ANALYSIS CONTINUATION

FIRST FELONY OFFENDERS - AVERAGE SENTENCES
Offenders Convicted Between January 1, 2001 and December 31, 2004

First Felony Offenders	Unique Offenders	Total Unsuspended Incarceration Average Days	Average Years
Felony, Class B	1155	864	2.4
Felony, Class C	4097	366	1.0
Total, Class B&C	5252	507	1.4

First Felony Sex Offenders	Unique Offenders	Total Unsuspended Incarceration Average Days	Average Years
Sex Felony, Class B	347	1,125	3.1
Sex Felony, Class C	202	637	1.7
Total, Class B&C	549	981	2.7

Note: If an offender was convicted for the first time of both a B and C felony, they are counted only in the Felony B category.

The department does not anticipate a significant fiscal impact to the Division of Institutions, Department of Corrections during the first six years.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HCS for CSSB56(JUD)
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Corrections
Title An Act relating to criminal law...
RDU Probation and Parole
procedure, criminal sentences, and probation and parole
Component Probation and Parole Directors Ofc
Sponsor Senators Therriault, Seekins
Requester Senate Judiciary
Component No. 2684

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS						
Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

The bill modifies state law governing the presumptive sentencing of felony offenders in Alaska, in response to the United States Supreme Court decision, Blakely v. Washington. The legislation proposes to amend Alaska's sentencing laws to avoid the worst consequences of Blakely, which could make it difficult for judges to consider all relevant factors in sentencing, causing complications throughout the criminal justice process. The modified presumptive sentencing structure proposed in the legislation primarily will impact the process and not the end result of felony sentences. Department research demonstrates that the average unsuspended incarceration for first time Class B and Class C felony offenders and first time Class B and Class C sex felony offenders already falls within the mid-range of the new presumptive ranges set out in the bill. (continued)

Prepared by: Sharleen Griffin, Acting Director
Phone 465-4641
Division Administrative Services
Date/Time 2/14/05 3:36 PM
Approved by: Portia Parker, Deputy Commissioner
Date 2/14/2005
Agency Department of Corrections

STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL NO. HCS for CSSB56(JUD)

ANALYSIS CONTINUATION

FIRST FELONY OFFENDERS - AVERAGE SENTENCES
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Sex Felony, Class C	202	637	1.7
Total, Class B&C	549	981	2.7

Note: If an offender was convicted for the first time of both a B and C felony, they are counted only in the Felony B category.

The department is unable to predict with any accuracy the future actions judges may or may not take regarding probation supervision, thus it is unknown whether the changes proposed in the legislation will have any impact on probation services. The department does not anticipate a significant fiscal impact to the Division of Probation and Parole, Department of Corrections during the first six years.

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

2-15-05

Alaska State Legislature

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SENATE DISTRICT F

SPONSOR STATEMENT – CS SENATE BILL 56(JUD)
"An Act relating to criminal law and procedure, criminal sentences, and probation and parole; and providing for an effective date."

Senate Bill 56 modifies the laws governing the presumptive sentencing of felony offenders in Alaska, as a result of *Blakely v. State of Washington*, a United States Supreme Court decision issued in June 2004. The court struck down Washington's sentencing laws by finding that under the Sixth Amendment a defendant has the right to have a jury, not a judge, determine whether aggravating circumstances exist to justify increasing a defendant's sentence above the statutorily prescribed term. The requirements of *Blakely* directly affect Alaska's sentencing laws. Senate Bill 56 addresses the provisions that apply to Alaska's sentencing structure and will eliminate the great confusion created in Alaska's courts as a result of *Blakely*.

Alaska's current felony sentencing statutes set out presumptive terms establishing a specific fixed term of imprisonment that in essence acts as both the minimum and maximum sentences that can be imposed, unless the court finds specific statutory mitigating or aggravating factors. The current presumptive terms were developed in the late 1970s to limit the discretion of judges because of a perceived need to achieve greater uniformity in sentencing. For the most part, the current terms adequately reflect the seriousness of offenses to the extent that they establish a presumptive lower limit on sentences, but it is no longer appropriate to continue to use the same presumptive term to also set the upper limit. The current presumptive term does not take into account the many different crimes within each class of offenses that come before the court. Therefore, this legislation provides judges in felony cases with the ability to weigh all relevant factors as they consider a range of sentences to impose. It also gives judges more authority to impose appropriate periods of probation.

Senate Bill 56 gives judges broader sentencing discretion in felony cases, by allowing them to consider all relevant circumstances in setting a sentence within the ranges established in the legislation. It gives judges broader authority to impose a period of probation supervision, which in some cases they are not able to do under current Alaska law, thus providing better

protection for the public and better assistance to the offender in reintegrating into the community.

For a judge to impose a sentence above the presumptive range, the state must comply with *Blakely v. Washington* and prove to a jury beyond a reasonable doubt the existence of certain statutory aggravating factors. Senate Bill 56 leaves it to the courts to develop procedures for presenting aggravating factors to the trial jury. In addition, because the rule in *Blakely* applies only at trial, the bill makes it clear that it is not necessary for the state to present aggravating factors to the grand jury.

Under this bill, a sentence cannot be reversed as excessive if it is imposed within a presumptive range or is required under consecutive sentencing legislation enacted last year. Over the last two decades the appellate courts in Alaska have developed a large body of case law that has resulted in *court-specified* "benchmark" sentences that often unnecessarily limit the discretion of sentencing judges. This bill replaces some of those court-imposed "benchmarks" in favor of legislatively enacted sentence ranges.

Senate Bill 56 also limits the ability of judges to impose "periodic" sentences, in which the judge allows the offender to periodically leave prison and then return to prison. This type of sentence significantly restricts the ability of prison officials to manage the prison population and to transfer prisoners so as to make the best and most efficient use of prison resources. To order "periodic" sentences is in essence allowing offenders to go on unsupervised furloughs. This is best left to prison officials, who can adopt equitable policies that take into account the specific security risks posed by each prisoner and the likely benefits of the furlough.

Senate Bill 56 addresses a judicial Memorandum Opinion Judgment (aka Husky) issued in 2004 making it clear that the courts and probation officers may continue using what is known as General Condition of Probation # 12. Under current practice an intermediate sanction is available to probations officers to invoke certain additional conditions such as curfew when supervision requires. It is nearly impossible for judges to anticipate every condition of probation that will be necessary during an offender's time under community supervision, this bill statutorily codifies the existing practice of judges delegating limited authority to probation officers.

Finally, Senate Bill 56 takes a practical approach to the supervision of persons on probation and parole, by giving police officers the explicit authority to detain or arrest offenders for certain types of violations of conditions imposed by the courts or the parole board. Under this bill, when a certified police officer has reasonable suspicion that a probationer or parolee is violating conditions, they can temporarily detain the person to investigate, and can arrest if there is probable cause that conditions were violated.

2-15-05

MEMORANDUM

ALASKA PUBLIC DEFENDER AGENCY
900 West 5th Avenue, Suite 200
Anchorage, Alaska 99501

Tel: (907) 334-4400
Direct line: 334-4416
Fax: (907) 269-5476
e-mail: linda_wilson@admin.state.ak.us

TO:	House Finance Committee Members
FROM:	Linda K. Wilson, Deputy Public Defender
RE:	HCS CSSB56
DATE:	2/07/05

Mister Chair and Members of the Committee:

Below is a brief memorandum on two areas of this bill that raise constitutional concerns. I hope this will be helpful to your consideration of this bill before you.

Section 1:

Section 1 of the bill is unconstitutional because it seeks to eliminate the right to indictment by the grand jury of an aggravating factor that essentially becomes an element of the crime charged. Article I, Section 8 of the Alaska Constitution: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.

In Blakely the U.S. Supreme Court required that its ruling in Apprendi be applied, that 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. The prescribed statutory maximum is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. Justice Scalia in his majority opinion reminded that "the Constitution limits States' authority to reclassify elements as sentencing factors.." 124 S.Ct. 2531, 2537, fn. 6. He also reiterated the point made by J. Bishop in a treatise that "every fact which is legally essential to the punishment" **must be charged in the indictment** and proved to the jury. 124 S.Ct. at 2536, fn. 5. Justice Scalia criticized the challenged practice of labeling elements as sentencing factors as a regime "in which the defendant, with **no warning in** either **his indictment** or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment." 124 S.Ct. at 2542.

In Alaska our Supreme Court in State v. Malloy, 46 P.3d 949 (Alaska 2002) upheld the Court of Appeals' pre-Apprendi view in its earlier opinion in the case, based on Donlun v. State, 527 P.2d 472 (Alaska 1974), that

general principles of fairness and notice, grounded in our constitutional guarantees of due process, right to trial by jury, and the **guarantee of grand jury indictment, require that aggravated circumstances that provide for increased punishment be set forth in the indictment** and proven at trial. 46 P.3d at 952. The Supreme Court stated: "Donlun accurately presaged Apprendi's holding that aggravating facts **must be charged [in the indictment]** and proved beyond a reasonable doubt to the jury when their existence would allow or require the court to impose a sentence exceeding the maximum otherwise authorized." 46 P.3d at 954.

Eliminating the need to present an aggravating factor to a grand jury is unconstitutional because it violates a defendant's constitutional right to grand jury indictment for what is essentially an element of the charged offense.

Sections 26, 30, and 31:

These sections of the bill seek to allow police officers to detain and arrest probationers and parolees, without being directed to do so by the supervising probation or parole officer, based upon their reasonable suspicion or probable cause to believe that they have recently violated or are about to violate a condition of probation or parole even though the believed violation is not a crime in and of itself, or one that creates an imminent public danger or threatens serious harm to persons or property.

Article I, Section 14 of our state constitution protects against unreasonable searches and seizures. Article I, Section 22 protects our right to privacy. In Roman v. State, 570 P.2d 1235 (Alaska 1977) our Supreme Court held as a matter of Alaska Constitutional law that prisoners released on parole have the same protections against government searches and seizures as other citizens, except when reasonably conducted searches and seizures are performed by probation/parole officers, or police officers acting under the direction of the probation/parole officer. This constitutional ruling was codified in AS 33.16.150(b)(3) that requires a parolee to submit to reasonable searches and seizures by a parole officer or a police officer acting under the direction of a parole officer.

It would therefore be unconstitutional to allow a police officer to detain or arrest a parolee/probationer for a believed violation that did not constitute an independent crime or if the officer is not acting at the direction of the probation/parole officer. That is exactly what these sections of the bill seek to do, rendering them unconstitutional.

2-16-05
withdrawn

24-LS0308\S.9
Luckhaupt
2/16/05

AMENDMENT 6

OFFERED IN THE HOUSE BY REPRESENTATIVE CROFT

TO: HCS CSSB 56(JUD)

Page 4, line 5, following "court.":

Insert "A victim of a crime may file a petition for review in an appellate court to seek review of a sentence imposed that is lower than the presumptive range."

2/16/05
adopted 2/0

24-LS0308\S.11
Luckhaupt
2/16/05

AMENDMENT 5

OFFERED IN THE HOUSE BY REPRESENTATIVE STOLTZE

TO: HCS CSSB 56(JUD)

Page 6, line 12:

Delete "40"

Insert "**99** [40]"

2-16-05
withdrawn

24-LS0308\S.12
Luckhaupt
2/16/05

AMENDMENT 4

OFFERED IN THE HOUSE BY REPRESENTATIVE STOLTZE

TO: HCS CSSB 56(JUD)

Page 6, line 12:

Delete "40"

Insert "**99** [40]"

Page 6, line 30:

Delete "**30 to 40**"

Insert "**35 to 50**"

2/16/05
withdrawn

24-LS0308\S.10
Luckhaupt
2/16/05

AMENDMENT 3

OFFERED IN THE HOUSE BY REPRESENTATIVE STOLTZE

TO: HCS CSSB 56(JUD)

Page 6, line 12:

Delete "40"

Insert "**99** [40]"

Page 6, line 30:

Delete "**30 to 40**"

Insert "**99**"

2/16/05
adopted N/O

24-LS0308\S.4
Luckhaupt
2/15/05

AMENDMENT 2

OFFERED IN THE HOUSE

TO: HCS CSSB 56(JUD)

Page 4, line 3:

Delete "the supreme court"

Insert "an appellate court"

adopted N/O 2/16/05

24-LS0308\S.13
Luckhaupt
2/16/05

New #1

AMENDMENT

OFFERED IN THE HOUSE

TO: HCS CSSB 56(JUD)

Page 5, line 25, following "**years;**":

Insert "**a defendant sentenced under this paragraph may, if the court finds it appropriate, be granted a suspended imposition of sentence under AS 12.55.085, and the court may as a condition of probation under AS 12.55.086, require the defendant to serve an active term of imprisonment within the range specified in this paragraph;**"

Page 6, lines 1 - 8:

Delete all material and insert:

"* **Sec. 11.** AS 12.55.125(g) is amended to read:

(g) If a defendant is sentenced under (c), **(d), (e)** [(d)(1), (d)(2), (e)(1), (e)(2), (e)(3),] or (i) of this section, except to the extent permitted under AS 12.55.155 - 12.55.175,

(1) imprisonment may not be suspended under AS 12.55.080 **below the low end of the presumptive range**;

(2) **and except as provided in (d)(1) or (e)(1) of this section,** imposition of sentence may not be suspended under AS 12.55.085;

(3) terms of imprisonment may not be otherwise reduced."

2-15-05

alaska judicial council

1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501-1969 (907) 279-2526 FAX (907) 276-5046
http://www.ajc.state.ak.us E-Mail: postmaster@ajc.state.ak.us

Memorandum

By: Council Staff

Re: *Blakely* Data

Date: February 3, 2005

---

1) Introduction

The constitutionality of the federal sentencing guidelines, and nearly a dozen state sentencing guidelines schemes, including Alaska's presumptive sentencing, was called into question June 24, 2004, with the Supreme Court's decision in *Blakely v. Washington*, No. 02-1632. The Court, following the line of *Apprendi v. New Jersey* and its progeny, held that a sentence in a criminal case could not be enhanced based on facts not found by a jury or admitted by the defendant. Since that time, the Alaska Judicial Council has been contacted by legislators, prosecutors, and public defenders, among others, who have requested Council data relevant to Alaska's effort to respond to the *Blakely* decision. This memo summarizes data that the Council has accumulated in response to these various requests.

The Council has conducted extensive reviews of sentencing, including four evaluations of sentencing since 1980 (reports on sentencing in 1980, 1984, 1984 - 1987 (a review of the plea bargaining ban and sentencing practices) and 1999). The report on 1999 charged felonies provided an extensive database and analysis of presumptive and non-presumptive sentencing practices in the state. The data reported in this memo come from the 1999 report, and help understand the effects on Alaska of *Blakely*. The Council can carry out added analyses of these data.

2) Judicial Council Role in Presumptive Sentencing

During the 1970s, the Council researched Alaska sentencing practices and summarized its findings in several reports. The reports all found that sentence lengths varied substantially by the identity of the judge, and by ethnicity, among other factors. One of these reports was commissioned

and funded by the legislature to provide background for its work on revising the criminal code and sentencing laws for Alaska. The legislature also asked the Council to recommend a sentencing structure that would reduce disparities, incorporate the *Chaney* criteria and suit the criminal code revisions also underway. After extensive review of other states' systems, and of the literature on sentencing, the Council recommended presumptive sentencing.

In 1990, the legislature funded the Alaska Sentencing Commission and asked the Judicial Council to staff and supervise the Commission's work. Chief among the Commission's tasks were a review of presumptive sentencing after its first decade of use. At the end of its three-year term, the Sentencing Commission recommended that the state continue to use presumptive sentencing for repeat felons in B and C offenses, and for all Class A and most Unclassified felons.

3) *Analysis of Alaska Data about Aggravated Presumptive Sentences*

Justice O'Connor, in her dissent to last term's U.S. Supreme Court decision, *Blakely v. Washington*, noted that Alaska's presumptive sentencing system would be open to attack under the majority's decision.[1] The Judicial Council's recent report on the felony process in 1999 has data on aggravated presumptive sentences that can be used to help estimate the magnitude of the possible consequences for Alaska.

An earlier Supreme Court case, *Apprendi v. New Jersey*, 530 U. S. 466, 490 (2000), set the stage for the *Blakely* decision. In *Apprendi*, the court said: "Other 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." The court's majority decision in *Blakely* said that the Washington decision to impose extra time for an aggravating factor in the defendant's kidnaping case violated the same Sixth Amendment right to a jury trial as had the *Apprendi* judge's decision. Alaska's sentencing statutes also permit judges to impose additional time on aggravating factors that have not been submitted to a jury. The aggravating factors must be proved by clear and convincing evidence, and the judge must then decide the extent to which the factor(s) warrant an adjustment of the presumptive term.

In the background section of its report, the Council presented data on the distribution of sentences in presumptive sentencing cases.[2] The analysis showed that about 15% of all felony cases filed resulted in an acquittal or dismissal of all the charges against the defendant in that case and all contemporaneous cases. The analysis showed that 68 of about 359 presumptive sentences imposed

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[1] Part IV A of the dissent cites AS 12.55.155 (2003).

[2] ALASKA FELONY PROCESS: 1999 (2004), Tables 7 and 7a, and Figure 8, pages 80 - 81.

in the 1999 sample had been aggravated.[3] This was 3% of all convicted defendants who had originally been charged with at least one felony.

Estimate of Aggravated Presumptive Sentences, FY-01 - FY'03					
FY'01 Felony Filings	3,486	x .85 =	2,963 convicted cases	x .03 =	89 est. aggrav. presumpt. cases
FY'02 Felony Filings	3,729	x .85 =	3,170 convicted cases	x .03 =	95 est. aggrav. presumpt. cases
FY'03 Felony Filings	4,056	x .85 =	3,448 convicted cases	x .03 =	103 est. aggrav. presumpt. cases
Total, est. aggrav. presumpt. cases					287 cases from7/1/00 - 6/30/03

In the table above,[4] the court's record of felony filings for each fiscal year has been multiplied by .85, to eliminate the dismissed and acquitted cases, and arrive at an estimate of cases in which the felony charges resulted in conviction on any charge(s), misdemeanor or felony.[5] Next, the resulting estimate of convicted defendants was multiplied by .03, the percentage found in the 1999 felony report for presumptive sentences in which aggravating factors actually lengthened the defendant's sentence beyond the statutory presumptive. The final estimate for the three-year period is 287 cases that might be affected by the court's decision.

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[3] These tables include only cases in which an aggravating factor had been proposed, had been proven, and had been used by the judge to increase the sentence.

[4] Data were taken from 2003 ANNUAL REPORT, ALASKA COURT SYSTEM, published in March 2004; page S-24.

[5] The Council looked at felony defendants and their single most serious charges in its reports, rather than at felony cases filed. It is possible that the percentages for dismissed or acquitted cases differs slightly from percentages for dismissed or acquitted defendants, but the differences are not likely to be significant in this analysis.

The distribution of aggravated sentences among defendants is fairly even. Figure 8, page 81 of the Council's report[6] shows that about 29% of Unclassified defendants had an aggravated presumptive sentence, as compared to about 22% of Class A defendants, 13% of Class B defendants and 20% of Class C defendants. Table 7 shows that numerically, the largest group of defendants was the 48 defendants who had aggravated Class C sentences. Four Unclassified defendants had aggravated sentences, as did seven Class A defendants and 5 Class B defendants.

Another way to look at the data is to attempt to quantify the difference that an aggravated sentence made for defendants. Using the mean sentences shown in Tables 7 and 7a on page 80 in the Council's report, and keeping in mind the very small numbers of cases for all groups except Class C offenders, the data show that aggravated sentences for the handful of Unclassified offenders were about 20% above the statutory presumptive sentences. Those for Class A offenders were about 90% above presumptive for the five first-time felons (an average of 54 months above the presumptive sentence of 60 months) and about 27% above presumptive for the two repeat offenders. Class B offenders (again, the numbers were much too small to be reliable) experienced increases of about 33% to 40%. Class C offenders showed increases of about 13 months (54% above the presumptive) for defendants with one prior felony conviction and 16 months (44% above the presumptive) for defendants with two prior felonies.[7] The data show that an aggravated sentence could make a difference of as little as 13 months and as much as 60 months, depending on the class of offense and the defendant's prior felony convictions.

4) Analysis of Alaska Data about Mean Sentences for B and C Offenders

SB 56 proposes presumptive sentences for first time felons convicted of Class B and Class C felony offenses. Under current law, first felony offenders convicted of Class B and Class C felony offenses are not subject to a presumptive sentence. These changes in sentencing law would affect most convicted felons. Among all defendants convicted of a felony in 1999[8], two-thirds were first felony offenders convicted of a Class B or Class C felony. In 1999, 81% of felons convicted of a Class B felony and 71% of felons convicted of a Class C were first felony offenders.

The mean sentences imposed on these offenders in 1999 can be compared to the proposed presumptive terms. In 1999, first felony offenders convicted of a Class B felony offense received a mean sentence of 609 days of unsuspended incarceration. First felony offenders convicted of a

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[6] ALASKA FELONY PROCESS: 1999 (2004), *supra* n. 2, page 81.

[7] Table 7a, *id.*, show that for the four aggravated offenders who had Class A presumptive sentences and used a weapon (which bumps the 60-month presumptive for first offenders up to 84 months), the average sentence went up by 38 months, or 45% above the presumptive sentence.

[8] This does not include defendants convicted of a felony driving offense subject to a mandatory minimum sentence.

Class C felony offense received a mean sentence of 163 days of unsuspended incarceration.

AS 12.55.125(d)(1) provides a presumptive sentencing range of one to three years for a first felony offender convicted of a Class B felony offense. Two years of incarceration would be the average presumptive term for a Class B felony offender if presumptive sentences were evenly distributed within this range, with about 121 more days of incarceration than under current law.

AS 12.55.125(e)(1) provides a presumptive sentencing range of zero to two years for a first felony offender convicted of a Class C felony offense. One year of incarceration would be the average presumptive term for a Class C felony offender if presumptive sentences were evenly distributed within this range, about 202 more days of incarceration than under current law.

The proposed legislation increases the amount of time imposed that offenders will be required to serve. Currently, under AS 33.16.100(c), offenders who serve at least 181 days of non-presumptive, non-mandatory minimum incarceration, are eligible for discretionary parole. In 1999, an estimated 192 defendants convicted of a Class B felony offense and 288 defendants convicted of a Class C felony had sentences of 181 days or longer.[9] Under current law, these defendants would be eligible for discretionary parole after serving one-quarter of their sentence. The proposed legislation would require these offenders to serve at least two-thirds of their sentences, possibly longer if they did not earn good time credit under AS 33.20.010. This suggests that, under the proposed legislation, defendants convicted of Class B and Class C felony offenses and sentenced to more than 180 days of incarceration would serve more of their sentences than under current law.

[9]The Council's felony study used a representative two-thirds sample of all Alaska felony cases in 1999. These estimates are based on an extrapolation of the two-thirds sample.

2-15-05

Vanessa Tondini

To: Rep. Lesil McGuire
Subject: RE: SB56; HB 78

-----Original Message-----
From: brx@gci.net [mailto:brx@gci.net]
Sent: Tuesday, January 25, 2005 9:14 PM
To: Rep. Lesil McGuire
Subject: SB56; HB 78

Email For: Representative Lesil McGuire
From: brx@gci.net
Name: Michael Boshears
Street: 1145 W. Josselin Lane
City: Palmer
Zip Code: 99645

Subject: SB56; HB 78

I simply do not understand why the legislature is recommending increasing sentencing ranges in response to Blakely. It is no wonder the U.S. has the highest incarceration rate of any (so-called) civilized country in the world. In addition to not being \"good public policy \" for ethical and moral reasons, it is bad public policy because it will cost the state of Alaska huge additional amounts of money in increased room & board for inmates, court costs, attorney costs, increased prison and other state personnel costs and last but not least, in prison facility costs at a time when Alaska is paying to send Alaska prisoners to Arizona because we simply do not have any place to put our overflowing inmate population serving already high presumptive sentences. Well, you get what you ask for. Soon the legislature and DOC will be entreating the public for a bigger budget to pay of all of the additional costs as a result of this ill-conceived and poorly thought-out \"solution\" to Blakely. Obviously the Judicial committee and all those who support Senate Bill 56 and House Bill 78 have done zero research into the dollar costs of such legislation. This is a perfect example of the type of shortsighted and ethically suspect lawmaking that has divided—and will continue to divide the people of this state across political lines.

2-15-05

SECTIONAL ANALYSIS – HCS CS SENATE BILL 56(JUD)

"An Act relating to criminal law and procedure, criminal sentences, and probation and parole; and providing for an effective date."

Section1 Includes Intent language originally adopted by the Senate as a Letter of Intent and subsequently amended to become section 1 of the bill in House Judiciary.

Section 2 makes it clear that an indictment is valid as long as it complies with all rules of court, even if it does not allege aggravating factors that may later have to be proven to a jury to justify a higher sentence. At the grand jury stage, the state may not be aware of all aggravating factors, and therefore it is unreasonable to expect the indictment to list them. The *Blakely* decision did not require indictments to list aggravating factors, and due process is satisfied as long as the defendant has adequate notice of the factors in advance of trial, which is set out in Section 21 of the bill.

Section 3 limits the ability of judges to order "periodic" sentences, in which the offender periodically leaves prison and then returns to prison. This type of sentence significantly restricts the ability of prison officials to manage the prison population and to transfer prisoners so as to make the best and most efficient use of prison resources. Most judges are appropriately deferential to the difficulties faced by Alaska prison officials, but some judges use their ability to order "periodic" sentences to allow offenders to go on what amounts to judicially-ordered and unsupervised furloughs from prison. There is a proper place for prison furloughs, but that is best left to prison officials, who can adopt equitable policies that take into account the specific security risks posed by each prisoner and the likely benefits of the furlough. The original intent of "periodic" sentences was to allow defendants to, for example, maintain their employment during the week, and serve a sentence on weekends, or to be released for fishing season and returned to prison when the season is over. The bill thus explicitly limits periodic sentences for defendants have an employment obligation that preexisted sentencing and the defendant has received a composite sentence of not more than two years to serve. This bill does not interfere with the court's authority under AS 12.55.025(e) to postpone the beginning date for service of a sentence, which allows defendants to complete school or get their affairs in order before they enter prison.

Section 4 is a technical amendment to remove a reference to a statute repealed by the bill.

Sections 5 - 6 amend statutes that contain the phrases "presumptive term" or "presumptive sentence" and substitute or add the new concept of "presumptive range" that is adopted in this bill.

Section 7 makes it clear that the higher courts in Alaska cannot reverse a sentence as excessive if a judge imposes a sentence within a statutory range specified in this bill, or imposes a consecutive sentence required by law. However the right to petition the Supreme Court for excessiveness is retained.

Sections 8 - 12 change the existing presumptive terms into presumptive ranges, and create ranges where no presumptive term previously existed. The best way to understand these sections is to refer to the chart attached to this sectional analysis. The numbers in parentheses show the existing presumptive term, and the numbers in bold show the range adopted by the bill. In general, the lower the presumptive term in existing law, the narrower the range adopted by this bill. Thus, with only minor exceptions, if the existing presumptive term is zero, one or two years, the bill adopts a range of two years. With presumptive terms of three, four or five years, the bill adopts a range of three years. With presumptive terms of six, seven, eight or ten years, the bill adopts a range of four years. Higher presumptive terms result in ranges of five or ten years.

Section 13 requires that, in the absence of aggravating or mitigating factors, the total term of imprisonment must fall within the range and the active term of imprisonment (the time actually served in prison) must also fall within the range. Thus, if the range is five to eight years, the judge could impose a sentence of eight years with three years suspended, thus the total sentence (eight years) is within the range, and the active term (eight minus three suspended = five years) is also within the range. However, the judge could not impose a sentence of ten years with three suspended because the total sentence is above the range, nor could the judge impose eight years with four suspended because the active term is below the range.

Section 14 defines the phrase "presumptive term" for purposes of the consecutive sentencing statute, as the middle of the presumptive range. This phrase is used in the consecutive sentencing statute to mandate certain amounts of consecutive sentences for convictions relating to multiple victims or multiple offenses.

Section 15 is a conforming technical amendment.

Section 16 specifies that aggravating or mitigating factors allow judges to impose a sentence outside of the presumptive ranges, and specifies the allowable amount of that adjustment.

Section 17 contains conforming amendments to account for the change in terminology from presumptive "term" to presumptive "range."

Section 18 also adds one aggravating factor that allows judges to impose an aggravated sentence if the offender has a long misdemeanor record, specified as five or more convictions for class A misdemeanor crimes. By requiring convictions for class A misdemeanors, the aggravating factor would not be triggered by convictions for many petty offenses such as disorderly conduct and harassment, which are class B misdemeanors, nor by violations such as minor consuming and traffic offenses.

Section 19 adds a mitigating factor to allow for a lesser sentence for a defendant with a mental defect including Fetal Alcohol Spectrum, that was insufficient to constitute a complete defense, but that significantly affected the defendant's conduct. Also contains conforming amendments to account for the change in terminology from presumptive "term" to presumptive "range."

Section 20 specifies that, as in current law, aggravating and mitigating factors that are part of the elements of the offense cannot also be used to justify a sentence outside of the applicable range.

Section 21 conforms Alaska law to the Supreme Court's *Blakely* decision. There are a small number of aggravating factors that are not required under *Blakely* to be proven to a jury beyond a reasonable doubt, and those are specified in proposed AS 12.55.155(f)(1). Those factors must, however, be found by a judge by clear and convincing evidence, as under current law. Proposed AS 12.55.155(f)(2) requires, for all other aggravating factors, that in order to justify a sentence above the presumptive range, a jury must find the existence of that factor beyond a reasonable doubt. This provision also specifies when the state must provide the defendant with notice that it intends to establish one of these aggravating factors.

Sections 22 – 25 relate to the "safety net" that allows a three-judge panel to approve sentences outside of the ranges. These sections make no change in existing law, but contain conforming amendments to account for the change in terminology from presumptive "term" to presumptive "range."

Sections 26, 30 and 31 give police officers the explicit authority to detain or arrest these probationers and parolees for certain types of violations of conditions imposed by the courts or the parole board. Under this bill, when a certified police officer has reasonable suspicion that a probationer or parolee is violating certain specified conditions, they can temporarily detain the person to investigate, and can arrest if there is probable cause that conditions were violated.

Section 27 is a conforming amendment to account for the change in terminology from presumptive "term" to presumptive "range."

Section 28 amends the parole eligibility statute to take into account the change in terminology from presumptive "term" to presumptive "range," and to re-organize the eligibility criteria to make the provisions more understandable and to statutorily adopt certain provisions that exist in parole board administrative regulations.

Section 29 makes it clear that if the parole board has already considered a prisoner for discretionary parole release, and has denied release, the board has the authority to also deny a prisoner further consideration for parole. The state's position is that the parole board already has this authority inherent in its discretion to consider prisoners for parole release. However, because the authority is not explicit, the question is often litigated by *pro se* prisoners.

2-15-05

Alaska State Legislature

Senate Majority Web: www.akrepublicans.org

Sponsor:	Senator Gene Therriault
Current Version:	CSSB 56 (JUD)
Contact:	Heather Brakes, 465-4522

Fact Sheet for: Senate Bill 56

Short Title: CRIMINAL LAW/PROCEDURE/SENTENCING

Summary:

- Amends current presumptive sentencing, from a set term to a range of terms, to bring Alaska law into conformity with requirements imposed by the federal constitution as a result of the Blakely v. Washington decision.
- Allows a probation officer to impose additional terms of release or supervision for offenders without further court proceeding.
- Allows for an additional aggravator when a defendant has prior criminal history of five or more class A misdemeanor convictions.
- Limits the ability of judges to order "periodic" sentences in which the offender periodically leaves prison and then returns to prison.
- Stipulates the authority of police officers to detain or arrest probationers and parolees for certain types of violations of conditions imposed by the courts or the parole board.

Benefits:

- Simplifies and improves sentencing by giving judges more discretion and removes current confusions in the aftermath of the Blakely decision.
- Criminal Law and Procedure:
  - Improves the supervision of offenders by clarifying that probation officers have the authority to impose additional terms.
  - Allows Correctional Facilities to better manage the prison population and better supervise offenders by limiting the abuse of periodic sentencing.
  - Improves public safety by clarifying that police officers have the authority to arrest violators of parole or probation.

Background:

- The Supreme Court ruled in June 2004 that, under the Sixth Amendment, a defendant has the right to have a jury—rather than the sentencing judge—determine whether aggravating circumstances exist to justify increasing a defendant's sentence above the statutorily-prescribed term. The Blakely decision has created confusion in the Alaska courts, and has affected Alaska differently than most other states. Alaska's presumptive sentencing system limits judicial discretion to a single, definite term. Therefore, to impose an appropriate sentence, or even to impose probation supervision, a judge must find specific aggravating factors. Most other states with similar systems provide the judge with a sentencing range that provides some measure of judicial discretion.

2-15-05

Current "presumptive" terms compared to presumptive ranges in Senate Bill 56 January 2005

	First Felony	First Felony (special crimes)	Second Felony	Sex Felony with a prior sex felony	Third+ Felony	Sex Felony with two prior sex felonies	Max
Unclassified Sex Offense	(8) **to 12**	weapon or serious injury (10) **12 to 16**	(15) **to 20**	(20) **to 30**	(25) **to 35**	(30) **to 40**	(40)
A Felony Sex Offense	(5) **to 8**	weapon or serious injury (10) **to 14**	(10) **12 to 16**	(15) **to 20**	(15) **to 25**	(20) **to 30**	(30)
A Felony	(5) **to 8**	weapon, serious injury, or police victim (7) **to 11**	(10) **to 14**	n/a	(15) **to 20**	n/a	(20)
B Felony Sex Offense	(0, but 1 to 3 by court-made law) **2 to 4**	n/a	(5) **to 8**	(10) **to 14**	(10) **to 14**	(15) **to 20**	(20)
B Felony	(0, but 1 to 3 by court-made law) **1 to 3**	crim neg hom of child: (0, but 1 to 3 by court-made law) **2 to 4**	(4) **to 7**	n/a	(6) **to 10**	n/a	(10)
C Felony Sex Offense	(0) **1 to 2**	n/a	(2) **to 5**	(3) **to 6**	(3) **to 6**	(6) **to 10**	(10)
C Felony	(0) **to 2**	wanton waste or same-day by guide (1) **to 2**	(2) **to 4**	n/a	(3) **to 5**	n/a	(5)

Numbers in parentheses are the current "presumptive" terms and maximums

Numbers in **bold** show the presumptive ranges in the bill

2-15-05

Table 23
Alaska Felony Sentences Compared to
Sentences In State Courts Nationwide, by
Incarceration versus Probation

Most serious conviction offense	State courts nationwide[1] Percent of felons sentenced		Alaska Percent of felons sentenced	
	Incarceration	Probation	Incarceration	Probation
All Offenses Combined	68%	32%	85%	15%
Violent Offenses	78%	22%	97%	3%
Property Offenses	65%	35%	75%	25%
Drug Offenses	68%	32%	70%	31%
Weapon Offenses	66%	34%	95%	5%
Other Offenses	63%	37%	98%	2%

Alaska Judicial Council 1999 Felony Report

[1] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1998 2 (2001).

2-15-05

Existing Aggravators and Mitigators

Sec. 12.55.155. Factors in aggravation and mitigation.

(a) If a defendant is convicted of an offense and is subject to sentencing under AS 12.55.125 (c), (d)(1), (d)(2), (e)(1), (e)(2), (e)(3), or (i) and

(1) the presumptive term is four years or less, the court may decrease the presumptive term by an amount as great as the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation;

(2) the presumptive term of imprisonment is more than four years, the court may decrease the presumptive term by an amount as great as 50 percent of the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation.

(b) Sentence increments and decrements under this section shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section.

(c) The following factors shall be considered by the sentencing court and may aggravate the presumptive terms set out in AS 12.55.125 :

(1) a person, other than an accomplice, sustained physical injury as a direct result of the defendant's conduct;

(2) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person;

(3) the defendant was the leader of a group of three or more persons who participated in the offense;

(4) the defendant employed a dangerous instrument in furtherance of the offense;

(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;

(6) the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices;

(7) a prior felony conviction considered for the purpose of invoking the presumptive terms of this chapter was of a more serious class of offense than the present offense;

(8) the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior;

(9) the defendant knew that the offense involved more than one victim;

(10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;

(11) the defendant committed the offense pursuant to an agreement that the defendant either pay or be paid for the commission of the offense, and the pecuniary incentive was beyond that inherent in the offense itself;

(12) the defendant was on release under AS 12.30.020 or 12.30.040 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;

(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, fire fighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;

(14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group;

(15) the defendant has three or more prior felony convictions;

(16) the defendant's criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight;

(17) the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income;

(18) the offense was a felony

(A) specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit comprised of those living together in the same dwelling as the defendant;

(B) specified in AS 11.41.410 - 11.41.458 and the defendant has engaged in the same or other conduct prohibited by a provision of AS 11.41.410 - 11.41.460 involving the same or another victim; or

(C) specified in AS 11.41 that is a crime involving domestic violence and was committed in the physical presence or hearing of a child under 16 years of age who was, at the time of the offense, living within the residence of the victim, the residence of the perpetrator, or the residence where the crime involving domestic violence occurred;

(19) the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult;

(20) the defendant was on furlough under AS 33.30 or on parole or probation for another felony charge or conviction that would be considered a prior felony conviction under AS 12.55.145 (a)(1)(B);

(21) the defendant has a criminal history of repeated instances of conduct violative of criminal laws, whether punishable as felonies or misdemeanors, similar in nature to the offense for which the defendant is being sentenced under this section;

(22) the defendant knowingly directed the conduct constituting the offense at a victim because of that person's race, sex, color, creed, physical or mental disability, ancestry, or nationa. origin;

(23) the defendant is convicted of an offense specified in AS 11.71 and

(A) the offense involved the delivery of a controlled substance under circumstances manifesting an intent to distribute the substance as part of a commercial enterprise; or

(B) at the time of the conduct resulting in the conviction, the defendant was caring for or assisting in the care of a child under 10 years of age;

(24) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the transportation of controlled substances into the state;

(25) the defendant is convicted of an offense specified in AS 11.71 and the offense involved large quantities of a controlled substance;

(26) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance that had been adulterated with a toxic substance;

(27) the defendant, being 18 years of age or older,

(A) is legally accountable under AS 11.16.110 (2) for the conduct of a person who, at the time the offense was committed, was under 18 years of age and at least three years younger than the defendant; or

(B) is aided or abetted in planning or committing the offense by a person who, at the time the offense was co mitted, was under 18 years of age and at least three years younger than the defendant;

(28) the victim of the offense is a person who provided testimony or evidence related to a prior offense committed by the defendant;

(29) the defendant committed the offense for the benefit of, at the direction of, or in association with a criminal street gang;

(30) the defendant is convicted of an offense specified in AS 11.41.410 - 11.41.455, and the defendant knowingly supplied alcohol or a controlled substance to the victim in furtherance of the offense with the intent to make the victim incapacitated; in this paragraph, "incapacitated" has the meaning given in AS 11.41.470 .

(d) The following factors shall be considered by the sentencing court and may mitigate the presumptive terms set out in AS 12.55.125 :

(1) the offense was principally accomplished by another person, and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;

(2) the defendant, although an accomplice, played only a minor role in the commission of the offense;

(3) the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but which significantly affected the defendant's conduct;

(4) the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant;

(5) the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age;

(6) in a conviction for assault under AS 11.41.200 - 11.41.220, the defendant acted with serious provocation from the victim;

(7) except in the case of a crime defined by AS 11.41.410 - 11.41.470, the victim provoked the crime to a significant degree;

(8) *[Repealed, Sec. 42 ch 143 SLA 1982].*

(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;

(10) before the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained;

(11) the defendant was motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for the defendant's immediate family;

(12) the defendant assisted authorities to detect, apprehend, or prosecute other persons who committed an offense;

(13) the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;

(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved small quantities of a controlled substance;

(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;

(16) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home;

(17) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior.

(e) If a factor in aggravation is a necessary element of the present offense, or requires the imposition of a presumptive term under AS 12.55.125(c)(2), that factor may not be

used to aggravate the presumptive term. If a factor in mitigation is raised at trial as a defense reducing the offense charged to a lesser included offense, that factor may not be used to mitigate the presumptive term.

(f) If the state seeks to establish a factor in aggravation at sentencing or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence. Factors in aggravation and factors in mitigation must be established by clear and convincing evidence before the court sitting without a jury. All findings must be set out with specificity.

(g) Voluntary alcohol or other drug intoxication or chronic alcoholism or other drug addiction may not be considered an aggravating or mitigating factor.

2-15-05

THE LAW

Suspended Sentencing

The consequences of "the single most irresponsible decision in the modern history of the Supreme Court"

BY BENJAMIN WITTES

When Dwight W. Watson first came before U.S. District Judge Thomas Penfield Jackson for sentencing, on June 23, the judge gave him six years in prison. Watson was the North Carolina tobacco farmer who paralyzed a section of Washington, D.C., for two days last year by driving a tractor into a pond on the National Mall and threatening to detonate an "organophosphate bomb." The federal sentencing rules suggested a maximum of sixteen months for Watson's crimes of making threats and damaging federal parkland. But in a time of heightened terrorism fears Judge Jackson felt that the incident's impact on the city—Washington, he said, had regarded Watson "as a one-man weapon of mass destruction"—justified a longer detention.

One day after Watson's sentencing, however, the Supreme Court handed down its blockbuster decision in *Blakely* v. *Washington*, and Judge Jackson had to backtrack. In *Blakely*, a kidnapping case originating in the state of Washington, the Court ruled that judges cannot use facts other than those brought before a jury to increase a convict's sentence beyond the standard set by state guidelines. So at a hearing a few days later Jackson cut Watson's time to the fifteen-plus months he had already served. "The Supreme Court has told me that what I did a week ago was plainly illegal," he told the defendant in court. "By my count, Mr. Watson, you're a free man in a few hours."

This was just the beginning. Within days of the *Blakely* decision the system of criminal sentencing in the United States was in turmoil. A few examples: A drug dealer in West Virginia saw nineteen of twenty years dropped from a sentence for conspiring to manufacture methamphetamine. In Tennessee a man convicted of raping an eighty-two-year-old woman got the minimum sentence of twenty-five years in prison. In Oklahoma a judge actually gave a bank robber three sentences for the same crime, saying he was unsure what was lawful under *Blakely*. By the time you read this, countless convicts will have had their cases affected by the ruling.

But *Blakely* did more than guarantee leniency for criminals in as many as 270,000 federal cases alone. It left state and federal legislatures wondering what the fundamental rules of sentencing were and which laws they would have to rewrite. Numerous states saw their sentencing rules imperiled, and the federal sentencing guidelines—the most ambitious effort to reform federal criminal sentencing in American history—were cast into grave constitutional doubt. The Justice Department was left unsure how to draft indictments so that people convicted of serious crimes would receive serious punishments.

Nor was clarity forthcoming, because in the aftermath of the *Blakely* decision the lower federal courts immediately split as to whether the federal guidelines must be scrapped. Some federal courts of appeals quickly ruled that the decision effectively invalidated them. Others ruled that *Blakely* did not apply to the federal guidelines. And the Second Circuit Court of Appeals, in a remarkable opinion, declared unanimously that its judges did not know what the decision meant and urged the Supreme Court to resolve the issue immediately to avert "what we see as an impending crisis in the administration of criminal justice in the federal courts." Both the Bush Administration, in court filings, and the Senate, in a nonbinding resolution, also urged the Court to take up the matter swiftly. And on August 2 the Court did so, agreeing to hear arguments on the day its new term begins in October. By the time you read this, the landscape may have changed dramatically.

In the incoherence of its principle, the awesome scope of its impact, and its sheer contempt for so many different institutions in American life, *Blakely* stands out as the single most irresponsible decision in the modern history of the Supreme Court. The case may never become an iconic example of judicial excess for either liberals or conservatives—either a *Roe* v. *Wade* or a *Bush* v. *Gore*. It doesn't involve a hot-button social issue, and it confounds the Court's normal ideological divide: Justice Antonin Scalia wrote the majority opinion for himself, his fellow conservative Clarence Thomas, and the liberal justices John Paul Stevens,

David Souter, and Ruth Bader Ginsburg. Dissenting were Chief Justice William Rehnquist, a conservative; the centrists Sandra Day O'Connor and Anthony Kennedy; and the more liberal Stephen Breyer. Neither major political movement can attack the majority without attacking some of the justices its partisans profess to admire most.

But as an example of judicial usurpation, *Blakely* has no modern parallel. It has deprived political institutions of their rightful authority on the basis of legal theories ill grounded in the Constitution—and has done so in a fashion profoundly disruptive to the democratic choices of the people's elected representatives and to the functioning of the courts. *Roe*, whether you love it or hate it, affected only abortion policy. *Blakely*, in contrast, razes the entire structure of something as basic to the justice system as criminal sentencing.

The Court's decision purports to limit judicial discretion. Scalia's opinion claims it will "give intelligible content to the right of jury trial" by "ensuring that the judge's authority to sentence derives wholly from the jury's verdict." In reality, however, the decision will more likely expand, not limit, the power of judges—specifically by preventing legislatures from meaningfully guiding their choices in handing down sentences.

Within days of the *Blakely* decision the U.S. system of criminal sentencing was in turmoil—because no one is sure what the decision means.

For most of the nation's history sentencing was a matter for judges alone. Congress set the range of punishments a crime could carry, and judges decided how, within that range, to impose those punishments. The result was huge racial, regional, and other disparities in sentences for comparable offenses—disparities that often reflected the oddities of individual jurists. Congress responded with the Sentencing Reform Act of 1984, which sought to make sentencing more predictable. Under the sentencing guidelines that resulted, judges were compelled to plug a variety of factors into a complex formula that would provide a sentencing range. The guidelines are far from perfect; they sometimes produce gross injustices, most often because of mandatory minimums in drug cases, and many judges have chafed at being forced to impose such terms. Indeed, *Blakely* is best understood as part of a judicial backlash against the constraints of determinate sentencing, as the guideline-based system is called. But what a childish backlash it has been.

The counterrevolution began in 2000, with a case called *Apprendi* v. *New Jersey*. *Apprendi* involved a state hate-crimes law that allowed judges to impose sentences beyond the usual maximum if racial animus lay behind the crime. In this case a man who had fired a gun into a black family's house was sentenced to twelve years in prison—two years more than the maximum for firearm possession. The Court, however, struck down the sentence, because the defendant's racial motivation had not been proved to the jury; rather, it had been found by a judge. "Other than the fact of a prior conviction," the Court held, "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."

The theory behind *Apprendi* seems both simple and attractive: a *fact* that pushes a sentence above the statutory maximum for the offense is really an *element* of a more serious crime, and every element of a crime has traditionally had to be proved to a jury. But judges have always considered facts in sentencing that were not proved to the jury. So *Apprendi* forced the question of which sentencing factors must count as elements and which judges could still consider on their own. In *Blakely* the Court answered that question: anything that increases a sentence beyond the "standard range" set by law is by definition an element, so a judge may not consider it in sentencing unless it has been proved to the jury.

Ralph H. Blakely Jr. was not actually given a sentence beyond the ten-year maximum for second-degree kidnapping under a Washington State statute. In fact, he received only seven years and six months. Even this sentence, however, exceeded the standard range of the state's sentencing guidelines, a range the trial judge was permitted to exceed only if he found unusual circumstances—which in this case he did. But those circumstances had not been presented to the jury. In the opinion of Scalia and the majority, this meant that they could not be the basis for the greater sentence.

The problems with this approach are profound; indeed, its consequences are absurd. What *would* be allowed under *Blakely*? To name one possibility, a state legislature could define all felonies as punishable by anything from probation to life in prison, giving judges unlimited flexibility. Such a system, of course, is precisely what Congress was reacting against when it passed the sentencing-reform law. Nor, under *Blakely*, would it present a constitutional problem to have sentencing dictated entirely by law; all robbers, for example, could get twenty years without regard to circumstances. But as the consequences of mandatory minimums have shown, no legislature ought to be painting with such broad strokes.

According to the logic of *Blakely*, however, a legislature *cannot* create a system for increasing sentences according to a range of factors and actually require judges to employ that system. A guideline system would work constitutionally only so long as it was not mandatory, or—more ridiculous—so long as judges started with a maximum sentence and departed *downward*. After all, *Apprendi* and *Blakely* are concerned only with facts that increase a sentence, effectively becoming elements of a more serious crime—not with facts that may cause a judge to punish more leniently. So the federal sentencing guidelines might be salvageable by making all felonies punishable by, say, the maximum

sentence the crime can carry, and then creating an elaborate system whereby judges would weigh various factors to reduce those sentences. Short of that, the only way to preserve guided sentencing would be to prove all sentencing factors to a jury, either at trial or in a separate hearing after a defendant's conviction—either way, a dramatic departure from traditional practice.

In short, it's almost inevitable that the decision will either make sentencing guidelines unacceptably rigid or loosen them to the point of meaninglessness, enabling judges to act according to their own whims. Right now, the defense bar loves this decision, because it lessens the sentences many current defendants will face. In the long run, however, the system the decision will create could end up being far less fair to defendants. Material now kept away from the jury as potentially inflammatory might have to be included in indictments and proved at trial—thereby exposing defendants to less impartial trials.

Then again, who knows? What makes this decision so deeply reckless is that nobody can say for sure what it means. Disruption is not always a bad thing. Some of the Court's finest hours, in fact, have caused widespread upset in political and legal institutions; think of the school-desegregation decisions. But consider also the differences between *Brown v. Board of Education* and *Blakely*. *Brown* stated a clear, morally compelling principle ("Separate educational facilities are inherently unequal") that gave voice to fundamental constitutional language ("No State shall ... deny ... the equal protection of the laws") and, in short order, gave crystal-clear guidance to any school district that cared to follow the law (desegregate schools with "all deliberate speed"). *Blakely*, in contrast, disrupts years of settled practice without protecting any coherent value—except the value, apparently so important to both right and left on the Court, of giving the justices the final say on everything. ▲

Benjamin Wittes is an editorial writer specializing in

2-15-05

Vera Institute of Justice
State Sentencing and Corrections

Policy and Practice Review

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Aggravated Sentencing: *Blakely v. Washington*

Practical Implications for State Sentencing Systems

Jon Wool and Don Stemen

At the close of its 2003-2004 term, the United States Supreme Court roiled many states' criminal justice systems when it struck down Washington's sentencing guidelines scheme.

In *Blakely v. Washington* the Court ruled that a judge may not increase a defendant's penalty beyond that which would be available "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[1] Put another way, under *Blakely*, when the law establishes an effective maximum sentence for an offense, the Sixth Amendment's right to trial by jury prohibits a judge from imposing a longer sentence if it is based on a fact—other than prior conviction—determined by the judge. Any such fact must be proved to a jury beyond a reasonable doubt if not admitted by the defendant.

The ruling, which invalidated the provisions of Washington's guidelines system that allow a judge to make factual findings and then impose a penalty beyond a recommended standard range of sentences, has wide implications. In her dissent, Justice O'Connor identified nine other states whose sentencing regimes are cast into doubt under *Blakely*. Our analysis suggests that there may be many more.[2]

Five states—Kansas, Minnesota, North Carolina, Oregon, and Tennessee—employ presumptive sentencing guidelines systems that enable judges to enhance sentences by finding

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This is the inaugural issue of a new series that will focus on the Supreme Court's powerful, yet profoundly disrupting, decision in *Blakely v. Washington*. Over the next six months, we will seek to provide timely and helpful analysis of *Blakely*'s reach, offer practical advice to state lawmakers needing to realign their systems, and report on state reactions to the ruling. In sum, we hope to help decision makers find appropriate answers (many of which already exist and some of which are working in practice)—and perhaps even the opportunity for positive change—amid the uncertainty and apprehension that the Court has caused.

In this first report, we look to answer two big questions: Which states' sentencing systems are affected by *Blakely*? and What responses are available to legislators and other policymakers? The first section assesses states according to the characteristics of their sentencing systems and their susceptibility to *Blakely*. The second section examines possible solutions, including the use of jury fact-finding for states seeking to retain enhanced penalties and how voluntary guidelines systems may be inoculated against *Blakely* ills by changing the ways in which judges use or report deviations from their guidelines.

The next publication in the series, the companion piece *Legal Considerations for State Sentencing Systems*, will provide a more detailed examination of the legal issues raised in *Blakely* and prior decisions of the Court and discusses the implications for sentencing provisions apart from those in structured sentencing regimes.

Publications are only part of Vera's *Blakely* response. We are helping state officials manage the implications of the ruling, both through onsite work in capitals and by bringing state leaders together to learn from national experts and each other about promising responses. To learn more about Vera's state work, please contact me at (212) 376-3073, dwilhelm@vera.org, or visit Vera's website at www.vera.org/ssc

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aggravating facts, as does the Washington system addressed by the Court. At least eight additional non-guidelines states—Alaska, Arizona, California, Colorado, Indiana, New Jersey, New Mexico, and Ohio—employ functionally equivalent presumptive sentencing systems. The systems in this core group of 13 states appear to be fundamentally affected by the *Blakely* decision.[3]

Glossary

The following definitions reflect their most common usage and their usage in this report.

Structured sentencing system: a system providing some form of recommended sentences within statutory sentence ranges.

Sentencing guidelines system: procedures to guide sentencing decisions and a system of multiple, recommended sentences based generally on a calculation of the severity of the offense committed and the criminal history of the offender.

Presumptive sentencing guidelines: sentencing guidelines that require a judge to impose the recommended (presumptive) sentence or one within a recommended range, or provide justification for imposing a different sentence.

Voluntary sentencing guidelines: sentencing guidelines that do not require a judge to impose a recommended sentence, but may require the judge to provide justification for imposing a different sentence.

Presumptive sentencing: a system of recommended (presumptive) sentences, based solely on the offense or offense class, that a judge must impose or provide justification for imposing a different sentence.

Effective maximum sentence: the maximum sentence authorized for an offense based solely on the facts reflected in the jury verdict or admitted by the defendant.

Enhanced sentence: a sentence longer than the effective maximum sentence.

Determinate sentencing system: a system in which there is no discretionary releasing authority and an offender may be released from prison only after expiration of the sentence imposed (less available good or earned time).

Indeterminate sentencing system: a system in which a discretionary releasing authority, such as a parole board, may release an offender from prison prior to expiration of the sentence imposed. It may also, but need not, allow judges to impose a sentence range (such as, three to six years) rather than a specific period of time to be served.

Although Justice O'Connor may have understated the number of states affected by the Court's ruling, the situation may not be as dire as her conclusion that "[o]ver 20 years of sentencing reform are all but lost." It is true that affected states will have to amend their sentencing structures . . . But that reality is tempered by the fact that in many states, unlike the federal system, judicial fact-finding is used in only a small fraction of cases.

The fallout may also envelop six other states—Arkansas, Delaware, Maryland, Rhode Island,[4] Utah, and Virginia—employing voluntary sentencing guidelines systems that nonetheless require a court to apply a suggested sentence range and provide justification for any sentence above that recommended by the range. Depending on how future court decisions define the scope of *Blakely*, it is also possible that two indeterminate sentencing states—Michigan and Pennsylvania—that employ presumptive sentencing guidelines systems may run afoul of the ruling. Finally, *Blakely* has implications for other state sentencing provisions beyond these 21 with structured sentencing systems.[5] Every statute that provides for an enhanced penalty beyond that authorized solely by the jury's verdict must be examined to determine whether it is based on facts—other than prior conviction—determined by a judge. Such statutes include those that allow additional punishment upon a judge's finding that the defendant was on parole at the time of the offense, that the crime was committed for compensation, or that the victim was of a certain age. We will discuss these implications in a companion report, *Legal Considerations for State Sentencing Systems*.

Although Justice O'Connor may have understated the number of states affected by the Court's ruling, the situation may not be as dire as her conclusion that "[o]ver 20 years of sentencing reform are all but lost."[6] It is true that affected states will have to amend their sentencing structures in large or small ways. But that reality is tempered by the fact that in many states, unlike the federal system, judicial fact-finding is used in only a small fraction of cases and thus is easier to avoid while states are constructing responses. Moreover, there are ways to cure *Blakely* ills, and examples exist of constitutionally-sound solutions that largely preserve the goals that drove states to enact

structured sentencing systems. As Justice Scalia states for the Court, "we are not . . . find[ing] determinate sentencing schemes unconstitutional. . . . Nothing we have said impugns [the] salutary objectives" of "proportionality to the gravity of the offense and parity among defendants" that prompted Washington's guidelines system.[7]

That having been said, states' ability to limit judicial discretion to achieve these and other goals is now significantly constrained. It is perhaps ironic that the Court has found that the Sixth Amendment, with its jury guarantee as a bulwark against state power, actually limits attempts to reign in judicial authority through structured sentencing. On the one hand, it is hard to argue with the Court's view of the centrality of both the right to be tried by a jury of one's peers and the application of the highest standard of proof beyond a reasonable doubt; indeed the dissenting justices do not make much of an effort. On the other hand, it is the Court's insistence on drawing a "bright-line" formulation to protect these rights, one that establishes a firm constitutional line rather than allowing legislative and judicial flexibility, that is precipitating the present upheaval.[8]

The Impact of *Blakely* on State Systems

At the end of the day, *Blakely*'s reach largely will be determined by courts in the states. They will determine the force and effect of their sentencing rules and whether certain provisions violate *Blakely*. And they will determine whether simply the offending provisions are affected or whether a state's entire structured sentencing scheme is void. It is likely that results will differ state to state based on distinctions in sentencing structures, differing interpretations of the Court's ruling, and the degree to which pragmatic concerns about systemic impact influence judgment. It will take a few years for the ultimate nature and scope of *Blakely*'s impact to be known, but this much we know for certain: its potential to reshape sentencing in the United States is profound, as we discuss below.

Presumptive sentencing guidelines systems

It is evident that the four other states (not including Kansas, which is discussed below) with presumptive sentencing guidelines systems—Minnesota, North Carolina, Oregon, and Tennessee—will be affected by the decision to the same extent as Washington. In each of these states, guidelines establish a range for an offense that sets the maximum sentence a judge may impose based on the jury's verdict. A judge may impose a sentence above the maximum in the range only when the judge makes a finding of aggravating factors.

Presumptive sentencing guidelines systems: fundamentally affected by *Blakely*

- Minnesota
- North Carolina
- Oregon
- Tennessee
- Washington

Presumptive (non-guidelines) sentencing systems: fundamentally affected by *Blakely*

- Alaska
- Arizona
- California
- Colorado
- Indiana
- New Jersey
- New Mexico
- Ohio

Voluntary sentencing systems: possibly affected by *Blakely*

- Arkansas
- Delaware
- Maryland
- Rhode Island
- Utah
- Virginia

Voluntary sentencing systems: not affected by *Blakely*

- District of Columbia
- Louisiana
- Missouri
- Wisconsin

Presumptive sentencing guidelines in indeterminate systems: possibly affected by *Blakely*

- Michigan
- Pennsylvania

Washington, for its part, prescribes a presumed sentence range, the "standard range," within the broader statutory sentence range for each offense. The judge must impose a definite term within this standard range, but on finding an "aggravating factor" the judge may impose an "exceptional sentence" beyond the standard range but lower than the

statutory maximum. When an exceptional sentence is based on such an aggravating factor, the judge must articulate, for the record, facts to support that decision.[9] The guidelines systems in Minnesota and Oregon are nearly identical in structure to Washington. Those in North Carolina and Tennessee are different, but not in ways relevant to the ruling in *Blakely*.

Unlike other systems, North Carolina's guidelines are "mandatory" in that they require a judge in every case to impose a sentence within the designated cell of a sentencing guidelines grid.[10] Thus, judges in North Carolina cannot impose a sentence above those recommended within a guidelines cell, as judges can in Washington. However, the North Carolina guidelines set mitigated, presumptive, and aggravated ranges within each cell. The court must impose a sentence within the presumptive range unless the judge finds aggravating factors by a preponderance of the evidence. Only then may the judge impose a sentence within the aggravated range. In this sense, a sentence in the aggravated range in North Carolina is an enhanced sentence, equivalent to an "exceptional sentence" under the Washington guidelines.

Blakely's reach largely will be determined by courts in the states. They will determine whether certain provisions of a state's sentencing rules violate *Blakely*.

In Tennessee, on the other hand, guidelines establish sentence ranges with single-term "presumptive sentences" within those ranges. For the most serious class of felonies, the presumptive sentence is the midpoint in the guidelines range; for lesser felonies, the presumptive sentence is the minimum term in the guidelines range. The court must impose the presumptive sentence unless the judge states on the record a finding of an "enhancement factor." In such instances the judge may impose a sentence up to the maximum in the guidelines range for the offense.[11] Thus, Tennessee's guidelines differ from those in Washington in that the presumptive sentence is a single term of years rather than a range of sentences. This single term is the effective maximum for an offense because a sentence above this term (even within the guidelines range) requires a finding of additional "enhancement factors."

All of these states share the same fundamental problem: a jury's verdict, or a defendant's guilty plea, only authorizes a sentence to the presumptive maximum sentence or within the presumptive range. An enhanced sentence requires a finding of facts by the judge—the very thing the Supreme Court ruled violates the Sixth Amendment right to trial by jury.

Kansas employs a presumptive sentencing guidelines system similar to Washington's. However, Kansas's system is not generally implicated by *Blakely* because it has amended its statutes to require that a jury find any fact that forms the basis of an enhanced sentence. Kansas acted in response to the only state court decision that struck down its guidelines system for the reasons ultimately determined by the Court in *Blakely*.[12] As we discuss below, the Kansas model represents one solution to the problem in these states' systems.[13]

Presumptive (non-guidelines) sentencing systems

At least eight states that do not formally employ guidelines—Alaska, Arizona, California, Colorado, Indiana, New Jersey, New Mexico, and Ohio—nonetheless employ presumptive sentences and require judges to provide justification when they deviate from those sentences. Although these states' systems lack the multiple ranges of sentencing guidelines systems, they are comprehensively structured and functionally equivalent to guidelines, at least for Sixth Amendment purposes. In all of these—often referred to as presumptive sentencing or determinate sentencing systems—statutes set a single presumptive sentence or range of sentences for each offense within the statutory range. The judge must impose that presumptive sentence or one within the presumptive range and may impose a higher term only after finding aggravating factors.

New Mexico is typical. In New Mexico, statutes set a single-term "basic sentence of imprisonment" for each offense. For a first degree felony, for example, the basic sentence is 18 years; for a second degree felony, it is nine years. The appropriate basic sentence must be imposed unless the court alters it based on aggravating or mitigating circumstances. When the judge finds any "aggravating circumstance" relevant to the offense or the defendant, the judge may impose a sentence up to one-third above the basic sentence.[14] Thus, in New Mexico, the basic sentence, although a single term, acts as the effective maximum sentence a defendant may receive absent a judicial finding of an aggravating circumstance.

Alaska, Arizona, California, Indiana, New Jersey, and Ohio use different terminology for the "basic sentences" and "aggravating circumstances" they rely on, but to the same effect. In Ohio, for example, statutes require the court to impose the "shortest prison term authorized for the offense" unless the judge finds that the shortest prison term will "demean the seriousness" of the offender's conduct

or "not adequately protect the public;" in such cases the judge may impose any term up to the statutory maximum.[15] In California, statutes prescribe a "lower," "middle," and "upper" term for each offense and require a judge to impose the middle term absent a finding of "aggravating circumstances."[16] In Colorado, on the other hand, statutes set a fairly wide "presumptive range" for each offense class and require the court to impose a definite sentence within the presumptive range unless it concludes that "extraordinary aggravating circumstances" are present and support a different sentence that "better serves the purposes" of the criminal code. If the judge finds such circumstances, the judge may impose a sentence up to twice the maximum authorized in the presumptive range for the offense.[17]

As with the presumptive guidelines jurisdictions, these states share the common problem that a jury verdict, or guilty plea, only authorizes a sentence to the presumptive term or within the presumptive range. Any enhanced sentence relies on judicial fact-finding in violation of the *Blakely* rule.

Voluntary sentencing systems

In contrast with states that use presumptive sentencing systems, with or without guidelines, 10 jurisdictions employ voluntary guidelines systems. These systems are similar in structure to the Washington guidelines in that they prescribe a range of sentences for each offense or offense class, but they differ in that the ranges are expressly not binding. Because there is considerable variety in the structure of these systems and differences in how legislatures instruct judges to employ the guidelines, some states may be at greater risk to *Blakely* challenge than others. These 10 jurisdictions fall into two basic groups.

In four of these systems—those of the District of Columbia, Louisiana, Missouri, and Wisconsin—judges are encouraged to consider guidelines ranges in determining appropriate sentences, but no additional fact-finding is required of a judge to impose a sentence outside the range and up to the statutory maximum. Nor is there a requirement that judges provide reasons for doing so. In these four jurisdictions, the effective maximum sentence—that which is authorized by the jury verdict or a defendant's guilty plea—is the statutory maximum in all cases, thus they do not seem to conflict with *Blakely*.

The other six voluntary guidelines states—Arkansas, Delaware, Maryland, Rhode Island, Utah, and Virginia—may however, run afoul of *Blakely*. They require judges first to apply the guidelines ranges but then allow them to depart upward—provided they state their reasons for doing so. In Arkansas, for example, "the presumptive sentence" in all cases is determined according to sentencing guidelines, for the judge to impose a sentence that varies more than five percent from the presumptive sentence, written justification "specifying the reasons for such departure" must be given.[18] Similarly, in Virginia the judge must "review and consider" the suitability of the applicable "discretionary" sentencing guidelines. Before imposing sentence, the judge "shall state for the record" that such review and consideration have been accomplished. If the judge imposes a sentence greater than that indicated by the guidelines, the judge must file a "written explanation of such departure."[19]

The requirement in each jurisdiction that a judge first apply the sentences articulated in the guidelines and then provide reasons for a decision not to follow them may bring them within the *Blakely* rule. Put another way, the requirement that a judge state reasons as a pre-condition of an enhanced sentence may establish the top of the guidelines range as the effective maximum sentence—a situation no different from the one presented in *Blakely*. Whether this is so will have to be determined first by the courts through their interpretations of the practical effect of the state's specific statutory or administrative language. If a court holds that the practical effect of a state's system is that a judge cannot deliver an enhanced sentence absent the finding and stating of reasons beyond those found by a jury or admitted by a defendant, these systems may fall.[20]

Such a result is far from certain for the following reasons. One could argue that the advisory character of the systems in these five states would spare them *Blakely* problems; judges are expressly not required to follow the guidelines recommendations. A court could hold, therefore, that the requirement that judges apply the guidelines and provide reasons for departing does not in fact constrain a judge's discretion but serves solely as an information-recording function. Or it could determine that the requirement that reasons be provided is so flexible—allowing a statement to the effect of "the guidelines range is not adequate for this offense"—that the jury verdict or plea alone authorizes a sentence up to the statutory maximum. In such instances, these states may indeed be immune to *Blakely*. That said, there is adequate reason for caution.[21] The Court made clear that the practical effects of sentencing rules determine the scope of the right to trial by jury, whether a system is called voluntary or not.[22]

Presumptive sentencing guidelines in indeterminate systems

Two states—Michigan and Pennsylvania—are in a somewhat different situation and it is less clear whether *Blakely* will affect them. Indeed, it is possible to construct equally compelling arguments that *Blakely* does or does not apply

The arguments turn on competing definitions of the effective maximum sentence in such indeterminate states.

Michigan and Pennsylvania employ indeterminate sentencing schemes with presumptive guidelines.[23] In both states, judges set a minimum and maximum term to each sentence, but limits are imposed only on the setting of the minimum term. The maximum term may be set in all instances up to the statutory maximum. The minimum term determines a defendant's parole eligibility date, or the period a defendant must serve in prison; the maximum term controls a defendant's mandatory release date, or the maximum period a defendant will serve if not released by a parole board. Thus, in each state, the judge determines how long an offender must serve in prison before being eligible for parole release. The sentencing guidelines in these states establish a range of minimum terms. A judge may impose a minimum term above the guidelines range only by finding aggravating factors on the record.

The Court has previously held that the Sixth Amendment is not violated by a system that requires an enhanced minimum sentence based upon judicial findings of fact. Yet that ruling applies only so long as the enhanced minimum sentence is not beyond that "authorized by the jury's verdict."[24]

On the one hand, therefore, it may be argued that a sentence with an enhanced minimum term in Michigan and Pennsylvania effectively exceeds that authorized by the jury verdict because a defendant who receives such a sentence likely will remain incarcerated longer than one who receives a sentence with a minimum term within the guidelines range. To the extent that an enhanced minimum term—that is, one beyond the guidelines range—leads to a longer period of incarceration by extending the date at which the defendant is eligible to be released, these systems may be held to violate *Blakely*.

On the other hand, it is also possible to characterize the maximum sentence authorized by the jury verdict as being controlled solely by the maximum term in an indeterminate system, and there is no limit on the maximum term a judge may set in these two states up to the statutory maximum. Moreover, because of the discretion vested in the parole board—the hallmark of indeterminate sentencing—some who are given non-enhanced minimum terms may remain incarcerated longer than those sentenced to enhanced minimum terms, the minimum term only commences parole eligibility but does not require that a defendant be released on that date. Thus, to the extent it is determined that the effective maximum sentence is the statutory maximum or that the mere likelihood of an increased period of incarceration is not sufficient to trigger the jury right, these systems will be upheld.

Part of the difficulty in assessing the effect of *Blakely* is that it addressed a determinate sentencing structure—one without parole or other discretionary release—in which the sentence is expressed as a single term that fully determines when a defendant will be released. No decision in the *Apprendi*[25] line has explicitly addressed the effect of these rulings on indeterminate sentencing structures such as in Michigan and Pennsylvania.[26] Future rulings will be required to settle how, or if, *Blakely* applies to these states.[27]

There is, finally, one other group of states that this decision affects. A number of jurisdictions (some of which have already been discussed as implicated by *Blakely*) are currently revising their sentencing systems or criminal codes, or studying the need to do so. They include Alabama, Georgia, Indiana, Iowa, Maine, Nebraska, New Jersey, New Mexico, Vermont, and Wisconsin. *Blakely's* ultimate effects should significantly influence the manner in which they pursue reforms.

Reconciling State Sentencing Systems with *Blakely*

The dissenting opinions in the *Blakely* case were short on constitutional argument and long on discussion of the dire practical considerations for state sentencing systems. This is not surprising; the constitutional issue had been largely decided in the Court's prior rulings, and the implications for many states, as well as the federal system, are indeed enormous. But will they be as dire as predicted?

Before venturing an answer, it is important to note that, constitutional jurisprudence aside, the *Blakely* decision allows for some seemingly perverse effects. For example, in a sentencing system that fully relies on statutory minimum and maximum sentences, judges have the fact-finding authority necessary to determine the appropriate sentence anywhere within the statutory range up to the maximum in any given case.[28] In such a system a judge may be authorized to make a fact-finding of deliberate cruelty, for example, and sentence a defendant to three years more incarceration than the judge might have otherwise. Yet a state is no longer free to do precisely that if it imposes limits on judicial sentencing discretion, as Washington did by enacting guidelines that regulate maximum sentences short of the statutory maximum. Thus the states may achieve in one context what the Court says the Constitution prohibits in another. It is perhaps perverse that the scope of the right to trial by jury turns on such a distinction.

Such effects notwithstanding, the Court's ruling does not require states to abandon their guidelines systems—

Managing a Response to *Blakely*

Kansas shows that states can create effective and well-informed processes to respond to *Blakely*. Following the Supreme Court's 2000 *Apprendi* ruling, Kansas officials were concerned about the constitutionality of their presumptive guidelines system. Even before the state's high court later validated that concern, the Kansas Sentencing Commission created a subcommittee to study the applicability of the ruling and to consider policy responses. Importantly, the subcommittee included legislators, prosecutors, defense attorneys, and judges. The participation of all four of these groups was essential to the creation of a legislative response that was not only substantively workable and fair but politically acceptable.

As the group came to understand the Court's decision and to consider which legislative options were most appropriate, subcommittee members kept the following key questions in mind, according to Barbara Tombs, then executive director of the Commission:

- First, what are the underlying goals of sentencing guidelines? Are principles of fairness, public safety, and resource control served by a possible solution?
- Second, how are the burdens of a possible solution distributed? Does either the defense or prosecution enjoy an unfair advantage or suffer an undue burden as a result? Are these factors in balance?
- Third, how does a solution affect judicial discretion and resources? Does a solution fit within understood or articulated powers granted to the court? And is it a solution that a court can apply with its existing capacity?

Thoughtful deliberations guided by these questions and participation by necessary institutional actors from both sides of the adversarial system and all three branches of government led to the creation of a legislative response that was quickly embraced and has proven to be effective in practice.

although it certainly limits a state's avenues to channel judicial discretion. States that have chosen to rein in judicial discretion through the presumptive or voluntary systems affected by *Blakely* still have an option that retains the core of their systems and complies with the ruling. Those states can allocate fact-finding to juries when enhanced sentences are sought. States that seek to maintain a maximum of judicial sentencing authority while providing persuasive, although non-binding, guidance may seek to make their voluntary systems fully voluntary—like those in the District of Columbia, Louisiana, Missouri, and Wisconsin—if the courts hold that they currently are not so. And the imperative of revisiting current systems also may provide an opportunity for some states to move from a presumptive system to a voluntary one, or vice versa. The decision each state makes likely will turn on the goals it sought to achieve by enacting guidelines, the degree to which those goals remain vital, and the combustible political forces that exert themselves whenever criminal justice is the subject of reform.

The feasibility of jury fact-finding

After the Kansas Supreme Court invalidated the state's guidelines system in 2001 (presaging *Blakely*), the legislature chose to retain presumptive guidelines by incorporating jury fact-finding as the basis of an enhanced sentence.[29] Kansas's choice and its subsequent experience thus provide some guidance for states that must alter their systems. Under the revised system, if Kansas prosecutors decide to seek an enhanced sentence, they must file a motion 30 days before trial. The judge then decides whether, in the interests of justice, the evidence of enhancing factors must be presented at a post-trial sentencing hearing rather than at the trial.[30] Only evidence that has been disclosed to the defense is admissible in an enhancement determination, if the defendant testifies at such a hearing it is not admissible in any subsequent criminal proceeding. The jury must be unanimous that a factor has been proven beyond a reasonable doubt. If the jury finds such a factor, the judge nonetheless retains the discretion to sentence within or beyond the guidelines range.

Neither prosecutors nor the defense bar have raised strong concerns about the justice or efficiency of this procedure. The Kansas Appellate Defender Office amicus brief in *Blakely*, arguing against the constitutionality of presumptive systems such as Washington's and Kansas's former system, provides implicit support for the state's legislative response. Interviews with defenders in the state indicate that the defense bar generally finds the procedure unobjectionable with one exception: the possibility that prejudicial "sentencing factors" might be presented during the trial (which appears not to

have occurred to date). Interviews with prosecutors and judges in the state also indicate that the procedure does not place significant extra burdens on the system. It has been used infrequently, but not because it is unworkable. Indeed, it had always been rare for judges to sentence defendants to enhanced sentences after trial, largely because in a plea-driven system the available sentences after trial are already effectively "enhanced."[31]

It is perhaps not surprising that jury fact-finding has proved feasible in Kansas. It is common in parts of other states' systems. Although not a structured sentencing state, Illinois previously authorized extended sentences based on judicially-determined facts. Following the Supreme Court's ruling in *Apprendi*, Illinois changed its enhancement statute to require that an aggravating factor be included in the charging document and that it be proved to the jury beyond a reasonable doubt.[32] Although California employs a general presumptive system in which judges make fact findings necessary to depart from presumptive sentences, implicating *Blakely*, in other circumstances it requires that aggravating factors—such as possession of a weapon in the course of an enumerated offense—be put to a jury.[33]

It also has to be kept in mind that concerns voiced by a number of commentators regarding the workability of jury fact-finding have a limited reach. The vast majority of criminal cases, perhaps as high as 95 percent, do not result in trials,[34] and it appears that most guidelines states use enhanced sentences in only between two percent and nine percent of all cases.[35] As with Kansas, *Blakely* affects only a small subset of trial cases that result in enhanced sentences, and trial cases themselves are only a small subset of all felony cases. Of course, the *Blakely* ruling may very well have some tangential effect on cases that result in pleas. The bargaining powers of prosecution and defense may shift, although it is far from clear in what direction, and the reports from Kansas are inconclusive in this regard. To the extent that the number of trials in the criminal justice system has diminished, the consequences of requiring juries to determine sentencing factors for enhanced sentences are relatively modest.

> The hope is that *Blakely* provides as much an opportunity as it does a challenge and that legislators will develop different and better approaches ...

On the other hand, there are two ways—not present in Kansas—in which jury fact-finding of aggravating factors may lead to "significant administrative difficulties," as the federal government's *Blakely* brief puts it.[36] First, in systems that use a large number of judicially-determined factors in arriving at the initial presumptive range—such as the federal system—jury fact-finding would have to be employed in virtually every sentencing, not just those in which an enhanced sentence was sought. It appears, however, that no state system relies on factors that determine the presumptive range to a degree comparable to the federal system.[37] Second, in states that require prosecution by grand jury indictment there may be the significant additional burden of presenting "sentencing factors" for grand jury consideration at the outset of virtually every felony case to enable their later presentation to the trial jury.[38]

Fully voluntary guidelines

Some states, particularly those with voluntary systems that are deemed to be affected by *Blakely*, may choose not to follow Kansas's example of requiring juries to make such fact findings. Rather they may choose to eliminate their effective sentencing thresholds and adopt fully voluntary sentencing systems. Here, too, there are examples from which states may draw lessons. The District of Columbia, Louisiana, Missouri, and Wisconsin have enacted such fully voluntary systems. Presumably they did so to achieve a proper balance between judicial discretion and legislative or administrative control so that sentences are geographically and racially neutral and appropriate to the offense.

To make their systems *fully* voluntary, these states might eliminate the requirement that judges provide reasons as a prerequisite to an enhanced sentence. Such a change is not, of course, without consequences and again suggests an apparently perverse result of the *Blakely* ruling. The requirement that judges provide reasons for departures would seem to be based on a state's determination of the value of publicly stating those reasons. Few would disagree that there is inherent value in requiring government actors to explain publicly decisions that have important individual and societal effects. And a state seeking to understand the causes of racial or geographic disparities in sentencing, for example, might examine the reasons stated in cases where members of different groups are given enhanced sentences. Moreover, although there is generally no right to appeal a sentence simply because it falls beyond the voluntary guidelines, appellate courts might in the future perform a rudimentary reasonableness review of all sentences, and this review would rely on sentencing judges' statements of their reasons. A regime that discourages the stating of reasons may adversely affect such appellate review of the reasonableness of sentencing decisions.

Questions to consider.

In deciding how to fashion a cure to a state's *Blakely* ills, there are a number of questions each state may wish to consider to ensure that the cure is not worse than the disease. A state may consider the following in light of the goals that underlie its decision to enact structured sentencing:

- How will a chosen system affect the balance of power between the defense and the prosecution, especially in regard to its effects on the system of plea bargaining?
- How will it affect the ability of judges to incorporate sentencing factors relevant to the specific circumstances of the offense and specific history and circumstances of the defendant?
- How will it affect racial and other demographic disparities in sentencing?
- How will it affect geographic disparities; will like cases be treated more alike or less alike in different parts of the state?
- How will it affect average sentence lengths and, thus, prison populations?
- What effects will it have on the predictability of sentences for purposes of determining institutional resources, such as probation and corrections staff and facilities?

Voluntary states affected by *Blakely* have another option, however, for achieving fully voluntary systems. They can retain the general requirement that judges provide reasons for their sentencing decisions but make explicit that judges need only consider, but need not apply, the guidelines in any given case. Although this distinction may seem to split hairs, the Supreme Court's bright-line rule requires that hairs be split somewhere, and this seems a likely place. In this way the value of judicially stated reasons is preserved, but because application of the guidelines is truly voluntary the effective maximum sentence in each case is the statutory maximum and no *Blakely* problem arises. The nation's most recently implemented sentencing guidelines system—in the District of Columbia—has taken this approach. The District expressly allows for sentencing outside the guidelines box based upon a "decision by a judge not to use the sentencing guidelines."[39] It was a conscious decision of the District's sentencing commission to provide judges with the information that advisory guidelines offer but to allow judges to continue to sentence according to their own processes. The system also preserves the benefits of judicially stated sentencing reasons—it requires stated reasons in all cases, whether judges apply the guidelines or not—and the commission hopes to use information both from judges who use the guidelines and those who do not in fashioning future changes to the system.

Other possible options

Justice Breyer, in his *Blakely* dissent, mentions other possible options for states. One is an outright bar on judicial discretion through what he calls "determinate sentencing": mandatory terms or ranges of terms from which a judge may not depart. There is one state example of this approach in the non-guidelines context. Iowa uses a mandatory system in which judges are bound to impose the sole statutory term of years for most felony offenses and the parole board has discretion to determine how long the defendant ultimately will serve. But, in the guidelines context, it appears that no state uses a system that is fully mandatory. Other than Iowa, the states shy away from such extreme limits on judicial sentencing discretion.

Another of Justice Breyer's options is a retreat from guidelines altogether, to the indeterminate sentencing regimes used in roughly half the states. But given the caution and discernable lack of appetite to abolish guidelines systems that many state officials have shown in the weeks since *Blakely*, there is little reason to suspect that states will jettison their guidelines altogether rather than apply one of the modifications mentioned above.

Justice Breyer suggests, too, that there may be more threatening responses to *Blakely*, such as a top-down system in which the presumptive sentence for each offense would be the maximum sentence authorized by statute. A sentencing judge might then depart downward only after finding mitigating facts. Yet, there is no reason to believe this option will prove attractive to state policymakers as it would be costly and might lead to harsh, perhaps unpredictable, sentences. More realistic may be an option that Florida has chosen, in which a judge's ability to sentence at the top of the statutory

range is not constrained. Yet, those states that enacted guidelines to control sentences deemed excessive may not be satisfied with such an approach. For such states the cost of jury fact-finding, as in Kansas, may be in line with the benefits of maintaining presumptive sentence ranges.

• • • • • •

The Supreme Court's decision in *Blakely* is not surprising from a legal standpoint in that it did not stray far from prior decisions. But it is truly extraordinary when viewed in the context of its near and far term implications for state sentencing systems. We have attempted one view of those likely implications, but this story is only beginning to play out. How courts will interpret different systems in light of *Blakely* is largely unknown and will guide legislatures in crafting new systems that preserve a reinvigorated right to trial by jury while also preserving to the greatest extent possible the goals of their structured sentencing systems. The hope is that *Blakely* provides as much an opportunity as it does a challenge and that legislators will develop different and better approaches than those we have mentioned.

To place in context the burdens state legislatures now face, Justice Scalia's closing words regarding Mr. Blakely's enhanced sentence serve as a useful reminder of what is at stake:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of his equals and neighbours, rather than a lone employee of the State.[40]

Notes

[1] *Blakely v. Washington*, 542 U.S. ____, No. 02-1632 (June 24, 2004) slip op. at 7 (emphasis in original).

[2] This examination focuses solely on the effects of *Blakely* on state sentencing structures. It does not address the ruling's significant impact on the federal sentencing structure.

[3] As discussed below, Kansas's system is not generally implicated by *Blakely*.

[4] Rhode Island does not have a guidelines system per se. Rather, it employs "sentencing benchmarks" similar to the other five states mentioned here, established by court rule.

[5] In this paper we use "structured sentencing systems" to refer to sentencing guidelines, whether labeled presumptive or voluntary, as well as to other comprehensive systems of presumptive sentences.

[6] *Blakely*, slip op. at 13 (O'Connor, J., dissenting).

[7] *Blakely*, slip op. at 12 (internal quotation marks omitted). The Court uses the term "determinate sentencing" in the same way we use "structured sentencing."

[8] *Id.* at 18.

[9] Wash. Rev. Code § 9.94A.535, 539.

[10] N.C. Gen. Stat. § 15A–1340.13.

[11] Tenn. Code Ann. § 40-35-210.

[12] *State v. Gould*, 23 P.3d 801 (Kan. 2001).

[13] The Kansas Supreme Court, however, subsequently limited its holding to upward durational departures, finding upward dispositional departures not to be implicated by *Blakely*'s antecedents. For the reasons that will be stated in the companion report, *Legal Considerations for State Sentencing Systems*, it is doubtful that this distinction will stand; Kansas too therefore may be affected by *Blakely*.

[14] N.M. Stat. Ann. § 31-18-15(B), 15.1.

[15] Ohio Rev. Code Ann. § 2929.14(C).

[16] Cal. Penal Code § 1170.

[17] Colo. Rev. Stat. § 18-1.3-401.

[18] Ark. Code. Ann. §16-90-803, 804.

[19] Va. Code Ann. §19.2-298.01(A), (B). Arkansas and Virginia both rely on jury sentencing for all cases tried before a jury. In such cases, the jury is free to select any sentence within the statutory sentence range and is not in any way required to base the sentence on the sentencing guidelines. In such jury-sentencings, no *Blakely* issue is raised. However, the judge determines the sentence in any case where the defendant pleads guilty to an offense, the defendant waives a jury trial and is tried by the court, the jury does not unanimously agree on the sentence; or the prosecution and the defense agree that the court may fix punishment. In such cases, the court must apply the sentencing guidelines and provide justification for an enhanced sentence.

[20] Louisiana provides an example of a state whose guidelines were labeled as voluntary but found by the courts to be presumptive because judges were required to apply them and provide reasons for departing from the recommended range.

[21] See the companion report, *Legal Considerations*, for a fuller discussion of the Court's reasoning and its implications.

[22] There is yet one further distinction that might insulate three of the voluntary guidelines systems from *Blakely* in the event that they are deemed to be within its ambit. Arkansas, Delaware, and Virginia statutorily require judges to provide reasons for a sentence beyond the guidelines range. In Maryland, Rhode Island, and Utah, on the other hand, sentencing commission policy or court rule, rather than statute, provides the source of the legal rule that requires reasons to be stated for a sentence above the guidelines recommendation. Md. Regs Code. 14 § 22.01.05, Utah Code Jud. Admin., App. D; R.I. Rules of Court, Superior Court Sentencing Benchmarks. However, as will be discussed in *Legal Considerations*, to the extent that such administrative rules have the force of law it is likely that this distinction ultimately will be found immaterial under the Court's reasoning.

[23] Additionally, Florida, which has determinate sentences expressed

as a single term, employs a system that provides a presumptive minimum sentence for each offense/criminal history score. It is thus rather like one-half of a presumptive guidelines system. The sentencing court may sentence the defendant to any sentence at or above the designated minimum up to the statutory maximum. Because there is no constraint on a judge's sentencing decision above the presumptive minimum, the sentence authorized by the jury verdict or plea is always the statutory maximum, to which a judge may sentence any defendant. The only constraint is on sentences below the mimumum, for which the judge must provide reasons. Such a system is in no way implicated by *Blakely*.

[24] *Harris v. United States* 536 U.S. 545 (2002) at 567. For further discussion of *Harris*, see *Legal Considerations*.

[25] *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was the first definitive statement governing the Sixth Amendment's jury right as it applies to the finding of facts relevant to enhanced sentences.

[26] In a footnote, the Michigan Supreme Court has noted that *Blakely* "did not affect indeterminate sentencing systems," such as Michigan's. *People v. Claypool*, No. 122696 (Mich., July 22, 2004), slip op. at 17, n.14. In response, the Chief Justice stated: "Given the lack of any definitive statement by the United States Supreme Court regarding mandatory minimum sentences, I believe that sweeping statements of broad judicial authority . . . may serve only to borrow trouble." Slip op. at 11 (Corrigan, C.J., concurring in part and dissenting in part).

[27] One other state, New Jersey, has a provision adjunct to its basic presumptive sentencing structure whereby judges may, upon the judicial finding of aggravating factors, set a minimum term that increases the likelihood that a defendant will remain incarcerated longer than otherwise. New Jersey uses an indeterminate system in which judges set a maximum term for each sentence; the minimum term for each sentence is one third of the maximum imposed by the court. Yet, upon the finding that "aggravating factors substantially outweigh the mitigating factors" a judge may set a minimum term that is one half of the maximum term imposed. N.J. Stat. Ann. §2C.43-6(b). This minimum term extends the defendant's parole eligibility date from the typical one third to what is effectively one-half of the maximum term. Just as in Michigan and Pennsylvania, therefore, defendants sentenced to enhanced minimum terms may remain incarcerated for longer than they would have in the absence of the judicial finding of aggravating factors.

[29] There is a constitutional limit on what the state can choose to label a sentencing factor and thus allocate to judicial fact-finding, and what to label an element and leave to juries to determine, but states have wide discretion in this area and there is no bright-line rule to help in drawing the line. See *Blakely*, slip op. at 6, n. 6.

[29] Kan. Stat. Ann. §21-4718(b).

[30] Justices Breyer and O'Connor note in their *Blakely* dissents the problem of character and other evidence not strictly relevant to the charge prejudicing a jury in its determination of guilt, thus necessitating a separate post-trial sentencing hearing in some instances. Slip op. at 8 (Breyer, J., dissenting) and 6 (O'Connor, J., dissenting).

[31] Indeed, in the four years before the new procedure took effect, there were never more than 24 jury trial cases in the state that led to enhanced sentences. Figures compiled by the Kansas Sentencing Commission, provided by e-mail correspondence.

[32] 725 Ill. Comp. Stat. 5/111-3(c-5).

[33] See, for example, Cal. Penal Code §12022.53.

[34] In 2000, 95 percent of all felony convictions in state courts followed a guilty plea, three percent followed a jury trial, and two percent a bench trial. Matthew R. Durose and Patrick A. Langan, *State Court Sentencing of Convicted Felons, 2000 Statistical Tables*. (Washington, DC: Department of Justice, Bureau of Justice Statistics, June 2003) Tables 4.1 and 4.2.

[35] Brian J. Ostrom, Neal B. Krauder, David Rottman, and Meredith Peterson (1998), *Sentencing Digest: Examining Current Sentencing Issues and Policies* (Williamsburg, VA: National Center for State Courts) at 13.

[36] Brief for the United States at 31.

[37] This problem will be discussed in *Legal Considerations*.

[38] Eleven states and the District of Columbia require grand jury indictments of felony charges, five of which are among those we conclude are possibly affected by *Blakely*.

[39] Practice Manual, Superior Court of the District of Columbia Voluntary Sentencing Guidelines, ch. 5.

[40] *Blakely*, slip op. at 13 (internal quotation marks and citation omitted).

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2-15-05

2 of 4 DOCUMENTS

RALPH HOWARD BLAKELY, Jr., Petitioner v. WASHINGTON

No. 02-1632

SUPREME COURT OF THE UNITED STATES

124 S. Ct. 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573; 72 U.S.L.W. 4546; 17 Fla. L. Weekly Fed. S 430

March 23, 2004, Argued
June 24, 2004, Decided

NOTICE: [***1]

The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY: US Supreme Court rehearing denied by *Blakely v. Wash., 159 L. Ed. 2d 851, 125 S. Ct. 21, 2004 U.S. LEXIS 4887 (U.S., Aug. 23, 2004)*

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON, DIVISION 3. *State v. Blakely, 111 Wn. App. 851, 47 P.3d 149, (2002)*

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner pled guilty to kidnapping his estranged wife. Pursuant to state law, the trial court imposed an "exceptional" sentence of 90 months after making a judicial determination that he acted with deliberate cruelty. Petitioner appealed, arguing the sentencing procedure violated his Sixth Amendment right to trial by jury. The State Court of Appeals affirmed, and the Washington Supreme Court denied discretionary review. Certiorari was granted.

OVERVIEW: Petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The judge in the case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because a reason offered to justify an exceptional sentence could be considered only if it took into account factors other than those which were used in computing the standard range sentence for the offense, which in this case included the elements of second-degree kidnapping and the use of a firearm. Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. The jury's verdict alone did not authorize the sentence. The judge acquired that authority only upon finding some additional fact. Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence was invalid.

OUTCOME: The judgment of the Washington Court of Appeals was reversed, and the case was remanded for further proceedings.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Sentencing > Sentencing Guidelines Generally
[HN1] In Washington, second-degree kidnapping is a class B felony. *Wash. Rev. Code Ann. § 9A.40.030(3).*

Criminal Law & Procedure > Sentencing > Sentencing Ranges
[HN2] See *Wash. Rev. Code Ann. § 9A.20.021(1)(b).*

Criminal Law & Procedure > Sentencing > Sentencing Ranges

[HN3] Washington's Sentencing Reform Act specifies, for an offense of second-degree kidnapping with a firearm, a "standard range" of 49 to 53 months. *Wash. Rev. Code Ann. § 9.94A.320.* A judge may impose a sentence above the standard range if he finds substantial and compelling reasons justifying an exceptional sentence. *Wash. Rev. Code Ann. § 9.94A.120(2).* The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. *Wash. Rev. Code Ann. § 9.94A.390.* Nevertheless, a reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Criminal Law & Procedure > Sentencing > Adjustments
[HN4] When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. *Wash. Rev. Code Ann. § 9.94A.120(3).* A reviewing court will reverse the sentence if it finds that under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence. *Wash. Rev. Code Ann. § 9.94A.210(4).*

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN5] 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.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial
[HN6] The truth of every accusation against a defendant should afterwards be confirmed by the unanimous suffrage of 12 of his equals and neighbors.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN7] An accusation which lacks any particular fact which the law makes essential to the punishment is no accusation within the requirements of the common law, and it is no accusation in reason.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN8] 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.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN9] For Apprendi purposes, 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.

Criminal Law & Procedure > Sentencing > Departures
[HN10] *Wash. Rev. Code Ann. § 9.94A.390(2)(h)(i)*-(iii) lists domestic violence as grounds for departure only when combined with some other aggravating factor.

Constitutional Law > Criminal Process > Impartial Jury
[HN11] The Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury.

Criminal Law & Procedure > Sentencing > Imposition > Factors
Criminal Law & Procedure > Sentencing > Adjustments
[HN12] When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.

Constitutional Law > Criminal Process > Impartial Jury
Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN13] Every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.

SYLLABUS:

[**409] Petitioner pleaded guilty to kidnaping his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months, but the judge imposed a 90-month sentence after finding that petitioner had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range. The Washington Court of Appeals affirmed,

rejecting petitioner's argument that the sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

Held: [***2]

Because the facts supporting petitioner's exceptional sentence were neither admitted by petitioner nor found by a jury, the sentence violated his *Sixth Amendment* right to trial by jury.

(a) This case requires the Court to apply the rule of *Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348*, that, "[o]ther 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." The relevant statutory maximum for *Apprendi* purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. Here, the judge could not have imposed the 90-month sentence based solely on the facts admitted in the guilty plea, because Washington law requires an exceptional sentence to be based on factors other than those used in computing the standard-range sentence. Petitioner's sentence is not analogous to those upheld in *McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411*, and *Williams v. New York, 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079*, which were not greater than what state law authorized based [***3] on the verdict alone. Regardless of whether the judge's authority to impose the enhanced sentence depends on a judge's finding a specified fact, one of several specified facts, or *any* aggravating fact, it remains the case that the jury's verdict alone does not authorize the sentence.

(b) This Court's commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the fundamental constitutional right of jury trial.

[**410] (c) This case is not about the constitutionality of determinate sentencing, but only about how it can be implemented in a way that respects the *Sixth Amendment*. The Framers' paradigm for criminal justice is the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. That can be preserved without abandoning determinate sentencing and at no sacrifice of fairness to the defendant. *111 Wn. App. 851, 47 P.3d 149*

, reversed and remanded.

COUNSEL:

Jeffrey L. Fisher argued the cause for petitioner.

John D. Knodell, Jr. argued the cause for respondent.

Michael R. Dreeben argued the cause for the United States, as amicus curiae, by special leave of court.

JUDGES: Scalia, J., delivered the opinion of the Court, in which Stevens, Souter, Thomas, and Ginsburg, JJ., joined. O'Connor, J., filed a dissenting opinion, [***4] in which Breyer, J., joined, and in which Rehnquist, C. J., and Kennedy, J., joined except as to Part IV-B. Kennedy, J., filed a dissenting opinion, in which Breyer, J., joined. Breyer, J., filed a dissenting opinion, in which O'Connor, J., joined.

OPINIONBY: SCALIA

OPINION: [*2534] Justice Scalia delivered the opinion of the Court.

[**LEdHR1A] [1A] Petitioner Ralph Howard Blakely, Jr., pleaded guilty to the kidnaping of his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the court imposed an "exceptional" sentence of 90 months after making a judicial determination that he had acted with "deliberate cruelty." App. 40, 49. We consider whether this violated petitioner's *Sixth Amendment* right to trial by jury.

I

Petitioner married his wife Yolanda in 1973. He was evidently a difficult man to live with, having been diagnosed at various times with psychological and personality disorders including paranoid schizophrenia. His wife ultimately filed for divorce. In 1998, he abducted her from their orchard home in Grant County, Washington, binding her with duct tape and forcing her at knifepoint into a wooden box in the bed of his pickup truck. [***5] In the process, he implored her to dismiss the divorce suit and related trust proceedings.

When the couple's 13-year-old son Ralphy returned home from school, petitioner ordered him to follow in another car, threatening to harm Yolanda with a shotgun if he did not do so. Ralphy escaped and sought help when they stopped at a gas station, but petitioner continued on with Yolanda to a friend's house in Montana. He was finally arrested after the friend called the police.

The State charged petitioner with first-degree kidnaping, *Wash. Rev. Code Ann. § 9A.40.020(1)* (2000). n1 Upon reaching a plea agreement, however, it reduced the charge to second-degree kidnaping involving domestic violence and use of a firearm, see *§ § 9A.40.030(1), 10.99.020(3)(p)*, 9.94A.125. n2 Petitioner

entered a guilty plea [*2535] admitting [**411] the elements of second-degree kidnaping and the domestic-violence and firearm allegations, but no other relevant facts.

n1 Parts of Washington's criminal code have been recodified and amended. We cite throughout the provisions in effect at the time of sentencing.

n2 Petitioner further agreed to an additional charge of second-degree assault involving domestic violence, *Wash. Rev. Code Ann. § § 9A.36.021(1)(c), 10.99.020(3)(b)* (2000). The 14-month sentence on that count ran concurrently and is not relevant here.

[***6]

[**LEdHR2] [2] [**LEdHR3] [3] The case then proceeded to sentencing. [HN1] In Washington, second-degree kidnaping is a class B felony. *§ 9A.40.030(3).* State law provides that [HN2] "[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years." *§ 9A.20.021(1)(b).* Other provisions of state law, however, further limit the range of sentences a judge may impose. [HN3] *Washington's Sentencing Reform Act* specifies, for petitioner's offense of second-degree kidnaping with a firearm, a "standard range" of 49 to 53 months. See *§ 9.94A.320* (seriousness level V for second-degree kidnaping); App. 27 (offender score 2 based on *§ 9.94A.360*); *§ 9.94A.310(1)*, box 2-V (standard range of 13-17 months); *§ 9.94A.310(3)(b)* (36-month firearm enhancement). n3 A judge may impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence." *§ 9.94A.120(2).* The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. *§ 9.94A.390.* Nevertheless, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those [***7] which are used in computing the standard range sentence for the offense." *State v. Gore, 143 Wn.2d 288, 315-316, 21 P.3d 262, 277 (2001).* [HN4] When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. *§ 9.94A.120(3).* A reviewing court will reverse the sentence if it finds that "under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence." *Gore, supra, at 315, 21 P.3d, at 277* (citing *§ 9.94A.210(4)*).

n3 The domestic-violence stipulation subjected petitioner to such measures as a "no-contact" order, see *§ 10.99.040*, but did not increase the standard range of his sentence.

[**LEdHR4A] [4A] Pursuant to the plea agreement, the State recommended a sentence within the standard range of 49 to 53 months. After hearing Yolanda's description of the kidnaping, however, the judge rejected the State's recommendation and imposed an exceptional sentence of 90 months [***8] --37 months beyond the standard maximum. He justified the sentence on the ground that petitioner had acted with "deliberate cruelty," a statutorily enumerated ground for departure in domestic-violence cases. *§ 9.94A.390(2)(h)(iii).* n4

[**LEdHR4B] [4B]

n4 The judge found other aggravating factors, but the Court of Appeals questioned their validity under state law and their independent sufficiency to support the extent of the departure. See *111 Wn. App. 851, 868-870, and n 3, 47 P.3d 149, 158-159, and n 3 (2002).* It affirmed the sentence solely on the finding of domestic violence with deliberate cruelty. *Ibid.* We therefore focus only on that factor.

Faced with an unexpected increase of more than three years in his sentence, petitioner objected. The judge accordingly conducted a 3-day bench hearing featuring testimony from petitioner, Yolanda, Ralphy, a police officer, and medical experts. After the hearing, he issued 32 findings of fact, concluding:

"The defendant's motivation to commit kidnapping was complex, [***9] contributed to by his mental condition and personality disorders, the [**412] pressures of the divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children. While he misguidedly intended to forcefully reunite his [*2536] family, his attempt to do so was subservient to his desire to terminate lawsuits and modify title ownerships to his benefit.

"The defendant's methods were more homogeneous than his motive. He used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained

the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order." App. 48-49.

The judge adhered to his initial determination of deliberate cruelty.

Petitioner appealed, arguing that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. The State Court of Appeals affirmed, *111 Wn. App. 851, 870-871, 47 P.3d 149, 159 (2002)*, [***10] relying on the Washington Supreme Court's rejection of a similar challenge in *Gore, supra, at 311-315, 21 P.3d, at 275-277*. The Washington Supreme Court denied discretionary review. *148 Wn. 2d 1010, 62 P.3d 889 (2003)*. We granted certiorari. *540 U.S. 965, 540 U.S. 965, 157 L. Ed. 2d 309, 124 S. Ct. 429 (2003)*.

II

[**LEdHR5] [5] [**LEdHR6] [6] [**LEdHR7A] [7A] This case requires us to apply the rule we expressed in *Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)*: [HN5] "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." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that [HN6] the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that [HN7] "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p 55 (2d [***11] ed. 1872). n5 These principles have been acknowledged by courts and treatises [**413] since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi*, see [*2537] *530 U.S., at 476-483, 489-490, n 15, 147 L. Ed. 2d 435, 120 S. Ct. 2348*; *id., at 501-518, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (Thomas, J., concurring), and need not repeat them here. n6

n5 Justice Breyer cites Justice O'Connor's *Apprendi* dissent for the point that this Bishop quotation means only that indictments must charge facts that trigger statutory aggravation of a common-law offense. *Post*, at ____, *159 L. Ed. 2d, at 437* (dissenting opinion). Of course, as he notes, Justice O'Connor was referring to an entirely different quotation, from *Archbold's* treatise. See *530 U.S., at 526, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (citing J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)). Justice Breyer claims the two are "similar," *post*, at ____, *159 L. Ed. 2d, at 437*, but they are as similar as chalk and cheese. Bishop was not "addressing" the "problem" of statutes that aggravate common-law offenses. *Ibid.* Rather, the entire chapter of his treatise is devoted to the point that "every fact which is legally essential to the punishment" must be charged in the indictment and proved to a jury. 1 J. Bishop, Criminal Procedure, ch. 6, pp 50-56 (2d ed. 1872). As one "example" of this principle (appearing several pages before the language we quote in text above), he notes a statute aggravating common-law assault. *Id.*, § 82, at 51-52. But nowhere is there the slightest indication that his general principle was *limited* to that example. Even Justice Breyer's academic supporters do not make *that* claim. See Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, *110 Yale L. J. 1097, 1131-1132 (2001)* (conceding that Bishop's treatise supports *Apprendi*, while criticizing its "natural-law theorizing"). [***12]

[**LEdHR7B] [7B]

n6 As to Justice O'Connor's criticism of the quantity of historical support for the *Apprendi* rule, *post*, at ____, *159 L. Ed. 2d, at 425-426* (dissenting opinion): It bears repeating that the issue between us is not *whether* the Constitution limits States' authority to reclassify elements as sentencing factors (we all agree that it does); it is only which line, ours or hers, the Constitution draws. Criticism of the quantity of evidence favoring our alternative would have some force if it were accompanied by *any* evidence favoring hers. Justice O'Connor does not even provide a coherent alternative meaning for the jury-trial guarantee, unless one considers "whatever the legislature chooses to leave to the jury, so long as it does not go too far" coherent. See *infra*, at ____ - ____, *159 L. Ed. 2d, at 415-416*.

Apprendi involved a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual 10-year maximum, if the judge found the crime to have been committed "'with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Id., at 468-469, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (quoting [***13] *N. J. Stat. Ann. § 2C:44-3(e)* (West Supp. 1999-2000)). In *Ring v. Arizona, 536 U.S. 584, 592-593, and n 1, 153 L. Ed. 2d 556, 122 S. Ct. 2428* (2002), we applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi, supra, at 491-497, 147 L. Ed. 2d 435, 120 S. Ct. 2348*; *Ring, supra, at 603-609, 153 L. Ed. 2d 556, 122 S. Ct. 2428.*

[**LEdHR1B] [1B] [**LEdHR8] [8] In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in *§ 9A.20.021(1)(b).* It observes that no exceptional sentence may exceed that limit. See *§ 9.94A.420.* Our precedents make clear, however, that [HN8] the "statutory maximum" for *Apprendi* purposes is the maximum [***14] sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* See *Ring, supra, at 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428* ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi, supra, at 483, 147 L. Ed. 2d 435, 120 S. Ct. 2348*)); *Harris v. United States, 536 U.S. 545, 563, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002)* (plurality opinion) (same); cf. *Apprendi, supra, at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (facts admitted by the defendant). In other words, [HN9] the relevant "statutory maximum" is not the maximum sentence a judge [**414] 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," Bishop, *supra,* § 87, at 55, and the judge exceeds his proper authority.

[**LEdHR1C] [1C] The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, "[a] reason offered to justify an exceptional [***15] sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense," [*2538] *Gore, 143 Wn.2d, at 315-316, 21 P.3d, at 277,* which in this case included the elements of second-degree kidnaping and the use of a firearm, see *§ § 9.94A.320, 9.94A.310(3)(b).* n7 Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See *§ 9.94A.210(4).* The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).

n7 The State does not contend that the domestic-violence stipulation alone supports the departure. That the [HN10] statute lists domestic violence as grounds for departure only when combined with some other aggravating factor suggests it could not. See § § *9.94A.390(2)(h)(i)-(iii).*

The [***16] State defends the sentence by drawing an analogy to those we upheld in *McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986),* and *Williams v. New York, 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949).* Neither case is on point. *McMillan* involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact. *477 U.S., at 81, 91 L. Ed. 2d 67, 106 S. Ct. 2411.* We specifically noted that the statute "does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Id., at 82, 91 L. Ed. 2d 67, 106 S. Ct. 2411*; cf. *Harris, supra, at 567, 153 L. Ed. 2d 524, 122 S. Ct. 2406.* *Williams* involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death. *337 U.S., at 242-243, and n 2, 93 L. Ed. 1337, 69 S. Ct. 1079.* The judge could have "sentenced [the defendant] to death giving no reason at all." *Id., at 252, 93 L. Ed. 1337, 69 S. Ct. 1079.* Thus, neither case involved a sentence greater than what state law authorized on the basis of the verdict alone.

[**LEdHR9A] [9A] Finally, the State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative [***17] rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified

facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge [**415] acquires that authority only upon finding some additional fact. n8

[**LEdHR9B] [9B]

n8 Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.

[**LEdHR1D] [1D] [**LEdHR10A] [10A] Because the State's sentencing procedure did not comply with the *Sixth Amendment*, petitioner's sentence is invalid. n9

[**LEdHR10B] [10B]

n9 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. See Brief for United States as *Amicus Curiae* 25-30. The Federal Guidelines are not before us, and we express no opinion on them.

[***18]

III

[**LEdHR1E] [1E] Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of [*2539] power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it [***19] is better to leave them out of the Legislative"); *Jones v. United States, 526 U.S. 227, 244-248, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)*. *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.

Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors--no matter how much they may increase the punishment--may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it--or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result. Cf. *530 U.S., at 552-553, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (O'Connor, J., dissenting). The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some [***20] point did something wrong, a mere preliminary to a judicial inquisition into the facts of the [**416] crime the State *actually* seeks to punish. n10

n10 Justice O'Connor believes that a "built-in political check" will prevent lawmakers from manipulating offense elements in this fashion. *Post*, at ____, *159 L. Ed. 2d, at 425*. But the many immediate practical advantages of judicial factfinding, see *post*, at ____ - ____, *159 L. Ed. 2d, at 422-423*, suggest that political forces would, if anything, pull in the opposite direction. In any case, the Framers' decision to entrench the jury-trial right in the Constitution shows that they did not trust government to make political decisions in this area.

The second alternative is that legislatures may establish legally essential sentencing factors *within limits*--limits crossed when, perhaps, the sentencing factor is a "tail which wags the dog of the substantive offense." *McMillan, 477 U.S., at 88, 91 L. Ed. 2d 67, 106 S. Ct. 2411*. What this means in operation is that the law must not go *too far*--it must not exceed the judicial estimation [***21] of the proper role of the judge.

The subjectivity of this standard is obvious. Petitioner argued below that second-degree kidnaping with deliberate cruelty was essentially the same as first-degree kidnaping, the very charge he had avoided by pleading to a lesser offense. The court conceded this might be so but held it irrelevant. See *111 Wn. App., at 869, 47 P.3d, at 158.* n11 Petitioner's 90-month sentence [*2540] exceeded the 53-month standard maximum by almost 70%; the Washington Supreme Court in other cases has upheld exceptional sentences 15 times the standard maximum. See *State v. Oxborrow, 106 Wn.2d 525, 528, 533, 723 P.2d 1123, 1125, 1128 (1986)* (15-year exceptional sentence; 1-year standard maximum sentence); *State v. Branch, 129 Wn.2d 635, 650, 919 P.2d 1228, 1235 (1996)* (4-year exceptional sentence; 3-month standard maximum sentence). Did the court go *too far* in any of these cases? There is no answer that legal analysis can provide. With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them.

n11 Another example of conversion from separate crime to sentence enhancement that Justice O'Connor evidently does not consider going "too far" is the obstruction-of-justice enhancement, see *post*, at ____ - ____, *159 L. Ed. 2d, at 423.* Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries, see 4 W. Blackstone, Commentaries on the Laws of England 136-138 (1769)), is unclear.

[***22]

Whether the *Sixth Amendment* incorporates this manipulable standard rather than *Apprendi*'s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is *too far.* We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

IV

[**LEdHR11] [11] By reversing the judgment below, we are not, as the State would have it, "find[ing] determinate sentencing schemes unconstitutional." Brief for Respondent 34. This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the *Sixth Amendment.* Several policies prompted Washington's adoption of determinate sentencing, including proportionality to the gravity of the offense and parity among defendants. See *Wash. Rev. Code Ann. § 9.94A.010* [**417] (2000). Nothing we have said impugns those salutary objectives.

[**LEdHR12] [12] [**LEdHR13] [13] Justice O'Connor argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion [***23] than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. *Post*, at ____ - ____, *159 L. Ed. 2d, at 420-426.* This argument is flawed on a number of levels. First, [HN11] the *Sixth Amendment* by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence--and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a [***24] 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence--and by reason of the *Sixth Amendment* the facts bearing upon that entitlement must be found by a jury.

[*2541] But even assuming that restraint of judicial power unrelated to the jury's role is a *Sixth Amendment* objective, it is far from clear that *Apprendi* disserves that goal. Determinate judicial-factfinding schemes entail less judicial power than indeterminate schemes, but more judicial power than determinate *jury*-factfinding schemes. Whether *Apprendi* increases judicial power overall depends on what States with determinate judicial-factfinding schemes would do, given the choice between the two alternatives. Justice O'Connor simply assumes that the net effect will favor judges, but she has no empirical basis for that prediction. Indeed, what evidence we have points exactly the other way: When the Kansas Supreme Court found *Apprendi* infirmities in that State's determinate-sentencing regime in *State v. Gould, 271 Kan. 394, 404-414, 23 P.3d 801, 809-814 (2001),* the legislature responded not by reestablishing [***25] indeterminate sentencing but by applying *Apprendi*'s requirements to its current regime. See Act of May 29, 2002, ch. 170, 2002 Kan. Sess. Laws pp 1018-1023

(codified at *Kan. Stat. Ann. § 21-4718* (2003 Cum. Supp.)); Brief for Kansas Appellate Defender Office as *Amicus Curiae* 3-7. The result was less, not more, judicial power.

[LEdHR14]** [14] **[**LEdHR15]** [15] **[**LEdHR16A]** [16A] Justice Breyer argues that *Apprendi* works to the detriment of criminal defendants who plead guilty by depriving them of the opportunity to argue sentencing factors to a judge. *Post*, at ____ - ____, *159 L. Ed. 2d, at 431*. But nothing prevents a defendant from waiving his *Apprendi* rights. [HN12] When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant **[**418]** either stipulates to the relevant facts or consents to judicial factfinding. See *Apprendi, 530 U.S., at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348*; *Duncan v. Louisiana, 391 U.S. 145, 158, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968)*. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant **[***26]** evidence would prejudice him at trial. We do not understand how *Apprendi* can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable. n12

[LEdHR16B]** [16B]

n12 Justice Breyer responds that States are not *required* to give defendants the option of waiving jury trial on some elements but not others. *Post*, at ____ - ____, *159 L. Ed. 2d, at 433-434*. True enough. But why would the States that he asserts we are coercing into hard-heartedness--that is, States that *want* judge-pronounced determinate sentencing to be the norm but we won't let them--want to prevent a defendant from *choosing* that regime? Justice Breyer claims this alternative may prove "too expensive and unwieldy for States to provide," *post*, at ____, *159 L. Ed. 2d, at 434*, but there is no obvious reason why forcing defendants to choose between contesting all elements of his hypothetical 17-element robbery crime and contesting none of them is less expensive than also giving them the third option of pleading guilty to some elements and submitting the rest to judicial factfinding. Justice Breyer's argument rests entirely on a speculative prediction about the number of defendants likely to choose the first (rather than the second) option if denied the third.

[*27]**

Nor do we see any merit to Justice Breyer's contention that *Apprendi* is unfair to criminal defendants because, if States respond by enacting "17-element robbery crime[s]," prosecutors will have more elements with which to bargain. *Post*, at ____ - ____, ____, *159 L. Ed. 2d, at 431, 434* (citing Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, *110 Yale L. J. 1097 (2001)*). Bargaining already exists with regard to sentencing factors because defendants can either stipulate or contest the facts that make them applicable. If there is any difference between **[*2542]** bargaining over sentencing factors and bargaining over elements, the latter probably favors the defendant. Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt. Moreover, given the sprawling scope of most criminal codes, and the power to affect sentences by making (even nonbinding) sentencing recommendations, there is already no shortage of *in terrorem* tools at prosecutors' disposal. See King & Klein, *Apprendi* and Plea Bargaining, *54 Stan. L. Rev. 295, 296 (2001)* ("Every prosecutorial **[***28]** bargaining chip mentioned by Professor Bibas existed pre-*Apprendi* exactly as it does post-*Apprendi*").

Any evaluation of *Apprendi*'s "fairness" to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, see *21 U.S.C. § § 841(b)(1)(A), (D), [21 USCS § § 841(b)(1)(A), (D)]* n13 based not on facts proved to his peers beyond a **[**419]** reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong. We can conceive of no measure of fairness that would find more fault in the utterly speculative bargaining effects Justice Breyer identifies than in the regime he champions. Suffice it to say that, if such a measure exists, it is not the one the Framers left us with.

n13 To be sure, Justice Breyer and the other dissenters would forbid those increases of sentence that violate the constitutional principle that tail shall not wag dog. The source of this principle is entirely unclear. Its precise effect, if precise effect it has, is presumably to require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine

with the longest tail. Or perhaps no greater than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.

[***29]

The implausibility of Justice Breyer's contention that *Apprendi* is unfair to criminal defendants is exposed by the lineup of *amici* in this case. It is hard to believe that the National Association of Criminal Defense Lawyers was somehow duped into arguing for the wrong side. Justice Breyer's only authority asking that defendants be protected from *Apprendi* is an article written not by a criminal defense lawyer but by a law professor and former prosecutor. See *post*, at ____ - ____, *159 L. Ed. 2d, at 431* (citing Bibas, *supra*); Association of American Law Schools Directory of Law Teachers 2003-2004, p 319.

Justice Breyer also claims that *Apprendi* will attenuate the connection between "real criminal conduct and real punishment" by encouraging plea bargaining and by restricting alternatives to adversarial factfinding. *Post*, at ____ - ____, ____ - ____, *159 L. Ed. 2d, at 433, 435.* The short answer to the former point (even assuming the questionable premise that *Apprendi* does encourage plea bargaining, but see *supra*, at ____, *159 L. Ed. 2d, at 417-418, and n 12)* is that the *Sixth Amendment* was not written for the benefit of those who choose to forgo its protection. It guarantees the *right* to jury trial. It does not guarantee that a particular number [***30] of jury trials will actually take place. That more defendants elect to waive that right (because, for example, government at the moment is not particularly oppressive) does not prove that a constitutional provision guaranteeing *availability* of that option is disserved.

Justice Breyer's more general argument--that *Apprendi* undermines alternatives [*2543] to adversarial factfinding--is not so much a criticism of *Apprendi* as an assault on jury trial generally. His esteem for "non-adversarial" truth-seeking processes, *post*, at ____, *159 L. Ed. 2d, at 436*, supports just as well an argument against either. Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury. See 3 Blackstone, Commentaries, at 373-374, 379-381. Justice Breyer may be convinced of the equity of the regime he favors, but his views are not the ones we are bound to uphold.

[**LEdHR17] [17] Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice [***31] entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred [**420] of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, [HN13] every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters' alternative, he has no such right. That should be the end of the matter.

* * *

[**LEdHR1F] [1F] Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," 4 Blackstone, Commentaries, at 343, rather than a lone employee of the [***32] State.

The judgment of the Washington Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

DISSENTBY: O'CONNOR; KENNEDY; BREYER

DISSENT: Justice **O'Connor**, with whom Justice **Breyer** joins, and with whom the **Chief Justice** and Justice **Kennedy** join as to all but Part IV-B, dissenting.

The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries. The Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you--dearly. Congress and States, faced with the burdens imposed by the extension of *Apprendi* to the present context, will either trim or eliminate altogether their sentencing guidelines schemes and, with them, 20 years of sentencing reform. It is thus of little moment that the majority does not expressly declare guidelines schemes unconstitutional, *ante*, at ____, *159 L. Ed. 2d, 416 (2004)*; for, as residents of "*Apprendi*-land" are fond of saying, "the relevant inquiry is one not of form, but of effect." *Apprendi v. New Jersey, 530 U.S. 466, 494, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)*; [***33] *Ring v. Arizona, 536 U.S. 584, 613, 153 L. Ed. 2d 556, 122 S. Ct.*

2428 (2002) (Scalia, J., concurring). The "effect" of today's decision will be greater judicial discretion and less uniformity in sentencing. Because I find it implausible that the Framers would have considered such a [*2544] result to be required by the *Due Process Clause* or the *Sixth Amendment*, and because the practical consequences of today's decision may be disastrous, I respectfully dissent.

I

One need look no further than the history leading up to and following the enactment of Washington's guidelines scheme to appreciate the damage that today's decision will cause. Prior to 1981, Washington, like most other States and the Federal [**421] Government, employed an indeterminate sentencing scheme. Washington's criminal code separated all felonies into three broad categories: "class A," carrying a sentence of 20 years to life; "class B," carrying a sentence of 0 to 10 years; and "class C," carrying a sentence of 0 to 5 years. *Wash. Rev. Code Ann. § 9A.20.020* (2000); see also *Sentencing Reform Act of 1981*, 1981 Wash. Laws, ch. 137, p 534. Sentencing judges, in conjunction with parole boards, had virtually unfettered discretion to sentence defendants [***34] to prison terms falling anywhere within the statutory range, including probation--*i.e.*, no jail sentence at all. *Wash. Rev. Code Ann. § § 9.95.010-.011*; Boerner & Lieb, Sentencing Reform in the Other Washington, *28 Crime and Justice 71, 73* (M. Tonry ed. 2001) (hereinafter Boerner & Lieb) ("Judges were authorized to choose between prison and probation with few exceptions, subject only to review for abuse of discretion"). See also D. Boerner, Sentencing in Washington § 2.4, pp 2-27 to 2-28 (1985).

This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories. Boerner & Lieb 126-127; cf. S. Rep. No. 98-225, p 38 (1983) (Senate Report on precursor to federal *Sentencing Reform Act of 1984*) ("[E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. . . . These disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges [***35] and parole authorities responsible for imposing and implementing the sentence"). Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race. Boerner & Lieb 126-128. See also Breyer, The Federal Sentencing Guidelines and Key Compromises Upon Which They Rest, *17 Hofstra L. Rev. 1, 5 (1988)* (elimination of racial disparity one reason behind Congress' creation of the Federal Sentencing Commission).

To counteract these trends, the state legislature passed the *Sentencing Reform Act of 1981. The Act* had the laudable purposes of "mak[ing] the criminal justice system accountable to the public," and "[e]nsur[ing] that the punishment for a criminal offense is proportionate to the seriousness of the offense . . . [and] commensurate with the punishment imposed on others committing similar offenses." *Wash. Rev. Code Ann. § 9.94A.010* (2000). The Act neither increased any of the statutory sentencing ranges for the three types of felonies (though it did eliminate the statutory mandatory minimum for class A felonies), nor reclassified any substantive offenses. 1981 Wash. Laws ch. 137, p. 534. [***36] It merely placed meaningful constraints on discretion to sentence offenders within the statutory ranges, and eliminated parole. There is thus no evidence that the legislature was attempting to manipulate the statutory elements of criminal offenses or to circumvent the procedural protections [*2545] of the *Bill of Rights*. Rather, lawmakers were trying to bring some much-needed uniformity, transparency, and accountability to an otherwise "'labyrinthine' sentencing and corrections [**422] system that 'lack[ed] any principle except unguided discretion.'" Boerner & Lieb 73 (quoting F. Zimring, Making the Punishment Fit the Crime: A Consumers' Guide to Sentencing Reform, Occasional Paper No. 12, p 6 (1977)).

II

Far from disregarding principles of due process and the jury trial right, as the majority today suggests, Washington's reform has served them. Before passage of the Act, a defendant charged with second degree kidnaping, like petitioner, had no idea whether he would receive a 10-year sentence or probation. The ultimate sentencing determination could turn as much on the idiosyncracies of a particular judge as on the specifics of the defendant's crime or background. A defendant did not know what facts, [***37] if any, about his offense or his history would be considered relevant by the sentencing judge or by the parole board. After passage of the Act, a defendant charged with second degree kidnaping knows what his presumptive sentence will be; he has a good idea of the types of factors that a sentencing judge can and will consider when deciding whether to sentence him outside that range; he is guaranteed meaningful appellate review to protect against an arbitrary sentence. Boerner & Lieb 93 ("By consulting one sheet, practitioners could identify the applicable scoring rules for criminal history, the sentencing range, and the available sentencing options for each case"). Criminal defendants still face the same statutory maximum sentences, but they now at least

know, much more than before, the real consequences of their actions.

Washington's move to a system of guided discretion has served equal protection principles as well. Over the past 20 years, there has been a substantial reduction in racial disparity in sentencing across the State. *Id.*, at 126 (Racial disparities that do exist "are accounted for by differences in legally relevant variables--the offense of conviction and prior [***38] criminal record"); *id.*, at 127 ("[J]udicial authority to impose exceptional sentences under the court's departure authority shows little evidence of disparity correlated with race"). The reduction is directly traceable to the constraining effects of the guidelines--namely, its "presumptive range[s]" and limits on the imposition of "exceptional sentences" outside of those ranges. *Id.*, at 128. For instance, sentencing judges still retain unreviewable discretion in first-time offender cases and in certain sex offender cases to impose alternative sentences that are far more lenient than those contemplated by the guidelines. To the extent that unjustifiable racial disparities have persisted in Washington, it has been in the imposition of such alternative sentences: "The lesson is powerful: racial disparity is correlated with unstructured and unreviewed discretion." *Ibid.*; see also Washington State Minority and Justice Commission, R. Crutchfield, J. Weis, R. Engen, & R. Gainey, Racial/Ethnic Disparities and Exceptional Sentences in Washington State, Final Report 51-53 (1993) ("[E]xceptional sentences are not a major source of racial disparities in sentencing").

The majority does [***39] not, because it cannot, disagree that determinate sentencing schemes, like Washington's, serve important constitutional values. *Ante*, at ____, *159 L. Ed. 2d, at 416*. Thus, the majority says: [**423] "[t]his case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the *Sixth Amendment*." *Ibid.* But extension of *Apprendi* to the present context will impose [*2546] significant costs on a legislature's determination that a particular fact, not historically an element, warrants a higher sentence. While not a constitutional prohibition on guidelines schemes, the majority's decision today exacts a substantial constitutional tax.

The costs are substantial and real. Under the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense. Thus, facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range--such as drug quantity, role in the offense, risk of bodily harm--all must now be charged in an indictment and submitted to a jury, *In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)*, simply because it is the legislature, rather than [***40] the judge, that constrains the extent to which such facts may be used to impose a sentence within a pre-existing statutory range.

While that alone is enough to threaten the continued use of sentencing guidelines schemes, there are additional costs. For example, a legislature might rightly think that some factors bearing on sentencing, such as prior bad acts or criminal history, should not be considered in a jury's determination of a defendant's guilt--such "character evidence" has traditionally been off limits during the guilt phase of criminal proceedings because of its tendency to inflame the passions of the jury. See, *e.g.*, *Fed. Rule Evid. 404*; 1 E. Imwinkelried, P. Giannelli, F. Gilligan, & F. Leaderer, Courtroom Criminal Evidence 285 (3d ed. 1998). If a legislature desires uniform consideration of such factors at sentencing, but does not want them to impact a jury's initial determination of guilt, the State may have to bear the additional expense of a separate, full-blown jury trial during the penalty phase proceeding.

Some facts that bear on sentencing either will not be discovered, or are not discoverable, prior to trial. For instance, a legislature might desire [***41] that defendants who act in an obstructive manner during trial or post-trial proceedings receive a greater sentence than defendants who do not. See, *e.g.*, United States Sentencing Commission, Guidelines Manual, *§ 3C1.1* (Nov. 2003) (hereinafter USSG) (2-point increase in offense level for obstruction of justice). In such cases, the violation arises too late for the State to provide notice to the defendant or to argue the facts to the jury. A State wanting to make such facts relevant at sentencing must now either vest sufficient discretion in the judge to account for them *or* bring a separate criminal prosecution for obstruction of justice or perjury. And, the latter option is available only to the extent that a defendant's obstructive behavior is so severe as to constitute an already-existing separate offense, unless the legislature is willing to undertake the unlikely expense of criminalizing relatively minor obstructive behavior.

Likewise, not all facts that historically have been relevant to sentencing always will be known prior to trial. For instance, trial or sentencing proceedings of a drug distribution defendant might reveal that he [**424] sold primarily to children. Under the [***42] majority's approach, a State wishing such a revelation to result in a higher sentence within a pre-existing statutory range either must vest judges with sufficient discretion to account for it (and trust that they exercise that discretion) *or* bring a separate criminal prosecution. Indeed, the latter choice might not be available--a separate prosecution, if it is for an aggravated offense, likely would be barred altogether by the *Double Jeopardy Clause*. *Blockburger v. United States, 284 U.S. 299, 76*

L. Ed. 306, 52 S. Ct. 180 (1932) (cannot [*2547] prosecute for separate offense unless the two offenses both have at least one element that the other does not).

The majority may be correct that States and the Federal Government will be willing to bear some of these costs. *Ante*, at ____ - ____, *159 L. Ed. 2d, at 417*. But simple economics dictate that they will not, and cannot, bear them all. To the extent that they do not, there will be an inevitable increase in judicial discretion with all of its attendant failings. n1

n1 The paucity of empirical evidence regarding the impact of extending *Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)*, to guidelines schemes should come as no surprise to the majority. *Ante*, at ____, *159 L. Ed. 2d, at 417*. Prior to today, only one court had ever applied *Apprendi* to invalidate application of a guidelines scheme. Compare *State v. Gould, 271 Kan. 394, 23 P.3d 801 (2001)*, with, *e.g., United States v. Goodine, 326 F.3d 26 (CA1 2003); United States v. Luciano, 311 F.3d 146 (CA2 2002); United States v. DeSumma, 272 F.3d 176 (CA3 2001); United States v. Kinter, 235 F.3d 192 (CA4 2000); United States v. Randle, 304 F.3d 373 (CA5 2002); United States v. Helton, 349 F.3d 295 (CA6 2003); United States v. Johnson, 335 F.3d 589 (CA7 2003) (per curiam); United States v. Piggie, 316 F.3d 789 (CA8 2003); United States v. Toliver, 351 F.3d 423 (CA9 2003); United States v. Mendez-Zamora, 296 F.3d 1013 (CA10 2002); United States v. Sanchez, 269 F.3d 1250 (CA11 2001); United States v. Fields, 346 U.S. App. D.C. 295, 251 F.3d 1041 (CADC 2001); State v. Dilts, 336 Ore. 158, 82 P.3d 593 (2003); State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001); State v. Lucas, 353 N.C. 568, 548 S.E.2d 712 (2001); State v. Dean, 2003 Minn. App. LEXIS 686, No. C4-02-1225, 2003 WL 21321425 (Minn. Ct. App., June 10, 2003)* (unpublished opinion). Thus, there is no map of the uncharted territory blazed by today's unprecedented holding.

[***43]

III

Washington's Sentencing Reform Act did not alter the statutory maximum sentence to which petitioner was exposed. See *Wash. Rev. Code Ann. § 9A.40.030* (2003) (second degree kidnaping class B felony since 1975); see also *State v. Pawling, 23 Wn. App. 226, 228-229, 597 P.2d 1367, 1369 (1979)* (citing second degree kidnapping provision as existed in 1977). Petitioner was informed in the charging document, his plea agreement, and during his plea hearing that he faced a potential statutory maximum of 10 years in prison. App. 63, 66, 76. As discussed above, the guidelines served due process by providing notice to petitioner of the consequences of his acts; they vindicated his jury trial right by informing him of the stakes of risking trial; they served equal protection by ensuring petitioner that invidious characteristics such as race would not impact his sentence.

Given these observations, it is difficult for me to discern what principle besides doctrinaire formalism actually motivates today's decision. The majority chides the *Apprendi* dissenters for preferring a nuanced interpretation of the *Due Process Clause and Sixth Amendment* jury trial guarantee that [***44] would generally defer to legislative labels while acknowledging the existence of constitutional constraints--what the majority calls the "the law must not go [**425] too far" approach. *Ante*, at ____, *159 L. Ed. 2d, at 416* (emphasis deleted). If indeed the choice is between adopting a balanced case-by-case approach that takes into consideration the values underlying the *Bill of Rights*, as well as the history of a particular sentencing reform law, and adopting a rigid rule that destroys everything in its path, I will choose the former. See *Apprendi, 530 U.S., at 552-554, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (O'Connor, J., dissenting) ("Because I do not believe that the Court's 'increase in the maximum penalty' rule is required by the Constitution, I would evaluate New Jersey's sentence-enhancement statute by analyzing the factors we have examined in past cases" (citation omitted)).

[*2548] But even were one to accept formalism as a principle worth vindicating for its own sake, it would not explain *Apprendi*'s, or today's, result. A rule of deferring to legislative labels has no less formal pedigree. It would be more consistent with our decisions leading up to *Apprendi*, see *Almendarez-Torres v. United States, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998)* [***45] (fact of prior conviction not an element of aggravated recidivist offense); *United States v. Watts, 519 U.S. 148, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997) (per curiam)* (acquittal of offense no bar to consideration of underlying conduct for purposes of guidelines enhancement); *Witte v. United States, 515 U.S. 389, 132 L. Ed. 2d 351, 115 S. Ct. 2199 (1995)* (no double jeopardy bar against consideration of uncharged conduct in imposition of guidelines enhancement); *Walton v. Arizona, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990)* (aggravating factors need not be found by a jury in capital case); *Mistretta v. United States, 488 U.S. 361, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989)* (Federal

Sentencing Guidelines do not violate separation of powers); *McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986)* (facts increasing mandatory minimum sentence are not necessarily elements); and it would vest primary authority for defining crimes in the political branches, where it belongs. *Apprendi, supra, at 523-554, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (O'Connor, J., dissenting). It also would be easier to administer than the majority's rule, inasmuch as courts would not be forced to look behind statutes and regulations to determine whether a particular fact does [***46] or does not increase the penalty to which a defendant was exposed.

The majority is correct that rigid adherence to such an approach *could conceivably* produce absurd results, *ante*, at ____, *159 L. Ed. 2d, at 415*; but, as today's decision demonstrates, rigid adherence to the majority's approach *does and will continue* to produce results that disserve the very principles the majority purports to vindicate. The pre-*Apprendi* rule of deference to the legislature retains a built-in political check to prevent lawmakers from shifting the prosecution for crimes to the penalty phase proceedings of lesser included and easier-to-prove offenses--*e.g.*, the majority's hypothesized prosecution of murder in the guise of a traffic offense sentencing proceeding. *Ante*, at ____, *159 L. Ed. 2d, at 415*. There is no similar check, however, on application of the majority's "'any fact that increases the upper bound of judicial discretion'" by courts.

The majority claims the mantle of history and original intent. But as I have explained elsewhere, a handful [**426] of state decisions in the mid-19th century and a criminal procedure treatise have little if any persuasive value as evidence of what the Framers of the Federal Constitution intended [***47] in the late 18th century. See *Apprendi, 530 U.S., at 525-528, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (O'Connor, J., dissenting). Because broad judicial sentencing discretion was foreign to the Framers, *id., at 478-479, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (citing J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862)), they were never faced with the constitutional choice between submitting every fact that increases a sentence to the jury or vesting the sentencing judge with broad discretionary authority to account for differences in offenses and offenders.

IV

A

The consequences of today's decision will be as far reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government. See, *e.g.*, [*2549] *Alaska Stat. § 12.55.155* (2003); *Ark. Code Ann. § 16-90-804* (Supp. 2003); *Fla. Stat. § 921.0016* (2003); *Kan. Stat. Ann. § 21-4701 et seq* (2003); *Mich. Comp. Laws Ann. § 769.34* (West Supp. 2004); *Minn. Stat. § 244.10* (2002); *N. C. Gen. Stat. § 15A-1340.16* (Lexis 2003); Ore. Admin. Rule § 213-008-0001 (2003); 204 Pa. Code § 303 *et seq.* (2004), reproduced following *42 Pa. Cons. Stat. Ann. § 9721* (Purden [***48] Supp. 2004); *18 U.S.C. § 3553*; [*18 USCS § 3553*] *28 U.S.C. § 991 et seq.* [*28 USCS § § 991 et seq.*]. Today's decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments. Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy. And, despite the fact that we hold in *Schriro v Summerlin, 542 U.S. ____, 159 L. Ed. 2d 442, 124 S. Ct. 2519*, that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack. See *Teague v. Lane, 489 U.S. 288, 301, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989)* (plurality opinion) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final"). n2

n2 The numbers available from the federal system alone are staggering. On March 31, 2004, there were 8,320 federal criminal appeals pending in which the defendant's sentence was at issue. Memorandum from Carl Schlesinger, Administrative Office of the United States Courts, to Supreme Court Library (June 1, 2004) (available in Clerk of the Court's case file). Between June 27, 2000, when *Apprendi* was decided, and March 31, 2004, there have been 272,191 defendants sentenced in federal court. Memorandum, *supra*. Given that nearly all federal sentences are governed by the Federal Sentencing Guidelines, the vast majority of these cases are Guidelines cases.

[***49]

The practical consequences for trial courts, starting today, will be equally unsettling: How are courts to mete out guidelines sentences? Do courts apply the guidelines as to mitigating factors, but not as to aggravating factors? Do they jettison the guidelines altogether? The Court ignores the havoc it is about to wreak on trial courts across the country.

B

It is no answer to say that today's [**427] opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines. See

ante, at ____, n 9, *159 L. Ed. 2d, at 415* ("The Federal Guidelines are not before us, and we express no opinion on them"); cf. *Apprendi, supra, at 496-497, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (claiming not to overrule *Walton, supra,* soon thereafter overruled in *Ring*); *Apprendi, supra, at 497, n 21, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (reserving question of Federal Sentencing Guidelines). The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning. The Guidelines have the force of law, see *Stinson v. United States, 508 U.S. 36, 123 L. Ed. 2d 598, 113 S. Ct. 1913 (1993)*; and Congress has unfettered control to reject or accept [***50] any particular guideline, *Mistretta, 488 U.S., at 393-394, 102 L. Ed. 2d 714, 109 S. Ct. 647.*

The structure of the Federal Guidelines likewise does not, as the Government half-heartedly suggests, provide any grounds for distinction. Brief for United States as *Amicus Curiae* 27-29. Washington's scheme is almost identical to the upward departure regime established by *18 U.S.C. § 3553(b)* [*18 USCS § 3553(b)*] and implemented in *USSG § 5K2.0.* If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack. The provision struck down here provides for an increase in the upper bound of the presumptive [*2550] sentencing range if the sentencing court finds, "considering the purpose of [the Act], that there are substantial and compelling reasons justifying an exceptional sentence." *Wash. Rev. Code Ann. § 9.94A.120* (2000). The Act elsewhere provides a nonexhaustive list of aggravating factors that satisfy the definition. *§ 9.94A.390.* The Court flatly rejects respondent's argument that such soft constraints, which still allow Washington judges to exercise a substantial amount of discretion, survive *Apprendi. Ante*, at ____ - ____, *159 L. Ed. 2d, at 414-415.* This suggests that the hard constraints [***51] found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate. See, *e.g., USSG § 2K2.1* (increases in offense level for firearms offenses based on number of firearms involved, whether possession was in connection with another offense, whether the firearm was stolen); *§ 2B1.1* (increase in offense level for financial crimes based on amount of money involved, number of victims, possession of weapon); *§ 3C1.1* (general increase in offense level for obstruction of justice).

Indeed, the "extraordinary sentence" provision struck down today is as inoffensive to the holding of *Apprendi* as a regime of guided discretion could possibly be. The list of facts that justify an increase in the range is nonexhaustive. The State's "real facts" doctrine precludes reliance by sentencing courts upon facts that would constitute the elements of a different or aggravated offense. See *Wash. Rev. Code Ann. § 9.94A.370(2)* (2000) (codifying "real facts" doctrine). If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would.

* [***52] * *

What I have feared most has now [**428] come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy. *Apprendi, 530 U.S., at 549-559, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (O'Connor, J., dissenting); *Ring, 536 U.S., at 619-621, 153 L. Ed. 2d 556, 122 S. Ct. 2428* (O'Connor, J., dissenting). I respectfully dissent.

Justice **Kennedy**, with whom Justice **Breyer** joins, dissenting.

The majority opinion does considerable damage to our laws and to the administration of the criminal justice system for all the reasons well stated in Justice O'Connor's dissent, plus one more: The Court, in my respectful submission, disregards the fundamental principle under our constitutional system that different branches of government "converse with each other on matters of vital common interest." *Mistretta v. United States, 488 U.S. 361, 408, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989).* As the Court in *Mistretta* explained, the Constitution establishes a system of government that presupposes, not just "'autonomy'" and "'separateness,'" but also "'interdependence'" and "'reciprocity.'" *Id., at 381, 102 L. Ed. 2d 714, 109 S. Ct. 647* (quoting *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 96 L. Ed. 1153, 72 S. Ct. 863 (1952)* [***53] (Jackson, J., concurring)). Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design. Case-by-case judicial determinations often yield intelligible patterns that can be refined by legislatures and codified into statutes or rules as general standards. As these legislative enactments are followed by incremental judicial interpretation, the legislatures may respond again, and the cycle repeats. This recurring dialogue, an essential source for the elaboration and the evolution of the law, is basic constitutional theory in action.

[*2551] Sentencing guidelines are a prime example of this collaborative process. Dissatisfied with the wide disparity in sentencing, participants in the criminal justice system, including judges, pressed for legislative reforms. In response, legislators drew from these participants' shared experiences and enacted measures to correct the problems, which, as Justice O'Connor explains, could sometimes rise to the level of a

constitutional injury. As *Mistretta* recognized, this interchange among different actors in the constitutional scheme is consistent with the Constitution's structural protections. [***54]

To be sure, this case concerns the work of a state legislature, and not of Congress. If anything, however, this distinction counsels even greater judicial caution. Unlike *Mistretta*, the case here implicates not just the collective wisdom of legislators on the other side of the continuing dialogue over fair sentencing, but also the interest of the States to serve as laboratories for innovation and experiment. See *New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 76 L. Ed. 747, 52 S. Ct. 371 (1932)* (Brandeis, J., dissenting). With no apparent sense of irony that the effect of today's decision is the destruction of a sentencing scheme devised by democratically elected legislators, the majority shuts down alternative, nonjudicial, sources of ideas and experience. It does so under a faintly disguised distrust of judges and their purported usurpation of the jury's function in criminal trials. It tells [**429] not only trial judges who have spent years studying the problem but also legislators who have devoted valuable time and resources "calling upon the accumulated wisdom and experience of the Judicial Branch . . . on a matter uniquely within the ken of judges," *Mistretta, supra, at 412, 102 L. Ed. 2d 714, 109 S. Ct. 647*, that [***55] their efforts and judgments were all for naught. Numerous States that have enacted sentencing guidelines similar to the one in Washington State are now commanded to scrap everything and start over.

If the Constitution required this result, the majority's decision, while unfortunate, would at least be understandable and defensible. As Justice O'Connor's dissent demonstrates, however, this is simply not the case. For that reason, and because the Constitution does not prohibit the dynamic and fruitful dialogue between the judicial and legislative branches of government that has marked sentencing reform on both the state and the federal levels for more than 20 years, I dissent.

Justice Breyer, with whom Justice O'Connor joins, dissenting.

The Court makes clear that it means what it said in *Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)*. In its view, the *Sixth Amendment* says that "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.'" *Ante*, at ____, *159 L. Ed. 2d, at 412* (quoting *Apprendi, supra, at 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348*). "'[P]rescribed statutory maximum'" means the penalty that the relevant statute authorizes "solely on [***56] the basis of the facts reflected in the jury verdict." *Ante*, at ____, *159 L. Ed. 2d, at 413* (emphasis deleted). Thus, a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime.

It is not difficult to understand the impulse that produced this holding. Imagine a classic example--a statute (or mandatory sentencing guideline) that provides a 10-year sentence for ordinary bank robbery, but a 15-year sentence for bank robbery committed with a gun. One might ask why it should matter for jury trial purposes [*2552] whether the statute (or guideline) labels the gun's presence (a) a *sentencing fact* about the way in which the offender carried out the *lesser* crime of ordinary bank robbery, or (b) a factual *element* of the *greater* crime of bank robbery with a gun? If the *Sixth Amendment* requires a jury finding about the gun in the latter circumstance, why should it not also require a jury to find the same fact in the former circumstance? The two sets of circumstances are functionally identical. In both instances, identical punishment follows from identical factual findings [***57] (related to, *e.g.*, a bank, a taking, a thing-of-value, force or threat of force, and a gun). The only difference between the two circumstances concerns a legislative (or Sentencing Commission) decision about which *label* ("sentencing fact" or "element of a greater crime") to affix to one of the facts, namely, the presence of the gun, that will lead to the greater sentence. Given the identity of circumstances apart from the label, the [**430] jury's traditional factfinding role, and the law's insistence upon treating like cases alike, why should the legislature's labeling choice make an important *Sixth Amendment* difference?

The Court in *Apprendi*, and now here, concludes that it should not make a difference. The *Sixth Amendment's* jury trial guarantee applies similarly to both. I agree with the majority's analysis, but not with its conclusion. That is to say, I agree that, classically speaking, the difference between a traditional sentencing factor and an element of a greater offense often comes down to a legislative choice about which label to affix. But I cannot jump from there to the conclusion that the *Sixth Amendment* always requires identical treatment of the two scenarios. That [***58] jump is fraught with consequences that threaten the fairness of our traditional criminal justice system; it distorts historical sentencing or criminal trial practices; and it upsets settled law on which legislatures have relied in designing punishment systems.

The Justices who have dissented from *Apprendi* have written about many of these matters in other opinions. See *530 U.S., at 523-554, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (O'Connor, J., dissenting); *id., at 555-*

566, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (Breyer, J., dissenting); *Harris v. United States, 536 U.S. 545, 549-550, 556-569, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002)* (Kennedy, J.); *id., at 569-572, 153 L. Ed. 2d 524, 122 S. Ct. 2406* (Breyer, J., concurring in part and concurring in judgment); *Jones v. United States, 526 U.S. 227, 254, 264-272, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)* (Kennedy, J., dissenting); *Monge v. California, 524 U.S. 721, 728-729, 141 L. Ed. 2d 615, 118 S. Ct. 2246 (1998)* (O'Connor, J.); *McMillan v. Pennsylvania, 477 U.S. 79, 86-91, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986)* (Rehnquist, C. J.). At the risk of some repetition, I shall set forth several of the most important considerations here. They lead me to conclude that I must again dissent.

I

The majority ignores the adverse consequences inherent in its conclusion. [***59] As a result of the majority's rule, sentencing must now take one of three forms, each of which risks either impracticality, unfairness, or harm to the jury trial right the majority purports to strengthen. This circumstance shows that the majority's *Sixth Amendment* interpretation cannot be right.

A

A first option for legislators is to create a simple, pure or nearly pure "charge offense" or "determinate" sentencing system. See Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, [*2553] *17 Hofstra L. Rev. 1, 8-9 (1988)*. In such a system, an indictment would charge a few facts which, taken together, constitute a crime, such as robbery. Robbery would carry a single sentence, say, five years' imprisonment. And every person convicted of robbery would receive that sentence--just as, centuries ago, everyone convicted of almost any serious crime was sentenced to death. See, *e.g.*, Lillquist, The Puzzling Return of Jury Sentencing: Misgivings About *Apprendi*, *82 N. C. L. Rev. 621, 630 (2004)*.

Such a system assures uniformity, but at intolerable costs. First, simple determinate sentencing systems impose [**431] identical punishments on [***60] people who committed their crimes in very different ways. When dramatically different conduct ends up being punished the same way, an injustice has taken place. Simple determinate sentencing has the virtue of treating like cases alike, but it simultaneously fails to treat different cases differently. Some commentators have leveled this charge at sentencing guideline systems themselves. See, *e.g.*, Schulhofer, Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity, *29 Am. Crim. L. Rev. 833, 847 (1992)* (arguing that the "most important problem under the [Federal] Guidelines system is not too much disparity, but rather excessive uniformity" and arguing for adjustments, including elimination of mandatory minimums, to make the Guidelines system more responsive to relevant differences). The charge is doubly applicable to simple "pure charge" systems that permit no departures from the prescribed sentences, even in extraordinary cases.

Second, in a world of statutorily fixed mandatory sentences for many crimes, determinate sentencing gives tremendous power to prosecutors to manipulate sentences through their choice of charges. Prosecutors can [***61] simply charge, or threaten to charge, defendants with crimes bearing higher mandatory sentences. Defendants, knowing that they will not have a chance to argue for a lower sentence in front of a judge, may plead to charges that they might otherwise contest. Considering that most criminal cases do not go to trial and resolution by plea bargaining is the norm, the rule of *Apprendi*, to the extent it results in a return to determinate sentencing, threatens serious unfairness. See Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, *110 Yale L. J. 1097, 1100-1101 (2001)* (explaining that the rule of *Apprendi* hurts defendants by depriving them of sentencing hearings, "the only hearings they were likely to have"; forcing defendants to surrender sentencing issues like drug quantity when they agree to the plea; and transferring power to prosecutors).

B

A second option for legislators is to return to a system of indeterminate sentencing, such as California had before the recent sentencing reform movement. See *Payne v. Tennessee, 501 U.S. 808, 820, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991)* ("With the increasing importance of probation, as opposed to imprisonment, [***62] as a part of the penological process, some States such as California developed the 'indeterminate sentence,' where the time of incarceration was left almost entirely to the penological authorities rather than to the courts"); Thompson, Navigating the Hidden Obstacles to Ex-Offender Reentry, *45 Boston College L. Rev. 255, 267 (2004)* ("In the late 1970s, California switched from an indeterminate criminal sentencing scheme to determinate sentencing" (footnote omitted)). Under indeterminate systems, the length of the sentence is entirely or almost entirely within the discretion of the judge or of the parole board, which typically has broad [*2554] power to decide when to release a prisoner.

When such systems were in vogue, they were criticized, and rightly so, for producing unfair disparities, including race-based disparities, in the [**432] punishment of similarly situated defendants. See, *e.g.*, *ante*, at ____ - ____, *159 L. Ed. 2d, at 420-421* (O'Connor, J., dissenting) (citing sources). The length of

time a person spent in prison appeared to depend on "what the judge ate for breakfast" on the day of sentencing, on which judge you got, or on other factors that should not have made a difference to the length of the sentence. See Breyer, [***63] *supra*, at ____ - ____, *159 L. Ed. 2d, at 431* (citing congressional and expert studies indicating that, before the United States Sentencing Com-nission Guidelines were promulgated, punishments for identical crimes in the Second Circuit ranged from 3 to 20 years' imprisonment and that sentences varied depending upon region, gender of the defendant, and race of the defendant). And under such a system, the judge could vary the sentence greatly based upon his findings about how the defendant had committed the crime--findings that might not have been made by a "preponderance of the evidence," much less "beyond a reasonable doubt." See *McMillan, 477 U.S., at 91, 91 L. Ed. 2d 67, 106 S. Ct. 2411* ("Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all" (citing *Williams v. New York, 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949)*)).

Returning to such a system would diminish the "'reason'" the majority claims it is trying to uphold. *Ante*, at ____, *159 L. Ed. 2d, at 412* (quoting 1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872)). It also would do little to "ensur[e] [the] control" of what the majority calls "the peopl[e,]" *i.e.*, the jury, "in the judiciary," *ante*, at ____, *159 L. Ed. 2d, at 415*, since "the peopl[e]" [***64] would only decide the defendant's guilt, a finding with no effect on the duration of the sentence. While "the judge's authority to sentence" would formally derive from the jury's verdict, the jury would exercise little or no control over the sentence itself. *Ante*, at ____, *159 L. Ed. 2d, at 415*. It is difficult to see how such an outcome protects the structural safeguards the majority claims to be defending.

C

A third option is that which the Court seems to believe legislators will in fact take. That is the option of retaining structured schemes that attempt to punish similar conduct similarly and different conduct differently, but modifying them to conform to *Apprendi*'s dictates. Judges would be able to depart *downward* from presumptive sentences upon finding that mitigating factors were present, but would not be able to depart *upward* unless the prosecutor charged the aggravating fact to a jury and proved it beyond a reasonable doubt. The majority argues, based on the single example of Kansas, that most legislatures will enact amendments along these lines in the face of the oncoming *Apprendi* train. See *ante*, at ____ - ____, *159 L. Ed. 2d, at 417* (citing *State v. Gould, 271 Kan. 394, 404-414, 23 P.3d 801, 809-814 (2001)*; [***65] Act of May 29, 2002, ch. 170, 2002 Kan. Sess. Laws pp 1018-1023 (codified at *Kan. Stat. Ann. § 21-4718* (2003 Cum. Supp.)); Brief for Kansas Appellate Defender Office as *Amicus Curiae* 3-7). It is therefore worth exploring how this option could work in practice, as well as the assumptions on which it depends.

[**433] 1

This option can be implemented in one of two ways. The first way would be for legislatures to subdivide each crime into a list of complex crimes, each of which would be defined to include commonly found sentencing factors such as drug quantity, type [*2555] of victim, presence of violence, degree of injury, use of gun, and so on. A legislature, for example, might enact a robbery statute, modeled on robbery sentencing guidelines, that increases punishment depending upon (1) the nature of the institution robbed, (2) the (a) presence of, (b) brandishing of, (c) other use of, a firearm, (3) making of a death threat, (4) presence of (a) ordinary, (b) serious, (c) permanent or life threatening, bodily injury, (5) abduction, (6) physical restraint, (7) taking of a firearm, (8) taking of drugs, (9) value of property loss, etc. Cf. United States Sentencing Commission, Guidelines Manual [***66] *§ 2B3.1* (Nov. 2003) (hereinafter USSG).

This possibility is, of course, merely a highly calibrated form of the "pure charge" system discussed in Part I-A, *supra*. And it suffers from some of the same defects. The prosecutor, through control of the precise charge, controls the punishment, thereby marching the sentencing system directly away from, not toward, one important guideline goal: rough uniformity of punishment for those who engage in roughly the same *real* criminal conduct. The artificial (and consequently unfair) nature of the resulting sentence is aggravated by the fact that prosecutors must charge all relevant facts about the way the crime was committed before a presentence investigation examines the criminal conduct, perhaps before the trial itself, *i.e.*, before many of the facts relevant to punishment are known.

This "complex charge offense" system also prejudices defendants who seek trial, for it can put them in the untenable position of contesting material aggravating facts in the guilt phases of their trials. Consider a defendant who is charged, not with mere possession of cocaine, but with the specific offense of possession of more than 500 grams of cocaine. [***67] Or consider a defendant charged, not with murder, but with the new crime of murder using a machete. Or consider a defendant whom the prosecution wants to claim was a "supervisor," rather than an ordinary gang member. How can a Constitution that guarantees due process put these defendants, as a matter of course, in the

position of arguing, "I did not sell drugs, and if I did, I did not sell more than 500 grams" or, "I did not kill him, and if I did, I did not use a machete," or "I did not engage in gang activity, and certainly not as a supervisor" to a single jury? See *Apprendi, 530 U.S., at 557-558, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (Breyer, J., dissenting); *Monge, 524 U.S., at 729, 141 L. Ed. 2d 615, 118 S. Ct. 2246*. The system can tolerate this kind of problem up to a point (consider the defendant who wants to argue innocence, and, in the alternative, second-degree, not first-degree, murder). But a rereading of the many distinctions made in a typical robbery guideline, see *supra*, at ____, *159 L. Ed. 2d, at 433*, suggests that an effort to incorporate any real set of guidelines in a complex statute would reach well beyond that point.

The majority announces that there really is no problem here because "States may continue to offer judicial [***68] [**434] factfinding as a matter of course to all defendants who plead guilty" and defendants may "stipulat[e] to the relevant facts or consen[t] to judicial factfinding." *Ante*, at ____, *159 L. Ed. 2d, at 418*. The problem, of course, concerns defendants who do not want to plead guilty to those elements that, until recently, were commonly thought of as sentencing factors. As to those defendants, the fairness problem arises because States may very well decide that they will *not* permit defendants to carve subsets of facts out of the new, *Apprendi*-required 17-element robbery crime, seeking a judicial determination as to some of those facts and a jury determination as to others. Instead, States may simply require defendants to plead guilty [*2556] to all 17 elements or proceed with a (likely prejudicial) trial on all 17 elements.

The majority does not deny that States may make this choice; it simply fails to understand *why* any State would want to exercise it. *Ante*, at ____, n 12, *159 L. Ed. 2d, at 418*. The answer is, as I shall explain in a moment, that the alternative may prove too expensive and unwieldy for States to provide. States that offer defendants the option of judicial factfinding as to some facts (*i.e.*, sentencing facts), [***69] say, because of fairness concerns, will also have to offer the defendant a second sentencing jury--just as Kansas has done. I therefore turn to that alternative.

2

The second way to make sentencing guidelines *Apprendi*-compliant would be to require at least two juries for each defendant whenever aggravating facts are present: one jury to determine guilt of the crime charged, and an additional jury to try the disputed facts that, if found, would aggravate the sentence. Our experience with bifurcated trials in the capital punishment context suggests that requiring them for run-of-the-mill sentences would be costly, both in money and in judicial time and resources. Cf. Kozinski & Gallagher, Death: The Ultimate Run-On Sentence, *46 Case W. Res. L. Rev. 1, 13-15*, and n 64 (1995) (estimating the costs of each capital case at around $1 million more than each noncapital case); Tabak, How Empirical Studies Can Affect Positively the Politics of the Death Penalty, *83 Cornell L. Rev. 1431, 1439-1440 (1998)* (attributing the greater cost of death penalty cases in part to bifurcated proceedings). In the context of noncapital crimes, the potential need for a second [***70] indictment alleging aggravating facts, the likely need for formal evidentiary rules to prevent prejudice, and the increased difficulty of obtaining relevant sentencing information, all will mean greater complexity, added cost, and further delay. See Part V, *infra*. Indeed, cost and delay could lead legislatures to revert to the complex charge offense system described in Part I-C-1, *supra*.

The majority refers to an *amicus curiae* brief filed by the Kansas Appellate Defender Office, which suggests that a two-jury system has proved workable in Kansas. *Ante*, at ____ - ____, *159 L. Ed. 2d, at 417*. And that may be so. But in all likelihood, any such workability reflects an uncomfortable fact, a fact at which the majority hints, *ante*, at ____, *159 L. Ed. 2d, at 417-418*, but whose constitutional implications it does not seem to grasp. The uncomfortable fact that could make the system seem workable--even desirable [**435] in the minds of some, including defense attorneys--is called "plea bargaining." See Bibas, *110 Yale L. J., at 1150*, and n 330 (reporting that in 1996, fewer than 4% of adjudicated state felony defendants have jury trials, 5% have bench trials, and 91% plead guilty). See also *ante*, at ____, *159 L. Ed. 2d, at 418* (making [***71] clear that plea bargaining applies). The Court can announce that the Constitution requires at least two jury trials for each criminal defendant--one for guilt, another for sentencing--but only because it knows full well that more than 90% of defendants will not go to trial even once, much less insist on two or more trials.

What will be the consequences of the Court's holding for the 90% of defendants who do not go to trial? The truthful answer is that we do not know. Some defendants may receive bargaining advantages if the increased cost of the "double jury trial" guarantee makes prosecutors more willing to cede certain sentencing issues to the defense. Other defendants may be hurt if a "single-jury-decides-all" approach makes them more reluctant to risk a trial--perhaps because they want to argue [*2557] that they did not know what was in the cocaine bag, that it was a small amount regardless, that they were unaware a confederate had a gun, etc. See Bibas, *110 Yale L. J., at 1100* ("Because for many defendants going to trial is not a desirable option, they

are left without any real hearings at all"); *id., at 1151* ("The trial right does little good when [***72] most defendants do not go to trial").

At the least, the greater expense attached to trials and their greater complexity, taken together in the context of an overworked criminal justice system, will likely mean, other things being equal, fewer trials and a greater reliance upon plea bargaining--a system in which punishment is set not by judges or juries but by advocates acting under bargaining constraints. At the same time, the greater power of the prosecutor to control the punishment through the charge would likely weaken the relation between real conduct and real punishment as well. See, *e g.*, Schulhofer, *29 Am. Crim. L. Rev., at 845* (estimating that evasion of the proper sentence under the Federal Guidelines may now occur in 20%-35% of all guilty plea cases). Even if the Court's holding does not further embed plea-bargaining practices (as I fear it will), its success depends upon the existence of present practice. I do not understand how the *Sixth Amendment* could *require* a sentencing system that will work in practice only if no more than a handful of defendants exercise their right to a jury trial.

The majority's only response is to state that "bargaining [***73] over elements . . . probably favors the defendant," *ante,* at ____, *159 L. Ed. 2d, at 418,* adding that many criminal defense lawyers favor its position, *ante,* at ____, *159 L. Ed. 2d, at 419.* But the basic problem is not one of "fairness" to defendants or, for that matter, "fairness" to prosecutors. Rather, it concerns the greater fairness of a sentencing system that a more uniform correspondence between real criminal conduct and real punishment helps to create. At a minimum, a two-jury system, by preventing a judge from taking account of an aggravating fact without the prosecutor's acquiescence, would undercut, if not nullify, legislative efforts to ensure through guidelines that punishments [**436] reflect a convicted offender's real criminal conduct, rather than that portion of the offender's conduct that a prosecutor decides to charge and prove.

Efforts to tie real punishment to real conduct are not new. They are embodied in well-established pre-guidelines sentencing practices--practices under which a judge, looking at a presentence report, would seek to tailor the sentence in significant part to fit the criminal conduct in which the offender actually engaged. For more than a century, questions of *punishment* (not those of [***74] guilt or innocence) have reflected determinations made, not only by juries, but also by judges, probation officers, and executive parole boards. Such truth-seeking determinations have rested upon both adversarial and non-adversarial processes. The Court's holding undermines efforts to reform these processes, for it means that legislatures cannot *both* permit judges to base sentencing upon real conduct *and* seek, through guidelines, to make the results more uniform.

In these and other ways, the two-jury system would work a radical change in pre-existing criminal law. It is not surprising that this Court has never previously suggested that the Constitution--outside the unique context of the death penalty--might require bifurcated jury-based sentencing. And it is the impediment the Court's holding poses to legislative efforts to achieve that greater systematic fairness that casts doubt on its constitutional validity.

[*2558] D

Is there a fourth option? Perhaps. Congress and state legislatures might, for example, rewrite their criminal codes, attaching astronomically high sentences to each crime, followed by long lists of mitigating facts, which, for the most part, would consist of [***75] the absence of aggravating facts. *Apprendi, 530 U.S., at 541-542, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (O'Connor, J., dissenting) (explaining how legislatures can evade the majority's rule by making yet another labeling choice). But political impediments to legislative action make such rewrites difficult to achieve; and it is difficult to see why the *Sixth Amendment* would require legislatures to undertake them.

It may also prove possible to find combinations of, or variations upon, my first three options. But I am unaware of any variation that does not involve (a) the shift of power to the prosecutor (weakening the connection between real conduct and real punishment) inherent in any charge offense system, (b) the lack of uniformity inherent in any system of pure judicial discretion, or (c) the complexity, expense, and increased reliance on plea bargains involved in a "two-jury" system. The simple fact is that the design of any fair sentencing system must involve efforts to make practical compromises among competing goals. The majority's reading of the *Sixth Amendment* makes the effort to find those compromises--already difficult--virtually impossible.

II

The majority rests its conclusion in significant [***76] part upon a claimed historical (and therefore constitutional) imperative. According to the majority, the rule it applies in this case is rooted in "longstanding tenets of common-law criminal jurisprudence," *ante,* at ____, *159 L. Ed. 2d, at 412*: that every accusation against a [**437] defendant must be proved to a jury and that "'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law,

and it is no accusation in reason,'" *ibid.* (quoting Bishop, Criminal Procedure § 87, at 55). The historical sources upon which the majority relies, however, do not compel the result it reaches. See *ante*, at ____, *159 L. Ed. 2d, at 425* (O'Connor, J., dissenting); *Apprendi, 530 U. S., at 525-528, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (O'Connor, J., dissenting). The quotation from Bishop, to which the majority attributes great weight, stands for nothing more than the "unremarkable proposition" that where a legislature passes a statute setting forth heavier penalties than were available for committing a common-law offense and specifying those facts that triggered the statutory penalty, "a defendant could receive the greater statutory punishment only if the indictment expressly [***77] charged and the prosecutor proved the facts that made up the statutory offense, as opposed to simply those facts that made up the common-law offense." *Id., at 526, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (O'Connor, J., dissenting) (characterizing a similar statement of the law in J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)).

This is obvious when one considers the problem that Bishop was addressing. He provides as an example "statutes whereby, when [a common-law crime] is committed with a particular intent, or with a particular weapon, or the like, it is subjected to a particular corresponding punishment, heavier than that for" the simple common-law offense (though, of course, his concerns were not "*limited* to that example," *ante*, at ____ - ____, n 5, *159 L. Ed. 2d, at 412-413*. Bishop, *supra*, § 82, at 51-52 (discussing the example of common assault and enhanced-assault statutes, *e.g.*, "assaults committed with the intent to rob"). That indictments historically had to charge all of the statutorily labeled elements [*2559] of the offense is a proposition on which all can agree. See *Apprendi, supra, at 526-527, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (O'Connor, J., dissenting). See also J. Archbold, Pleading and Evidence [***78] in Criminal Cases 44 (11th ed. 1849) ("[E]very fact or circumstance which is a necessary ingredient in the offence must be set forth in the indictment" so that "there may be no doubt as to the judgment which should be given, if the defendant be convicted"); 1 T. Starkie, Criminal Pleading 68 (2d ed. 1822) (the indictment must state "the criminal nature and degree of the offence, which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offence").

Neither Bishop nor any other historical treatise writer, however, disputes the proposition that judges historically had discretion to vary the sentence, within the range provided by the statute, based on facts not proved at the trial. See Bishop, *supra*, § 85, at 54 ("[W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation not covered by the allegations of the indictment"); K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines [**438] in the Federal Courts 9 (1998). The modern history of pre-guidelines [***79] sentencing likewise indicates that judges had broad discretion to set sentences within a statutory range based on uncharged conduct. Usually, the judge based his or her sentencing decision on facts gleaned from a presentence report, which the defendant could dispute at a sentencing hearing. In the federal system, for example, *Federal Rule of Criminal Procedure 32* provided that probation officers, who are employees of the Judicial Branch, prepared a presentence report for the judge, a copy of which was generally given to the prosecution and defense before the sentencing hearing. See Stith & Cabranes, *supra*, at 79-80, 221, note 5. See also *ante*, at ____, *159 L. Ed. 2d, at 420-421* (O'Connor, J., dissenting) (describing the State of Washington's former indeterminate sentencing law).

In this case, the statute provides that kidnaping may be punished by up to 10 years' imprisonment. *Wash. Rev. Code Ann. § § 9A.40.030(3), 9A.20.021(1)(b)* (2000). Modern structured sentencing schemes like Washington's do not change the statutorily fixed maximum penalty, nor do they purport to establish new elements for the crime. Instead, they undertake to structure the previously unfettered discretion of the sentencing judge, channeling [***80] and limiting his or her discretion even *within* the statutory range. (Thus, contrary to the majority's arguments, *ante*, at ____ - ____, *159 L. Ed. 2d, at 417*, kidnapers in the State of Washington know that they risk up to 10 years' imprisonment, but they also have the benefit of additional information about how long--within the 10-year maximum--their sentences are likely to be, based on how the kidnaping was committed.)

Historical treatises do not speak to such a practice because it was not done in the 19th century. Cf. *Jones, 526 U.S., at 244, 143 L. Ed. 2d 311, 119 S. Ct. 1215* ("[T]he scholarship of which we are aware does not show that a question exactly like this one was ever raised and resolved in the period before the framing"). This makes sense when one considers that, prior to the 19th century, the prescribed penalty for felonies was often death, which the judge had limited, and sometimes no, power to vary. See Lillquist, *82 N. C. L. Rev., at 628-630*. The 19th century saw a movement to a rehabilitative mode of punishment in which prison terms became a norm, shifting power to the judge to impose a longer or shorter term within the statutory maximum. See [*2560] *ibid.* The ability of legislatures to guide [***81] the judge's

discretion by designating presumptive ranges, while allowing the judge to impose a more or less severe penalty in unusual cases, was therefore never considered. To argue otherwise, the majority must ignore the significant differences between modern structured sentencing schemes and the history on which it relies to strike them down. And while the majority insists that the historical sources, particularly Bishop, should not be *"limited"* to the context in which they were written, *ante,* at ____ - ____, n 5, *159 L. Ed. 2d, at 412-413,* it has never explained why the Court *must* transplant those discussions to the very different context of sentencing schemes designed to structure judges' discretion within a statutory sentencing range.

Given history's silence on the question of laws that structure a judge's [**439] discretion within the range provided by the legislatively labeled maximum term, it is not surprising that our modern, pre-*Apprendi* cases made clear that legislatures could, within broad limits, distinguish between "sentencing facts" and "elements of crimes." See *McMillan, 477 U.S., at 85-88, 91 L. Ed. 2d 67, 106 S. Ct. 2411.* By their choice of label, legislatures could indicate whether a judge or a jury must [***82] make the relevant factual determination. History does not preclude legislatures from making this decision. And, as I argued in Part I, *supra,* allowing legislatures to structure sentencing in this way has the dual effect of enhancing and giving meaning to the *Sixth Amendment's* jury trial right as to core crimes, while affording additional due process to defendants in the form of sentencing hearings before judges--hearings the majority's rule will eliminate for many.

Is there a risk of unfairness involved in permitting Congress to make this labeling decision? Of course. As we have recognized, the "tail" of the sentencing fact might "wa[g] the dog of the substantive offense." *McMillan, supra, at 88, 91 L. Ed. 2d 67, 106 S. Ct. 2411.* Congress might permit a judge to sentence an individual for murder though convicted only of making an illegal lane change. See *ante,* at ____, *159 L. Ed. 2d, at 415* (majority opinion). But that is the kind of problem that the *Due Process Clause* is well suited to cure. *McMillan* foresaw the possibility that judges would have to use their own judgment in dealing with such a problem; but that is what judges are there for. And, as Part I, *supra,* makes clear, the alternatives [***83] are worse--not only practically, but, although the majority refuses to admit it, constitutionally as well.

Historic practice, then, does not compel the result the majority reaches. And constitutional concerns counsel the opposite.

III

The majority also overlooks important institutional considerations. Congress and the States relied upon what they believed was their constitutional power to decide, within broad limits, whether to make a particular fact (a) a sentencing factor or (b) an element in a greater crime. They relied upon *McMillan* as guaranteeing the constitutional validity of that proposition. They created sentencing reform, an effort to change the criminal justice system so that it reflects systematically not simply upon guilt or innocence but also upon what should be done about this now-guilty offender. Those efforts have spanned a generation. They have led to state sentencing guidelines and the Federal Sentencing Guideline system. *E.g., ante,* at ____ - ____, *159 L. Ed. 2d, at 420-421* (O'Connor, J., dissenting) (describing sentencing reform in the State of Washington). These systems are imperfect and they yield far from perfect results, but I cannot believe the Constitution forbids the state legislatures [***84] and Congress to adopt such systems and to try to improve them [*2561] over time. Nor can I believe that the Constitution hamstrings legislatures in the way that Justice O'Connor and I have discussed.

IV

Now, let us return to the question I posed at the outset. Why does the *Sixth Amendment* permit a jury trial right (in respect to a particular fact) [**440] to depend upon a legislative labeling decision, namely, the legislative decision to label the fact a *sentencing fact,* instead of an *element of the crime?* The answer is that the fairness and effectiveness of a sentencing system, and the related fairness and effectiveness of the criminal justice system itself, depends upon the legislature's possessing the constitutional authority (within due process limits) to make that labeling decision. To restrict radically the legislature's power in this respect, as the majority interprets the *Sixth Amendment* to do, prevents the legislature from seeking sentencing systems that are consistent with, and indeed may help to advance, the Constitution's greater fairness goals.

To say this is not simply to express concerns about fairness to defendants. It is also to express concerns about the serious practical [***85] (or impractical) changes that the Court's decision seems likely to impose upon the criminal process; about the tendency of the Court's decision to embed further plea bargaining processes that lack transparency and too often mean nonuniform, sometimes arbitrary, sentencing practices; about the obstacles the Court's decision poses to legislative efforts to bring about greater uniformity between real criminal conduct and real punishment; and ultimately about the limitations that the Court imposes upon legislatures' ability to make democratic legislative decisions. Whatever the faults of guidelines systems--and there are many--they are more likely to find their

cure in legislation emerging from the experience of, and discussion among, all elements of the criminal justice community, than in a virtually unchangeable constitutional decision of this Court.

V

Taken together these three sets of considerations, concerning consequences, concerning history, concerning institutional reliance, leave me where I was in *Apprendi, i.e.*, convinced that the Court is wrong. Until now, I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo [***86] sentencing reform efforts. Today's case dispels that illusion. At a minimum, the case sets aside numerous state efforts in that direction. 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.

Consider some of the matters that federal prosecutors must know about, or guess about, when they prosecute their next case: (1) Does today's decision apply in full force to the Federal Sentencing Guidelines? (2) If so, must the initial indictment contain all sentencing factors, charged as "elements" of the crime? (3) What, then, are the evidentiary rules? Can the prosecution continue to use, say presentence reports, with their conclusions reflecting layers of hearsay? Cf. *Crawford v. Washington, 541 U.S. __, __, __-__, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004)* (clarifying the *Sixth Amendment's* requirement of confrontation with respect to testimonial hearsay). Are the numerous cases of this Court holding that a sentencing judge may consider virtually any reliable information still good law when juries, not judges, are [*2562] required [***87] to determine [**441] the matter? See, *e.g., United States v. Watts, 519 U.S. 148, 153-157, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997) (per curiam)* (evidence of conduct of which the defendant has been acquitted may be considered at sentencing). Cf. *Witte v. United States, 515 U.S. 389, 399-401, 132 L. Ed. 2d 351, 115 S. Ct. 2199 (1995)* (evidence of uncharged criminal conduct used in determining sentence). (4) How are juries to deal with highly complex or open-ended Sentencing Guidelines obviously written for application by an experienced trial judge? See, *e.g., USSG § 3B1.1* (requiring a greater sentence when the defendant was a leader of a criminal activity that involved four or more participants or was *"otherwise extensive"* (emphasis added)); *§ § 3D1.1-3D1.2* (highly complex "multiple count" rules); *§ 1B1.3* (relevant conduct rules).

Ordinarily, this Court simply waits for cases to arise in which it can answer such questions. But this case affects tens of thousands of criminal prosecutions, including federal prosecutions. Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in these cases will have to be sentenced, perhaps tried, anew. Given this consequence and the [***88] need for certainty, I would not proceed further piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised. But that is not the Court's view.

For the reasons given, I dissent.

REFERENCES: Go To Full Text Opinion

Go to Supreme Court Brief(s)

Go to Supreme Court Transcripts

21A Am Jur 2d, Criminal Law § § 1077, 1079; 75A Am Jur 2d, Trial § § 732, 733, 840, 841

USCS, *Constitution, Amendments 6, 14*

L Ed Digest, Jury § 33

L Ed Index, Jury and Jury Trial; Sentence or Punishment

Annotation References

Limitations, under Federal Constitution's guaranty of due process of law, as to consideration of personal information about accused in imposition of initial sentence for criminal offense--federal cases. *63 L Ed 2d 872.*

Due process requirements of presentence procedure [***89] following conviction. *3 L Ed 2d 1808.*

2-15-05

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSSB 56(JUD)
(S) Publish Date: 1/21/05

Revision Date/Time (Note if correction):
Dept. Affected: Corrections
Title: An Act relating to criminal law... procedure, criminal sentences, and probation and parole
RDU: Probation and Parole
Component: Probation and Parole Directors Ofc
Sponsor: Senators Therriault, Seekins
Requester: Senate Judiciary
Component No.: 2684

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

SB56 modifies state law governing the presumptive sentencing of felony offenders in Alaska, in response to the United States Supreme Court decision, *Blakely v. Washington*. The legislation proposes to amend Alaska's sentencing laws to avoid the worst consequences of *Blakely*, which could make it difficult for judges to consider all relevant factors in sentencing, causing complications throughout the criminal justice process. The modified presumptive sentencing structure proposed in SB56 primarily will impact the process and not the end result of felony sentences; therefore the legislation will have a negligible, if any, effect on the length of sentences imposed. The department also is unable to predict with any accuracy the future actions judges may or may not take regarding probation supervision, thus it is unknown whether the changes proposed in the legislation will have any impact on probation services.

Prepared by: Sharleen Griffin, Acting Director
Phone: 465-4641
Division: Administrative Services
Date/Time: 1/18/05 12:57 PM
Approved by: Portia Parker, Deputy Commissioner
Date: 1/18/2005
Agency: Department of Corrections

2-15-05

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 5
Bill Version: CSSB 56(JUD)
(S) Publish Date: 1/21/05

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to criminal law and procedure, sentencing, probation and parole
RDU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: Senators Therriault, Seekins
Requester: SJUD
Component No.: 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill modifies the laws governing the presumptive sentencing of felony offenders in Alaska, in response to Blakely v. Washington , a decision by the U.S. Supreme Court announced in June 2004. By careful amendment of Alaska's sentencing laws this legislation seeks to avoid the worst consequences of Blakely, which could prevent judges from considering all relevant factors in sentencing and causing undue complications in the criminal justice process. The Committee does not anticipated a fiscal impact from passage of this legislation.

Prepared by: Senate Judiciary Committee
Division
Phone
Date/Time 1/20/05 5:58 PM

Approved by: Senate Judiciary Committee
Agency
Date 1/20/2005

(Revised 9/23/2004 OMB)

2-15-05

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSSB 56(JUD)
(S) Publish Date: 1/21/05

Revision Date/Time (Note if correction):
Dept. Affected: Corrections
Title: An Act relating to criminal law and procedure, criminal sentences, and probation and parole
RDU: Institutional Facilities
Component: Institution Director's Office
Sponsor: Senators Therriault, Seekins
Requester: Senate Judiciary
Component No.: 1381

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

SB56 modifies state law governing the presumptive sentencing of felony offenders in Alaska, in response to the United States Supreme Court decision, *Blakely v. Washington*. The legislation proposes to amend Alaska's sentencing laws to avoid the worst consequences of *Blakely*, which could make it difficult for judges to consider all relevant factors in sentencing, causing complications throughout the criminal justice process. The modified presumptive sentencing structure proposed in SB56 primarily will impact the process and not the end result of felony sentences; therefore the legislation will have a negligible, if any, effect on the length of sentences imposed. The Department of Corrections does not anticipate a fiscal impact to the Division of Institutions from the passage of this legislation.

Prepared by: Shaileen Griffin, Acting Director
Phone: 465-4641
Division: Administrative Services
Date/Time: 1/18/05 8:26 AM
Approved by: Portia Parker, Deputy Commissioner
Date: 1/18/2005
Agency: Department of Corrections

(Revised 9/23/2004 OMB)

SB

60

Withdrawn 3/8/05

AMENDMENT

OFFERED IN THE HOUSE
TO: SB 60

BY REPRESENTATIVE HAWKER

Page 1, line 4 through Page 1, line 6

Delete all material

Insert

"* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REPORT TO THE LEGISLATURE. The Department of Health and Social Services shall investigate the legal and practical viability of merging the Suicide Prevention Council into an existing advisory board or an integrated behavioral health advisory board combining the activities of one or more of these boards. The department shall report its findings to the legislature by the 30th day of the Second Regular Session of the Twenty- Fourth Alaska State Legislature.

* **Sec. 2.** AS 44.66.010(8) is amended to read:

(8) Statewide Suicide Prevention Council (AS 44.29.300) - June 30, 2006 [2005];"

HOUSE COMMITTEE REPC r

(11)
Date Referred to Committee: February 18, 2005 FURTHER REFERRALS:

Date of Committee Action: March 8, 2005

The FINANCE Committee considered: SB 60

SENATE BILL NO. 60 EXTEND SUICIDE PREVENTION COUNCIL

"An Act extending the termination date of the Statewide Suicide Prevention Council; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ [X] Same Title [ ] New Title

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
HSS	2	✓		

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Hawker	✓			
	MOSES	✓			
	Holm	✓			
	STOLTZE	✓			
	Taylor	✓			
	Weyhrauch	X			
	CROFT	✓			
	Kelly			X	
	FOSTER	X			
Chair:	Meyer	✓			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: SB 60
(S) Publish Date: 2/14/05

Revision Date/Time (Note if correction): 2/11/05 6:45 a
Dept. Affected: Health & Social Services

Title: EXTENDING THE TERMINATION DATE OF THE STATEWIDE SUICIDE PREVENTION COUNCIL
RDU: Boards and Commissions
Component: Suicide Prevention Council

Sponsor: STEVENS, BEN
Requester: SENATE (HES)
Component No.: 2651

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services		38.2	38.2	38.2	38.2	38.2
Travel		41.5	41.5	41.5	41.5	41.5
Contractual		38.3	38.3	38.3	38.3	38.3
Supplies		1.0	1.0	1.0	1.0	1.0
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**119.0**	**119.0**	**119.0**	**119.0**	**119.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1037 GF/Mental Health		119.0	119.0	119.0	119.0	119.0
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	**0.0**	**119.0**	**119.0**	**119.0**	**119.0**	**119.0**

Estimate of any current year (FY2005) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal: X

POSITIONS

Full-time						
Part-time		1	1	1	1	1
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The Suicide Prevention Council (SPC) is due to sunset on June 30, 2005. The SPC is the state planning and coordinating agency for issue surrounding suicide and suicide prevention. The powers, duties and responsibilities of the Council are to act in the advisory capacity to the Governor and legislature with respect to what actions can and should be taken to:

(continued on page 2)

Prepared by: Janet Clarke, Assistant Commissioner
Phone 465-1632
Division: Finance and Management Services
Date/Time 02/11/2005
Approved by: Joel S. Gilbertson, Commissioner
Date 02/11/2005
Agency: Department of Health and Social Services

STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL NO. SB 60

ANALYSIS CONTINUATION

- Improve health and wellness throughout the state by reducing suicide and its effect on individuals, families, and communities;
- Broaden the public's awareness of suicide and the risk factor related to suicide;
- Enhance suicide prevention services and programs throughout the state;
- Develop healthy communities through comprehensive, collaborative, community-based approaches;
- Develop and implement a statewide suicide prevention plan; and
- Strengthen existing and build new partnerships between public and private entities that will advance suicide prevention efforts in the state.

Extension of the Council does not have any fiscal impact since the funding is budgeted in the Governor's budget.

Suicide Prevention Council
Summary of Expenditures

		Expended:						
	Authorized	P. Services	Travel	Contractual	Commodities	Equipment	Total Expended	Lapse
FY 2002	222.5	17.1	34.4	8.7	7.2	1.7	69.1	153.4
FY 2003	225.5	77.5	20.4	11.2	6.6	2.6	118.3	107.2
FY 2004	179.8	24.4	8.2	2.1	27.5	0.0	62.2	117.6
FY 2005 (thru Jan 2005)	118.8	18.3	6.5	26.3	0.0	0.0	51.1	N/A
FY 2006	119.0							N/A
Special Appropriation for								
Followback Study	300.0			300.0			300.0	0.0
Grand Totals	1,165.6	137.3	69.5	348.3	41.3	4.3	600.7	378.2

3/7/2005

Alaska State Legislature

SENATOR
BEN STEVENS
716 WEST 4TH AVENUE
ANCHORAGE, AK
99501-2133
(907) 269-0200
FAX (907) 269-0204

Session:
STATE CAPITOL
JUNEAU, AK
99801-1182
(907) 465-4993
FAX (907) 465-3872

Senate President

SPONSOR STATEMENT
SENATE BILL 60

"An Act extending the termination date of the Statewide Suicide Prevention Council; and providing for an effective date."

Suicide is an Alaskan tragedy. On average suicide takes 130 Alaskans every year, nearly twice the national average. With Alaska's large geography, multiple cultures, and many communities, addressing suicide is a complicated matter.

In 2001, the 22nd Alaska State Legislature enacted legislation that created the Statewide Suicide Prevention Council (SSPC) and tasked it with the mission to reduce suicide through coordination with public and private entities as well as its own initiatives, and broaden suicide awareness. Under Alaska Statute 44.29.350, the Council is charged with advising the legislature and the governor on "*...actions that can and should be taken to improve health and wellness throughout the state by reducing suicide and its effect on individuals, families and communities.*"

The council is made up of 15 members. In addition to legislative and executive branch members there are nine public members. The public appointments represent a broad spectrum of individuals from rural and urban communities, clergy, youth, and behavioral health community. There is one part-time staff person to coordinate council activities

Among the council's accomplishments is a recently completed statewide suicide prevention plan. The plan sets up goals and strategies for suicide prevention. Currently, the Council is also in the process of implementing a Follow Back Study and a public awareness campaign. This study consists of voluntary interviews of family and friends; information from the Medical Examiner's Office; law enforcement agencies; and other records as permitted. The media campaign fulfils the council's mission to educate Alaskans on suicide and its devastating effects.

The findings from a recently conducted sunset audit recommend the SSPC to continue in its work of research, broadening public awareness, collaborating prevention and intervention efforts around the state and in making recommendations to the Governor and Legislature.

Senate Bill 60 will extend the termination date of the council to 2009 allowing the Statewide Suicide Prevention Council to continue in their mission.

handout 3/2/05

November 16, 2004

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 and Title 44 of the Alaska Statutes (sunset legislation), the attached report is submitted for your review.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
STATEWIDE SUICIDE PREVENTION COUNCIL
SUNSET REVIEW

November 15, 2004

Audit Control Number

06-20037-05

This audit was conducted as required by AS 44.66.050 and under the authority of AS 24.20.271(1). Alaska Statute 44.66.050(c) lists criteria to be used to assess the demonstrated public need for a given board, commission, agency, or program subject to the sunset review process. Currently under AS 44.66.010(a)(20), the Statewide Suicide Prevention Council is scheduled to terminate June 30, 2005. If the legislature takes no action to extend this date, the council would have one year to conclude operations.

In our opinion, the termination date for the Statewide Suicide Prevention Council should be extended. The council serves a public need and is operating in the public's interest. We recommend the legislature extend the council's termination date to June 30, 2009.

The audit was conducted in accordance with generally accepted government audit standards. Fieldwork procedures utilized in the course of developing the findings and discussion presented in this report are discussed in the Objectives, Scope, and Methodology.

Pat Davidson, CPA
Legislative Auditor

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