind of a system is really  
15 impractical for a number of reasons, we take it. If we  
16 separate the logistical problems here, there's some real  
17 structural problems with that.

18 In a state like ours where crimes almost have to be  
19 pled. You would basically be left with a system, where the  
20 prosecutor can tell the Judge, can tell the jury, dictate to  
21 them what sentencing factors will or will not be considered.  
22 When you instruct the jury you have to tailor a -- some kind  
23 of instruction that would somehow try to approximate the kind  
24 of wide range in discretion the Judge has. I would suggest to  
25 you

1 QUESTION: I thank you, Mr. Knodell.

2 Mr. Dreeben, we'll hear from you.

3 ORAL ARGUMENT OF MICHAEL DREEBEN

4 FOR UNITED STATES, AS AMICUS CURIAE

5 MR. DREEBEN: Mr. Chief Justice and may it please  
6 the Court:

7 Sentencing guideline systems, like the State of  
8 Washington's and the Federal Sentencing Guidelines fulfil  
9 valuable functions in regularizing the sentencing process, and  
10 are distinctly different from the systems that this Court  
11 considered in Apprendi and Ring.

12 QUESTION: Do you agree that the two standards  
13 together, that if this is invalid, the Federal Sentencing  
14 Guidelines are invalid?

15 MR. DREEBEN: Justice Scalia, the United States will  
16 argue if this Court applies Apprendi to the Washington  
17 guideline system, that it should not be further extended to  
18 the administrative guidelines that are created by the  
19 sentencing commission.

20 QUESTION: The answer is no, you don't agree.

21 MR. DREEBEN: The answer is

22 QUESTION: You think it is possible to uphold the  
23 sentencing guidelines and yet find this to be unlawful.

24 MR. DREEBEN: I think it's possible and the United  
25 States will certainly contend that this Court apply

1           QUESTION: But you don't mean it's easily -- it's  
2 not

3           QUESTION: It is consistent with what we said in  
4 Apprendi, isn't it?

5           MR. DREEBEN: Well, there are some obstacles to it  
6 that the Court should be aware of before it concludes that  
7 Apprendi can easily be applied to Washington and not to the  
8 Federal guidelines. Under Federal law Section 3553 (b) of  
9 Title 18 the sentencing courts are required to impose a  
10 sentence of the kind and within the range specified by the  
11 sentencing commission. So there is an act of Congress that  
12 requires that the sentencing guidelines be applied.

13           QUESTION: The sentencing commission is in the  
14 judicial branch.

15           MR. DREEBEN: For administrative purposes

16           QUESTION: That was a very important part of our  
17 opinion upholding the sentencing commission. It's in the  
18 judicial branch, because Congress said so.

19           MR. DREEBEN: The sentencing guidelines themselves  
20 are not self-operative. They come into play for the  
21 sentencing courts direction, because of an independent Federal  
22 statute. In addition, there are situations which Congress has  
23 given very detailed direction to the sentencing commission  
24 about the type of guidelines that Congress.....

25           QUESTION: How are the members of the sentencing

1 commission appointed?

2 MR. DREEBEN: They're appointed by the President and  
3 confirmed by the Senate. And they do not include only members  
4 of the Article 3 branch. In addition to that Congress has on  
5 occasion

6 QUESTION: But they are -- the commission is in the  
7 judicial branch. You acknowledge that. You argued that in  
8 the case, or the government argued that in the case, right?

9 MR. DREEBEN: Well, certainly, Justice Scalia.

10 QUESTION: It is the judicial branch.

11 MR. DREEBEN: The Court held it in the judicial  
12 branch but the question is, what status the guidelines have,  
13 not which branch the commission is in.

14 QUESTION: So what is your distinction. Look where  
15 I end up. Apprendi rests on a perception that where a fact is  
16 found that means a longer time in jail. It's unfair, not to  
17 have the jury find it. That's a true perception.

18 So if you're not going to follow that across the  
19 board, there has to be a good reason for not following it.  
20 And the reason is, that if you do follow it, you end up with a  
21 pure charge event system, all power to the prosecutor, very  
22 bad and unfair. Or California, indeterminate sentencing where  
23 people rot forever at the judge's discretion, or a multi-jury  
24 system which is impossible to work with.

25 So that's why you can't follow the perception.

1 Practical reasons. But if you're going to limit Apprendi,  
2 you're then going to have to find what are - in terms of the  
3 principle, arbitrary distinction. One such arbitrary  
4 distinction is it matters whether it was a group of judges  
5 called the commission or the Congress itself that set the  
6 lower limit before the departure.

7 Another arbitrary suggestion is going to be the one  
8 you're going to suggest, and that's what I want to know what  
9 it is.

10 MR. DREEBEN: Thank you for the lead in, Justice  
11 Breyer. I think that the best way for the Court to look at  
12 the problem of sentencing guideline systems is to understand  
13 the penalty systems fall on a continuum. At one end of the  
14 continuum are the kinds of statutes that the Court had before  
15 it, Williams versus New York, in which judicial findings about  
16 fact were critical to what sentence a defendant actually  
17 received and those findings were not subjected to a jury  
18 trial, or proof beyond a reasonable doubt guarantee.

19 QUESTION: Not only that but the judge didn't even  
20 have to make any findings. He could have just said his name  
21 is Smith, so I'm going to give him 20 years.

22 MR. DREEBEN: I think that that would probably have  
23 been reversed even at

24 QUESTION: I don't think so at that time, there was  
25 very little appellate review of sentencing on Williams that

1 was decided.

2 MR. DREEBEN: Very little but sheer arbitrariness  
3 would probably not have sufficed even under Williams. But

4 QUESTION: Well, he was foolish enough to say that,  
5 you know I don't like the way you comb your hair. But he  
6 wouldn't say that. He would just say, you know, 40 years.

7 MR. DREEBEN: What he did

8 QUESTION: He didn't have to give a reason.

9 MR. DREEBEN: But what happened in fact in Williams  
10 is critical. The judge made findings that this defendant had  
11 a long arrest record, he posed a future danger to the  
12 community and he therefore deserved a longer sentence. And  
13 those were facts. They were ascertained by a judge.

14 And there's no dispute in this Court's jurisprudence  
15 that facts that are ascertained by a judge, when the judge has  
16 wide open discretion in a long range are not subject to  
17 Apprendi. The facts.....

18 QUESTION: Not only does he have wide open  
19 discretion, but he has no obligation to make those findings.  
20 He did make them in that case, but there was nothing in the  
21 statute that required him to.

22 MR. DREEBEN: But what the legislature expects,  
23 Justice Stevens, when it gives wide ranges to judges, is that  
24 they will exercise their discretion based on facts to sentence  
25 the most serious offenders at the top of the range and the

1 least serious

2 QUESTION: That's what they expect under sentencing  
3 guidelines and what they expect today. It's not what they  
4 expected when Williams was decided.

5 MR. DREEBEN: Well, Justice Stevens, what I would  
6 submit to the Court is that when a legislature established a  
7 wide range, say, 10 to 30 years in prison for a particular  
8 offense, it expected that the judges that heard criminal cases  
9 would use their experience and discretion to take into account  
10 all of the circumstances of the offense and the offender and  
11 determine whether rehabilitation and retribution were properly  
12 served by a longer sentence, or a least harsh sentence.

13 And they did this, in the expectation of calling on  
14 judicial wisdom based on particular facts. What they

15 QUESTION: But it wasn't just facts, you left a lot  
16 of discretion to the judge. If the judge thought that this  
17 particular crime was becoming rampant in this community the  
18 judge could decide we need to make an example. And for that  
19 reason give the individual the maximum. It wasn't just fact  
20 findings. The judge had a whole lot of discretion, he had  
21 sentencing discretion.

22 It was really up to him whether this crime, not just  
23 considering the facts of the crime, but considering the needs  
24 of society, should be given a longer or a shorter sentence.

25 MR. DREEBEN: I



1 QUESTION: It's a different system.

2 MR. DREEBEN: I agree with that, and it was a large  
3 purpose of the sentencing guideline system to provide some  
4 centralization for the policy decisions that are made in  
5 sentencing to ensure uniformity, and proportionality. But  
6 this is what's critical for purposes of the Apprendi decision  
7 here, also room for individualization.

8 Based on the judge's traditional perception, that  
9 there are things in the record, or in the character of this  
10 defendant that were not taken into account by the legislature  
11 and that the judge in the exercise of his discretion will  
12 determine, deserve a higher or a shorter sentence. Now, in  
13 the context of

14 QUESTION: Mr. Dreeben, just answer me this. I will  
15 understand the government's position if you give me an answer  
16 to this question. If you do you not think that the meaning of  
17 the Sixth Amendment which guarantees trial by jury, if you  
18 don't think that the meaning is, that every fact which is  
19 essential to the length of sentence that you receive must be  
20 found by the jury, if that's not what it means, what does it  
21 mean.

22 MR. DREEBEN: It means

23 QUESTION: What is the limitation upon the  
24 legislature's ability to require facts to be found and yet  
25 those facts not to be found by the jury.

1           MR. DREEBEN: It means, Justice Scalia, that the  
2 facts -- that the legislature itself identifies as warranting  
3 the harsher punishment shall be found by the jury. But when  
4 the legislature says to the judge, impose a sentence in the  
5 standard range, unless you in your discretion determine that  
6 there are circumstances that take the case outside the  
7 standard range, or outside the heartland.

8           In that event, the judge may exercise his discretion  
9 to go up to what the legislature determines is the statutory  
10 maximum, then what the judge's -- what the legislature has  
11 attempted to do, is combine a system that will regularize and  
12 provide some uniformity but at the same time import that  
13 Williams discretion, the traditional discretion that this  
14 Court has recognized is consistent with the Sixth Amendment.

15           And I submit that if in the Williams `era a  
16 legislature had passed a law that said, judges, we are giving  
17 you a range of 10 to 50 years for this offense. We want you  
18 to figure out who should be sentenced where. We want you to  
19 find facts and make judgments that are expressed in writing so  
20 that we can see what you are doing. And we want you to put  
21 the worst offenders at the top and the least worst offenders  
22 at the bottom.

23           But this Court would not have held that those sorts  
24 of inroads on judicial discretion automatically mean that the  
25 Sixth Amendment kicks in. And traditional judicial discretion

1 is out the window.

2 QUESTION: Does that mean that the facts that are  
3 elements of the crime must be found by the jury. The facts  
4 that are not elements of the crime, that are pertinent to  
5 punishment can be found by a judge?

6 MR. DREEBEN: That is exactly right, and that is  
7 exactly what Washington purported to do when it said there are  
8 illustrative factors that we are going to put in a statute  
9 that replicate what we know judges have traditionally done,  
10 but we are not eliminating your discretion to find other  
11 facts. This is a nonexclusive list. We want to call upon

12 QUESTION: What determines whether a fact is -- it's  
13 so facile it's a wonderful solution. What determines whether  
14 a fact is an element of the crime or not?

15 MR. DREEBEN: Precisely what you

16 QUESTION: You get whacked another five years,  
17 another five years for it. But the legislature says, oh this  
18 is not an element of the crime. It's just a sentencing  
19 factor. What -- how do you separate the element of the crime  
20 from sentencing factors?

21 MR. DREEBEN: It's not a label. It is a consequence  
22 of the effect when the legislature says these are the facts  
23 that are necessary. Here's the set, you use a gun, you engage  
24 in deliberate cruelty, you have a certain quantity of drugs,  
25 you have one of those facts, and nothing else can justify a

1 sentence above the standard range. That would define the  
2 standard range as a statutory maximum.

3 But that's not what Washington does and that's not  
4 what the Federal sentencing guidelines do. What those systems  
5 do is say, here are some illustrative facts for your  
6 consideration. But we are not going to cabin your discretion  
7 to identify additional aggravating circumstances in the  
8 exercise of the time immemorial judicial prerogative to look  
9 at all of the facts of the case in the sentencing. And go up  
10 to what we have legislated as the statutory maximums.

11 QUESTION: But it used to -- they have cabined it,  
12 judges can be reversed. If they give the additional penalty  
13 in a manner that is not permitted by the sentencing  
14 guidelines, or here by Washington's system. Don't say they  
15 haven't cabined it and they have?

16 MR. DREEBEN: They have cabined. They have cabined  
17 it.

18 QUESTION: It's reversible.

19 MR. DREEBEN: Justice Scalia, but my point of the --  
20 the point of my hypothetical in which the legislature says to  
21 the sentencing judge, find facts, put the worse offenders at  
22 the top, apply the following three policies of sentencing.  
23 Proportionality, retribution, and rehabilitation.

24 QUESTION: Okay. So it used to be that the answer  
25 to the elements question was the people will decide what's an

1 element through their elected representatives. But after  
2 Apprendi we have to find some other way, all right. So you're  
3 saying, well, if it is a delegation from the legislature, use  
4 your judgment, as judges used to do in sentencing, and find  
5 those facts in the process. It's not an element, it's  
6 relevant to sentencing. Is that the key?

7 MR. DREEBEN: That's right.

8 QUESTION: Have I got the key?

9 MR. DREEBEN: If the delegation

10 QUESTION: Rephrase it, because I'm trying to get  
11 the precise key to what -- to what it is. I said general --  
12 I'm using general policies, that isn't the right word. What's  
13 your word?

14 MR. DREEBEN: Well, Justice Breyer, if what the  
15 legislature does is say to the judge, here's a standard range,  
16 but you in the exercise of your discretion identifying whether  
17 a factor takes the case outside what the sentencing commission  
18 calls the heartland, what Washington calls the standard range,  
19 then in that event you may go up to what we have defined as  
20 the statutory maximum.

21 And by doing that, by calling upon judicial  
22 discretion to consider unspecified factors, the legislature  
23 has not erected surrogate elements, which is what the Court  
24 found in Apprendi.

25 QUESTION: Is that the nub of your argument? That

1 Apprendi is concerned with the erosion of jury trial, by the  
2 combined efforts of the legislative and the executive branches  
3 and we don't have to worry about the erosion of jury trial if  
4 the operative determinations are left entirely within judicial  
5 discretion, is that what you're argument boils down to?

6 MR. DREEBEN: That is what it boils down to, Justice  
7 Souter, because we're starting from a spectrum at which one  
8 end lies Williams versus New York, in which the Court fully  
9 accepted that it is entirely constitutional for a judge to  
10 say, in my courtroom if you commit a kidnaping and you engage  
11 in deliberate cruelty which I'm going to find by a  
12 preponderance of the evidence, you're going to get the  
13 maximum.

14 QUESTION: All right. If that in fact is the  
15 position, then I take it, it is open to a legislature in a  
16 case like this to say, instead of having a formal maximum  
17 range, I forget what it is, but from zero to 10 years, we're  
18 going to make it zero to 100 years, and we're going to leave  
19 everything else to the discretion of the judiciary, and  
20 Apprendi in effect will be a dead letter.

21 But your argument is that's okay, because we're not  
22 worrying about the judiciary. Is that what it is, is that  
23 what it boils down to?

24 MR. DREEBEN: I think that follows directly from  
25 Williams versus New York, and it's an additional reason why

1 this Court should be very reluctant to apply Apprendi to  
2 sentencing guideline systems. Washington would not have to  
3 react to a decision applying Apprendi to its guidelines the  
4 way Kansas did. Washington could decide that, all right, if  
5 the problem is that our standard range created a top of a  
6 statutory maximum term, we're just going to do away with the  
7 top of the standard range, and we'll leave it to judicial  
8 discretion, with the following policy statements to give some  
9 guidance to what they do.

10 QUESTION: I think you understated the prior -- the  
11 prior system. Because -- the Williams system, it wasn't just  
12 the judge could say, if you kidnap and are cruel to your  
13 victims I'll give you the maximum. He could say I -- in my  
14 court if you kidnap, you get the max. I mean there were  
15 judges around you know, known as Maximum John. ` If you  
16 committed a certain crime you would get the maximum. That's a  
17 different system than what we have now.

18 QUESTION: Thank you, Justice Scalia. Mr. Dreeben.  
19 Mr. Fisher, you have four minutes.

20 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

21 ON BEHALF OF THE PETITIONER

22 MR. FISHER: Thank you, Mr. Chief Justice. I think  
23 it's important to make two points about Washington law, lest  
24 the Court be left with any confusion. The first is, the  
25 Washington legislature has most definitely not left it up to

1 Washington judges to depart upward for any reason they want.  
2 They have not left it entirely up to the judges' discretion.

3 A judge has to find, as the judge in this case did,  
4 one of the eleven listed factors or one that is analogous to  
5 those eleven factors. And there are case after case in  
6 Washington, or appellate decisions saying this aggravating  
7 fact is not good enough.

8 But if the Gore decision, and the Cardenas decision  
9 both cited in my briefs. Another example is Barnes -- the  
10 Barnes decision at 818 P.2d 1088 in which for example the  
11 Washington Supreme Court said future dangerous which is a  
12 common aggravating factor in other contexts, it's not a valid  
13 aggravating factor in Washington in most kinds of crimes  
14 because the legislature did not list that out.

15 And in fact what the Washington Supreme Court said  
16 there, is they said, if we were to find that we would be  
17 giving ourselves too much discretion back for the very point  
18 of the Sentencing Reform Act was to take discretion away from  
19 us, to go above the standard sentencing range.

20 The second point about Washington law is, Mr.  
21 Knodell is right, that there is some discretion built into the  
22 system, but that discretion kicks in only after the judge has  
23 made the required factual finding. In that respect the system  
24 is just like the one in Ring where the aggravating fact is  
25 necessary but not sufficient for the ultimate sentence. The



1 Judge still can in his discretion - this, Justice Breyer,  
2 goes to your question, the judge still once the jury or the  
3 proper fact finder makes all the required factual findings,  
4 the judge can still consider all the facts in the case, and go  
5 anywhere below that new maximum that's been established.

6 So judicial discretion is still retained in Kansas'  
7 system and it would be retained in Washington's system. And  
8 the final thing I'd like to say is that Mr. Dreeben's point  
9 that this case is different than Ring because the fact that  
10 they're illustrative rather than exclusive would lead to  
11 Apprendi simply being a mere formality because all the  
12 legislature would have to do, for example in the Ring case, is  
13 have factor number 11 that says anything similar to the others  
14 on this list.

15 Then you'd have people saying, well, `judges can do  
16 just about what they were doing, which was finding one of  
17 those 10 factors, but because there's factor 11, that says  
18 something similar to this is also good enough that Apprendi  
19 somehow doesn't apply. We submit that a straightforward  
20 application of Apprendi as it was stated in Ring, requires a  
21 reversal in this case. Thank you, Mr. Chief Justice.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fisher.  
23 The case is submitted.

24 (Whereupon, at 11:08 a.m, the case in the  
25 above-entitled matter was submitted.)