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United States Sentencing Guidelines and the Supreme Court: *Booker*, *Fanfan*, *Blakely*, *Apprendi*, and *Mistretta*

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name redacted
Senior Specialist
American Law Division

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Summary

For fifteen years, sentencing in federal court had been governed by the United States Sentencing Guidelines. During that time, the Supreme Court has upheld the Guidelines in the face of various challenges. In the meantime, however, it had decided a series of cases which called into question past assumptions relating to the role of the jury in the sentencing process. In *Apprendi*, the Court held that any fact that increases the penalty for a crime beyond the statutory maximum assigned for that offense must be submitted to the jury and found beyond a reasonable doubt. The federal Sentencing Guidelines were considered beyond the reach of *Apprendi* because they only govern sentencing beneath the maximum penalty assigned to the crime of conviction. In *Blakely*, however, the Court held that the "statutory maximum" for *Apprendi* purposes constituted the applicable statutory sentencing guideline maximum, not the higher statutory maximum assigned to the crime of conviction. This raised questions as to the constitutional validity of the federal Sentencing Guidelines which the Court agreed to address in two consolidated cases, *Booker* and *Fanfan*.

Together the cases presented two issues: (1) Was the judicial factfinding that was central to the operation of the federal Sentencing Guidelines unconstitutional in light of the principles announced in *Apprendi* and *Blakely*? (2) If so, was the taint severable or did it doom the Sentencing Guidelines and perhaps the Sentencing Reform Act that authorized them? The Court concluded that the answer to the first question was yes but that the solution was to convert the Guidelines to advisory standards by severing only those sections of the Sentencing Reform Act that made the Guidelines binding on the lower federal courts.

The alignment of the justices in the two-part *Booker* decision is such that the prediction of future developments is even more perilous than usual. Some may find clarification in the Court's later decision in *United States v. Shepard*. Thus far the Court has exempted the fact of a prior conviction from the facts that must be found by the jury. In *Shepard* a plurality of the Court declined to allow the lower federal courts to make factual determinations concerning the existence of the fact of a prior conviction for purposes of the Armed Career Criminal Act.

This report appears in abridged form as CRS Report RS21932, *United States Sentencing Guidelines After* Blakely*:* Booker *and* Fanfan — *A Sketch.*

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United States Sentencing Guidelines and the Supreme Court: *Booker*, *Fanfan*, *Blakely*, *Apprendi,* and *Mistretta*

Introduction

Until recently, the United States Sentencing Guidelines governed sentencing in federal court. The Supreme Court had upheld them in the face of arguments that they constituted an unconstitutional delegation of authority and an affront to the separation of powers. *Mistretta v. United States*, 488 U.S. 361 (1989). Ye t thereafter, the Court held that due process and the right to a criminal jury trial require that any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). And for this reason, the Court found constitutionally wanting a state sentence imposed by operation of a legislative sentencing guideline procedure even though the final sentence fell beneath the maximum penalty assigned to the crime of conviction. *Blakely v. Washington*, 124 S.Ct. 2531 (2004). Then the Court agreed to decide what impact these principles had on the federal Sentencing Guidelines. *United States v. Fanfan*, 125 S.Ct. 12 (2004); *United States v. Booker*, 125 S.Ct. 11 (2004).[1]

More precisely, it agreed to consider two questions:

> Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.
>
> If the answer to the first question is "yes," the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

The Court answered the first question, yes, *United States v. Booker*, 125 S.Ct. 738, 746.[2] A different array of Justices responding to the second question for the Court

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[1] Resolutions have been offered in both the House and the Senate urging expeditious Supreme Court review, S.Con.Res. 130, H.Con.Res. 478.

[2] The Court considered the issues raised by Booker and Fanfan as one and thus for convenience the Court's decision which governs both cases will nonetheless be referred to as *Booker*.

answered, yes kind of. The Guidelines remain applicable on an advisory basis, but the statutory provisions that made them binding were severed from the law, 125 S.Ct. at 756-57.

Background of the United States Sentencing Guidelines

The Sentencing Reform Act of 1984, which established the United States Sentencing Commission and authorized it to issue sentencing guidelines, brought about striking changes in federal sentencing law.[3] Sentencing under earlier law was considered inconsistent and uncertain. Different federal statutes set different maximum penalties for the same misconduct committed under different jurisdictional circumstances. In 1976, the House Judiciary Committee identified over 20 separate federal murder statutes, 12 criminal restraint statutes, 38 property destruction statutes, 15 blackmail statutes, and 134 theft statutes, *Subcomm. on Criminal Justice of the House Comm. on the Judiciary, Impact of S. 1437 Upon Present Federal Criminal Laws, Pt.2 (Comm.Print)* 927-1264 (1976). Among these, the criminal restraint provisions featured 9 different maximum penalties, and the maximum penalties available under the property destruction and theft provisions were only more consistent by degree, *id.*; *see also*, S.Rept. 98-225, at 39-40 n.9 (1983) (recounting sentencing variations among theft and embezzlement statutes).

At the same time, federal judges enjoyed virtually unlimited discretion to impose any sentence beneath the maximum established by statute. Once imposed, sentences were ordinarily beyond appellate review, *Gore v. United States*, 357 U.S. 386, 393 (1958). Moreover, time actually served was a product of the parole laws. In spite of a facially longer sentence, a federal prisoner became eligible for parole and thus eligible for release after serving the shorter of 10 years, one third of his sentence, or the term set by the sentencing court, 18 U.S.C. 4205 (1982 ed.). At the discretion of the Parole Commission, a prisoner might be paroled at any time after becoming eligible up to and until his mandatory release date, generally pegged at service of two-thirds of his sentence (or 30 years of each consecutive sentence of 45 years or more), 18 U.S.C. 4206 (1982 ed.). Many in Congress came to conclude that the system did not work:

> In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the Parole Commission is to determine when to release the prisoner because he is "rehabilitated." Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One

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[3] Although styled an act, the Sentencing Reform Act was actually enacted as chapter II of the Comprehensive Crime Control Act, which in turn was enacted as Title II of P.L. 98-473, 98 Stat. 1976 (1984).

> offender may receive a sentence of probation, while another – convicted of the very same crime and possessing a comparable criminal history – may be sentenced to a lengthy term of imprisonment. S.Rept. 98-225, at 38 (1983).

Congress responded with the Sentencing Reform Act. The act abolished parole,[4] and replaced it with "supervised release," a term of conditional release imposed in addition to, rather than in lieu of, time to be served in prison, 18 U.S.C. 3583.[5] It retained the probation officer's presentence report to the court,[6] and the exemption of sentencing courts from the restrictions of the rules of evidence, 18 U.S.C. 3577 (1982 ed.), now 18 U.S.C. 3661. It articulated a series of purposes of sentencing and directed courts to weigh them when imposing sentence, 18 U.S.C. 3553(a). Both the prosecution and defendant were given authority to appeal the court's sentencing decisions, 18 U.S.C. 3742.

But the act's most dramatic change was the creation of the United States Sentencing Commission, 28 U.S.C. 991, and the act's insistence that federal courts impose sentences within the ranges dictated by the Commission's Sentencing Guidelines, except in those cases marked by circumstances that the Guidelines failed to take into consideration, 18 U.S.C. 3553(b). The Commission was placed in the judicial branch of the United States as an independent entity, 28 U.S.C. 991. With the advice and consent of the Senate, the President was to appoint the Commission's seven members, at least three of whom were required to be members of the federal bench, Id.[7]

The act gave the Commission rather exact instructions as to the nature of the Guidelines it was to issue, 28 U.S.C. 994. The Guidelines, for instance, were to establish a sentencing range "for each category of offense involving each category of defendant," 28 U.S.C. 994(b)(1), and each of these was to be assigned a sentencing range in which the maximum term of imprisonment was to be at most six months more than the minimum term for the range.[8] The Guidelines and subsequent

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[4] As a consequence of the demands of the Constitution's ex post facto clause, U.S.Const. Art.I, §9, cl.3, a crime committed prior to the act's effective date is punishable under the law in place at the time of the commission of the crime include its parole provisions.

[5] Parole served two functions: it permitted a prisoner to be released prior to service of his full sentence of imprisonment, 18 U.S.C. 4206 (1982 ed.), but following his release the prisoner was under supervision subject to a return to prison for service of the remainder of his term for breach of the conditions of his parole, 18 U.S.C. 4209, 4214. The act abolished the first feature, early release, but it retained the second in the form of an additional term of "supervised release" imposed as an additional component of a defendant's sentence.

[6] F.R.Crim.P. 32(c) (18 U.S.C. App. 1982 ed.), now F.R.Crim.P. 32(c) and 18 U.S.C. 3552(a).

[7] Congress later adjusted this requirement so that *no more* than 3 members of the Commission might be federal judges, P.L. 108-21, §401(n)(1), 117 Stat. 650, 676 (2003).

[8] "If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or six months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment," 28 U.S.C. 994(b)(2).

amendments to them were to go into effect 180 days after they had been presented to Congress, 28 U.S.C. 994(p).

The first Sentencing Guidelines went into effect on November 1, 1987, without Congressional deletion or amendment. They called for a scoring system under which broad categories of offenses – homicide, assault, theft, etc. – were assigned an initial score (base offense level) and points (offense levels) were added or subtracted to account for various aggravating and mitigating circumstances. The aggravating circumstances included not only the offense with which the defendant was charged, but all misconduct relevant to the charged offense, U.S.S.G. 1B1.3.[9]

The 43 possible final point totals (final offense levels) were each given 6 different ranges calibrated according to the defendant's criminal record ("criminal history category"). The score card was prepared first as part of the probation officer's presentence report, U.S.S.G. §6A1.1. The prosecution and the defendant were allowed to contest the presentence report's sentencing recommendations and the court was to resolve any disputes, U.S.S.G. §§6A1.2, 6A1.3. In 1991 without Congressional objection, the Commission expressed the view that the court should resolve disputed issues of fact by a preponderance of the evidence, U.S.S.G. §6A1.3, cmt.

The Sentencing Commission faced its first constitutional challenge in *Mistretta v. United States*, 488 U.S. 361 (1989). There the Court rejected arguments that the Commission was the beneficiary of an unconstitutional delegation of legislative authority;[10] that the Commission's placement within the Judicial Branch offended constitutional principles of separation of powers;[11] that required judicial service upon

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[9] "One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense with which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted," U.S.S.G. §1A1.1, cmt 4(a).

[10] "Petitioner argues that in delegating the power to promulgate sentencing guidelines for every federal criminal offense to an independent Sentencing Commission, Congress has granted the Commission excessive legislative discretion in violation of the constitutionally based nondelegation doctrine. We do not agree. . . .The statute outlines the policies which prompted establishment of the Commission, explains what the Commission should do, and how it should do it, and sets out specific directives to govern particular situations," 488 U.S. at 371, 379.

[11] "In sum, since substantive judgment in the field of sentencing has been and remains appropriate to the Judicial Branch, and the methodology of rulemaking has been and remains appropriate to that Branch, Congress' considered decision to combine these functions in an independent Sentencing Commission within the Judicial Branch does not violate the principle of separation of powers," 488 U.S. at 396-97.

the Commission likewise offended those principles;[12] and that the President's power to appoint and remove members gave further offense to the notion of separation of powers.[13]

A few years later, the Court found no merit in the contention that the application of the Sentencing Guideline enhancement for defendant's perjury at trial undermined the accused's implicit constitutional right to testify on her own behalf, *United States v. Dunnigan*, 507 U.S. 87, 98 (1993).[14] Then it turned a deaf ear to arguments that the Sentencing Guidelines' use of "relevant conduct" raised double jeopardy concerns either when a defendant was later tried for conduct that formed the basis for an earlier sentencing enhancement, *Witte v. United States*, 515 U.S. 389, 403-404 (1995), or when the conduct for which a defendant had been acquitted was later considered relevant conduct for sentencing enhancement purposes following conviction on other related charges, *United States v. Watts*, 519 U.S. 148, 157 (1997). In both instances the rationale was the same, "sentencing enhancements do not punish a defendant for crimes for which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction," 519 U.S. at 155, *citing*, *Witte*, 515 U.S. at 402-403. At least on the facts before it, the Court in *Watts* also endorsed the Guidelines use of the preponderance standard.[15] Between *Witte* and *Watts*, the Court emphasized the discretion of district court to depart from a Guidelines sentencing range in the presence of unaccounted circumstances (and the deference due such a departure), *Koon v. United States*, 518 U.S. 81 (1996).[16]

Then in *Edwards*, defendants, charged with a conspiracy involving both powdered cocaine *and* crack, were convicted after the trial court instructed the jury

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[12] "[P]articipation of federal judges on the Sentencing Commission does not threaten, either in fact or in appearance, the impartiality of the Judicial Branch," 488 U.S. at 407.

[13] "We simply cannot imagine that federal judges will comport their actions to the wishes of the President for the purpose of receiving an appointment to the Sentencing Commission," 488 U.S. at 410.

[14] [I]f a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of Justice, or attempt to do the same . . . . When doing so, it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding," 507 U.S. at 95.

[15] "The Guidelines state that it is 'appropriate' that facts relevant to sentencing be proved by a preponderance of the evidence, U.S.S.G. §6A1.3, cmt., and we have held that application of the preponderance standard at sentencing generally satisfies due process, *McMillan v. Pennsylvania*, 477 U.S. 79, 91-2 (1986). We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence. The cases before us today do not present such exceptional circumstances, and we therefore do not address that issue." 519 U.S. at 156-57.

[16] The Court in *Koon* held that district court departure decisions were entitled to deference and consequently should be reviewed under an abuse of discretion standard. 518 U.S. at 96-100. Congress later subjected certain departure decisions to de novo review, 18 U.S.C. 3742(e).

that the prosecution needed to show a conspiracy involving powdered cocaine *or* crack, *Edwards v. United States*, 523 U.S. 511, 512-13 (1998). The defendants were sentenced as charged with conspiracy involving both powdered cocaine and crack. They argued that it must be assumed that the jury only found them guilty of the less severely punishable powdered cocaine conspiracy. Not so, said the Court. Since the sentence imposed fell beneath the statutory maximum for the less severely punishable powdered cocaine conspiracy, it did not matter whether the trial court based its sentence upon the jury's verdict or upon its own finding of relevant conduct.[17] All of these cases, however, predate *Blakely* and *Apprendi*.[18]

Blakely, *Apprendi*, and Related Matters

With disarming simplicity, the United States Constitution declares that, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law," U.S.Const. Amend. V. Moreover, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S.Const. Amend. VI.[19]

Only surprisingly late in our constitutional history, did the Court find occasion to point out that due process demands that the guilt of a criminally accused be found "beyond a reasonable doubt;" that the due process clause "protects the accused

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[17] "Thus, the sentencing judge here would have had to determine the total amount of drugs, determine whether the drugs consisted of cocaine, crack, or both, and determine the total amount of each – regardless of whether the judge believed that petitioners' crack-related conduct was part of the offense of conviction or the judge believed that it was part of the same course of conduct or common scheme or plan. The Guidelines sentencing range – on either belief – is identical." 523 U.S. at 514-15.

[18] There is one post-*Apprendi* case, *United States v. Cotton*, 535 U.S. 625 (2002). The defendants in *Cotton* were convicted following a jury trial which heard "overwhelming" and "essentially uncontroverted" evidence that they were involved in a conspiracy to deal at least 50 grams of cocaine base (crack), 535 U.S. at 633, an offense for which they could be sentenced to prison for any term of years or for life and for which they were in fact sentenced to 30 years, 535 U.S. at 628. The indictment under which they were convicted, however, simply charged conspiracy to trafficking in a detectable amount of crack, an offense which carried a maximum term of 20 years, *id.* The defendants argued that the Fifth Amendment right to grand jury indictment and *Apprendi* required that they be sentenced no more severely than the crime of indictment allowed. Yet the Court ruled that by operation of the plain error rule they had forfeited the objection by failing to raise it at trial, 535 U.S. at 631-35. In the course of its opinion, the Court suggested that the sentencing guideline did not provide the *Apprendi*-triggering prescribed statutory maximum, "Respondents challenged the presentence reports' assignment of a base offense level of 38, which is applicable to 1.5 kilograms or more of cocaine base. But they never argued that the conspiracy involved less than 50 grams of cocaine base, which is the relevant quantity for purposes of *Apprendi*, as that is the threshold quantity for the penalty of life imprisonment in 21 U.S.C. §841(b)(1)(A)." 535 U.S. at 633 n.3.

[19] Other than the right to grand jury indictment, *Hurtado v. California*, 110 U.S. 519, 538 (1884), these rights are binding upon the states with equal force, U.S.Const. Amend. IV, §1; *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968).

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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 U.S. 358, 364 (1970)(emphasis added).

Conviction cannot be had, the Court subsequently explained, upon the defendant's failure to prove the absence of one of the elements of the crime with which he is charged. Thus, for example, a state may not require an accused to prove that he acted in the heat of passion (i.e., with an absence of malice aforethought) and therefore is not guilty of murder (for which malice aforethought is an element) but only of manslaughter, *Mullaney v. Wilbur*, 421 U.S. 684, 698-701 (1975).

Due process in this context is focused upon the prosecutor's responsibility to prove each of the crime's elements beyond a reasonable doubt. Due process is not offended if the defendant must prove the existence of a lesser included offense rather than the more serious offense with which he is charged. So, a state may outlaw the intentional killing of another as murder, but allow the accused to claim guilt under a less severely punished crime when he can show by a preponderance of the evidence that he acted under the influence of extreme emotional disturbance, *Patterson v. New York*, 432 U.S. 197, 205-207 (1977).

Still focused upon the prosecutor's burden to prove each of the crime's elements, the Court held that once the prosecution has done so no denial of due process occurs simply because the defendant, convicted of the crime, is subject to a mandatory minimum sentence based upon the prosecutor's proof to the court (not the jury) of an additional sentencing factor (by a preponderance of the evidence), *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986).[20]

Moreover, at least when the sentencing factor is the fact of a prior conviction, the sentencing factors might be used to enhance maximum penalties as well as to establish minimum penalties. Thus, a majority of the Court saw no constitutional impediment in a statutory scheme that raised the maximum penalty of a crime from two years to 20 years based on the presence of a prior conviction established to the court's satisfaction by a preponderance of the evidence, *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998).[21]

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[20] The *McMillan* procedure exposed anyone convicted of various designated offenses to a mandatory minimum term of imprisonment for five years if the sentencing judge found by a preponderance of the evidence that the defendant had brandished a firearm during the commission of the offense.

[21] Subsection (a) of 8 U.S.C. 1326 makes it a crime for deported aliens to reenter the United States without special permission. Offenders are subject to imprisonment for not more than two years, unless prior to deportation they had been convicted of an aggravated felony in which case they are subject to imprisonment for not more than 20 years, 8 U.S.C. 1326(b)(2). Almendarez-Torres had entered a plea of guilty to a charge of violating subsection 1326(a), but argued that the "sentencing factor" of a prior conviction must in fact be considered an element of a separate crime which the Fifth Amendment required to be charged in the indictment. The Court did not agree, "We conclude that the subsection is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution require the government to charge the factor that it mentions, an earlier conviction, in the

Logical though it may have been in light of the Court's precedents, a majority of the Court's members became uneasy with the implications of *Almendarez-Torres* almost immediately.[22] They began with an arguably strained statutory interpretation in which they characterized various statutory factors as elements rather than sentencing factors. They did so they explained because otherwise the statutes might be considered constitutionally suspect.

Jones v. United States, 526 U.S. 227 (1999), presented facts similar to those in *Almendarez-Torres*. Jones was indicted and convicted of carjacking in violation of 18 U.S.C. 2119. Conviction carried a sentence of imprisonment for not more 15 years, 18 U.S.C. 2119(1), but the maximum sentence was increased to 25 years if the offense resulted in serious bodily injury, 18 U.S.C. 2119(2), and to life imprisonment if the offense resulted in death, 18 U.S.C. 2119(3).[23] Neither the indictment nor the instructions to the jury made any mention of bodily injury, but the presentence report did and recommended a sentence of 25 years which the trial court imposed. The Court of Appeals affirmed, *United States v. Jones*, 60 F.3d 547 (9th Cir. 1995). The Supreme Court, in a 5-4 decision, reversed.

The Court reasoned that the statute did not create a single crime with three possible sentences. Instead, it created three separate crimes each with its own penalty, i.e., simple carjacking (not more than 15 years); carjacking where serious bodily injury results (not more than 25 years); and carjacking where death results (life imprisonment). The Court observed, however, that "[w]hile we think the fairest reading of §2119 treats the fact of serious bodily harm as an element, not a mere enhancement, we recognize the possibility of the other view. Any doubt that might be prompted by the arguments for that other reading should, however, be resolved against it under the rule repeatedly affirmed, that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." 526 U.S. at 239.

To find otherwise, the Court believed, might bring it into conflict with the principle that "under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior

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indictment." 523 U.S. at 226-27.

[22] Since the *Apprendi* majority consisted of the four dissenting Justice in *Almendarez-Torres* and Justice Thomas, it might be more accurate say that four Justices remained uneasy and a pivotal fifth Justice began to question the wisdom of *Almendarez-Torres*.

[23] "Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall – (1) be fined under this title or imprisoned not more than 15 years, or both, (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death." 18 U.S.C. 2119.

conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," 526 U.S. at 243 n.6. *Apprendi* made real the constitutional warnings in *Jones*.[24]

Apprendi was convicted of shooting up the home of his African-American neighbors. There was evidence, which Apprendi disputed, that his crime was motivated by racial animus, *Apprendi v. New Jersey*, 530 U.S. at 469, citing, *Apprendi v. State*, 159 N.J. 7, 10, 731 A.2d 485, 486 (1999). Under New Jersey law, possession of a firearm for an unlawful purpose [was] a second degree crime, N.J.Stat.Ann. §2C:39-4.a., and, unless otherwise provided, [was] punishable by imprisonment for a term fixed at between 5 and 10 years, N.J.Stat.Ann. §2C:43-6.a.(2). A second degree crime, however, carried an extended term of imprisonment if the court found that it was committed by a defendant "acting with a purpose to intimidate an individual or group of individuals because of race . . ." N.J.Stat.Ann. §2C:44-3.e. A second degree crime found to have been committed under such circumstances carried a term of imprisonment fixed at between 10 and 20 years, N.J.Stat.Ann. §2C:43-7.a.(3).

Apprendi pled guilty under a multicount indictment which nowhere mentioned either the hate crime sentencing enhancement statute or the allegations which would support its application, 530 U.S. at 469. Nevertheless, in the plea agreement the prosecution reserved the right to seek the hate crime enhancement and Apprendi reserved the right to challenge its constitutionality, 530 U.S. at 470. The trial court sentenced Apprendi to a hate-crime-enhanced term of 12 years on one of the unlawful possession counts (which otherwise would have carried a maximum term of 10 years) and rejected his constitutional arguments; the New Jersey appellate courts affirmed, *Apprendi v. State*, 304 N.J.Super. 147, 698 A.2d 1265 (1997), *aff'd*, 159 N.J. 7, 731 A.2d 485 (1999).

The Supreme Court, in a decision written by Justice Stevens and joined by Justices Scalia, Thomas, Souter and Ginsburg, reversed and remanded, 530 U.S. at 468. The Court declared that the jury trial and notification clauses of the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments embody a principle that insists that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum*

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[24] Only a few weeks prior to Apprendi, a near unanimous Court announced, *Castillo v. United States*, 530 U.S. 120 (2000), another elements-or-sentencing-factor decision in which it appeared hesitant to pursue *Jones'* broad implications. "The statute in question, 18 U.S.C. 924(c), prohibit[ed] the use or carrying of a firearm in relation to a crime of violence, and increase[d] the penalty dramatically when the weapon used or carried is, for example, a machinegun." 530 U.S. at 121 (internal quotation marks omitted) In doing so, the Court concluded, subsection 924(c) created a series of crimes in which the presence of a machinegun or one of the other sentence-escalating weapons was an element, *id.* Although some might not find this construction no more compelling than the one produced in *Jones*, the Court did: "this [is] a stronger separate crime case than either *Jones* or *Almendarez-Torres* — cases in which we were closely divided as to Congress' likely intent." 530 U.S. at 131. Other than possibly this reference to *Jones*, *Castillo* neither speaks nor hints of a construction driven by the specter of unconstitutionality. The Court might have confirmed *Jones* in *Castillo*, but *Apprendi*, a state case, provides a broader base.

must be submitted to the jury and proved beyond a reasonable doubt," 530 U.S. at 490 (emphasis added).

Justice Thomas, together with Justice Scalia, agreed but issued a concurrence that suggested they would have gone further.[25] Justice O'Connor wrote a dissent in which she was joined by Chief Justice Rehnquist and Justices Breyer and Kennedy, 530 U.S. at 523. At the heart of the dissent lies the belief that the majority had announced as constitutional mandate a rule that the Constitution does not require.[26]

Justice Breyer and Chief Justice Rehnquist joined in an additional separate dissenting opinion, arguing the benefits of judicial participation in sentencing, 530 U.S. at 555, a view whose constitutional foundations Justice Scalia questioned in a separate concurrence, 530 U.S. at 498-99.

When the Court limited the *Apprendi* rule to any fact which drove punishment beyond the applicable statutory maximum, they seemed to leave unscathed the federal Sentencing Guidelines that operate only up to that maximum, U.S.S.G. §5G1.1(a). The *Apprendi* dissenters, however, sensed a conflict with *Apprendi*'s underlying rationale. "The actual principle underlying the court's decision," the dissent opined, "may be that any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt," 530 U.S. at 543-44 (O'Connor, J., dissenting). If so the dissenters speculated, "[t]he principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (e.g., *the federal sentencing guidelines*)." 530 U.S. at 544 (emphasis added).

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[25] "This case turns on the seemingly simple question of what constitutes a crime . . . . All of [the] constitutional protections turn on determining which facts constitute the crime — that is, which facts are the elements or ingredients of a crime . . . . [Historic] authority establishes that a crime includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)." 530 U.S. at 499-501.

[26] "I do not believe that the Court's 'increase in the maximum penalty' rule is required by the Constitution . . . . Last Term, in *Jones v. United States*, 526 U.S. 227 (1999), this Court found that our prior cases suggested the following principle: '[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' Id., at 243, n. 6. At the time, Justice Kennedy rightly criticized the Court for its failure to explain the origins, contours, or consequences of its purported constitutional principle; for the inconsistency of that principle with our prior cases; and for the serious doubt that the holding cast on sentencing systems employed by the Federal Government and States alike. Id., at 254, 264-272 (dissenting opinion). Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in Jones." 530 U.S. at 552, 523-24.

And they added, Justice Thomas' concurrence appeared to endorse this construction when he "essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the sentencing guidelines," *id.* In fact, neither Justice Stevens in his opinion for the Court nor Justices Thomas nor Scalia in their concurrences offered a great deal to allay the dissent's concerns. The Court noted that the issue was not before it and that Guideline sentences must fall within the maximum prescribed by statute.[27] Justice Thomas observed that the impact on the guidelines need not be addressed, but sounded ambivalent on the merits of the issue.[28] Justice Scalia, who joined in Justice Thomas' concurrence, wrote separately to emphasize the constitutional necessity of jury fact-finding rather than the guideline-assisted judicial fact-finding which he saw favored in Justice Breyer's dissent.[29]

There followed *Apprendi* two rather unusual cases. In one, *Ring v. Arizona*, 536 U.S. 584 (2002), the Court reversed one its earlier decisions, *Walton v. Arizona*, 497 U.S. 639 (1990), when the Arizona Supreme Court asserted that *Walton* was based on a misunderstanding of Arizona law. In the second, *Harris v. United States*, 536 U.S. 545 (2002), the Court upheld *McMillan* on the votes of the four *Apprendi* dissenters, joined (without a written concurrence) by Justice Scalia.

The Court in *Jones* explained that *Walton* was premised on the understanding that a defendant found guilty of a capital offense became subject to imposition of the death penalty without the need for any further judicial fact finding.[30] The Court in

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[27] "The principal dissent, in addition, treats us to a lengthy disquisition on the benefits of determinate sentencing schemes, and the effect of today's decision on the federal Sentencing Guidelines. The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held. *See, e.g., Edwards v. United States*, 523 U.S. 511, 515 (1998) (opinion of Breyer, J., for a unanimous court) (noting that '[o]f course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines.')," 530 U.S. at 497 n.21.

[28] "It is likewise unnecessary to consider whether (and, if so, how) the rule regarding elements applies to the Sentencing Guidelines, given the unique status that they have under *Mistretta v. United States*, 488 U.S. 361 (1989). But it may be that this special status is irrelevant, because the Guidelines have the force and effect of laws." *Id.*, at 413 (Scalia, J., dissenting)." 530 U.S. at 523 n.11.

[29] "I feel the need to say a few words in response to Justice Breyer's dissent. It sketches an admirably fair and efficient scheme of criminal Justice designed for a society that is prepared to leave criminal Justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State – and an increasingly bureaucratic part of it, at that.) The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." 530 U.S. at 498 (Scalia, J. concurring).

[30] "The [*Walton*] Court thus characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." 526 U.S. at 251.

Apprendi affirmed this understanding in no uncertain terms.[31] Yet the Arizona courts in *Ring* made it clear that in fact Arizona law permitted imposition of capital punishment only following judicial fact finding, a revelation that placed *Walton* and *Apprendi* clearly in conflict, 536 U.S. at 609. The clarification doomed *Walton*, which the Court overruled "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty," *id.*

In light of what was to follow, *Ring* may be understandable; *Harris* may be perplexing. *Harris* confirmed the continued vitality of *McMillan* and appeared to confirm that *Apprendi* does not govern sentencing beneath the canopy set by the statutory maximum for the crime of conviction. Harris was convicted of selling drugs with a pistol visible at his side, 536 U.S. at 550. By operation of 18 U.S.C. 924(c)(1)(A), he became subject to a mandatory minimum sentence of imprisonment for not less than five years for carrying the pistol, or not less than seven years for brandishing it, or not less than 10 years for discharging it.[32] The indictment under which he was convicted simply noted that Harris carried a firearm during and in relation to drug trafficking. No mention was made of brandishing, but the court at sentencing found by a preponderance of the evidence that subparagraph 924(c)(1)(A)(ii) applied, 536 U.S. at 551. Harris argued that imposition of the judge-found brandishing minimum rather than the grand-jury-charged and jury-found carrying minimum contravened *Apprendi*. In the eyes of four Members of the Court – Justices Kennedy, O'Connor, and Scalia, and Chief Justice Rehnquist:

> *McMillan* and *Apprendi* are consistent because there is a fundamental distinction between the factual findings that were at issue in those two cases. *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an

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[31] "[T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. *Walton v. Arizona*, 497 U.S. 639, 647-649 (1990); *id*., at 709-714 (Stevens, J., dissenting). For reasons we have explained, the capital cases are not controlling: `Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.' *Almendarez-Torres*, 523 U.S., at 257, n. 2 (Scalia, J., dissenting) (emphasis deleted). *See also Jones*, 526 U.S., at 250-251." 530 U.S. at 496-97.

[32] ". . . [A]ny person who, during and in relation to any crime of . . . drug trafficking . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime — (i) be sentenced to a term of imprisonment of not less than five years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than seven years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years. . . ." 21 U.S.C. 924(c)(1)(A).

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> element of an aggravated crime — and thus the domain of the jury — by those who framed the Bill of Rights. The same cannot be said of a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum), for the jury's verdict has authorized the judge to impose the minimum with or without the finding. As *McMillan* recognized, the state may reserve this type of factual finding for the judge without violating the Constitution." 536 U.S. at 557.

The fifth Justice, Justice Breyer, agreed with the result but could not see the distinction between *McMillan* and *Apprendi*; yet his view that the Sixth Amendment accommodated judge-found sentencing factors left him unwilling to extend *Apprendi* to mandatory minimums given his perception of the consequences of such an extension, 536 U.S. at 569.

The dissenters – Justices Thomas, Stevens, Souter and Ginsburg – found in the Constitution a demand that "if a statute annexes a higher degree of punishment based on certain circumstances, exposing a defendant to that higher degree of punishment requires that those circumstances be charged in the indictment and proved beyond a reasonable doubt," 536 U.S. at 576.

Blakely

Through all of this, the lower federal appellate courts either implicitly or explicitly had as one held that the "prescribed statutory maximum" that triggered *Apprendi* concerns was the maximum penalty assigned to the crime of conviction, not the top of the range assigned to the Sentencing Guidelines' base offense level for the crime of conviction.[33] The Court's *Blakely* decision raised questions about the

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[33] *Blakely v. Washington*, 124 S.Ct. 2531, 2547 n.1 (2004) (O'Connor, J., dissenting)(Prior to today, only one court [the Kansas Supreme Court] had ever applied *Apprendi* to invalidate application of a guidelines scheme)(citing cases from each of the U.S. Courts of Appeal); *see also, United States v. Caba*, 241 F.3d 98, 101 (1st Cir. 2001)("*Apprendi* simply does not apply to guideline findings (including, inter alia, drug weight calculations) that increase the defendant's sentence but do not elevate the sentence to a point beyond the a lowest applicable maximum"); *United States v. White*, 240 F.3d 127, 136 (2d Cir. 2001) ("*Apprendi* does not alter this conclusion, as, again, we read it to apply only when a sentencing court's findings increase the penalty faced by the defendant above the statutory maximum for a given count, and not when they merely affect the length of a sentence within the statutory range"); *United States v. Kinter*, 235 F.3d 192, 199-200 (4th Cir.2000)("This contention essentially boils down to an argument that *Apprendi* renders much, if not all, of the current sentencing practices under the Sentencing Guidelines unconstitutional. . . The *Apprendi* Court, however, did not paint with the broad brush that Kinter now offers us. On the contrary, the majority opinion explicitly limited its holding to factual determinations 'that increase[] the penalty for a crime beyond the *prescribed statutory maximum*.' . . . The government contends, and all of the Courts of Appeal to have considered the issue have thus far agreed, that to find the 'prescribed statutory maximum' as contemplated in *Apprendi*, one need only look to the language of the statute criminalizing the offense, and no further"); *United States v. Doggett*, 230 F.3d 160, 166 (5th Cir. 2000)("To the extent that Doggett argues *Apprendi* prohibits the trial court from determining the amount of drugs for relevant conduct purposes under the Sentencing Guidelines, this argument is rejected. The decision in *Apprendi* was specifically limited to facts which increase the penalty beyond the statutory

accuracy of that view. *Blakely* applied *Apprendi* principles to strike down a state sentencing guideline enhancement that fell well within the maximum sentence provided for the crime of conviction.

Blakely had kidnapped his estranged wife, bound her with duct tape, stuffed her into a wooden crate in the bed of his truck, and driven her from Washington to Montana.[34] He eventually pled guilty to second degree kidnaping involving domestic violence and use of a firearm, a class B felony under Washington State law.[35] Class B felonies were punishable by imprisonment for a maximum of 10 years.[36] Under the applicable Washington statutory sentencing guidelines, the crime was punishable by imprisonment within the "standard range" of 49 to 53 months.[37] A second statutory guideline provision, however, authorized the court to impose a more severe sentence (an "upward departure"), when it found additional aggravating factors unaccounted for in the standard range.[38] Upon hearing the circumstances of the offense, the court found that the crime had been committed with "deliberate cruelty," and sentenced Blakely to a 90 month term of imprisonment.[39]

The Washington appellate court found Blakely's *Apprendi* argument unpersuasive. Although the enhanced sentence was based on judicial findings of fact that carried it beyond the ceiling set by the standard guideline range for the crime of

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maximum, and does not invalidate a court's factual finding for the purpose of determining the applicable Sentencing Guidelines"); *United States v. Corrado*, 227 F.3d 528, 542 (6th Cir. 2000)("In this case, [defendants] faced a maximum sentence of twenty years on the RICO conspiracy counts . . . Because the district court did not sentence either defendant to a term of more than twenty years on the RICO counts, *Apprendi* is not triggered"); *Hernandez v. United States*, 226 F.3d 839, 841 (7th Cir. 2000)("In so arguing, however, he overlooks the distinction between the prescribed statutory maximum and the various levels of punishment authorized by the Sentencing Guidelines. . . The fact that different levels under the statutory maximum depend on proof of various aggravating facts is not enough to make those facts elements of the offense rather than sentencing factors"); *United States v. Lewis*, 236 F.3d 948, 950 (8th Cir. 2001)("defendant argues that the District Court violated *Apprendi*. . . when it used the firearms seized during the search to enhance his Guidelines offense range. This argument is misplaced, because the enhancement did not affect the statutory maximum); *United States v. Ochoa*, 311 F.3d 1133, 1134 (9th Cir. 2002)("Pursuant to U.S.S.G. §5G1.1(c), any application of §1B1.3 may not exceed the statutory maximum for the underlying offense of conviction and therefore does not violate *Apprendi*"); *United States. v. Heckard*, 238 F.3d 1222, 1235 (10th Cir. 2001)("[After *Apprendi*,] judges may still ascertain drug quantities by a preponderance of the evidence for the purpose of calculating offense levels under the Sentencing Guidelines, so long as they do not sentence above the statutory maximum for the jury-fixed crime"); *United States v. Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000)("The Sentencing Guidelines are not subject to the *Apprendi* rule").

[34] *State v. Blakely*, 111 Wash. App. 851, 47 P.3d 149 (2002).

[35] Wash.Rev.Code Ann. §9A.40.030(3)(1997).

[36] Wash.Rev.Code Ann. §9A.20.021(1)(b)(1997).

[37] Wash.Rev.Code Ann. §9A.94A.320. Table 2.V; 9.94.310. Table 1(1)V[2], 3(b)(1997).

[38] Wash.Rev.Code Ann. §9A.94A.120(2); 9.94A.390 (1997); *State v. Gore*, 143 Wash.2d 288, 315-16, 21 P.3d 262, 277 (2001).

[39] 111 Wash.App. at 870-71, 47 P.3d at 159.

conviction, a sentence of 90 months was still well within the 10 year (120 month) maximum established for such offenses.[40]

The United States Supreme Court disagreed, *Blakely v. Washington*, 124 S.Ct. 2531 (2004). The question in *Blakely* was simply did the "prescribed statutory maximum" that triggered jury trial and proof beyond a reasonable doubt requirements refer to the 10 year maximum for second degree kidnaping or to the 53 month maximum of the sentencing guidelines' standard sentencing range? In the mind of the *Blakely* Court "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words 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 facts." 124 S.Ct. at 2537 (emphasis of the Court; internal citations omitted). Blakely's guilty plea did not include the facts upon which the sentencing court had relied to enhance his sentence from the maximum 53 months that his plea would have supported the 90 month enhanced sentence the court had imposed. Thus, "[b]ecause the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid." 124 S.Ct. at 2538.

The *Blakely* Court expressly declined to comment on the application, if any, of this principle to the federal Sentencing Guidelines:

> The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. The Federal Guidelines are not before us, and we express no opinion on them. 124 S.Ct. at 2538 n.9.

As they had in *Apprendi*, Justices O'Connor and Breyer in dissent expressed concern for impact of the decision on the federal Sentencing Guidelines.[41]

Fanfan and *Booker*

The Court addressed that concern in *Booker*, 125 S.Ct. 738 (2005).[42] Fanfan and Booker were each convicted of controlled substances offenses, *United States v. Fanfan*, 2004 WL 1723114, *2 (D.Me. June 28, 2004); *United States v. Booker*, 375

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[40] *Id.*

[41] "If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would. What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost." 124 S.Ct. at 2549 (O'Connor, J. dissenting).

"Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how. As a result of today's decision, federal prosecutors, like state prosecutors, must decide what to do next, how to handle tomorrow's case . . . Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew." 124 S.Ct. at 2561 (Breyer, J. dissenting).

[42] As noted earlier, although referred to as the *Booker* case, the Court's decision applies to both Booker and Fanfan.

F.3d 508, 509 (7th Cir. 2004). In both instances, application of the Sentencing Guidelines would require sentencing within ranges beyond those supported by the jury verdict alone, in Fanfan's case 15 to 16 years (188 to 235 months) rather than five to six years (63 to 78 months) and in Booker's case 30 years to life (360 months to life) rather than 17 to 21 years (210 to 262 months).

The lesson of *Blakely* for the district court in *Fanfan* was clear: a judge may not sentence a defendant other than on facts found by the jury.[43] The court agreed with suggestions in the Solicitor General's *Blakely* amicus brief and in the remarks of the dissenters in *Blakely* that for purposes of constitutional analysis the federal Sentencing Guidelines were indistinguishable from those in *Blakely*.[44]

A majority of the appellate panel in *Booker* concurred that the lesson of *Blakely* is that "the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," 375 F.3d at 510, *quoting Blakely*, 124 S.Ct. at 2536; and therefore "that *Blakely* dooms the guidelines insofar as they require that sentences be

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[43] "According to *Blakely*, and I'm quoting directly here now, 'Our precedents make clear, however, that the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

'In other words 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. 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 and the judge exceeds his proper authority.' . . .

"Moreover, the *Blakely* court in adhering to the principles of its earlier *Apprendi* decision states at an another point, and I quote, '*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.'. . .

"And one other quotation near the end of the opinion, 'As *Apprendi* held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.'" 2004 WL 1723114, *1-*2.

[44] "I see no basis upon which to avoid the reasoning of *Blakely* just because I'm applying federal guidelines, rather than Washington state guidelines.

"Indeed, I note that the Solicitor General of the United States, the top government lawyer for the Supreme Court, expressed his concern to the Supreme Court that a holding such as the court came up with in *Blakely* would jeopardize the Federal Sentencing Guidelines. . . .

"Returning back to the quotation from the [Solicitor's] brief, 'Such a rule would have profound consequences for the federal Guidelines. As explained more fully below, facts other than the elements of the offense enter into almost all of the calculations under the Guidelines, beginning with the most basic calculations for determining the offender's presumptive sentencing range. A decision in favor of petitioner,' the Solicitor General goes on, of course that's exactly what *Blakely* did, he says, 'could thus raise a serious question about whether *Apprendi* applies to myriad factual determinations under the Guidelines. . .

"So although the *Blakely* court did not address the federal guidelines, I do conclude that the Solicitor General was exactly correct in his briefing that a decision like *Blakely* applies to the Federal Guidelines." *3- *4.

based on facts found by a judge." 375 F.3d at 511. Although the appellate panel did not rule on severability, it did comment upon the consequences of severance:

> To summarize, (1) The application of the guidelines in this case violated the Sixth Amendment as interpreted in *Blakely*; (2) in cases where there are no enhancements – that is, no factual findings by the judge increasing the sentence – there is no constitutional violation applying the guidelines unless the guidelines are invalid in their entirety; (3) we do not decide the severability of the guidelines, and so that is an issue for consideration on remand should it be made an issue by the parties; (4) if the guidelines are severable, the judge can use a sentencing jury; if not, he can choose any sentence between 10 years and life and in making the latter determination he is free to draw on the guidelines for recommendations as he sees fit; (5) as a matter of prudence, the judge should in any event select a nonguidelines alternative sentence. 375 F.3d at 515.

Judge Easterbrook cited two reasons for his dissent to the panel's decision, (1) the Supreme Court's decision in *Edwards* overshadows the field to an extent that only the Supreme Court by overturning *Edwards* would permit the lower courts to apply *Blakely* to the federal Sentencing Guidelines, 375 F.3d at 516-17, and (2) *Blakely* is inapplicable to the Sentencing Guidelines because, unlike the Washington scheme, in federal law there is only one maximum *statutory* sentence and that is the maximum sentence assigned the crime of conviction. 375 F.3d at 517-21.[45]

The Court granted certiorari for expedited consolidated review of the cases in order to consider two questions, 125 S.Ct. 11, 12 (2004): Did *Apprendi/Blakely* apply to the federal Sentencing Guidelines? And if so, how much, if any, of the Guidelines or the Sentencing Act under which they were created, remained viable?

The answers were easily stated, but splintered the Court yet again. The principles announced in *Apprendi/Blakely* apply to the federal Sentencing Guidelines, 125 S.Ct. 746. As a consequence, the statutory provisions which made the Guidelines binding on federal trial courts and those which directed federal appellate courts to ensure their binding application must be severed from the Sentencing Reform Act, 125 S.Ct. 756-57.

The answers required an opinion of two separate parts, each written and (with one exception) espoused by a different array of the Justices. Justice Ginsburg joined the four *Apprendi/Blakely* "jury right" Justices (Stevens, Scalia, Souter, and Thomas) in the part of the Court's opinion devoted to the issue of *Apprendi/Blakely*'s application to the federal Sentencing Guidelines; and she then joined the four *Apprendi/Blakely* "judicial sentencing factor" dissenters (Rehnquist, O'Connor, Kennedy, and Breyer) in the part of the Court's opinion devoted to the issue of

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[45] The defendants in *Edwards v. United States*, 523 U.S. 511 (1998), sought to avoid the consequences of judicial sentencing determinations through the doctrine of constitutional avoidance. In Judge Easterbrook's view, "the Court's opinion in *Edwards* acknowledged that constitutional contentions have been advanced. *Edwards* held that a judge nonetheless may ascertain (using the preponderance standard) the type and amount of drugs involved, and impose a sentence based on that conclusion, as long as the sentence does not exceed the statutory maximum." 375 F.3d at 516.

severance. Other than Justice Ginsburg, each of the Justices wrote or joined a dissenting opinion.

On the question of application, Justice Stevens' opinion for the Court rather quickly dispensed with the counter-application arguments. It was said that *Apprendi/Blakely* does not apply to the Guidelines because: (1) the Guidelines are the work of a Commission rather than a legislative body; they are Guidelines not statutes; they establish Guideline maximum penalties not statutory maximum penalties; (2) the Court's past treatment of the Guidelines belies the possibility of any Sixth Amendment infirmities as a matter of stare decisis; and (3) to elevate the Guidelines to the status of legislation for Sixth Amendment purposes would offend separation of powers principles. To which the Court responded: (1) the critical defect in *Apprendi*, *Blakely*, and *Booker* is the intrusion upon the function of the jury not the name given the intrusive mechanism;[46] (2) none of the Court's earlier cases addressed the Sixth Amendment's application to the Guidelines; there is no conflicting stare decisis, 125 S.Ct. at 754; and (3) *Mistretta* made clear that the Guidelines constitute the exercise of a constitutionally valid delegation of authority, 125 S.Ct. at 755.

The Court repeated the ways in which it has described the basic *Apprendi* principle that puts these objections to rest. "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," 125 S.Ct. at 748, quoting, *Apprendi v. New Jersey*, 530 U.S. at 490. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt," 125 S.Ct. at 749, quoting, *Ring v. Arizona*, 536 U.S. at 602. "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," 125 S.Ct. at 749, quoting, *Blakely v. Washington*, 124 S.Ct. at 2537. The opinion ends with a view of the principle from yet a fourth angle, "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt," 125 S.Ct. at 756.

Of course, while at least since *Almendarez-Torres* the five Justice who joined in Justice Stevens' opinion for the Court have rather consistently identified this principle as an unavoidable attribute of the Sixth Amendment right to jury trial, the other four members of the Court have just as consistently objected that the principle cannot be found there, 125 S.Ct. at 802 (Breyer, J. with Rehnquist, Ch.J., O'Connor and Kennedy, JJ., dissenting)(citing dissents in various cases to that effect).

The Court's treatment of the second question may have come as a surprise to some. There were arguably three more predictable remedies, assuming in response to the first question that the Guidelines operated to impermissibly permit judges by

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[46] "Regardless of whether the legal basis for the accusation [which brings with it a penalty increase] is in a statute or in guidelines promulgated by an independent commission, the principles behind the jury trial right are equally applicable," 125 S.Ct. at 753.

a preponderance of the evidence to make sentencing decision constitutionally reserved for the jury beyond a reasonable doubt. The infirmity might prove fatal to the Guidelines as a whole. Or it might only prove fatal to those Guidelines provisions that set the preponderance standard and made the impermissible fact-finding assignment. Or it might simply require that the judge and the Guidelines act only upon those factual determinations found by the jury beyond a reasonable doubt or conceded by the defendant. The second part of the Court's opinion embraced none these options. Justice Stevens in part one of the Court's opinion gave a hint of what was to come when he observed that the constitutional defect in the manner which the Guidelines had been operated was a product of their mandatory nature.

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges; it is that circumstance that makes the Court's answer to the second question presented possible. For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant. 125 S.Ct. at 750.

This suggested the remedy Congress would have preferred and consequently the remedy the Court adopted – only the statutory provisions that made the Guidelines mandatory need be pruned from the system. So concluded the second part of the Court's *Booker* opinion which also explained how the Court anticipated the modified federal sentencing system would operating thereafter and how the opinion applied to Booker and Fanfan.

The Court, writing through Justice Breyer with the concurrence of Chief Justice Rehnquist and Justices O'Connor, Kennedy and Ginsburg, reasoned that Congress would have preferred the demise of the Sentencing Reform Act to a Guidelines system in which the jury made the factual decisions which the Guidelines had originally assigned to the judge. And it would have preferred an advisory Guidelines system over the loss of the Sentencing Reform Act, 125 S.Ct. at 757-58.[47]

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[47] We answer the remedial question by looking to the legislative intent. We seek to determine what 'Congress would have intended' in light of the Court's constitutional holding. . . . Hence we must decide whether we would deviate less radically from Congress' intended system (1) by superimposing the constitutional requirement announced today or (2) through elimination of some provisions of the statute. . . . While reasonable minds can, and do, differ about the outcome, we conclude that the constitutional jury trial requirement is not compatible with the act as written and that some severance and excision are necessary. . . . In essence . . . (1) why Congress would likely have preferred the total invalidation of the act to an act with the Court's Sixth Amendment requirement engrafted onto it, and (2) why Congress would likely have preferred the excision of some of the act, namely the act's mandatory language, to the invalidation of the entire Act," Id. (internal citations and quotations omitted).

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The Court inferred these preferences (1) from the language of the statute,[48] (2) from Congressional purpose in passing the act,[49] (3) from the fact that "the sentencing statutes, read to include the Court's Sixth Amendment requirement, would create a system far more complex than Congress could have intended, 125 S.Ct. at 761, (4) from the fact that a reduced judicial role and an increased jury role would exacerbate the problems inherent in plea bargaining, 125 S.Ct. at 762-63, (5) from the fact that Congress would not have intended a system that encumbered the imposition of more severe sentences but not of more lenient ones,[50] and (6) from the fact that most of the act and most of the Guidelines could continue to function effectively and constitutionally by severing but two provisions of the act, 125 S.Ct. at 764.

The Court then described the sentencing system that remained after severing 18 U.S.C. 3553(b)(1) which required trial courts to follow the dictates of the Guidelines[51] and 18 U.S.C. 3472(e) which instructed the appellate courts to make

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[48] "[T]he statute's text states that '[t]he court' when sentencing will consider the 'the nature and circumstances of the offense and the history and characteristics of the defendant.' In context the words 'the court' mean 'the judge without the jury,' not 'the judge working together with the jury.' The further statutory provision, by removing typical 'jury trial' evidentiary limitations, makes this clear. See §3661 (ruling out any 'limitation . . . on the information concerning the [offender's] background, character, and conduct' that the 'court . . . may receive'). The act's history confirms it. See e.g. S.Rep. No. 98-225, p. 51 (1983)(the Guidelines system 'will guide *the judge* in making' sentencing decisions (emphasis added); *id.* at 52 (before sentencing, 'the judge' must consider 'the nature of the offense'); *id.* at 53 ('the judge' must consider a comprehensive examination of the characteristics of the particular offense and the particular offender')," 125 S.Ct. at 759.

[49] "Congress' basic statutory goal – a system that diminishes sentencing disparity – depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction," 125 S.Ct. at 759 (emphasis of the Court).

[50] "Congress would not have enacted sentencing statutes that make it more difficult to adjust sentences *upward* than to adjust them *downward*," 125 S.Ct. at 763 (emphasis of the Court). This assumes that the Sixth Amendment right attaches only with regard to fact finding that *increases* the otherwise applicable sentence.

[51] "Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission," 18 U.S.C. 3553(b)(1).

For whatever reason, the Court did not address 18 U.S.C. 3553(b)(2) which binds sentencing courts to the Guidelines in child and sexual abuse cases even more tightly than does (b)(1) and whose continued vitality some may question, *see e.g., United States v. Starpley*, __ F.3d __, __ n.3 (2d Cir. Feb. 16, 2005)("*Booker* excises 18 U.S.C. 3553(b)(1)

sure that they did.[52] Federal judges are no longer bound by the Guidelines, but they remain bound to consider them along with the other considerations identified in section 3553(a), 125 S.Ct. at 764-65.[53] Their sentencing decisions are still subject

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from the Sentencing Reform Act, which makes the Guidelines generally binding on courts, but does not excise 18 U.S.C. 3553(b)(2), which makes the Guidelines binding in sentencing for convictions for certain child crimes and sexual offenses . . . . subsection (b)(2) could arguably be read to independently require a court to follow the Guidelines in convictions [for certain child crimes and sexual offenses]. However, we see no unique feature of Guidelines sentences for child crimes and sexual offenses that would prevent them from violating the Sixth Amendment in the same manner as Guidelines sentences for other crimes. . . . For this reason, we suspect that the Supreme Court's failure to excise the entirety of Section 3553(b) was simply an oversight").

[52] "Upon review of the record, the court of appeals shall determine whether the sentence – (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is outside the applicable guideline range, and (A) the district court failed to provide the written statement of reasons required by section 3553(c); (B) the sentence departs from the applicable guideline range based on a factor that – (i) does not advance the objectives set forth in section 3553(a)(2); or (ii) is not authorized under section 3553(b); or (iii) is not justified by the facts of the case; or (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

"The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts," 18 U.S.C. 3742(e).

[53] Section 3553(a) provides, "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider – (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed – (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for – (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines – (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (ii) that except as provide in section 3742(g), are in effect on the date the defendant is sentenced; or (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of

to appeal by either the government, the defendant, or both under 18 U.S.C. 3742(a),(b), 125 S.Ct. 765. The standard by which such appeals are to be judged is one of the "reasonableness" as understood from the jurisprudence that arose under 18 U.S.C. 3742(e)(3) prior to its repeal with respect to departures and the review of sentences for which there was no applicable Guideline, 125 S.Ct. at 765-67.[54]

Booker applies to all cases on direct review to the extent the sentence imposed gives rise to the constitutional rights announced in *Booker* and within the confines of the "plain error" rule and the "harmless error" doctrine, 125 S.Ct. at 769.[55]

Justices Stevens, Souter, Scalia and Thomas dissented from the second part of the Court's opinion. Justice Stevens, joined by Justice Souter and in large part by Justice Scalia, pointed out that from his perspective none of the Sentence Reform Act provisions or of the Guidelines were unconstitutional on their face and thus the question of severability did not arise.[56] Moreover even if this were not the case, he

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whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); (5) any pertinent policy statement – issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendment made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense".

[54] Prior to its repeal in 2003, 18 U.S.C. 3742(e)(3) provided that, "Upon review of the record, the court of appeals shall determine whether the sentence . . . (3) is outside the applicable guideline range, and is unreasonable, having regard for – (A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title [e.g., 18 U.S.C. 3553(a)]; and (B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)."

[55] Rule 52 of the Federal Rules of Criminal Procedure provides that, "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded," but that "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention [in a timely manner]."

[56] "Neither of the two Court opinions that decide these cases finds any constitutional infirmity inherent in any provision of the Sentencing Reform Act of 1984 (SRA) or the Federal Sentencing Guidelines. . . . [I]t is indisputable that the vast majority of federal sentences under the Guidelines would have complied with the Sixth Amendment without the Court's extraordinary remedy. Under any reasonable reading of our precedents, in no way can it be said that the Guidelines are, or that any particular Guidelines provision is, facially unconstitutional. . . . Our 'severability' precedents, however, cannot support the Court's remedy because there is no provision of the SRA or the Guidelines that falls outside of Congress' power. . . . There is no justification for extending our severability cases to cover this situation. The SRA and the Guidelines can be read – and are being currently read – in a way that complies with the Sixth Amendment . . . . Rather than engage in a wholesale rewriting of the SRA, I would simply allow the Government to continue doing what it has done since this Court handed down *Blakely* – prove any fact that is *required* to increase a defendant's sentence under the Guidelines to a jury beyond a reasonable doubt," 125 S.Ct. at 771, 776, 777, 779 (Stevens, J. with Scalia and Souter, JJ., dissenting).

would find the majority view unpersuasive because (1) the reasons offered for its acceptance he found unconvincing,[57] (2) the legislative history argues for a different conclusion,[58] and (3) he believed the goal of the Sentence Reform Act and of the Guidelines – the reduction of sentencing diversity – is more likely to be frustrated than served by the majority's remedy.[59]

Justices Scalia and Thomas were in general agreement with Justice Stevens' dissent, but Justice Scalia wrote a separate dissent to articulate his reservations concerning the possibly uncertain state of post-*Booker* appellate review.[60] Justice Thomas had a somewhat different view of the severability question and like Justice Scalia was unwilling place any reliance upon legislative history.[61]

And what of Mr. Booker and Mr. Fanfan? The Court affirmed the court of appeals decision vacating Booker's sentence because the trial court had increased it

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[57] 125 S.Ct. at 779-82.

[58] "The Court cannot meet this burden because Congress has already considered and overwhelmingly rejected the system it enacts today. In doing so, Congress revealed both an unmistakable preference for the certainty of a binding regime and a deep suspicion of judges' ability to reduce disparities in federal sentence. A brief examination of the SRA's history reveals the gross impropriety of the remedy the Court has selected," 125 S.Ct. at 783. It is this legislative history discussion in Justice Stevens' dissent that Justice Scalia declined to join.

[59] "Congress' stated goal of uniformity is eliminated by the majority's remedy. . . . {D]isparities will undoubtedly increase in a discretionary system in which the Guidelines are but one factor a judge must consider in sentencing a defendant within a broad statutory range. . . . Prior to the Guidelines regime, the a Parole Commission was designed to reduce sentencing disparities and to provide a check for defendants who received excessive sentences. Today, the Court reenacts the discretionary Guidelines system that once existed without providing this crucial safety net," 125 S.Ct. at 787-88.

[60] "Today, the same Justices [who dissented in *Blakely*] wreak havoc on federal district and appellate courts quite needlessly, and for the indefinite future. Will appellate review for "unreasonableness" preserve *de facto* mandatory guidelines by discouraging district courts from sentencing outside the Guidelines ranges? Will it simply add another layer of unfettered judicial discretion to the sentencing process? Or will it be a mere formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion? Time may tell, but today's remedial majority will not," 125 S.Ct. at 795 (Scalia, J., dissenting).

[61] "While I agree with Justice Stevens' proposed remedy and much of his analysis, I disagree with his restatement of severability principles and reliance on legislative history . . . .The Constitution prohibits allowing a judge alone to make a finding that 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. Application of the federal sentencing Guidelines resulted in impermissible factfinding in Booker's case, but not in Fanfan's. Thus Booker's sentence is unconstitutional, but Fanfan's is not. Rather than applying the usual presumption in favor of severability, and leaving the Guidelines standing insofar as they may be applied without any constitutional problem, the remedial majority converts the Guidelines from a mandatory system to a discretionary one. The majority's solution fails to tailor the remedy to the wrong, as this Court's precedents require," 125 S.Ct. at 795 (Thomas, J., dissenting).

based on facts other than those found by the jury. "On remand, the District Court should impose a sentence in accordance with [the Court's *Booker*] opinions, and, if the sentence comes before the Court of Appeals for review, the Court of Appeals should apply the review standards set forth in [*Booker*]," 125 S.Ct. at 769. Fanfan had been sentenced solely within the facts found by the jury and consequently below the range called for by the Guidelines. The Court vacated Fanfan's sentence and remanded his case to permit the parties to seek resentencing consistent with the Court's opinion, if they elect to do so, *Id*.

The alignment of the Justices in *Booker* renders predictions of its legacy even more perilous than usual. Why did Justice Ginsburg join the four Justices, who believed *Booker* presented no Sixth Amendment problem, in the part of the Court's opinion designed to solve the problem? Some may find illumination in a case the Court decided two months after *Booker*, *Shepard v. United States*, 125 S.Ct. __ (No. 03-9168)(Mar. 3, 2005).

Shepard

Shepard arose out of what might be considered unusual circumstances at first glance, a factual dispute over the existence and status of prior criminal convictions. Shepard involved the application of the federal Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), which requires the imposition of a minimum 15-year term of imprisonment for unlawful possession of a firearm, 18 U.S.C. 922(g), by an individual with three prior serious drug or violent felony convictions. Burglaries are numbered among the qualifying "violent crimes" for purposes of 18 U.S.C. 924(e), 18 U.S.C. 924(e)(2)(B)(ii). The Court has interpreted "burglary" to include any offense consisting of the "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime," regardless of how it is captioned, *Taylor v. United States*, 495 U.S. 575, 599 (1990).

Shepard had pleaded guilty to possession of a firearm in violation of 18 U.S.C. 922(g)(1), *United States v. Shepard*, 348 F.3d 308, 309 (1st Cir. 2003). At the time he had five prior convictions (also following guilty pleas) under Massachusetts statutes that outlawed breaking and entering into a building, ship, vessel, or vehicle, with the intent to commit a crime, *id*. The complaints under which he was charged and pleaded recited the language of the statutes without indicating whether the premises entered were burglary-qualifying buildings or nonqualifying ships, vessels or vehicles, *id.* The government offered copies of the back ground police reports and complaint applications to demonstrate that Shepard had previously been convicted of breaking into buildings rather than ships, vessels or vehicles, *id*. at 309-10. The trial court found this called for impermissible judicial factfinding in order to impose the mandatory minimum penalty under 18 U.S.C. 924(e); the court of appeals disagreed, *id*. at 310-15. The Supreme Court agreed with the district court and reversed, 125 S.Ct. at __.

Shepard arguably afforded the Court an opportunity to walk away from the *Almendarez-Torres*, prior conviction exception to the *Apprendi* rule. Justice Thomas at least implicitly urged his colleagues to do so; they declined, 125 S.Ct. at __ (Thomas, J., concurring in part and concurring in the judgment). In a plurality

opinion, five members of the Court – Justices Stevens, Scalia, Souter, Ginsburg and Thomas – concluded that in the case of a statute permitting conviction for either qualifying (generic) burglaries or nonqualifying (nongeneric) burglaries, qualification must be shown either in "the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or some comparable judicial record of this information" or in the charge to the jury, 125 S.Ct. at ___. Justice Thomas would reach the result by constitutional necessity;[62] the others as a matter of statutory construction in constitutional avoidance.[63]

The dissenters – Justices O'Connor, Kennedy, and Breyer – felt the result was required neither by the Constitution nor by statute, 125 S.Ct. __.

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[62] "The constitutional infirmity of §924(e)(1) as applied to Shepard makes today's decision an unnecessary exercise. Nevertheless, the plurality today refines the rule of *Taylor v. United States*, and further instructs district courts on the evidence they may consider in determining whether prior state convictions are §924(e) predicate offenses. *Taylor* and today's decision thus explain to lower court s how to conduct factfinding that is, according to the logic of this Court's intervening precedents, unconstitutional in this very case. The need for further refinement of *Taylor* endures because this Court has not yet reconsidered *Almendarez-Torres v. United States*, which draws an exception to the *Apprendi* line of cases for judicial factfinding that concerns a defendant's prior convictions. *Almendarez-Torres*, like *Taylor*, has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continued viability," 125 S.Ct. at __ (internal citations omitted).

[63] "[T]he sentencing judge considering the ACCA enhancement would (on the Government's view) make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea, and the dispute raises the concern underlying *Jones* and *Apprendi*: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality, therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as *Taylor* constrained judicial findings about the generic implications of a jury's verdict," 125 S.Ct. at ___ (plurality opinion for the Court).

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