No. 20-1062

In the Supreme Court of the United States

CHAD BENNETT,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Washington

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

This Court has made clear that states may not evade the Constitution through relabeling. Prior to 2004, Washington State insisted *Apprendi*'s Due Process holding did not apply to its aggravating factors because Washington's aggravators were not "elements" and did not increase the "maximum" punishment. But this Court held otherwise, explaining, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (emphasis in original). Moreover, "any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime," regardless of whether a statute labels it an element. *Alleyne v. United States*, 570 U.S. 99, 111 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). The protections of the Sixth and Fourteenth Amendments apply to "all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane…." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

In its opposition brief, the State calls Washington's current sentencing scheme "advisory" in a renewed effort to avoid the dictates of Due Process. But this recharacterization cannot conceal the truth: Washington's aggravators are elements because they increase the prescribed range of penalties to which a criminal defendant is exposed. Judges are not merely "advised" to sentence at or

below the top of the standard range; they *must* do so *unless* the jury finds an aggravating factor beyond a reasonable doubt.

Like any other element, an aggravating factor is void for vagueness if it permits arbitrary enforcement or fails to provide fair notice. Many states allow defendants to challenge aggravating factors as vague in violation of the Due Process Clause, but Washington and Minnesota do not. This Court should grant certiorari to resolve the split and enforce the Fourteenth Amendment.

ARGUMENT

I. Aggravating factors are elements of a crime subject to due process protections.

The word "element" is nowhere found in the opposition brief. But the State concedes, as it must, that a judge may not impose a sentence above the standard range unless the jury finds an aggravating factor beyond a reasonable doubt. BIO 2, 5. Thus, aggravating factors are elements. *Alleyne,* 570 U.S. at 111. Elements may be challenged as unconstitutionally vague. *Johnson v. United States*, 576 U.S. 591, 596 (2015).

The State implies that only elements raising the *minimum* term are subject to due process constraints, while elements increasing the *maximum* available sentence are exempt from Constitutional protections. BIO 5. It argues that, unlike the statute subject to a vagueness challenge in *Johnson*, an aggravating factor in Washington "does not fix or otherwise increase the length of minimum sentences." *Id.* Instead, it "expands the

maximum sentencing range to the maximum term allowed for the class of crime for which the offender is convicted." BIO at 5.

This argument is wrong and ironic. Long before this Court recognized that so-called "sentencing factors" raising a minimum term were actually "elements" subject to constitutional protection, this Court held that aggravating factors raising the *maximum* available sentence were elements subject to the Due Process Clause. *Alleyne*, 570 U.S. at 111 (recognizing factor raising minimum term was an element); *Apprendi*, 530 U.S. at 476-77 (recognizing aggravating factor raising maximum punishment was an element subject to the Due Process Clause of the Fourteenth Amendment); *accord id.* at 501 (Thomas, J., concurring) ("The aggravating fact is an element of the aggravated crime"). Indeed, this Court did so in a case arising out of Grant County, Washington—the same county in which petitioner was convicted and sentenced. *Blakely*, 542 U.S. at 306 (applying *Apprendi* to Washington's aggravating factors and rejecting relevance of what "the legislature chooses to label elements of the crime"). Whether an aggravator increases only the minimum, only the maximum, or both, it is an element subject to constitutional constraints.

Washington's aggravators are elements, and as such should be subject to vagueness challenges under the Fourteenth Amendment. But unlike most states with mandatory guidelines, Washington does not permit defendants to contest aggravating elements as unconstitutionally vague. This Court should grant certiorari.

II. The State's use of the label "advisory" does not change the fact that judges have no discretion to impose an enhanced sentence absent a jury finding of an aggravating factor.

Although it nowhere uses the term "element" to describe Washington's aggravating factors, the opposition brief repeatedly invokes the label "advisory" in an attempt to characterize Washington's sentencing scheme as analogous to the advisory federal sentencing Guidelines. BIO 1, 10. But federal "advisory Guidelines do not fix the permissible range of sentences." *Beckles v. United States*, ___ U.S. ___, 137 S. Ct. 886, 892 (2017). For example, "even if a person behaves so as to avoid an enhanced sentence under the career-offender guideline, the sentencing court retains discretion to impose the enhanced sentence." *Id.* at 894. Therefore, the advisory Guidelines "are not subject to a vagueness challenge under the Due Process Clause." *Id.* at 892.

In contrast, Washington's guidelines *do* fix the permissible range of sentences, as the State concedes. BIO 2, 5. A judge has no discretion to impose an enhanced sentence above the guidelines range ("standard range") unless the jury finds an aggravating factor beyond a reasonable doubt. Wash. Rev. Code §§ 9.94A.535, 9.94A.537; *Blakely*, 542 U.S. at 303-04. Thus, regardless of the prosecution's label for Washington's mandatory guidelines, Washington's aggravators are subject to

the strictures of the Constitution. *Blakely*, 542 U.S. at 306.[1]

The State protests that sentencing judges "may, but are not required to, impose enhanced sentences up to the statutory maximum upon the jury's unanimous determination of facts supporting an exclusive list of aggravating factors established under Wash. Rev. Code §§ 9.94A.535. Wash. Rev. Code§ 9.94A.537(6)." BIO 5. This is irrelevant to the constitutional analysis. Whether findings on aggravating factors "*require* a sentence enhancement or merely *allow* it," the aggravators are elements subject to constitutional constraints. *Blakely*, 542 U.S. at 305, n.8 (emphases in original).

In sum, the opposition brief eschews the term "element" and invokes the label "advisory," but the facts remain the same: Washington's aggravating factors are elements subject to the Due Process Clause of the Fourteenth Amendment. Washington courts do not acknowledge this rule, but other states with similar schemes allow due process challenges to aggravators. This Court should grant review.

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[1] The State continues to rely on *State v. Baldwin*, 78 P.3d 1005, 1012 (Wash. 2003), without acknowledging that it predated *Blakely* and the resulting statutory amendments requiring proof of aggravating factors to a jury beyond a reasonable doubt before an exceptional sentence may be imposed. BIO 5-6.

III. A deep split remains regarding the availability of vagueness challenges to aggravating elements in state criminal statutes.

The petition demonstrated a split on this issue. New Jersey, North Carolina, and Oregon allow defendants to argue that aggravating factors are vague in violation of the Fourteenth Amendment, while Washington and Minnesota prohibit defendants from raising the issue. Pet. at 1, 11-15 (citing *State v. Pomianek*, 110 A.3d 841 (N.J. 2015); *State v. Houser*, 768 S.E.2d 626 (N.C. Ct. App. 2015); *State v. Speedis*, 256 P.3d 1061 (Or. 2011); *State v. Rourke*, 773 N.W.2d 913 (Minn. 2009)).

The State urges this Court to ignore the above cases because they predate *Beckles*. BIO 7-9. But this makes no sense. *Beckles* is irrelevant to states like Washington, Minnesota, New Jersey, Oregon, and North Carolina, because these states have mandatory guidelines disallowing enhanced sentences absent jury findings on aggravating factors. Pet. 11-15. *Beckles* does not apply to these aggravators; instead, *Apprendi, Blakely*, and *Johnson* apply. The prosecution's disagreement with petitioner on this point mirrors the state courts' disagreement with each other. It is precisely this disagreement that warrants this Court's review. Sup. Ct. R. 10(b).

Courts have recognized that *Beckles* is irrelevant to mandatory guidelines. The First and Seventh Circuits, for example, hold that defendants may challenge career-offender enhancements as unconstitutionally vague if their crimes occurred

before *United States v. Booker,* 543 U.S. 220 (2005) rendered the federal Guidelines advisory. *Shea v. United States*, 976 F.3d 63, 81-82 (1st Cir. 2020); *Cross v. United States,* 892 F.3d 288, 304-06 (7th Cir. 2018).[2] The Seventh Circuit explained, "*Beckles* applies only to advisory guidelines, not to mandatory sentencing rules." *Cross,* 892 F.3d at 291. The First Circuit agrees that the pre-*Booker* Guidelines fell within the "*Apprendi/Alleyne*" framework and were subject to vagueness challenges because they "fixed" sentences. *Shea*, 976 F.3d at 77. Similarly, because Washington's guidelines fall within the *Apprendi/Alleyne* framework, its aggravators should be subject to vagueness challenges. *See Booker*, 543 U.S at 233 (holding that there was "no distinction of constitutional significance between the [then-mandatory] Federal Sentencing Guidelines and the Washington procedures at issue" in *Blakely*).

Likewise, Arizona holds both pre- and post-*Beckles* that aggravating factors are subject to vagueness challenges in light of *Apprendi* and its progeny. In *State v. Schmidt*, 208 P.3d 214, 216-17 (Ariz. 2009), the Arizona Supreme Court held its "catch-all" aggravating factor was vague in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 217. Before reaching the merits, the court explained that aggravating factors are subject to vagueness challenges because this Court had "made clear beyond peradventure" that due process protections apply to factors that increase the

[2] Other circuits have deemed such claims time-barred. *See Shea*, 976 F.3d at 69 (collecting cases).

maximum available sentence. *Id.* at 216 (quoting *Apprendi*, 530 U.S. at 484). Citing *Blakely*, 542 U.S. at 303-04, and *Ring*, 536 U.S. at 609, the court reasoned, "[a]n aggravating factor that subjects a defendant to an increased statutory maximum penalty is … the functional equivalent of an element of an aggravated offense." *Schmidt*, 208 P.3d at 216.[3] And, "[b]ecause protection against arbitrary government action is the quintessence of due process, the rationale of *Apprendi* and subsequent cases requires that we assess the vagueness of the catch-all aggravator in Arizona's sentencing scheme …." *Id.* at 216-17.

Arizona continues to permit vagueness challenges to aggravators after *Beckles*. *See State v. Hernandez*, 476 P.3d 709 (Ariz. Ct. App. 2020). In *Hernandez*, the defendant challenged the aggravator that the "defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value." *Id.* at 711 (quoting A.R.S. § 13-701(D)(6)). The court addressed the issue on the merits, recognizing an aggravating factor is unconstitutionally vague if it "does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and does not provide explicit instructions for those who will apply it." *Id.* at 712 (internal citation omitted). The court affirmed the defendant's sentence after holding he failed to show this particular aggravating factor was unconstitutionally vague. *Id.*

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[3] This Court later jettisoned the "functional equivalent" qualifier. *Alleyne*, 570 U.S. at 111.

In permitting defendants to challenge aggravating factors under the Due Process Clause, Arizona and other states have correctly applied this Court's cases. But Washington and Minnesota continue to prohibit such challenges. This divide persists even though this Court decided *Apprendi* over twenty years ago and *Blakely* seventeen years ago. It persists even though it has been eight years since this Court dispensed with the "functional equivalent" modifier and emphasized that any factor raising either the maximum or minimum punishment is simply an "element" of a greater crime. *Alleyne*, 570 U.S. at 103, 107-08. This Court should grant certiorari to resolve this enduring split.

IV. This case is an excellent vehicle for resolving the important question presented.

This case is the right vehicle for the issue. Petitioner Chad Bennett was aquitted of first-degree murder and convicted only of second-degree murder. App. 16. But he received a sentence that was thirty-five years longer than the top of the standard range, based on aggravating factors he was not allowed to challenge as unconstitutionally vague. App. 77. As the State concedes, other defendants are also regularly subjected to sentences that are decades longer than the top of the standard range, based on aggravating factors Washington prohibits them from contesting under the Due Process Clause. BIO 13, n.3 (citing cases in which "standard range for felony murder 120-160 months; 720 months imposed"; "10 year sentence for first degree theft, 15 times more than the standard range"; "648 month

first degree murder sentence was 315 months longer than standard range"; and case "upholding sentence three times the standard range").

In petitioner's case, a dissenting appellate judge would have reversed for insufficient evidence of the deliberate cruelty aggravator, noting "Bennett sought to kill Moore quickly," and a "brief violent attack is inconsistent with inflicting gratuitous fear or pain." App. 67, n.6. "The State believed Moore died quickly and did not even argue the injuries occurred in a manner designed to inflict pain as an end in itself." *Id.* This judge's disagreement with his colleagues reflects the problems judges and juries have long had distinguishing atypically cruel crimes from the mine-run offense. Pet. 17-19; *cf. Johnson,* 576 U.S. at 601 (describing varied approaches to ACCA's residual clause, which "proved nearly impossible to apply consistently") (internal citation omitted). But the Washington Supreme Court denied review and has long refused to address the issue of whether aggravating factors may be challenged as unconstitutionally vague. App. 67, n. 6, 70-75; Pet. 10. This Court should grant certiorari.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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