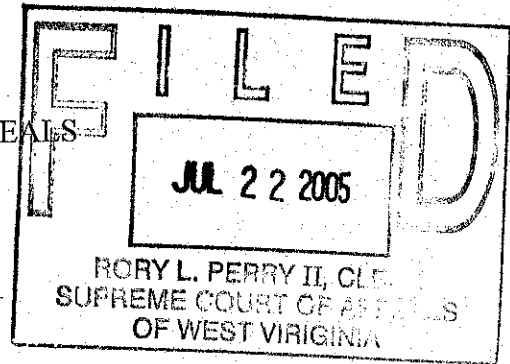


IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA
Plaintiff Below, Respondent,

vs.

32583
Case No. ~~041763~~

CHESDON JAMES HAUGHT
Defendant Below, Petitioner.

**TO THE HONORABLE JUDGES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA**

RESPONSE ON BEHALF OF THE STATE OF WEST VIRGINIA

THE STATE OF WEST VIRGINIA

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I. TABLE OF AUTHORITIES

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United States v. Booker, ____ U.S. ____, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

United States v. Gripper, 122 Fed.Appx. 15, (4th Cir.(N.C.) Jan 28, 2005).

Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1990).

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II. FACTS OF THE OFFENSE

Stephanie Hilton met Chesdon Haught in December of 2002. (Record, Volume II, page 200). At the time of the kidnapping, they dated for only one month, and had known each other for only four months. (Record, Volume II, page 201). During their short relationship, the defendant revealed himself to be controlling, manipulative and scary individual. Id. Even after Stephanie ended the romantic relationship between herself and the defendant, he forced himself on her after appearing at her home uninvited and refusing to leave. (Record, Volume II, page 202). The defendant continually followed Stephanie to

public places, and when she refused to leave with him, he would abuse her or threaten her friends. (Record, Volume III, page 113).

On the evening of April 24, 2003, Stephanie went out for the evening with one of her girlfriends, Brittany Warwick (Record, Volume II, page 207). As usual when she was out without him, the defendant called Stephanie repeatedly on her cell phone (Record, Volume II, page 211-212). When he was able to reach her by phone, the defendant insisted that she come to his house. When she refused, he threatened to come find her. (Record, Volume II, page 211-212; Volume III, page 113-115). Consequently, Stephanie and Brittany decided to leave the public establishment, and go to visit Brittany's boyfriend, Donald Abduhl. (Record, Volume II, page 207). On the way to Donald's house, Stephanie hit a curb, causing a tire to go flat. (Record, Volume II, page 208).

When Stephanie and Brittany arrived at Donald's house, they went inside to speak to him. (Record, Volume II, page 212). Talking to Donald, they determined that they would spend the evening at Donald's house. Id. In order to save time in the morning, Stephanie decided to call American Automobile Association (AAA) to fix her tire, and called her mother to get the membership number. Id. While Stephanie was making calls, she and Donald got into a verbal spat, calling each other names. (Record, Volume II, page 213). Stephanie went outside to finish talking to her mother and AAA. Id.

While she was at Donald's and waiting for AAA, the defendant continued to call Stephanie, he asked her to come to his house, or tried to find out where Stephanie was, so that he could come to her. Id. Stephanie refused to tell the defendant where she was staying that night. (Record, Volume II, page 214). The defendant deduced Stephanie's location,

from the voices in the background, and showed up at Donald's house against Stephanie's request. (Record, Volume II, page 213-214; Volume III, page 113-115).

The defendant appeared two separate times while Stephanie waited for her tire to be repaired. (Record, Volume III, page 132). Stephanie was outside, on the phone, the first time the defendant appeared and harassed her. (Record, Volume II, page 214-215). The defendant parked his car, and attempted to intimidate Stephanie into leaving with him, so she would spend the night at his house. (Record, Volume II, page 216). Stephanie refused, telling him to leave her alone and go home. Id. Stephanie retreated inside Donald's house to get away from the defendant. (Record, Volume II, page 214-215).

After the AAA driver, Lee Haight (Lee), arrived, Stephanie waited outside with him while he repaired her flat tire. (Record, Volume II, page 215; Volume III, page 132). He informed Stephanie that he had taken money out of her car and would not return it unless she got in his car with him. (Record, Volume II, page 216-217). She still refused. Id. Stephanie continued to tell the defendant "just take it and leave." (Record, Volume III, page 132). When the defendant became more insistent, she threatened to call the police if he didn't leave. (Record, Volume II, page 217; Volume III, page 133). The defendant pretended to go home. (Record, Volume II, page 217).

Minutes later, the defendant returned. Id. When the defendant returned the second time, he parked his car very close to hers, and left the engine running. (Record, Volume II, page 220, Volume III, page 134). Lee, the AAA driver, was still fixing the flat tire. (Record, Volume II, page 218). This time the defendant was more insistent. (Record, Volume III, page 134-136). He argued with Stephanie, telling her she needed to talk to him and come with him. (Record, Volume II, page 217-219; Volume III, page 134-136). Stephanie kept

telling the defendant to leave her alone. (Record, Volume II, page 218). The defendant then tried to get her to give him her cellular phone, so that he could use that to get her into his car. Id. Instead, the defendant forced Stephanie into his car and left. (Record, Volume II, page 218-220).

While Stephanie was sitting in her vehicle, the defendant came over and pulled her out of her car, and forcibly dragged and carried her to his own vehicle. (Record, Volume II, page 218-219, Record, Volume III, page 134-136). Stephanie fought against the defendant, pulling away, and telling him to leave her alone. (Record, Volume II, page 218-220; Volume III, page 134-136). The defendant kept forcing her to go. (Record, Volume III, page 134-136). After he got her to his vehicle, he coerced her, promising that if she didn't get out, and if she rode around the block with him, he would return her money. (Record, Volume II, page 200). She stayed in the car, hung her head over her lap, and waited for the trip around the block. (Record, Volume II, page 220).

Stephanie was afraid to ask Lee for help. She had asked others for help in the past. When her friends tried to help her, the defendant threatened them. (Record, Volume III, page 149-154). When a woman on the street tried to call police for her, the defendant attacked her and broke her cellular phone. (Record, Volume III, page 137-140).

The defendant didn't ride around the block as he promised. (Record, Volume II, page 220). Instead, he headed towards his house in Pennsylvania, where he intended to force Stephanie stay for the evening. (Record, Volume II, page 220-221). When Stephanie realized the defendant was not taking her back to Donald's house, she became upset. (Record, Volume II, page 221). She demanded to be returned to her car. (Record, Volume II,

page 221). The defendant refused. Instead, he continued to drive towards Pennsylvania. His driving became faster and more reckless. Id.

Stephanie became so scared of the defendant that she jumped from the moving vehicle in an attempt to escape the defendant. Id. Stephanie was terrified of what he would do to her when he got her to his house. Stephanie was afraid he would rape or further harm her. Id. When she jumped, she rolled on the ground near the road, got up and ran through the grass up a hill trying to escape. (Record, Volume II, page 223; Volume II, page 61-63). She didn't escape. The defendant got out of his vehicle and chased her. (Record, Volume II, page 223). He caught her, held her, and forced her back into his vehicle by causing her pain and threatening her. (Record, Volume II, page 223-225). The defendant then continued to take Stephanie against her will to his home. (Record, Volume II, page 224-226).

After the defendant took Stephanie, Lee, the AAA driver, went to the house to tell Brittany and Donald that the defendant took her against her will. (Record, Volume III, page 137-138). He told them that somebody should call the police. Id. The driver couldn't call the police because he did not have a cellular phone, and did not know who the defendant was or where they were going, or the description of his car. (Record, Volume III, page 155-158). Lee told Brittany, so she could help Stephanie.

Brittany used her cellular phone to try to contact Stephanie's cellular phone to find out where she was, and if she was alright. (Record, Volume II, page 222). Brittany tried to reach Stephanie twelve times. (Record, Volume III, page 169). When Brittany called, the defendant would answer the phone. (Record, Volume II, page 222). The defendant had Stephanie's phone. (Record, Volume II, page 222, Volume III, page 89). He answered Stephanie's phone, told Brittany to stop calling, and refused to let Brittany have a

conversation with Stephanie. (Record, Volume III, page 170). But, Brittany could hear Stephanie screaming for help in the background.

The defendant traveled dark roads with very few houses, lights, or cars. (Record, Volume II, page 225-226). Stephanie felt she was unable to find someone to help her. Id. She tried kicking, punching, and biting the defendant, and screaming for help, while trying to get him to pull over and let her out. (Record, Volume II, page 225-227). He refused. Stephanie started telling the defendant that she would go to the police this time, if he didn't let her go. (Record, Volume II, page 227). Stephanie threatened to tell the police if the defendant didn't let her free (Record, Volume II, page 227-229). Instead, the defendant pulled over to the side of the road, and tried to strangle Stephanie. Id.

While the defendant was strangling Stephanie, she began to believe she would lose consciousness. Id. She couldn't get any air, and thought she was going to die. Id. As she looked into the defendant's face, she could see that he was not even angry, and it made her panic. (Record, Volume II, page 228). Stephanie began to fight harder, kicking out the windshield of the defendant's car in her attempt to escape. (Record, Volume II, page 229). He then stopped strangling her, and resumed driving. (Record, Volume II, page 229-230). Stephanie now believed that if the defendant took her to his house, he would kill her. (Record, Volume II, page 229).

Stephanie decided that in order to live, she had to calm down and convince the defendant that she would go with him. (Record, Volume II, page 230). She started talking to the defendant about rekindling their relationship. (Record, Volume II, page 230-231). Stephanie then waited until she got on a more populated road, Point Marion Road, and by grabbing the steering wheel, caused the defendant to drive into a ditch, where he was unable

to continue driving. (Record, Volume II, page 230-232). She got out of the car, apologizing, pretending to help him push his car out of the ditch. (Record, Volume II, page 232-233; Volume III, page 81). Then, when she saw the headlights of another vehicle, she ran towards the headlights, waving her arms over her head, screaming for help. (Record, Volume II, page 233-234).

The vehicle she stopped was driven by Allen Conner. (Record, Volume III, page 184). Mr. Conner was on his way home from work. Id. Stephanie ran to Conner's passenger door, relieved that she would be safe now that she was with him. (Record, Volume II, page 235). She asked to borrow Conner's phone to call someone she knew to come help her. (Record, Volume II, page 234; Volume III, page 171). She called Brittany to come get her. (Record, Volume III, page 171). After she was unsuccessful in giving Brittany directions to her location, Conner drove Stephanie to the Dairy Mart in Point Marion. (Record, Volume III, page 190, 194).

Conner described that Stephanie was very upset when she reached his truck, sobbing and unintelligible. (Record, Volume II, page 237; Volume III, page 188). She stood for minutes before calming down enough to communicate to Conner what happened to her. (Record, Volume II, page 187-188). Even while Stephanie was standing in front of Allen Conner, the defendant came over to her and took money off of her body, flipping her off when he left. (Record, Volume II, page 235-236). Conner waited with her at the Dairy Mart until her friends arrived, talking about himself to try to calm her down. (Record, Volume II, page 237; Volume III, page 194-195).

While Stephanie was waiting for Brittany, she saw other girls she knew go into the store. (Record, Volume II, page 237-238). Stephanie got out to wait for Brittany with the

girls. Id. Stephanie went into the store with the girls while telling them what happened. (Record, Volume II, page 238). When Brittany arrived at Dairy Mart, Stephanie was still crying and hysterical. (Record, Volume III, page 174). While Stephanie talked to her friends, the woman working the counter overheard the details, and together, she and the girls convinced Stephanie that the police would help. (Record, Volume II, page 238; Volume III, page 94).

Stephanie was afraid to call the police for help. When Stephanie had tried to call the police in the past, the defendant would hang up the phone, or do more harm to her. (Record, Volume III, page 143-146). The only time she had tried to get the Pennsylvania police to help, they refused. (Record, Volume III, page 118,123).

After the Sheriff's department responded, Stephanie rode to the station with the investigating officer. (Record, Volume II, page 238-239). Stephanie was still crying and shaking upon her arrival to the Sheriff's department. (Record, Volume III, page 200). Once there, pictures were taken of Stephanie's injuries, and a Bodily Injury Map was completed. (Record, Volume III, page 200-202). Stephanie had injuries to her neck, shoulder, side, arms, wrist, nose, and head. (Record, Volume III, page 200-205).

After Stephanie escaped, the defendant still didn't stop intimidating her. He called her cell phone, telling her not to call the police. Then, the defendant called Brittany, telling her to convince Stephanie not to talk to the police. (Record, Volume III, page 100). The defendant threatened to have Stephanie arrested if she went to the police for help. True to his threat, the defendant went to the Monongalia County Sheriff's department and gave them a statement, attempting to have Stephanie arrested for breaking his windshield. (Record, Volume I, Page 52). Stephanie had broken the windshield while the defendant was strangling her. Id. When

the police determined the defendant's whereabouts, they told him to turn himself in to West Virginia. The defendant did so to avoid being held for the extradition process.

III. FACTS RELATING TO CONVICTION AND SENTENCING

The jury was instructed on the offenses of kidnapping, petit larceny and domestic battery, pursuant to the court's charge on March 12, 2004. (Record, Volume IV, page 3-4). Both the State and Defendant submitted proposed jury instructions to the court. The defendant made no request for a jury finding on physical harm to the victim (Record, Volume I, Page 185). Additionally, in the defendant's requested charge for kidnapping, he cites State v. Farmer, 193 W. Va. 84, 454 S.E.2d 378, (1994), as authority stating that "it is not the province of the jury to make any findings of fact such as 'bodily harm'." (Record, Volume I, Page 188-189). Counsel for the parties reviewed the judge's charge prior to its issuance to the jury, and the defendant made no objections to the charge. (Record, Volume IV, page 3). The charge read to the jury contained the specific instruction that "in the event you make a recommendation of mercy, the Court must sentence him to confinement in the West Virginia State penitentiary for life, but the defendant, Chesdon Haught, shall be eligible to be considered for parole only after having served a minimum of ten years." (Record, Volume I, Page 210).

On March 12, 2004, the jury returned a verdict in the State's case against Chesdon Haught. (Record, Volume IV, page 49). The jury found the defendant guilty of kidnapping, handing down a sentence to life with the recommendation of mercy, in Count One of the Indictment. Id. The jury found the defendant not guilty of petty larceny, the lesser-included offense of Count Two of the Indictment. Id. The jury found the defendant guilty of domestic

battery, Count Three of the Indictment. *Id.* The jury was polled, and the verdict was reported to be unanimous. (Record, Volume IV, page 49-53).

The sentencing hearing was held on May 17, 2004 (Record, Volume IV). At that hearing, the court addressed the defendant's Motion for a Post-Verdict Judgment of Acquittal and Motion for a New Trial. Both were denied after argument of counsel (Record, Volume IV, pages 18-19). The court proceeded to sentencing, and to a determination of the sentence pursuant to the West Virginia Code 61-2-14a.

Upon the court's review of the testimony at trial, and because of the verdict of guilty to domestic battery rendered by the jury, the court found that the victim was not returned without bodily harm. (Record, Volume VI, page 40). The defendant was then sentenced to life with the recommendation of mercy for the offense of kidnapping, consistent with the verdict of the jury (Record, Volume VI, page 41). The defendant was sentenced to one year on the offense of domestic battery, with credit for time served. *Id.* At sentencing, the defendant did not object to the judge, instead of the jury, making the finding of physical harm.

IV. RESPONSE TO ASSIGNMENT OF ERROR

THE DEFENDANT'S SENTENCE UNDER WEST VIRGINIA CODE § 61-2-14A IS CONSTITUTIONAL AND WAS APPLIED IN ACCORDANCE WITH THE SIXTH AMENDMENT AND THE VERDIT OF THE JURY AT THE PETITIONER'S TRIAL AND SENTENCING.

V. ARGUMENT

The defendant argues that the he was denied due process and a trial by jury because West Virginia Code 61-2-14a allows the trial court to consider factors that determined the defendant's sentence (Defendant's Petition, page 12). The defendant cites Blakely v.

Washington, and the preceding cases in this line, as controlling due to the United States Supreme Court's holding in Blakely that the determination of any fact that increases a sentence beyond the statutory maximum must be submitted to the jury. Blakely, 124 S.Ct. 2531 (2004). While the State agrees that this line of cases, including Blakely, does prohibit an increase in the defendant's sentence due to factual findings by a judge, that is not what happened here. The cases cited by the defendant are not applicable to this case because the trial court did not make a determination of any fact that **increased** the defendant's sentence beyond the statutory maximum. Further, the defendant's sentence was not enhanced by any factor not found by the jury.

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), was the first in a series of cases wherein the United States Supreme Court addressed sentence enhancement based upon factual determinations made by the trial court rather than the jury. Apprendi was convicted of second degree possession of an unlawful weapon. This conviction carried a five to ten year penalty. However, the New Jersey hate crimes provision allowed the judge to find additional factors which could increase the penalty from a ten year maximum to a maximum of twenty years. Apprendi was sentenced to twelve years, two years above the maximum sentencing range on his statutory conviction. In Apprendi, the question presented was:

“whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt.”

Id at 469. In discussing the history of decisions effecting the question at issue, the court stated:

“We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to the offense and offender – in imposing a judgment *within the range* prescribed by statute. We have long noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.”

Id at 481. Appendi does not apply as the defendant here was clearly sentenced within the statutory limits for his offenses.

Next, the defendant addresses the Court decision in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002), and Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1990), arguing that because this Court’s decision in State v. Farmer, 193 W.Va. 84, 454 S.E.2d 378 (1994), was based in part on Walton (which is overruled in Ring) that Farmer “needs to be overruled.” (Defendant’s Petition at 16). The State acknowledges that the Supreme Court overruled Walton in Ring. However, Ring can be easily distinguished from the case at bar.

In Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002), the second in this line of cases, the jury convicted Ring of felony murder because of a killing in conjunction with an armed robbery. According to the Arizona statute, the penalty on a conviction returned by the jury was “death or life imprisonment.” Ring at 584. In order to receive a death sentence, the judge acting alone needed to find sufficient aggravating factors. If an insufficient number of factors were found, the penalty was life imprisonment. The judge then made those factual findings and sentenced Ring to death. Ring could not have received a death sentence unless the judge made the factual determination that a statutory aggravating factor exists. That is not the case with Haught.

The W.Va. Code requires that anyone convicted of the offense of kidnapping “shall be punished by confinement by the division of corrections for life, and, notwithstanding the provisions of article twelve, chapter sixty-two of this code, shall not be eligible for parole.”

W.Va. Code 61-2-14a(a). The kidnapping statute then provides for limited and specifically delineated exceptions to that sentence, one of which applies to the defendant in this case:

“A jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provisions of said article twelve.”

W.Va. Code 61-2-14a(a)(1). The jury in this case returned a verdict of guilty with the recommendation of mercy, and the defendant, therefore, qualifies for this exception to the life sentence.

The Code provides an avenue for a reduction from the life sentence imposed by the kidnapping statute: where the person against whom the offense is committed is returned, or is permitted to return, alive, *without bodily harm having been inflicted upon him or her*.

W.Va. Code 61-2-14a(a)(3) and (4). (Emphasis added). In the event the above criteria are met, the defendant may qualify for a reduction in sentence to either a definite term of years not less than twenty nor more than fifty, or a definite term of years not less than ten nor more than thirty. *Id.* However, the defendant did not qualify for either of the reductions in 61-2-14a(a)(3) or (4) because Stephanie was not returned without bodily harm. This finding was appropriately made by the trial court, based in part upon the fact that the jury returned a verdict of guilty to domestic battery.

In Blakely v. Washington, 124 S.Ct. 2531 (2004), Blakely pled guilty to second degree kidnapping. Under Washington's determinate sentencing scheme, Blakely by virtue of his plea was exposed to a standard sentence of 53 months. However due to the specifics of his kidnapping offense, the Judge found facts supporting deliberate cruelty in the offense, which allowed the Judge to upwardly depart from the normal sentence. Consequently, an

“exceptional sentence” of 90 months was imposed, which exceeded the statutory maximum three years.

The Supreme Court explains the concept of a statutory maximum as:

“[N]ot the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment.”

Blakely at 2537. The Court again discusses that the significance of the unconstitutional upward departure in Blakely was that the “case involved a sentence greater than what state law authorized on the basis of the verdict alone,” and that “[t]he judge acquires that authority only upon finding some additional fact.” Id. at 2539. Findings leading to downward departures, as in the defendant’s case, are not the subject of the Apprendi line of cases. Justice Breyer in his dissent to Blakely addresses the issue posed by the current case very clearly “by the majority’s holding a judge may depart downward from a presumptive sentence but not aggravate the sentence.” Id. at 2554.

The Apprendi, Ring, Blakely line of cases stands for the proposition that: all factors which increase the “normal” sentence which a defendant could receive must be admitted by a defendant or found by a jury. That is not the construction of West Virginia Code Section 61-2-14a. This statute provides for a sentence of life, and instead allows for a *downward* departure, if appropriate mitigating factors are found by the judge. Therefore, clearly the normal sentence, as found by a jury, is life. The possibility of parole is at the discretion of the jury or mandatory if a defendant pleads guilty. W.Va. § 61-2-14a(a)(1)-(2).

The defendant argues that while the words “enhance and reduce” have opposite meanings, they should be considered equivalent for the fact that they both effect a change on

the sentence. However, in United States v. Booker, ___ U.S. ___, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the Supreme Court clearly distinguishes between enhancement and reduction. The Booker Court explained the holding of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), as: "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." Booker at 748. (Stevens opinion). In the other opinions in Booker, members of Court discuss the internal conflicts caused by the Apprendi and Blakely decisions, which resulted in the pronouncement that the Federal Sentencing Guidelines are now declared to be advisory instead of mandatory.

One of the topics of debate was the asymmetry that resulted in the application of sentencing guidelines as a result of the Apprendi and Blakely decisions. Specifically, the Court acknowledged that the former rulings resulted in "a sentencing guidelines system in which sentencing judges were free to consider facts or circumstances not found by a jury or admitted in a plea agreement for the purpose of adjusting a base-offense level down, but not up, within the applicable guidelines range." Booker at 763. (Breyer opinion, part II). The Court opined that if the Guidelines were left as binding, the result would "impose mandatory Guidelines-type limits upon a judge's ability to reduce sentences, but it would not impose those limits upon a judge's ability to increase sentences." Booker at 768. (Breyer opinion, part IV).

The dissenting opinion further emphasizes "to be clear, our holding ... that Blakely applies to the Guidelines does not establish the impermissibility of judicial factfinding." Booker at 775. (Stevens dissent, Part I). Justice Stevens explains that:

"[E]ven in those trials in which the Guidelines require the finding of facts not alleged in the indictment, such factfinding by a judge is not

unconstitutional per se. Instead, judicial factfinding to support an offense level determination or an enhancement is only unconstitutional when that finding raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant. This distinction is crucial to a proper understanding of why the Guidelines could easily function as they are currently written.”

Id. (Emphasis in original).

The procedure as applied at Booker's sentencing hearing required the judge to make findings that increased Booker's offense level beyond the Guidelines range authorized by the jury. Therefore, this was deemed unconstitutional. However, as the Justice Thomas stated in his dissenting opinion:

“Nonetheless, the Rule has other valid applications. For example, the Rule is valid when it requires the sentencing judge, without a jury, to resolve a factual dispute in order to decide where within the jury-authorized Guidelines range a defendant should be sentenced. The Rule is equally valid when it requires the judge to resolve a factual dispute in order to support a downward adjustment to the defendant's offense level.”

Booker at 778. (Thomas dissent).

Even assuming arguendo that the defendant's sentence in this case constituted an actual sentencing enhancement, in United States v. Gripper (an unpublished opinion) the court based its decision affirming the lower court on similar factual grounds. United States v. Gripper, 122 Fed.Appx. 15, (4th Cir.(N.C.) Jan 28, 2005). Addendum. The defendant in Gripper was convicted of bank robbery, armed bank robbery, use and carrying of a firearm during a crime of violence, and possession of a firearm by a convicted felon. Gripper at 5. After sentencing, Gripper contended that the district court impermissibly enhanced his sentence from five to seven years for violating 18 U.S.C. §924(c), in violation of the Supreme Court's recent decision in Blakely. Gripper at 6.

However, the Court in Gripper distinguished Blakely stating that Blakely involved enhancing a defendant's sentence based upon facts not presented to the jury. *Id.* (Emphasis added). In Gripper, the Court recognized that the indictment specifically charged Gripper with brandishing a firearm, and that violation was presented to and found by the jury. *Id.* Consequently, the Court concluded that Gripper's sentence did not run afoul of the reasoning set forth in Blakely. *Id.* Similarly, even if Mr. Haught's trial court had enhanced the sentence based upon a finding of bodily harm, it would have been an appropriate enhancement, as the violation of domestic battery was presented to and found by the jury, as was the weapon offense in Gripper.

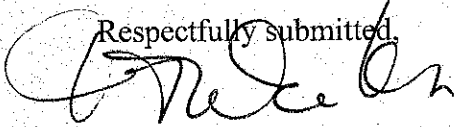
The jury found the defendant guilty of violating W.Va. Code § 61-2-14a, by kidnapping Stephanie Hilton, implicating the sentence of life, with a recommendation of mercy. The jury was instructed that a recommendation of mercy would cause the defendant to be sentenced to life in prison with the possibility of parole after ten years. There was no ambiguity as to the sentence the jury was returning against the defendant.

In West Virginia, the trial court has the ability to depart downward from the sentence handed down by the jury, if the court finds certain enumerated mitigating factors to have existed. Those factors were not found in this case, and the sentence returned by the jury was imposed. The defendant argues that a jury should be permitted to determine his sentence. It has. The defendant has been sentenced in accordance with the verdict of the jury, to life with mercy.

VI. CONCLUSION

For the above cited reasons, the Court is asked to leave undisturbed both the verdict of the jury and the sentence of the trial court in this matter.

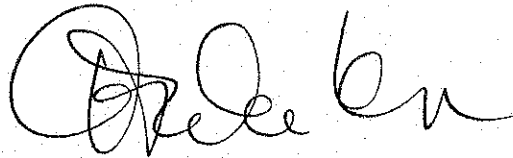
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kathleen Kern, do hereby certify that I have served a true and accurate copy of the State's Response to Defendant's Petition on Edward Harman, counsel for defendant, by first class mail, postage prepaid, at the his office address, on this 21st day of July, 2005.



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