No. 02-1632

IN THE
SUPREME COURT OF THE UNITED STATES

RALPH HOWARD BLAKELY, JR.
Petitioner,

v.

STATE OF WASHINGTON
Respondent.

On Writ of Certiorari to the
Washington Court of Appeals, Division III

BRIEF OF KANSAS APPELLATE DEFENDER OFFICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a fact (other than a prior conviction) necessary for an upward departure from a statutory standard sentencing range must be proved according to the procedures mandated by *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

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INTEREST OF AMICUS CURIAE[1]

The Kansas Appellate Defender Office is a unit of the Kansas Board of Indigent Defense Services and is responsible for representing persons convicted of felonies on direct appeal in state court. The Kansas Appellate Defender Office was counsel of record in *State v. Gould*, 23 P.3d 801 (Kan. 2001), which is a case that dealt with an issue quite similar to that raised by petitioner in this case. As a result, many of amicus' clients have an interest in the outcome of this case. Amicus is also in a position to relate to the Court the state legislative response to the *Gould* decision.

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[1]Letters of consent have been filed with the Clerk. No counsel for a party authored any part of this brief, and no person made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In *State v. Gould*, 23 P.3d 801 (Kan. 2001), the Kansas Supreme Court correctly held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), compelled the conclusion that a statutory procedure that exposes a defendant to a greater punishment based on facts other than those authorized by the jury's verdict violated the Sixth and Fourteenth Amendments. And, despite predictions of some extreme legislative responses, the Kansas Legislature has not attempted to "end-run" around *Apprendi* and *Gould*. The Kansas Legislature amended the existing sentencing guidelines so that enhanced sentences can be imposed in conformity with this Court's pronouncement in *Apprendi*.

ARGUMENT

The Kansas Sentencing Guidelines Act

In 1993, the Kansas Legislature enacted the Kansas Sentencing Guidelines Act ("KSGA"). *See* K.S.A. 21-4701 to -4728 (1995).[2] The Legislature expressly indicated its intent that these "sentencing guidelines and prosecuting standards ... shall apply equally to all offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous criminal record of the defendant." K.S.A. 21-4702.

The KSGA consists of two sentencing grids, one for drug felonies and one for nondrug felonies. K.S.A. 21-4704, -4705. The determination of a sentencing range is based upon the intersection of two factors on a sentencing grid: the statutorily-defined severity level of the crime of conviction and the offender's prior criminal history. Each grid box sets out a relatively narrow range of months, which is the authorized sentence of imprisonment for that offense. Unless aggravating or mitigating factors are proved,

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[2]For a thorough exposition of the KSGA, *see* Kansas Sentencing Commission, 2003 Kansas Sentencing Guidelines Desk Reference Manual, which can be accessed at: http://www.accesskansas.org/ksc/2003DeskRef.htm

the sentencing court is required to pronounce a sentence within that grid box. *See* K.S.A. 21-4704, -4705, -4716. In form, the KSGA appears to operate identically to the Washington Sentencing Reform Act, which is the subject of this writ. *See State v. Richardson*, 901 P.2d 1, 4 (Kan. App. 1995) (Kansas Legislature relied on Washington, Oregon, and Minnesota guidelines when formulating KSGA).

Prior to 2001, the KSGA provided that the sentencing court could depart upward to increase the length of a sentence up to a maximum of twice the highest number in a grid box if it found one or more aggravating factors. K.S.A. 21-4716. Prior to 2001, the statute was silent as to the standard of proof, although the Kansas Supreme Court had indicated that the facts "established for use in sentencing require less evidentiary weight than facts asserted for conviction." *State v. Spain*, 953 P.2d 1004, 1009-10 (Kan. 1998).

State v. Gould

Crystal Gould was convicted of three counts of child abuse, each a severity level 5 nondrug offense. Ms. Gould did not have any criminal history, so she fell into the lowest criminal history category of "I". Using the nondrug grid, the sentencing range for each count was 31 to 34 months. *See* K.S.A. 21-4704. But the state moved for an upward departure and the sentencing court found three aggravating factors: (1) that the victims were particularly vulnerable due to age, (2) that the offender's conduct manifested excessive brutality in a manner not normally present in that offense, and (3) that the offense involved a fiduciary relationship between the victims and the offender. As a result of these findings, the sentencing court imposed a 68-month prison sentence for each of the first two

counts and ran those sentences consecutive.

While Ms. Gould's case was on direct appeal to the Kansas Court of Appeals, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Ms. Gould had already challenged her sentence based on this Court's holding in *Jones v. United States*, 526 U.S. 227 (1999). After the *Apprendi* decision, Ms. Gould's appeal was transferred to the Kansas Supreme Court and both parties filed supplemental briefs concerning the impact of *Apprendi*.

In its decision in *Gould*, the Kansas Supreme Court acknowledged that this Court had expressed the following guarantee in *Apprendi*: "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." *State v. Gould*, 23 P.3d 801, 810 (Kan. 2001) (quoting 530 U.S. at 490).

The state argued that, with regard to the KSGA, the "prescribed statutory maximum" was twice the maximum sentence set out in the appropriate grid box and, therefore, Ms. Gould's exceptional sentence was not affected by *Apprendi*. The Kansas Supreme Court disagreed:

> Under *Apprendi*, it does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict. Gould's jury verdict "authorized" a sentence of 31 to 34 months for each child abuse conviction. By imposing two 68-month sentences, the district court went beyond

> the maximum sentence in the applicable grid box and exposed Gould to punishment greater than that authorized by the jury's verdict. [23 P.3d at 812-13 (citing 530 U.S. at 469, 490-96)].

The Kansas Supreme Court correctly followed this Court's teaching that "the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." 23 P.3d at 813 (quoting 530 U.S. at 494). *See also Ring v. Arizona*, 536 U.S. 584, 607 (2002)(Arizona capital sentencing scheme unconstitutional because it allows judge– not jury–to find aggravating factor necessary to impose death penalty; noting that there is "no reason to differentiate capital crimes from all others in this regard").

Because the sentenced imposed on Ms. Gould exceeded that authorized by the jury's guilty verdict, the Kansas Supreme Court reversed her sentence and remanded for resentencing.

Legislative reaction to Gould.

In response to the instant petition, the State of Washington predicts that if this Court agrees with Petitioner's position, "it would encourage the legislature to write out standard ranges." Br. in Opp. at 22. And in *Apprendi*, dissenting members of this Court expressed concern that a state might make an "end-run" around its pronouncement by simply increasing all maximum sentences. 530 U.S. at 541 (O'Connor, J., dissenting). Kansas provides an example of legislative reaction to *Apprendi* where those concerns were not realized.

The *Gould* decision was issued in May 2001. In its next legislative session, the Kansas Legislature simply adopted this Court's standard and set up a procedure whereby this Court's standard could be applied to state requests for upward durational departure sentences:

> Subject to the provisions of subsection (b) of K.S.A. 21-4718, and amendments thereto, any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt. [K.S.A. 2002 Supp. 21-4716(b)].
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> . . . .
>
> Upon motion of the county or district attorney to seek an upward durational departure sentence, the court shall consider imposition of such upward durational departure sentence in the manner provided in subsection (b)(2). The county or district attorney shall file such motion to seek an upward durational departure sentence not less than 30 days prior to the date of trial or if the trial date is to take place in less than 30 days then within five days from the date of the arraignment. [K.S.A. 2002 Supp. 21-4718(b)(1).]

K.S.A. 2002 Supp. 21-4718(b) then goes on to set out procedures, evidentiary rules, and unanimity standards for the jury consideration of aggravating factors, and includes provisions for

waiver of a jury trial on such matters.

After *Apprendi* and *Gould*, both the standard sentencing ranges found in the KSGA and the legislative intent to promote uniformity and standardize sentences, while allowing for exceptional cases, remain intact. The crux of the *Apprendi* decision turned on who determined the critical facts and by what standard. The Kansas Legislature has not attempted an "end-run" around *Apprendi*, but has simply modified the KSGA to effect the guarantees explained in *Apprendi*.

CONCLUSION

By conducting its analysis "not of form, but of effect," the Kansas Supreme Court correctly applied this Court's pronouncement in *Apprendi* to a statutory sentencing scheme that purported to allow increased sentences greater than those authorized by the jury's verdict. And, from a practical standpoint, the Kansas Legislature has simply enacted the very guarantees explained by this Court in *Apprendi*. To the extent that the sentencing schemes in Kansas and Washington are the same for purposes of the instant writ, amicus urges this Court to reverse the decision of the Washington Court of Appeals.

Respectfully submitted,

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