IN THE SUPREME COURT OF THE UNITED STATES

RALPH HOWARD BLAKELEY, JR. :

:

Petitioner :

V. : No. 02-1632

WASHINGTON. :

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.

C O N T E N T S

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

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

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

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

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

QUESTION: Why not?

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

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

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

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

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

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

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

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

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

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

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

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

judge's discretion, that's perfectly okay.

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

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

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

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

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

So it's absolutely the case of course that Winship

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

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

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

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

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

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

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

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

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

MR. FISHER: I'm not sure I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Justice Ginsburg, yeah.

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

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

MR. FISHER: Absolutely, Justice Souter.

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

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

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

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

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

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

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

MR. FISHER: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. FISHER: That's correct.

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

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

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

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

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

QUESTION: Well, sometimes works, sometimes not?

MR. FISHER: Right.

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

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

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

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

QUESTION: True.

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

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

MR. FISHER: Well

QUESTION: Why not?

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

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

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

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

elements had to be charged?

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

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

QUESTION: Can the grand juries indict him for that?

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

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

MR. FISHER: Right.

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

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

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

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

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

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

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

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

QUESTION: Why not?

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

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

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

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

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

MR. FISHER: I'll try.

QUESTION: You agree that it's undemocratic?

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

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

QUESTION: Very well, Mr. Fisher.

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

MR. KNODELL: You are, Your Honor.

ORAL ARGUMENT OF JOHN D. KNODELL, JR.

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

MR. KNODELL: Not

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

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

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

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

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

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

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

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

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

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

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

MR. KNODELL: I disagree with that.

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

MR. KNODELL: Well

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

removed?

MR. KNODELL: He could.

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

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

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

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

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

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

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

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

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

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

QUESTION: Yes, but in Williams there was no

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

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

QUESTION: Without additional procedure before the judge?

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

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

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

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

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

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

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

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

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

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

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

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

finding, which you have here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: I thank you, Mr. Knodell.

Mr. Dreeben, we'll hear from you.

ORAL ARGUMENT OF MICHAEL DREEBEN

FOR UNITED STATES, AS AMICUS CURIAE

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

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

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

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

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

MR. DREEBEN: The answer is

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

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

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

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

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

QUESTION: The sentencing commission is in the judicial branch.

MR. DREEBEN: For administrative purposes

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

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

QUESTION: How are the members of the sentencing

commission appointed?

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

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

MR. DREEBEN: Well, certainly, Justice Scalia.

QUESTION: It is the judicial branch.

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

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

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

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

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

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

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

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

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

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

was decided.

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

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

MR. DREEBEN: What he did

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

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

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

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

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

least serious

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

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

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

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

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

MR. DREEBEN: I

QUESTION: It's a different system.

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

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

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

MR. DREEBEN: It means

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

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

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

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

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

is out the window.

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

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

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

MR. DREEBEN: Precisely what you

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

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

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

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

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

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

QUESTION: It's reversible.

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

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

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

MR. DREEBEN: That's right.

QUESTION: Have I got the key?

MR. DREEBEN: If the delegation

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

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

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

QUESTION: Is that the nub of your argument? That

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

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

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

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

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

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

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

QUESTION: Thank you, Justice Scalia. Mr. Dreeben.

Mr. Fisher, you have four minutes.

REBUTTAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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