No. 05-1078

In the
SUPREME COURT OF THE UNITED STATES

State of Minnesota, *Petitioner,*

vs.

James A. Allen, *Respondent.*

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Minnesota

BRIEF IN OPPOSITION

BENJAMIN J. BUTLER
Assistant Minnesota State Public Defender

Office of the Minnesota State Public Defender
2221 University Avenue SE
Suite 425
Minneapolis, Minnesota 55414
(651) 627-6980

Counsel of Record
Attorney for Petitioner

BRIEF IN OPPOSITION

Respondent James A. Allen respectfully submits the following brief in opposition to the petition for writ of certiorari filed in the above-named matter. The petition should be denied for at least three reasons: first, there is no split of lower-court authority for the Court to resolve on the issue on which petitioner seeks certiorari; second, the rule proposed by petitioner would run afoul of years of Supreme Court precedent; and third, this case is not the proper vehicle for addressing petitioner's concerns.

I. THE LIMITED NATURE OF THE ISSUE.

In the Minnesota Supreme Court, petitioner contended that respondent's sentence was imposed in a constitutional manner on two grounds:

> The state argues that: (1) the constitutional rule [announced in Apprendi and applied in Blakely] is concerned with the length of the sentence, and a dispositional departure merely alters its mode of service; and (2) the rule requires the state to prove facts relating to the offense sought to be punished, not facts relating to the offender.

Pet. App. at 6.[1] These issues were separate and distinct, and the Minnesota Supreme Court considered them as much. Pet. App. at 7-9 (considering the first issue); at 9-11 (considering the second issue).

Petitioner seeks certiorari of the second issue only: whether Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), affect "offender-related facts." Pet. at i; 3; 4 (addressing "whether Blakely applies to offender-

[1] "Pet. App." refers to the appendix in the petition for writ of certiorari, which reproduces the Minnesota Supreme Court's opinion.

related facts"); 9-13 (addressing an alleged "offender/offense distinction").[2] Although the petition touches upon the first issue[3], petitioner does not seek certiorari of the Minnesota Supreme Court's decision that the type of sentencing enhancement imposed upon respondent falls under Blakely. Therefore, the sole question is whether the Court should consider if respondent's alleged unamenability to probation – which unquestionably enhanced the available sentence from probation to prison – qualifies as "any fact" for Apprendi and Blakely purposes.

II. THERE IS NO SPLIT OF LOWER-COURT AUTHORITY ON THE ISSUE.

Petitioner contends that certiorari is needed to "resolve a split among the states that have considered the breadth of the Blakely rule." Pet. at 4. No such split exists.

Petitioner suggests that the Court adopt the following rule: that facts labeled as "offender-related" do not qualify as "any fact" under Blakely and that, therefore, the Minnesota Supreme Court's decision in this case is incorrect. No state supreme court in the country has adopted this rule.[4] To be sure, a few courts have adopted an expanded interpretation of Blakely's prior-conviction exception, and have held that facts related to

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[2] "Pet." refers to the petition for writ of certiorari.

[3] See Pet. at 4 n. 2; 9.

[4] There is something of a split on the nature of the sentencing enhancement. The Kansas Supreme Court, relying upon state law, held that Apprendi did not affect dispositional departures. State v. Carr, 53 P.3d 843, 850, 852 (Kan. 2002). But Carr only discussed the nature of the sentencing enhancement (probation to prison) and did not rely upon, or even discuss, the nature of the fact at issue (offender vs. offense-based). Because petitioner does not seek certiorari of any issues concerning the nature of the enhancement, Carr is inapposite.

an offender's prior convictions fall within that exception and are therefore "sentencing factors" that do not have to be proven to a jury beyond a reasonable doubt. See, e.g., DeHerrera v. People, 122 P.3d 992, 994 (Col. 2005) (holding that "the short period of time between [the defendant's] release from prison and the commission of the offense in this case" qualified as a "Blakely-exempt" factor under the prior-conviction exception); Lopez v. People, 113 P.3d 713, 723 (Col. 2005) (describing "prior conviction facts" as "Blakely-exempt"). But no court has held that all offender-related facts are *per se* exempt from the Sixth Amendment.[5] Indeed, the only authority that petitioner presents for its proposed distinction is the work of one law professor. Pet. at 11-12. There is no split of authority for the Court to resolve and the petition should be denied.

III. PETITIONER'S PROPOSED RULE WOULD RUN AFOUL OF THE COURT'S WELL-ESTABLISHED PRECEDENT.

In Apprendi v. New Jersey, the Court announced the following constitutional rule:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi, 530 U.S. at 490; see also Blakely, 542 U.S. at 301 (applying Apprendi rule to upward departures in guidelines-sentencing schemes). Petitioner asks the Court to hold that it did not really mean what it said; that it is not "*any* fact that increase the penalty"

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[5] Most courts that have specifically considered this issue have rejected any such distinction. See, e.g., State v. Foster, ___ N.E.2d ___, 2006 WL 509549, *9, *12-14, *18, 2006-Ohio-856 (Ohio 2006) (holding that all facts required to enhance sentence, including "recidivism factors" that are not the fact of a prior conviction, are subject to Blakely); State v. Hughes, 110 P.3d 192, 202 (Wash. 2005); Smylie v. State, 823 N.E.2d 679, 682, 687 (Ind. 2005), *cert. denied*, 126 S.Ct. 545 (2005); Kaua v. Frank, 436 F.3d 1057, 1061-62 (9th Cir. 2006) (rejecting "intrinsic"/ "extrinsic" distinction).

(emphasis added) that triggers the Sixth Amendment, but rather it is any *offense-based* fact. Nothing in this Court's caselaw suggests that such a rule would be a proper interpretation of the Sixth Amendment. In fact, if adopted, petitioner's rule would call into doubt the results reached in the Apprendi line of cases.

Petitioner's rule would be contrary to nearly six years of precedent. Apprendi made clear that, when determining which facts receive Sixth Amendment protection, "the relevant inquiry is one not of form, but of effect." 530 U.S. at 494; Blakely, 542 U.S. at 303-05 (holding that, because effect of finding aggravating factors was to expose defendant to an enhanced sentence, those facts had to be proven to a jury beyond a reasonable doubt). "If a State makes an increase in the defendant's sentence contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 602 (2002) (citing Apprendi, 530 U.S. at 482-83); see also Ring, 536 U.S. at 589 (holding that defendants "are entitled to jury determination of *any* fact on which the legislature conditions an increase in maximum punishment") (emphasis added); United States v. Booker, 125 S.Ct. 738, 756 (2005) (holding that Apprendi rule applies to *"[a]ny* fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum") (emphasis added).

Minnesota law made respondent's prison sentence contingent upon the finding of some fact beyond the elements of the offense with which he was charged. Pet. App. at 7-9 (Minnesota Supreme Court's explanation of presumptive stayed and executed prison sentences under the Minnesota Sentencing Guidelines). In this case that fact was

respondent's alleged unamenability to probation. Under Apprendi and its progeny, the Minnesota Supreme Court correctly held that that fact had to be proven to a jury beyond a reasonable doubt.

If "offender-based facts" are not subject to the Apprendi rule, then the Court will have to reevaluate the cornerstone of its recent Sixth Amendment jurisprudence; Apprendi itself is the most famous example of an offender-based fact, the offender's motive for committing the crime, leading to an unconstitutional increase in sentence. At issue in Apprendi was a New Jersey law that allowed for a 10 to 20 year sentencing enhancement if the sentencing judge found that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity." Apprendi, 530 U.S. at 468-69 (statutory citation omitted). Charles Apprendi "fired several .22-caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood." Id. at 469. Apprendi said that he committed the crime "because they are black in color he (sic) does not want them in the neighborhood." Id. (citation omitted). The Court held that because Apprendi's motivation (or "purpose" in the language of the statute) for committing the crime authorized an otherwise unavailable sentence, it was the functional equivalent of an element of the offense and had to be proven to a jury beyond a reasonable doubt. Id. at 490, 494 n. 14.

The defendant's motive for committing the crime – the fact at issue in Apprendi – is a classic offender-based fact. Apprendi's racial animus towards African-Americans had nothing to do with *how* the crime was committed; it was only relevant to *why* the

crime was committed. If the crime has been committed in exactly the same way (firing several .22.caliber bullets into the victims' house) but by a different offender, the fact at issue, the offender's motive, would not have been relevant. Cf. Pet. at 13 (stating proposed rule). If offender-based facts are immune from the Apprendi rule, then Apprendi itself is in serious jeopardy.

Further support for the Court's "effects-based" jurisprudence is found in Ring. There, the Court considered an Arizona statute which authorized death as a penalty for murder only if the sentencing judge found one or more "aggravating circumstances." Ring, 536 U.S. at 593. Among the circumstances listed in the statute were whether "[t]he defendant has been convicted of another offense [for which he could receive a life sentence];" whether [t]he defendant was previously convicted of a serious offense;" and whether "[t]he defendant committed the offense while in the custody of or on authorized release from the state department of corrections, a law enforcement agency or a county or city jail." Id. at 592 n. 1 (statutory citations omitted). These are "offender-related facts" under petitioner's proposed rule; they relate only to the particular offender and not to the facts of the specific offense. But the Ring Court drew no distinction between these facts and the offense-related facts listed under the Arizona statute. The only question was whether the effect of finding *any* of the facts exposed the defendant to the death penalty. Id. at 603-05, 609 ("we overrule Walton to the extent that it allows a sentencing judge, sitting without a jury, to find *an* aggravating circumstance necessary for imposition of the death penalty.") (emphasis added, citation omitted).

If adopted, petitioner's proposed rule would dramatically alter nearly six years of Sixth Amendment and sentencing jurisprudence carefully set forth by the Court. It would return the jurisprudence to the "labeling" rule that the Apprendi Court rejected.[6] Because the rule finds no support in this Court's precedent, the petition should be denied.

IV. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR ADDRESSING ANY OFFENDER/OFFENSE DISTINCTION.

Even if the Court wishes to explore a possible offender/offense distinction in facts eligible for Sixth Amendment protection, this case is not an appropriate vehicle for doing so for at least three reasons. First, as discussed above, petitioner does not seek certiorari on issues concerning the type of sentencing enhancement at issue here: the dispositional departure of moving from probation to prison. Because that issue is not before the Court, any attempt to tie the offender/offense distinction to a distinction in the type of sentencing enhancement would not be proper.[7]

Second, the policy concerns with applying Blakely to dispositional departures raised in the petition, see Pet. at 6-7, can be and have been adequately dealt with by the state courts and the state legislature. In a series of well-reasoned opinions, the Minnesota Supreme Court held that state sentencing policy is best served by applying Blakely to the

[6] Whether a particular fact has to be found by a jury would no longer turn upon the effect of the fact upon the available sentence, see Apprendi, 530 U.S. at 494; Ring, 536 U.S. at 602 (citing Apprendi, 530 U.S. at 482-83); Blakely, 542 U.S. at 303-05, but rather upon its label as offender- or offense-based.

[7] The Minnesota Court of Appeals, for example, based its decision in State v. Hanf, holding that Blakely did not affect dispositional departures or offender-based facts, on a combination of factors including the nature of the sentencing enhancement and the nature of the fact at issue. Pet. App. at 22-36 (reproducing Hanf).

Minnesota sentencing system and leaving the task of responding to the legislature and the state Sentencing Guidelines Commission.[8] The legislature and the Guidelines Commission have responded accordingly.[9] The Minnesota Supreme Court, the Minnesota Legislature, and the Minnesota Sentencing Guidelines Commission are perfectly capable of addressing the policy concerns discussed in the petition.

Third, even if the Court grants the petition, this case will likely be moot before the Court issues an opinion. Following the issuance of the Minnesota Supreme Court's opinion, and after the 10-day period for filing a petition for rehearing with that court had lapsed,[10] respondent was re-sentenced. See Transcript of "Sentencing Hearing," Dec. 9, 2005, attached in appendix. The district court judge sentenced respondent to three years of unsupervised probation retroactive to October, 2003. Sent. Trans. at 8-10. Respondent's probation is scheduled to expire in October, 2006, and he has no probationary conditions other than to "stay out of trouble." Id. at 10. By the time the

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[8] See State v. Shattuck, 704 N.W.2d 131, 147-48 (Minn. 2005) ("we leave to the legislature the task of deciding how the Sentencing Guidelines system should be altered to comport with [Blakely]"); see also State v. Barker, 705 N.W.2d 768 (Minn. 2005); State v. Allen, 706 N.W.2d 40 (Minn. 2005); State v. Henderson, 706 N.W.2d 758 (Minn. 2005).

[9] See 2005 Minn. Laws, ch. 136, art. 16, §§ 3-6, *codified at* Minn. Stat. §§ 244.10, subd. 3-7 (2005) (authorizing "sentencing juries" to make findings required to impose enhanced sentences under the Guidelines); 2005 Minn. Laws, ch. 136, art. 16, § 14, *codified at* Minn. Sent. Guidelines II.D (2005) (amending Minnesota Sentencing Guidelines to allow for "sentencing juries" and to allow jury findings to authorize departures from presumptive sentences).

[10] See Minn. R. Civ. App. P. 140.01 (allowing petitions for rehearing in the Minnesota Supreme Court "within 10 days" of filing of opinion).

Court issues an opinion in this case, it is highly likely that respondent will have been discharged from probation and will no longer be serving a sentence in this matter.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

BENJAMIN J. BUTLER
Assistant Minnesota State Public Defender

Office of the State Public Defender
2221 University Avenue SE
Suite 425
Minneapolis, Minnesota 55414
(651) 627-6980

Counsel of Record
Attorney for Petitioner