SUPREME COURT OF THE UNITED STATES

No. 01–488

TIMOTHY STUART RING, PETITIONER *v.* ARIZONA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

[June 24, 2002]

JUSTICE O'CONNOR, with whom the CHIEF JUSTICE joins, dissenting.

I understand why the Court holds that the reasoning of *Apprendi* v. *New Jersey,* 530 U. S. 466 (2000), is irreconcilable with *Walton* v. *Arizona,* 497 U. S. 639 (1990). Yet in choosing which to overrule, I would choose *Apprendi*, not *Walton*.

I continue to believe, for the reasons I articulated in my dissent in *Apprendi*, that the decision in *Apprendi* was a serious mistake. As I argued in that dissent, *Apprendi*'s rule that any fact that increases the maximum penalty must be treated as an element of the crime is not required by the Constitution, by history, or by our prior cases. See 530 U. S., at 524–552. Indeed, the rule directly contradicts several of our prior cases. See *id.,* at 531–539 (explaining that the rule conflicts with *Patterson* v. *New York,* 432 U. S. 197 (1977), *Almendarez-Torres* v. *United States,* 523 U. S. 224 (1998), and *Walton*, *supra*). And it ignores the "significant history in this country of . . . discretionary sentencing by judges." 530 U. S., at 544 (O'CONNOR, J., dissenting). The Court has failed, both in *Apprendi* and in the decision announced today, to "offer any meaningful justification for deviating from years of cases both suggesting and holding that application of the 'increase in the maximum penalty' rule is not required by the Constitution." *Id.,* at 539.

Not only was the decision in *Apprendi* unjustified in my view, but it has also had a severely destabilizing effect on our criminal justice system. I predicted in my dissent that the decision would "unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of *[Apprendi].*" *Id.,* at 551. As of May 31, 2002, less than two years after *Apprendi* was announced, the United States Courts of Appeals had decided approximately 1,802 criminal appeals in which defendants challenged their sentences, and in some cases even their convictions, under *Apprendi*.[1] These federal appeals are likely only the tip of the iceberg, as federal criminal prosecutions represent a tiny fraction of the total number of criminal prosecutions nationwide. See *ibid.* (O'CONNOR, J., dissenting) ("In 1998 . . . federal criminal prosecutions represented only about 0.4% of the total number of criminal prosecutions in federal and state courts"). The number of second or successive habeas corpus petitions filed in the federal courts also increased by 77% in 2001, a phenomenon the Administrative Office of the United States Courts attributes to prisoners bringing *Apprendi* claims. Administrative Office of the U. S. Courts, 2001 Judicial Business 17. This Court has been similarly overwhelmed by the aftershocks of *Apprendi*. A survey of the petitions for certiorari we received in the past year indicates that 18% raised *Apprendi*-related claims.[2] It is simply beyond dispute that *Apprendi* threw countless criminal sentences into doubt and thereby caused an enormous increase in the workload of an already overburdened judiciary.

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[1] This data was obtained from a Westlaw search conducted May 31, 2002, in the United States Courts of Appeals database using the following search terms: "'Apprendi v. New Jersey' & Title['U.S.' or 'United States']."

[2] Specific counts are on file with the Clerk of the Court.

The decision today is only going to add to these already serious effects. The Court effectively declares five States' capital sentencing schemes unconstitutional. See *ante*, at 21, n. 5 (identifying Colorado, Idaho, Montana, and Nebraska as having sentencing schemes like Arizona's). There are 168 prisoners on death row in these States, Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc., Death Row U. S. A. (Spring 2002), each of whom is now likely to challenge his or her death sentence. I believe many of these challenges will ultimately be unsuccessful, either because the prisoners will be unable to satisfy the standards of harmless error or plain error review, or because, having completed their direct appeals, they will be barred from taking advantage of today's holding on federal collateral review. See 28 U. S. C. §§2244(b)(2)(A), 2254(d)(1); *Teague* v. *Lane,* 489 U. S. 288 (1989). Nonetheless, the need to evaluate these claims will greatly burden the courts in these five States. In addition, I fear that the prisoners on death row in Alabama, Delaware, Florida, and Indiana, which the Court identifies as having hybrid sentencing schemes in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determination, see *ante*, at 21, n. 6, may also seize on today's decision to challenge their sentences. There are 529 prisoners on death row in these States. Criminal Justice Project, *supra.*

By expanding on *Apprendi*, the Court today exacerbates the harm done in that case. Consistent with my dissent, I would overrule *Apprendi* rather than *Walton.*