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The Lost History of *Apprendi* and the *Blakely* Petition for Rehearing

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Volumes surely will be written about our visions, and the realities, of the post-*Blakely* world. However, before we all march reluctantly or otherwise into that future, it is valuable to fully acknowledge the past. As the Petition for Rehearing filed on Behalf of Washington State in *Blakely* (hereinafter "Pet.") explained, *Blakely* and *Apprendi* were undoubtedly founded on an erroneous historical understanding of the Framers' views in 1790 when they wrote the 6th Amendment's jury-trial guarantee. The fact that the Framers themselves wrote over a dozen indeterminate sentencing ranges in the first federal crime bill (*see* 1 Stat. 112–118; Pet. at 3–4), has simply been overlooked by the Court. A full and fair debate about the constitutional rules still being defined (most immediately in *Booker* and *Fanfan*) cannot be had if this history is ignored.

Thus we are very grateful to Professor Doug Berman and the editors of the Federal Sentencing Reporter for reprinting the Petition in full below. Although the Petition was denied without opinion on August 23, 2004, the constitutional debate to which it speaks is far from over.

Amid the robust and fruitful policy discussions about sentencing that Blakely has engendered, it is possible to forget that *Blakely* and *Apprendi* state *constitutional* rules. As such, without a firm basis in the Constitutional text, their holdings may not legitimately be applied to the States, whether or not their policy effects are good are bad. Yet the precise steps to reach the constitutional holding of *Blakely* tend to be ignored. It is worthwhile then to review the relevant constitutional language that allegedly requires *Blakely*'s result: "The Trial of all Crimes . . . shall be by jury" (Art. III, sec. 2) and "In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . ." (Sixth Amendment).

Concededly, there is no "plain language" here about sentencing. Thus sentencing has never been viewed part of the "criminal prosecution" for Sixth Amendment purposes (or part of the "Trial" mentioned in Article III), such that jury sentencing would be constitutionally required in all criminal cases. *Cabana v. Bullock*, 474 U.S. 376, 385 (1986).[1] We know this to be true most fundamentally because when the Framers themselves wrote sentencing statutes — in 1790, contemporaneously with drafting the Bill of Rights and sending it to the States for ratification — they did not require jury involvement. Federal sentencings, by judges alone, were subsequently carried out as the living and breathing Framers watched. Silence can sometimes speak volumes. *See* Pet. at 6 & n.8.

Thus constitutional interpretation is required to determine whether, and when, the Constitution requires jury involvement in punishment determination. And of course, for at least the past quarter-century, the "intent of the Framers" has been thought to be the primary inquiry in constitutional interpretation.[2] The principal focus of the *Blakely* Petition for Rehearing was simply to point out that significant evidence of the Framers' own sentencing statutes has, so far, been overlooked. Rather than look to English courts or common law, as the Court did at length in *Apprendi* (530 U.S. at 478–483), the constitutional focus must be on what the Sixth Amendment's authors thought about sentencing. Our Petition presented undisputable evidence that what they thought is that indeterminate sentencing, without jury involvement, was fine. When this is known (rather than assuming that they were unfamiliar with it, as was repeatedly suggested in *Apprendi*), the constitutional "leap" needed to say that the Framers nevertheless would have condemned as unconstitutional more precise legislative direction about how to sentence within their ranges, becomes larger than recognized in *Blakely*. Who knows, had this understanding of the Framers been considered initially, it might even have changed a vote.

A surprising, and significant, point about *Blakely*, however, is that none of the parties or amici argued to the Court about contemporaneous constitutional history. The briefs are devoid of any historical presentation, even though the question presented in *Blakely* — within-range sentencing — had been expressly reserved by the *Apprendi* Court immediately after it presented its historical analysis (erroneously claiming that indeterminate sentencing had been largely unknown to the Framers). Whatever the explanation for this briefing lacuna, it perhaps makes it less surprising that the *Blakely* Court likewise did not discuss historical sentencing evidence specific to the Framers. Rather, the majority merely said that "we compiled the relevant authorities in *Apprendi* and need not repeat them here" (124 S.Ct. at 2536–37).

This was an odd dodge, however, because the issue of legislative sentencing directions given to judges, for

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sentencing *within* statutory ranges, was (as the *Apprendi* Court repeatedly stressed, *see* 530 U.S. at 481–483), a significantly different one from *increasing* a statutory maximum range. Indeed, every federal Court of Appeals to consider the within-range question after *Apprendi* decided that the distinction made a constitutional difference, and upheld the federal Guidelines. To omit relevant Framer-written history that bears directly on sentencing *within* ranges thus seems like an interpretive error, one that made asking for rehearing seem more than an idle request.

Readers and scholars will have to draw their own conclusion about whether the Framers' endorsement of indeterminate sentencing ranges, without ever mentioning any conception of jury involvement although they were composing the Sixth Amendment at the very same time, has constitutional import. We do not contend that this history settles the issue, only that it is too important to ignore. Sadly, it is likely to be discounted at this late date — we seem to be too far down the *Blakely* road, though it has been only a few months, to re-consider the constitutional issue afresh.[3] At the very least, however, this unconsidered evidence shows that the Framers were fully aware that judicial fact-finding would be necessary to set precise sentences for the federal crimes they were defining. Yet they never connected their within-range sentencing regime to any aspect of their Constitutional jury guarantees. Further responses to some of Justice Scalia's criticisms of the dissenters' constitutional views can be found in the Petition at pages 6–7 & n. 9.

On the Cutting Room Floor

The Supreme Court's rules provide that a Petition for Rehearing can be only 10 pages long, and that no supportive amicus briefs are permitted. Washington State was thus somewhat constrained in how much it could offer in its Petition. Moreover, we were rushing to file the Petition so that it could be considered at the same time as the Solicitor General's expedited *certiorari* petitions in *Booker* and *Fanfan*.[4] (In fact our Petition was listed for the same Court conference as *Booker* and *Fanfan*; we do not know if it was actively considered at that time. It was not denied until three weeks later.) Consequently, we were compelled to cut three pages (close to 25%) of our draft on the morning of its printing. Two of the arguments we eliminated may be of interest.

The first "cut" argument noted the possible irony that a guidelines system enacted directly by a legislature (Washington's) might be struck down, while a "sentencing commission's" administrative construct might yet be upheld:

> "Washington State is committed to its guideline system, developed after many years of study and well before the federal system. Washington's system represents a democratic legislative choice, rather than the views of an administrative commission. Indeed, Washington's system is more discretionary than, and free of criticisms leveled against, the federal system. Washington's structure does not *mandate* any upward adjustment, no matter what the facts; has few and reasonable mandatory minimums; and prohibits aggravated sentences based on facts that would establish any additional or more serious crime."

Our second "cut" argument addressed the specific facts of Mr. Blakely's case, and the "harmlessness" of any non-jury sentencing determination, a la *United States v. Cotton*, 535 U.S. 625 (2002). The aggravating factor in Mr. Blakely's case was "deliberate cruelty." But Blakely never contested his actions: he kidnapped his estranged wife at gunpoint, and as he compelled his terrified 13 year-old son to watch, Blakely put his wife (the boy's mother with whom he lived) in a coffin-sized box in the back of his pickup. Blakely then ordered the boy to *drive* a following car, alone, for many miles or he would kill the boy's mother. (Indeed, Mr. Blakely is currently back in custody on charges that he subsequently hired a killer to murder his wife and daughter.) Blakely's only argument at sentencing was that his cruelty was not "deliberate," but the sentencing judge found that that particular argument had been waived. With the basic facts conceded, the only remaining issue to be decided under the Washington statute was whether the facts amounted to cruelty "substantial and compelling" enough to warrant an aggravated sentence. This seems plainly to be an issue of judgment, not fact, of the sort traditionally reserved for judicial determination. Moreover, wasn't the evidence on this factor "overwhelming" and "essentially uncontroverted," which *Cotton* says is the standard for harmless *Apprendi* error?

Ah, well, such are the choices any appellate briefwriter makes. And it didn't seem to matter — the Court continued its unbroken 40-year history of denying Petitions for Rehearing. But whether or not a formal rehearing petition was granted, there is no doubt that this Fall's cases will require the Justices to reconsider the constitutional theory of *Blakely*. As Justice Breyer suggested in his dissent (counselling "further argument"), it would have been fairer to allow Washington State to participate in that reconsideration, rather than be the sole jurisdiction, at this moment, whose sentencing system has been declared unconstitutional (although experts believe that over 20 other States may be affected).

One further thought. Supreme Court rule 44.1 suggests that *Blakely*'s dissenting Justices could not take part in any rehearing evaluation. The same will not be true this Fall in *Booker* and *Fanfan*. Perhaps the "lost" history of *Apprendi* will be considered there.

Notes

1 *Accord, McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986) (although the ineluctable force of the *Apprendi-Blakely* engine may well put the result in *McMillan* at risk, as explained in

Justice Breyer's concurrence in *United States v. Harris*, 536 U.S. 545, 569 (2002)). Even Justice Stevens' dissenting views regarding constitutionally-required jury sentencing have been limited to the capital context, in *Spaziano v. Florida*, 468 U.S. 447, 476, 482 (1984). Justice Stevens' early-stated views in *Spaziano* also go far to explain his steady, if unusual, alliance with Justice Scalia over a decade later in the *Apprendi* doctrinal line.

[2] On this point, one of the many ironies of *Blakely* is that its newly discovered constitutional limit on legislatively-directed sentencing schemes comes principally from Justice Scalia, who of course has been the Court's leading proponent of constitutional originalism and "plain language" limitation. Compare, for example, Justice Scalia's dissenting opinion in *Dickerson v. United States*, 530 U.S. 428, 465 (2000), issued the same day as *Apprendi*: "The proposition that the Supreme Court has power to impose extra-constitutional constraints upon the States" is "not the system that was established by the Framers."

[3] We think it is clear that this history can influence the *Blakely* issue without requiring overruling *Apprendi*. Indeed, a constitutional distinction between facts that simply direct discretion within a clear and reasonable statutory range, versus facts that can increase the range, seems unremarkable. It is quite simply the basic distinction between separate offenses and a *single* offense that provides for individualized distinctions within an indeterminate sentencing range.

[4] A separate "Motion for Expedited Consideration and Argument in Tendem with the Federal Cases" was filed concurrently with our Petition (and was likewise denied on August 23).

Petition for Rehearing on Behalf of The State of Washington

in *Blakely v. Washington*, No. 02-1632 (filed July 26, 2004)

[Original page numbers appear in breakets]

[Page 1] "The Court has rightly been parsimonious in ordering rehearings, but the occasions on which important and difficult cases have been reargued have, I believe, enhanced the deliberative process." *City of Detroit v. Murray Corp.*, 357 U.S. 913, 915 (1958) (Frankfurter, J., dissenting from denial of rehearing).

In dissent to this Court's June 24, 2004, ruling in this case (*Blakely* "Slip Op."), Justice Breyer proposed that this case be scheduled for "further argument." Slip Op. at 21 (Breyer, J., dissenting). In addition to the serious concerns Justice Breyer raised, Washington State now provides to the Court significant historical evidence not considered in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or in this case. *See* Slip Op. at 6 ("we compiled the relevant [historical] authorities in *Apprendi*... and need not repeat them here"). This evidence bears directly on the Framers' intent regarding indeterminate sentencing statutes. It indicates that an historical assumption that was centrally relied upon in *Apprendi* (and incorporated in *Blakely*) was erroneous. Consideration of this new, precept-altering historical evidence merits rehearing. *See Reid v. Covert*, 352 U.S. 901 (1956) (granting rehearing in right to jury trial case, in part to consider "historical evidence" bearing on Framers' intent).

In addition, the unprecedented turmoil and confusion that this Court's June 24 decision engendered was not fully appreciated when the ruling was issued. *See* Stern, Gressman, *et al.*, *Supreme Court Practice*, (8th ed. 2002) at 729. For example, although the Court referenced possible effects on the sentencing structures of nine States (*see* Slip Op. at 11, O'Connor, J., dissenting), it is now clear that the number of States that will be adversely affected is at least *double* that number.[1] It is also becoming increasingly clear [Page 2] that the effects of this Court's opinion will be adverse to the long-term interests of criminal defendants.

Finally, since June 24, 2004, two expedited certiorari petitions have been filed by the United States, requesting "guidance" about the federal sentencing guidelines. *See* Petitions for Certiorari in *United States v. Booker*, No. 03-104 and *United States v. Fanfan*, No. 03-105 (filed July 21, 2004). It seems clear that this Court will very soon be readdressing the constitutional underpinnings of its June 24 decision. Rather than being narrowly limited to the federal regime, the upcoming arguments will surely have to address the "deep structure" of *Blakely* and *Apprendi*, and will directly impact the interests of dozens of States.

For all these reasons, Washington hereby respectfully requests that rehearing be granted in its case and (by an accompanying Motion) that reargument be scheduled in tandem with the upcoming federal cases.

I. The Historical Evidence the Court Has Relied On to Interpret the Meaning of the Fifth and Sixth Amendments is Inaccurate and Incomplete

Underlying both the *Blakely* majority opinion and the principal dissent was an assumption that the Framers

were unfamiliar with judicial discretion in criminal sentencing, *i.e.*, indeterminate sentencing schemes. The *Blakely* majority merely incorporated what *Apprendi* said on this point. *Blakely* Slip Op. at 6; *see, e.g., Apprendi*, 530 U.S. at 481 (asserting that at the time of the framing of the Constitution and the Bill of Rights, "statutes provid[ed] fixed-term sentences"). The dissenters here also accepted this assumption, *see* Slip Op. at 10 (O'Connor, J., dissenting) ("Because broad judicial sentencing discretion was foreign to the Framers, ...").

However, the Court was in error insofar as the Framers themselves were concerned. Historical records confirm [Page 3] that, whatever may have been the situation in English courts or at common law, the Framers themselves *wrote* discretionary, indeterminate criminal sentencing provisions.[2] In 1789–90, the First Congress — the same legislators who contemporaneously adopted the Bill of Rights, *see* 1 Stat. 97 (Sept. 1789), — enacted numerous indeterminate sentencing provisions.[3] For example, that legislation (endorsed by influential Framers who were in that Congress such as James Madison) defined the following federal crimes and yoked them to the following indeterminate punishments:

- Misprision of treason, "shall be imprisoned not exceeding seven years" (1 Stat. 112, Sec. 2), thus creating a sentencing range of zero to 84 months;
- Misprision of felony, "shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars" (1 Stat. 113, Sec. 6), thus creating a fine range and an imprisonment range of zero to 36 months;
- Stealing or falsifying court records, "shall be . . . imprisoned not exceeding seven years, and whipped not exceeding 39 stripes" (1 Stat. 115–116, Sec. 15), thereby creating a range of zero to 84 months and recognizing alternative sanctions.

[Page 4] Similar indeterminate sentencing ranges were enacted for an additional 13 federal crimes.[4] Rather than being "foreign" to the Framers, it was the consistent pattern of their legislation.

The erroneous notion that precise criminal sentences were "invariabl[y] link[ed]" with the statutory definition of the crime "during the years surrounding our Nation's founding" (*Apprendi*, 530 U.S. at 478), was not expressed merely in passing. Rather, it was repeated over and over in the Court's six-page historical discussion.[5]

This historical error takes on great significance, when one compares the questions presented in *Apprendi* and [Page 5] *Blakely*. In *Apprendi*, the erroneous historical assumption may have gone unexplored because it could be viewed as inconsequential to the question of facts directed by a legislature to *increase* the statutory range tied to a crime. Indeed, the *Apprendi* Court stressed this distinction immediately after canvassing common law — not federal — history. *See* 530 U.S. at 481 (stressing that *Apprendi* did not involve "imposing a judgment *within the range* prescribed by statute") (emphasis in original).[6] However, when *Blakely* directly presented the question of legislatively-directed sentencing *within* a prescribed statutory range, the erroneous historical assumption was simply incorporated by reference without analysis.

Because the history that Washington now presents bears directly on the Framers' understandings as they wrote the Fifth and Sixth Amendments, and has never been examined by this Court, rehearing is appropriate. *Reid v. Covert, supra*, 352 U.S. at 901; *accord Flora v. United States*, 362 U.S. 145, 167 (1960) (granting rehearing because a factual assertion in the Court's prior opinion was shown to have been erroneous).[7]

This Court has recognized that giving interpretive content to Bill of Rights provisions should be "guided by the meaning ascribed to [the words] by the Framers of the Amendment[s]." *Wilson v. Arkansas*, 514 U.S. 927, 931 [Page 6] (1995). But in this case, direct evidence of the Framers' understandings about criminal sentencing, contemporaneous with their consideration of the Fifth and Sixth Amendments, has been overlooked by the Court. It simply is not accurate that the Framers were relying on a practice of "fixed-term sentences" when they enshrined the constitutional right to jury trial. Rather, the Bill of Rights' authors wrote *indeterminate* criminal sentencing provisions. Yet they said nothing to suggest that the jury trial right they were simultaneously advocating would apply to facts relevant to such sentences.

It cannot be ignored that the Framers were Legislators as well as Constitution-writers. While venerating the right to trial by jury, they also strongly believed in the authority of legislation. It is difficult to imagine that the same legislators who wrote the Sixth Amendment *as well as* many indeterminate criminal sentencing statutes would have, at the same time, thought unconstitutional legislative directions given to judges as to how to sentence *within* the ranges they wrote. Rather, it seems likely that the Framers would have *approved* of giving legislative direction to sentencing judges, had they seen any need for it.

The Court's June 24 opinion took Justice O'Connor to task for an absence of "*any* [historical] evidence." Slip Op. at 6 n.6 (emphasis in original). But it now appears that, in fact, the Court's own historical account was incomplete and erroneous. Moreover, silence can sometimes "speak volumes:" it can be powerful evidence of the *absence* of definitive constitutional or legislative intent.[8] Had the Framers believed that aggravating facts relevant to sentencing within the ranges they wrote would be required, under any scenario, to be the special province of [Page 7] the jury, one imagines that they might have said *something* about it.[9]

It must be emphasized, however, that the Court need not decide now what bearing its historical misunderstanding in *Apprendi* has on the ultimate issues presented here.

Rather, this new historical evidence is sufficient to counsel rehearing. *Reid v. Covert, supra.* The appropriate occasion for full investigation and evaluation should be a rehearing, not merely the glimpse this Petition provides. The issues are too weighty, and the impact on the States too disruptive, not to merit the fullest and fairest hearing opportunity.

II. Because this Court Will Soon Again Hear Arguments About *Apprendi*, Fairness to the State of Washington Supports Reargument in this Case

Since *Almendarez-Torres v. United States*, 523 U.S. 224, 250–260 (1998) (Scalia, J., dissenting), the law of criminal sentencing in the United States has been in turmoil. Six years later — and four weeks after this court's June 24 opinion — the situation is no better. Unprecedented [Page 8] turmoil and uncertainty in theory and in practice reign. It is inevitable that this Court will soon have to confront again the underlying constitutional theory of the *Apprendi* line of cases. *See Booker* and *Fanfan* Petitions, *supra.*

The Fall arguments this Court is likely to allow cannot, however, realistically be restricted to the narrow question of "does *Blakely* invalidate the federal guidelines?" Instead, the Court will be compelled to analyze the roots of *Apprendi*, to address the question whether various distinctions presented by the United States make any *constitutional* difference.

Accordingly, not just the federal sentencing guidelines, but also the guideline systems in at least 19 states (*see* n.1, *supra*), will be at issue in this Court's Fall arguments. Many unanswered questions — including severability of guidelines, facts that initially establish sentencing guideline ranges, prior convictions, consecutive sentences, mandatory minimums, retroactivity, and harmless error doctrines — will be pressed upon the Court. These issues are vital to the 19 affected States and are present in Washington State's case. If the Court does not revise its initial ruling in this case — although the new historical evidence presented above provides ample occasion to do so — reargument would present a full and fair opportunity to address these issues as they affect the States.

Washington is a sovereign jurisdiction no less than the federal government. So too are the 18 other States whose chosen sentencing systems are now affected. "Fair federalism" should not countenance Washington's system being condemned, in a decision that changed common understanding of the law in a way surprising even to seasoned observers, while all other systems are still being considered and the constitutional theory is being reexamined.

If, as seems certain, the Court is going to reconsider the theoretical underpinnings of *Apprendi* as applied to legislatively-directed sentencing within indeterminate ranges, then Washington should be allowed to reargue this [Page 9] case as part of that enterprise. If any change in analysis is accepted by even one Justice in the majority, the effect could be a significantly different ruling for Washington's statutes. Washington's system should be kept alive rather than condemned before all others.[10] Washington can fully represent the interests of many States as this Court further develops its thinking.

Finally, although this Court earlier stated that its decisions in this area "would in no way hinder the States (or the National Government) from choosing to pursue policies aimed at rationalizing sentencing practices." *Jones v. United States*, 526 U.S. 227, 251 n.11 (1999), it is now apparent that the practical difficulties in complying with the Court's June 24 decision will, in fact, prevent many States from pursuing the sentencing regimes their legislatures prefer. Indeed, it seems increasingly likely that Legislatures will adopt statutory responses that are less favorable to the overall interests of criminal defendants. Thus some Members of Congress responded immediately to *Blakely* by advocating more "mandatory minimum" imprisonment statutes. Brent Kendall, "Bill Adds, Increases Mandatory Minimums," *The Daily Journal*, at 3 (July 6, 2004) (Rep. Coble: "mandatory minimums may well take on added importance . . . as a result of the Supreme Court's action"). While *Blakely* will produce short-term windfall benefits to some criminal defendants, many experts are coming to agreement that its long-term will include many adverse consequences for that group, including increasing sentencing ranges to the statutory maxima, rolling back sentencing "transparency" and effective appellate review, increasing prosecutorial power, and placing prejudicial facts before juries deciding [Page 10] guilt or innocence.[11] If members of the June 24 majority harbored the view that their ruling would lead to more fairness or other benefits for criminal defendants, they ought to vote for rehearing now.

Conclusion

This Court now knows two things it did not know on June 24, 2004: (1) it has proceeded in this area based on a significant historical misunderstanding about the Framers; and (2) its June 24 decision has produced greater disruption, and more adverse consequences for defendants, than the majority had anticipated. The issues are too important to over a third of the States not to permit full consideration of the accurate historical record, and to permit a well-represented State to participate in the expedited consideration that is forthcoming.

Thus the State of Washington respectfully requests this Court to grant it rehearing and expedited scheduling of argument in tandem with the federal cases (or, in the alternative, "hold" this Petition, *see* n.10 *supra*).

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Notes to Petition for Rehearing

[1] Email from Jon Wool, The Vera Institute of Justice, to Rory Little (July 23, 2004) (copy on file with Clerk). For example, on July 22, 2004, the Governor of Tennessee appointed a Commission to address the disruption. *See generally* Douglas Berman, "Sentencing Law and Policy Blog," http://sentencing.typepad.com.

[2] In this sense the Framers themselves were progressive sentencing reformers, making it even harder to imagine that they would have thought unconstitutional the progressive "guided discretion" sentencing reforms of the past 25 years.

[3] The bill, entitled "An Act for the Punishment of Certain Crimes Against the United States," 1 Stat. 112–119, was under consideration from May 13, 1789, when a Senate Committee was appointed to "report a bill defining the crimes and offences that shall be cognizable under the authority of the United States, *and their punishment*" (1 *Annals of Congress* 36, emphasis added), until passage by both Houses of Congress in April 1790, *see id.* at 999, 1001; 2 *Annals of Congress* 1522.

[4] *See* 1 Stat. 113, Sec. 5 (rescue of executed body, "not exceeding twelve months") and Sec. 7 (manslaughter on federal property, "not exceeding three years"), *id.* at 114, Sec. 11 (accessory after the fact to piracy or robbery, "not exceeding three years"), *id.* at 115, Sec. 12 (confederacy to piracy, or ship's revolt, "not exceeding three years") and Sec. 13 (maiming, "not exceeding seven years"); *id.* at 116, Sec. 16 (larceny, "fine not exceeding the four-fold value of the property ... and be publically whipped, not exceeding thirty-nine stripes"), Sec. 17 (same for receipt of stolen goods); and Sec. 18 (perjury, "not exceeding three years"), *id.* at 117, Sec. 21 (bribery, "shall be fined and imprisoned at the discretion of the court"), Sec. 22 (obstruction of process, "not exceeding twelve months"), Sec. 23 (rescue of federal offenders, "not exceeding one year"), *id.* at 118, Sec. 26 ("violators of the laws of nations, ... not exceeding three years"), Sec. 28 (violation of ambassador, "not exceeding three years"). *See also* 1 Stat. 83, Sec. 19 (emphasis added) ("it shall be the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause *the facts on which they found their sentence* or decree, fully to appear upon the record. ..."); 1 Stat. 175 (customs bribery or false entry, "fine or imprisonment or both, in the discretion of the court ... not [to] exceed twelve months").

[5] *See* 530 U.S. at 478 (sanction-specific statutes were the "general rule;" "The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from *the invariable linkage of punishment with crime*") (emphasis added); 479 (English judges "had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific") (quoting Langbein); 481 ("statutes providing fixed-term sentences"); 482 n.9 ("legislation ordinarily fixes the penalties") (quoting Bishop); 483 ("historic link between verdict and judgment"); 483 n.10 (referencing "the evidence we describe that punishment was, by law, tied to the offense").

[6] Thus, every Circuit to consider the *Blakely* issue after *Apprendi*, and even after *Ring v. Arizona*, 536 U.S. 584 (2002), concluded that legislatively-directed sentencing systems, directing judges how to sentence *within* statutory ranges, were constitutional. *See Booker* Cert. Pet., *supra*, at 10 n.3.

[7] Washington has not previously brought this evidence to the Court's attention. However, "acquir[ing] new wisdom," particularly in the still-evolving *Apprendi* era, is to be encouraged. *Ring v. Arizona*, 536 U.S. at 611 (Scalia, J., concurring). This Court may consider grounds not previously raised by a respondent defending its judgment. *United States v. Estate of Romani*, 523 U.S. 517, 526 (1998). The Court should do so here, where the questions are so important, the evidence of historical error is so clear, and the constitutional precepts have been so fluid since *Apprendi*.

[8] *See, e.g., Alden v. Maine*, 527 U.S. 706, 741 (1999) ("We believe ... that the founders' silence is best explained by the simple fact that no one ... suggested the document might strip the States of the immunity."). *See also Seminole Tribe v. Florida*, 517 U.S. 44, 70 (1996); *Chisolm v. Roemer*, 501 U.S. 380, 396 & n.23 (1991); *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 294 (1989).

[9] As for providing a "coherent alternative meaning for the jury-trial guarantee," Slip Op. at 6 n.6, it would be merely the simple one with which the Framers were familiar: the Legislature defines the crime, and the defendant has the right to ask a jury whether the facts prove him or her guilty. Thus here, Blakely was charged with kidnaping, a simple common-law crime, and he pled guilty, thereby authorizing a sentence of up to 10 years imprisonment. All the facts "essential" to a punishment up to 10 years were encompassed by his plea: Washington's legislature has declared that only the elements of kidnaping simpliciter are "essential" to authorize that full punishment. *Cf.* Slip Op. at 5, 7 (facts "essential to the punishment" must be found by the jury). The rest is merely legislative direction about the details of within-range sentencing, transmitted directly to sentencing judges. As this Court recognized in *Apprendi*, the Framers designed "structural democratic constraints" that would block extreme abuses of these principles. 530 U.S. at 490 n.16.

Given the relatively small number of crimes extant in 1790 and the clarity and simplicity of their elements, the Framers had no need to consider, or intend, more meaning than this. Their simple understanding ought to control interpretation of the Sixth Amendment here.

[10] For this reason, even if the Court does not grant rehearing, we entreat the Court to "hold" this Petition for Rehearing until the results in *Booker* and *Fanfan* are announced. Allowing final judgment to issue against Washington now, while a major examination of the area is scheduled for the coming Fall, is simply unfair.

[11] For articles and testimony detailing the impacts of, and proposed responses to, this Court's June 24 decision, *see, e.g.*, Mark Osler, "The 3x Solution;" Stephanos Bibas, "*Blakely's* Federal Aftermath;" and King & Klein, "Beyond *Blakely*," all forthcoming in 16 *Fed. Sent. Rep.* (Summer 2004) and available at the Berman website, *supra* n.1; and Frank Bowman, "Memoranda to U.S. Sentencing Commission" (June 27 and July 16, 2004), also available on the Berman website.