

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL VASILIIY KOLESNIK — PETITIONER
(Your Name)

vs.

STATE OF WASHINGTON — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

WASHINGTON SUPREME COURT AND WASHINGTON COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MICHAEL VASILIIY KOLESNIK, DOC# 863743

(Your Name)

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QUESTIONS PRESENTED

1. Following Blakely v. Washington, 542 US 296 (2004), Washington State amended its sentencing statutes; under these statutes, a sentencing court is authorized to sentence a criminal defendant above the statutory standard range if a jury finds beyond a reasonable doubt the following aggravating factor:

The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

The trial court failed to submit the underlined part of the aggravating factor to the jury. Did the trial court violate Petitioner's Sixth Amendment right to a jury trial when it sentenced him above the statutory standard range based on this aggravating factor?

2. Under Washington's sentencing statutes, a sentencing court is authorized to sentence a criminal defendant above the statutory standard range if the State proves to a jury beyond a reasonable doubt the following aggravating factor:

The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

The State presented no evidence to the jury pertaining to the underlined part of the aggravating factor. Did the State violate Petitioner's Fourteenth Amendment right to due process when it sentenced him above the statutory standard range based on this aggravating factor?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Washington Court of Appeals court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from state courts:

The date on which the highest state court decided my case was 10/4/2017.
A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV (Section 1)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RCW 9A.36.011. Assault in the first degree. (eff. in 2005)

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony.

RCW 9.94A.510. Table 1 -- Sentencing grid. (eff. in 2005)

(Please see Appx. E)

RCW 9.94A.515. Table 2 -- Crimes included within each seriousness level. (eff. in 2005)

(Please see Appx. F)

RCW 9.94A.533. Adjustments to standard sentences. (eff. in 2005)

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

...

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. ... :

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

...

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possession of a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

RCW 9.94A.535. Departures from the guidelines. (eff. in 2005)

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for

its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

...

(3) Aggravating Circumstances - Considered By A Jury -
Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

...

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

**RCW 9.94A.537. Aggravating circumstances -- Sentences above
standard range. (eff. in 2005)**

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). ...

...

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

RCW 9A.20.021. Maximum sentences for crimes committed July 1, 1984, and after.

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

...

STATEMENT OF THE CASE

In December of 2005 Petitioner was charged with assault in the first degree for stabbing a police officer with a screwdriver. The State also alleged that Petitioner was armed with a deadly weapon during the commission of the crime. Further, the State alleged that the following aggravating factor was present:

The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

RCW 9.94A.535(3)(v) (2005) (underlined by Petitioner).

Following trial, the jury found Petitioner guilty of assault in the first degree, and also of the deadly weapon enhancement. As to the aggravating factor, however, the jury found only part of it; the trial court did not submit to the jury the underlined part of the aggravating factor, which is quoted above. See Appendix D, Felony Judgment and Sentence (FJS), Special Verdict Form (attached to the FJS). The State also presented no evidence to the jury pertaining to this (same) part of the aggravating factor.

Without a jury finding of the aggravating factor (in its entirety), the trial court was authorized to sentence Petitioner only within the standard sentence range of 135-

171 months in prison, based on Petitioner's criminal history of two prior felony convictions (2 points). See RCW 9A.36.011; RCW 9.94A.515 (2005); RCW 9.94A.510 (2002); RCW 9.94A.533(4)(a) (2003); see also Appx. D, FJS, at 3. The trial court, however, sentenced Petitioner to 240 months of confinement - 69 months above the maximum of the standard range. See Appx. D, FJS, at 6.

In August of 2016, Petitioner filed a Personal Restraint Petition (PRP) in Washington Supreme Court, claiming that his Sixth Amendment right to a jury trial was violated by the trial court's failure to submit part of the aggravating factor to the jury, - the aggravating factor which the trial court relied upon to sentence Petitioner above the statutory standard range. Petitioner also claimed that his Fourteenth Amendment right to due process was violated because the State presented no evidence to the jury pertaining to this same part of the aggravating factor. Washington Supreme Court transferred the PRP to the Washington Court of Appeals for initial consideration.

Washington Court of Appeals, believing that Petitioner's Sixth Amendment claim was time barred, did not address it on the merits. See Appx. B, Order Dismissing Petition, at 2. As to Petitioner's Fourteenth Amendment claim, the Court of Appeals held: "The evidence was

sufficient to prove beyond a reasonable doubt ... that the victim's status as a law enforcement officer was not an element of the crime of first degree assault." Id. The Court of Appeals cited no evidence that it believed was allegedly presented to the jury, to support its conclusion.

Petitioner sought discretionary review in the Washington Supreme Court. As to the Sixth Amendment claim, Commissioner of the Supreme Court ruled that, "whether a victim's status as a law enforcement officer is an element of the charged offense is a legal question beyond the purview of a jury's factfinding role. [The jury] did not have to be informed of that 'element' of the aggravating factor." Appx. A, Ruling Denying Review, at 3 (emphasis and alteration added). This decision is the last reasoned decision in state courts on the merits of Petitioner's Sixth Amendment claim.

As to the Fourteenth Amendment claim, the Supreme Court Commissioner failed to address the merits as to the specific part of the aggravating factor which Petitioner challenged, but (for an unclear reason) addressed sufficiency of the evidence only as to other parts of the aggravating factor, which Petitioner did not challenge. See Appx. A, at 2-3. Thus, the Court of Appeals' decision on the merits of Petitioner's Fourteenth Amendment claim is

the last reasoned decision in state courts.

Petitioner sought modification of the Commissioner's ruling by the Washington Supreme Court Justices, but his motion was denied without a reasoned opinion. See Appx. C, Order.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

- A. WASHINGTON SUPREME COURT REMOVED AGGRAVATED SENTENCING FACT WHICH INCREASED PETITIONER'S SENTENCE ABOVE THE STATUTORY STANDARD RANGE FROM THE JURY'S CONSIDERATION, BY LABELING THE FACT A "LEGAL" QUESTION; THIS REMOVAL OF THE AGGRAVATING FACT FROM THE JURY IS IN CONFLICT WITH DECISIONS OF THIS COURT.

On the merits of Petitioner's Sixth Amendment claim, Washington Supreme Court held that the aggravated sentencing question at issue -- whether a victim's status as a law enforcement officer is an element of the offense of conviction -- is a "legal question", and therefore, did not have to be submitted to the jury and proved beyond a reasonable doubt. This holding is in conflict with decisions of this Court.

In Apprendi v. New Jersey, 530 US 466, 490, 120 SCT 2348, 147 LEd2d 435 (2000), this Court held that, "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." Any such fact is deemed "an 'element' that must be submitted to a jury." Hurst v. Florida, 577 US ___, 136 SCT ___, 193 LEd2d 504, 510 (2016) (citing Apprendi, 530 US at 494). "[I]t is unconstitutional for a legislature [or a judge] to remove

from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" Apprendi, 530 US at 490 (quoting Jones v. United States, 526 US 227, 252-253, 119 Sct 1215, 143 LEd2d 311 (1999) (STEVENS, J., concurring)) (alteration added).

In Blakely v. Washington, 542 US 296, 124 Sct 2531, 159 LEd2d 403 (2004), this Court applied the holding of Apprendi to the Washington state's sentencing scheme, and held that any aggravating fact which exposes a criminal defendant to a sentence above the maximum of the statutory "standard range" must be submitted to a jury and proved beyond a reasonable doubt. See generally Blakely, 542 US at 301-305.

In this case, Washington Supreme Court got around Apprendi / Blakely by labeling the aggravating fact a "legal" question. However, even the Washington State's own law holds that "The existence of an aggravating factor is a factual question, not a question of law." State v. Gonzales Flores, 164 Wn2d 1, 20, 186 P3d 1038 (2008) (citing State v. Suleiman, 158 Wn2d 280, 292-93, 143 P3d 795 (2006)) (emphasis added). In fact, the same aggravating factor that is involved in this case was submitted to a jury in another case. See State v. Hale, 146 WnApp 299, 303-04, 189 P3d 829 (Div.2, 2008) ("the jury returned a special verdict finding

that: ... the victim's status as a law enforcement officer was not an element of the offense") (emphasis added); see also Appx. G (a copy of the Special Verdict Form that was submitted to the jury in State v. Hale). In State v. Hale, on appeal, the Court of Appeals treated this part of the aggravating factor as a factual question, reviewing it under the "clearly erroneous" standard. See Hale, 146 WnApp at 307-08.

Even the Washington Supreme Court itself, though not directly, has acknowledged that the aggravated factor in question must be submitted to a jury. See State v. Allen, 182 Wn2d 364, 370-71, 341 P3d 268 (2015) ("This aggravating factor allowed the trial court to sentence Allen above the standard range if THE JURY found that ... the victims' status as police officers were not elements of the offense.") (emphasis added). See also, e.g., State v. Davis, a Court of Appeals case, 176 WnApp 849, 882, 315 P3d 1105 (Div.2, 2013) ("Under RCW 9.94A.535(3)(v), the trial court may impose an exceptional sentence when THE JURY finds that ... the victim's status as a law enforcement officer is not an element of the offense.") (emphasis added). But when it came to Petitioner's case, this question somehow became a "legal" one.

Moreover, the aggravating factor in question falls

squarely under definitions of "question of fact" in the Black's Law Dictionary (10th ed. 2014). "[Q]uestion of fact" is defined as, inter alia, "1. An issue that has not been predetermined and authoritatively answered by the law", and "4. An issue capable of being answered by way of demonstration, as opposed to a question of unverifiable opinion." Black's Law Dict., p. 1442. The question in this case falls under these definitions.

In Washington, elements of a crime are not definitively and authoritatively predetermined by the law, but instead, they also depend on how the jury is instructed: an element can be added to a crime by being included in the "to convict" jury instruction by one of the parties. This doctrine is called "the law of the case" doctrine. It has recently been reaffirmed by the Washington Supreme Court in State v. Johnson, 188 Wn2d 742, 746-747, No. 93453-3 (July 13, 2017) ("Under [State v.] Hickman, [135 Wn2d 97, 102 (1998),] the State must establish all elements it agrees to include in the to-convict instruction, even if not required by statute, because unchallenged instructions become the 'law of the case.' ... This long standing doctrine has developed through the common law and state procedural rules, and remains intact following Musacchio [v. United States], ___ US ___, 136 S Ct

709, 193 LEd2d 639 (2016)].").

Thus, the Washington law does not authoritatively establish or predetermine that a victim's status as an officer is not an element of first degree assault. This depends on a case-by-case basis, depending on how the jury is instructed. Therefore, it is a "question of fact" and must be submitted to a jury.

Also, the aggravating factor in this case is "capable of being answered by way of demonstration" as opposed to a "question of unverifiable opinion." In this case, the state added an extra element by including it in Petitioner's "to convict" jury instruction. See Appx. H, Court's Instructions to the Jury, Instruction 13 ("the defendant assaulted Officer Greg Zimmerman") (emphasis added). An extra element of the victim's status as an "Officer" was added. Thus, whether the victim's status as an officer is an element of the offense can be demonstrated by the "to convict" jury instruction, as opposed to being a question of "unverifiable opinion". See also Black's Law Dict., p. 959 ("issue of fact" is defined as "A point supported by one party's evidence and controverted by another's").

On the contrary, the question in this case does not fit certain definitions of "question of law", and the definition of "issue of law", in the Black's Law

Dictionary. "[Q]uestion of law" is defined as, inter alia, "2. A question that the law itself has authoritatively answered, so that the court may not answer it as a matter of discretion." (p. 1442). An "issue of law" is defined as "A point on which the evidence is undisputed, the outcome depending on the court's interpretation of the law". (p. 959). As demonstrated above, the Washington state law does not authoritatively answer whether a victim's status as an officer is an element of first degree assault; this question also depends on what elements are included in the "to convict" jury instruction. Also, the aggravating factor in this case cannot be characterized as "[a] point on which the evidence is undisputed". Clearly, the state is disputing Petitioner's evidence by claiming that the victim's status as a police officer is not an element of the offense of his conviction, although the evidence is not in the state's favor.

Finally, whether an aggravating fact is an "element" that must be submitted to a jury is not dependent upon what label a state gives it, but rather upon what "effect" it has on punishment: "does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" See Apprendi, 530 US at 494; see also Alleyne v. United States, 570 US ___, 133 Sct ___,

186 LEd2d 314, 321 (2013) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." (citing Apprendi, 530 US at 483 n.10)).

In this case, the required finding did expose Petitioner to a greater sentence than that authorized by the jury's guilty verdict. The legislature has authorized state courts to impose an exceptional sentence above the standard range if "[a] jury" finds that "... the victim's status as a law enforcement officer is not an element of the offense." See RCW 9.94A.535(3)(v) (in relevant part). In this case, the jury did not make this finding, and therefore the judge was not authorized to sentence Petitioner above the standard range, based solely on the jury's guilty verdict and partial finding of the aggravating factor. Thus, Petitioner's unauthorized exceptional sentence violates his Sixth Amendment right to a jury trial.

This Court should grant review of this issue because, if not, Washington State, and potentially other states, will continue chipping away at the Sixth Amendment right by labeling aggravated sentencing factors - a "legal" question, thus effectively nullifying the Apprendi / Blakely holdings of the Court. Lower courts also need this

Court's guidance on where to draw the line between questions of fact and questions of law in the context of the Sixth Amendment jury trial right.

- B. THE STATE FAILED TO PROVE EVERY ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT BY FAILING TO PRESENT ANY EVIDENCE TO THE JURY PERTAINING TO PART OF THE AGGRAVATING FACTOR WHICH WAS USED TO SENTENCE PETITIONER ABOVE THE STATUTORY STANDARD RANGE; THIS FAILURE BY THE STATE IS IN CONFLICT WITH DECISIONS OF THIS COURT.

On the merits of Petitioner's Fourteenth Amendment claim, Washington Court of Appeals held that "The evidence was sufficient to prove beyond a reasonable doubt ... that the victim's status as a law enforcement officer was not an element of the crime of first degree assault." The Court of Appeals cited no evidence that it believed was allegedly presented to the jury; the truth is, none was presented. The Court of Appeals' holding is in conflict with decisions of this Court.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 US 358, 364, 25 LEd2d 368, 90 Sct 1068 (1970). For purposes of the Due Process Clause, any fact that, by law, increases the penalty for a crime is

deemed an "element" of the crime, that must be submitted to a jury and proved beyond a reasonable doubt. Apprendi, 530 US at 483 n.10, 494 n.19; see Alleyne, 186 LEd2d at 321, 324, 326 (citing Apprendi, at 483 n.10, 490).

As explained in the preceding argument, the statutorily required finding of whether a victim's status as a police officer is an element of the offense is a factual finding that, by law, increases the prescribed range of penalty to which a criminal defendant is exposed. See RCW 9.94A.535(3)(v) (in relevant part) (a sentence above the statutory standard range is authorized if "[a] jury" finds that "... the victim's status as a law enforcement officer is not an element of the offense"). Thus, this finding of fact is an "element" of the crime charged, and the State had to prove it beyond a reasonable doubt under Winship and Apprendi.

The State failed to prove this "element" beyond a reasonable doubt; it presented no evidence to the jury pertaining to this question. "[E]vidence" was defined by the court's jury instructions as "the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial." See Appx. H, Instruction 1. No witness has testified, nor was any exhibit admitted, at trial, pertaining to the question of whether the victim's

status as a police officer was an element of the offense of
Petitioner's conviction.

This Court should accept review of this issue to
remind Washington State, as well as other states, of their
responsibility to uphold the Constitution's most basic
protections.

CONCLUSION

The petition for a writ of certiorari should be
granted.

Respectfully submitted,


Michael V. Kolesnik

Date: December 26, 2017.