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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 [illegible] 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. 226, 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-mission 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, 183 (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 those 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

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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.*

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.

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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

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

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

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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.

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.

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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.

[28] 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 P. 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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Current Law (Example of 8 Year sentence)	*HB78*	*Proposed Fix to Ensure Average Sentences Reflect Current Law*
Higher than 8 Years – Based on ***court findings*** of aggravators	**8-12 Years** – upon conviction with ***no court findings***	**8-12 Years** – upon conviction with ***court findings***
	12 Years and higher – jury trial with findings on aggravators	**12 Years and higher** – jury trial with findings on aggravators
8 Years – upon conviction with ***no court findings***		**8 Years** – upon conviction with ***no court findings***
Less than 8 Years – based on court findings of mitigators	**Less than 8 Years** – based on court findings of mitigators (same)	**Less than 8 Years** - based on court findings of mitigators (same)

Distributed by Representative Les Gara

24-LS0391\A.1
Luckhaupt
1/24/05

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE GARA

TO: HB 78

Page 4, line 14:

Delete "within an"

Insert "the minimum in the"

Page 4, line 17, following "AS 12.55.127.":

Insert "If the court imposes a sentence above the minimum sentence in the applicable presumptive range, the court shall make findings that justify the decision under AS 12.55.005."

Table 23 Alaska Felony Sentences Compared to Sentences in State Courts Nationwide, by Incarceration versus Probation				
Most serious conviction offense	State courts nationwide[a] 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

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

HB 78 and CS 78 Changes

1. Pg 2, line 7

changed "and continuous incarceration would cause extreme hardship to the defendant's ability to pay fines or restitution"

replaced it with "and the defendant receives a composite sentence of not more than 2 years."

2. Pg 3, line 14

replaced "within" with "lower than" to fix a technical mistake

3. Pg 4, line 5/Pg 4, line 6 of CS

inserted "orally and" to ensure there be no question that the defendant doesn't understand

4. Last line of the bill(s)

Changed the effective date to immediately effective.

24-LS0391\G
Luckhaupt
1/21/05

CS FOR HOUSE BILL NO. 78( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES SAMUELS, McGuire, Hawker

A BILL

FOR AN ACT ENTITLED

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

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 12.40.100 is amended by adding a new subsection to read:

(c) An indictment that complies with this section and with applicable rules adopted by the supreme court, is valid and need not specify aggravating factors set out in AS 12.55.155.

*** Sec. 2.** AS 12.55.015(a) is amended to read:

(a) Except as limited by AS 12.55.125 - 12.55.175, the court, in imposing sentence on a defendant convicted of an offense, may singly or in combination

(1) impose a

(A) fine when authorized by law and as provided in AS 12.55.035; or

(B) day fine when authorized by law and as provided in

AS 12.55.036 if the court does not impose a term of periodic or continuous imprisonment or place the defendant on probation;

(2) order the defendant to be placed on probation under conditions specified by the court that may include provision for active supervision;

(3) impose a definite term of periodic imprisonment**, but only if an employment obligation of the defendant preexisted sentencing and the defendant receives a composite sentence of not more than two years to serve**;

(4) impose a definite term of continuous imprisonment;

(5) order the defendant to make restitution under AS 12.55.045;

(6) order the defendant to carry out a continuous or periodic program of community work under AS 12.55.055;

(7) suspend execution of all or a portion of the sentence imposed under AS 12.55.080;

(8) suspend imposition of sentence under AS 12.55.085;

(9) order the forfeiture to the commissioner of public safety or a municipal law enforcement agency of a deadly weapon that was in the actual possession of or used by the defendant during the commission of an offense described in AS 11.41, AS 11.46, AS 11.56, or AS 11.61;

(10) order the defendant, while incarcerated, to participate in or comply with the treatment plan of a rehabilitation program that is related to the defendant's offense or to the defendant's rehabilitation if the program is made available to the defendant by the Department of Corrections;

(11) order the forfeiture to the state of a motor vehicle, weapon, electronic communication device, or money or other valuables, used in or obtained through an offense that was committed for the benefit of, at the direction of, or in association with a criminal street gang;

(12) order the defendant to have no contact, either directly or indirectly, with a victim or witness of the offense until the defendant is unconditionally discharged.

*** Sec. 3.** AS 12.55.025(i) is amended to read:

fix indent- not a sub-sub paragraph

(i) Except as provided by AS 12.55.125(a)(3),

[12.55.125(k).] 12.55.145(d), 12.55.155(f), and 12.55.165, the preponderance of the evidence standard of proof applies to sentencing proceedings.

*** Sec. 4.** AS 12.55.055(d) is amended to read:

(d) The court may offer a defendant convicted of an offense the option of performing community work in lieu of a sentence of imprisonment. Substitution of community work shall be at a rate of eight hours for each day of imprisonment. A court may not offer substitution of community work for any mandatory minimum period of imprisonment or for any period **within the** [OF A] presumptive **range** [TERM] of imprisonment **for the offense**.

*** Sec. 5.** AS 12.55.088(c) is amended to read:

(c) **A** [NO] sentence may **not** be reduced or modified so as to result in a term of imprisonment **that** [WHICH] is less than the minimum [OR PRESUMPTIVE] sentence **or lower than the presumptive range** required by law for the original sentence.

*** Sec. 6.** AS 12.55.100(a) is amended to read:

(a) While on probation and among the conditions of probation, the defendant may be required

(1) to pay a fine in one or several sums;

(2) to make restitution or reparation to aggrieved parties for actual damages or loss caused by the crime for which conviction was had, including compensation to a victim that is a nonprofit organization for the value of labor or goods provided by volunteers if the labor or goods were necessary to alleviate or mitigate the effects of the defendant's crime;

(3) to provide for the support of any persons for whose support the defendant is legally responsible;

(4) to perform community work in accordance with AS 12.55.055;

(5) to participate in or comply with the treatment plan of an inpatient or outpatient rehabilitation program specified by either the court or the defendant's probation officer that is related to the defendant's offense or to the defendant's rehabilitation; [AND]

(6) to satisfy the screening, evaluation, referral, and program requirements of an agency authorized by the court to make referrals for rehabilitative treatment or to provide rehabilitative treatment; **and**

(7) if ordered by the court, to abide by additional conditions of probation imposed by the defendant's probation officer; an additional condition imposed by the probation officer must be provided orally and in writing to the defendant; the additional condition is binding upon delivery until modified by the court; this paragraph does not require written notice of conditions relating to the day-to-day management of probationers, in which probation officers direct the activities of probationers to implement existing court-imposed conditions.

*** Sec. 7.** AS 12.55.120 is amended by adding a new subsection to read:

(e) A sentence reviewed by the appellate court under this section and AS 22.07.020, or by the superior court under AS 22.10.020, or a sentence reviewed by petition accepted under court rules, may not be reversed as excessive, and the sentencing court is not required to make specific findings, if the sentence is within an applicable presumptive range set out in AS 12.55.125, or is a consecutive or partially consecutive sentence imposed in accordance with the minimum sentences set out in AS 12.55.127.

*** Sec. 8.** AS 12.55.125(c) is amended to read:

(c) Except as provided in (i) of this section, a defendant convicted of a class A felony may be sentenced to a definite term of imprisonment of not more than 20 years, and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, **five to eight** [FIVE] years;

(2) if the offense is a first felony conviction

[(A) OTHER THAN FOR MANSLAUGHTER] and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury **or death** during the commission of the offense, or knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional employee, emergency

medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, **seven to 11** [SEVEN] years;

[(B) FOR MANSLAUGHTER AND THE CONDUCT RESULTING IN THE CONVICTION WAS KNOWINGLY DIRECTED TOWARDS A CHILD UNDER THE AGE OF 16, SEVEN YEARS;

(C) FOR MANSLAUGHTER AND THE CONDUCT RESULTING IN THE CONVICTION INVOLVED DRIVING WHILE UNDER THE INFLUENCE OF AN ALCOHOLIC BEVERAGE, INHALANT, OR CONTROLLED SUBSTANCE, SEVEN YEARS;]

(3) if the offense is a second felony conviction, **10 to 14** [10] years;

(4) if the offense is a third felony conviction and the defendant is not subject to sentencing under (*l*) of this section, **15 to 20** [15] years.

*** Sec. 9.** AS 12.55.125(d) is amended to read:

(d) Except as provided in (i) of this section, a defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more than 10 years, and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, one to three years;

(2) if the offense is a first felony conviction, the defendant violated AS 11.41.130, and the victim was a child under 16 years of age, two to four years;

(3) if the offense is a second felony conviction, **four to seven** [FOUR] years;

(4) [(2)] if the offense is a third felony conviction, **six to 10** [SIX] years.

*** Sec. 10.** AS 12.55.125(e) is amended to read:

(e) Except as provided in (i) of this section, a defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) **if the offense is a first felony conviction and does not involve circumstances described in (4, of this subsection, zero to two years;**

(2) if the offense is a second felony conviction, **two to four** [TWO] years;

(3) [(2)] if the offense is a third felony conviction, **three to five** [THREE] years;

(4) [(3)] if the offense is a first felony conviction, and the defendant violated AS 08.54.720(a)(15), **one to two years** [ONE YEAR].

*** 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;

(2) imposition of sentence may not be suspended under AS 12.55.085;

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

*** Sec. 12.** AS 12.55.125(i) is amended to read:

(i) A defendant convicted of

(1) sexual assault in the first degree or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 40 years and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction and does not involve circumstances described in (B) of this paragraph, **eight to 12** [EIGHT] years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, **12 to 16** [10] years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, **15 to 20** [15] years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, **20 to 30** [20] years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (*l*) of this section, **25 to 35** [25] years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, **30 to 40** [30] years;

(2) attempt, conspiracy, or solicitation to commit sexual assault in the first degree or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction and does not involve circumstances described in (B) of this paragraph, **five to eight** [FIVE] years;

(B) if the offense is a first felony conviction, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, **10 to 14** [10] years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, **12 to 16** [10] years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, **15 to 20** [15] years;

(E) if the offense is a third felony conviction, does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (*l*) of this section, **15 to 25** [15] years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (*l*) of this section, and the defendant has two prior convictions for sexual felonies, **20 to 30** [20] years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography may be sentenced to a definite term of imprisonment of not more than 20 years and shall be sentenced to **a definite term within** the following presumptive **ranges**

[TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) **if the offense is a first felony conviction, two to four years;**

(B) if the offense is a second felony conviction and does not involve circumstances described in **(C)** [(B)] of this paragraph, **five to eight** [FIVE] years;

(C) [(B)] if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, **10 to 14** [10] years;

(D) [(C)] if the offense is a third felony conviction, does not involve circumstances described in **(E)** [(D)] of this paragraph, **10 to 14** [10] years;

(E) [(D)] if the offense is a third felony conviction, and the defendant has two prior convictions for sexual felonies, **15 to 20** [15] years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 10 years and shall be sentenced to **a definite term within** the following presumptive **ranges** [TERMS], subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) **if the offense is a first felony conviction, one to two years;**

(B) if the offense is a second felony conviction and does not involve circumstances described in **(C)** [(B)] of this paragraph, **two to five** [TWO] years;

(C) [(B)] if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, **three to six** [THREE] years;

(D) [(C)] if the offense is a third felony conviction and does not involve circumstances described in **(E)** [(D)] of this paragraph, **three to six** [THREE] years;

(E) [(D)] if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, **six to 10** [SIX] years.

*** Sec. 13.** AS 12.55.125 is amended by adding a new subsection to read:

(n) In imposing a sentence within a presumptive range under (c), (d), (e), or (i) of this section, the total term, made up of the active term of imprisonment plus any suspended term of imprisonment, must fall within the presumptive range, and the active term of imprisonment may not fall below the lower end of the presumptive range.

*** Sec. 14.** AS 12.55.127(d) is amended by adding a new paragraph to read:

(4) "presumptive term" means the middle of the applicable presumptive range set out in AS 12.55.125.

*** Sec. 15.** AS 12.55.145(a) is amended to read:

(a) For purposes of considering prior convictions in imposing sentence under

(1) AS 12.55.125(c), **(d), or (e)** [(d)(1), (d)(2), (e)(1), OR (e)(2)],

(A) a prior conviction may not be considered if a period of 10 or more years has elapsed between the date of the defendant's unconditional discharge on the immediately preceding offense and commission of the present offense unless the prior conviction was for an unclassified or class A felony;

(B) a conviction in this or another jurisdiction of an offense having elements similar to those of a felony defined as such under Alaska law at the time the offense was committed is considered a prior felony conviction;

(C) two or more convictions arising out of a single, continuous criminal episode during which there was no substantial change in the nature of the criminal objective are considered a single conviction unless the defendant was sentenced to consecutive sentences for the crimes; offenses committed while attempting to escape or avoid detection or apprehension after the commission of another offense are not part of the same criminal episode or objective;

(2) AS 12.55.125(*l*),

(A) a conviction in this or another jurisdiction of an offense having elements similar to those of a most serious felony is considered a prior

most serious felony conviction;

(B) commission of and conviction for offenses relied on as prior most serious felony offenses must occur in the following order: conviction for the first offense must occur before commission of the second offense, and conviction for the second offense must occur before commission of the offense for which the defendant is being sentenced;

(3) AS 12.55.135(g),

(A) a prior conviction may not be considered if a period of five or more years has elapsed between the date of the defendant's unconditional discharge on the immediately preceding offense and commission of the present offense unless the prior conviction was for an unclassified or class A felony;

(B) a conviction in this or another jurisdiction of an offense having elements similar to those of a crime against a person or a crime involving domestic violence is considered a prior conviction;

(C) two or more convictions arising out of a single, continuous criminal episode during which there was no substantial change in the nature of the criminal objective are considered a single conviction unless the defendant was sentenced to consecutive sentences for the crimes; offenses committed while attempting to escape or avoid detection or apprehension after the commission of another offense are not part of the same criminal episode or objective;

(4) AS 12.55.125(i),

(A) a conviction in this or another jurisdiction of an offense having elements similar to those of a sexual felony is a prior conviction for a sexual felony;

(B) a felony conviction in another jurisdiction making it a crime to commit any lewd and lascivious act upon a child under the age of 16 years, with the intent of arousing, appealing to, or gratifying the sexual desires of the defendant or the victim is a prior conviction for a sexual felony;

(C) two or more convictions arising out of a single, continuous criminal episode during which there was no substantial change in the nature of

the criminal objective are considered a single conviction unless the defendant was sentenced to consecutive sentences for the crimes; offenses committed while attempting to escape or avoid detection or apprehension after the commission of another offense are not part of the same criminal episode or objective.

*** Sec. 16.** AS 12.55.155(a) is amended to read:

(a) **Except as provided in (e) of this section, if** [IF] a defendant is convicted of an offense and is subject to sentencing under **AS 12.55.125(c), (d), (e), or (i)** [AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), (e)(3), OR (i)] and

(1) the **low end of the** presumptive **range** [TERM] is four years or less, the court may **impose any sentence below the presumptive range** [DECREASE THE PRESUMPTIVE TERM BY AN AMOUNT AS GREAT AS THE PRESUMPTIVE TERM] for factors in mitigation or may increase the **active term of imprisonment** [PRESUMPTIVE TERM] up to the maximum term of imprisonment for factors in aggravation;

(2) the **low end of the** presumptive **range** [TERM OF IMPRISONMENT] is more than four years, the court may **impose a sentence below the presumptive range as long as the active term of imprisonment is not less than 50 percent of the low end of the presumptive range** [DECREASE THE PRESUMPTIVE TERM BY AN AMOUNT AS GREAT AS 50 PERCENT OF THE PRESUMPTIVE TERM] for factors in mitigation or may increase the **active term of imprisonment** [PRESUMPTIVE TERM] up to the maximum term of imprisonment for factors in aggravation.

*** Sec. 17.** AS 12.55.155(b) is amended to read:

(b) **Sentences** [SENTENCE INCREMENTS AND DECREMENTS] under this section **that are outside of the presumptive ranges set out in AS 12.55.125** shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section.

*** Sec. 18.** AS 12.55.155(c) is amended to read:

(c) The following factors shall be considered by the sentencing court **if proven in accordance with this section, and may allow imposition of a sentence**

above the presumptive range [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 **a** [THE] presumptive **range under** [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 **under** [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 **made up of** [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 national 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 committed, 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;

(31) the defendant's prior criminal history includes convictions for five or more crimes in this or another jurisdiction that are class A misdemeanors under the law of this state, or having elements similar to a class A misdemeanor; two or more convictions arising out of a single continuous episode are considered a single conviction; however, an offense is not a part of a continuous episode if committed while attempting to escape or resist arrest or if it is an assault upon a uniformed or otherwise clearly identified peace officer; notice and denial of convictions are governed by AS 12.55.145(b), (c), and (d).

*** Sec. 19.** AS 12.55.155(d) is amended to read:

(d) The following factors shall be considered by the sentencing court **if proven in accordance with this section, and may allow imposition of a sentence below the presumptive range** [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 **that** [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

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

(9) [(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;

(10) [(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;

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

(12) [(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;

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

(14) [(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;

(15) [(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;

(16) [(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.

*** Sec. 20.** AS 12.55.155(e) is amended to read:

(e) If a factor in aggravation is a necessary element of the present offense, or requires the imposition of a **sentence within the** presumptive **range** [TERM] under AS 12.55.125(c)(2), that factor may not be used to **impose a sentence above the high end of** [AGGRAVATE] the presumptive **range** [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 **impose a sentence below the low end of** [MITIGATE] the presumptive **range** [TERM].

*** Sec. 21.** AS 12.55.155(f) is amended to read:

(f) If the state seeks to establish a factor in aggravation at sentencing

(1) under (c)(7), (8), (12), (15), (19), (20), (21), or (31) of this section, 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**; the factors** [. FACTORS] in aggravation **listed in this paragraph,** and factors in mitigation must be established by clear and convincing evidence before the court sitting without a jury**; all** [. ALL] findings must be set out with specificity**;**

(2) other than one listed in (1) of this subsection, the factor shall be presented to a trial jury under procedures set by the court, unless the defendant waives trail by jury, stipulates to the existence of the factor, or consents to have the factor proven under procedures set out in (1) of this subsection; a factor in aggravation presented to a jury is established if proved beyond a reasonable doubt; written notice of the intent to establish a factor in aggravation must be served on the defendant and filed with the court

(A) 10 days before trial, or at another time specified by the court;

(B) within 48 hours, or at a time specified by the court, if the court instructs the jury about the option to return a verdict for a lesser included offense; or

(C) five days before entering a plea that results in a finding of guilt, or at another time specified by the court.

*** Sec. 22.** AS 12.55.165(a) is amended to read:

(a) If the defendant is subject to sentencing under **AS 12.55.125(c), (d), (e), or (i)** [AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), (e)(3), OR (i)] and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of **a sentence within** the presumptive **range** [TERM], whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175.

*** Sec. 23.** AS 12.55.175(b) is amended to read:

(b) Upon receipt of a record of proceedings under AS 12.55.165, the three-judge panel shall consider all pertinent files, records, and transcripts, including the findings and conclusions of the judge who originally heard the matter. The panel may hear oral testimony to supplement the record before it. If the panel supplements the record, the panel shall permit the victim to testify before the panel. If the panel finds that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of **a sentence within** the presumptive **range** [TERM], whether or not adjusted for aggravating or mitigating factors, it shall sentence the defendant in accordance with this section. If the panel does not find that manifest injustice would result, it shall remand the case to the sentencing court, with a written statement of its findings and conclusions, for sentencing under AS 12.55.125.

*** Sec. 24.** AS 12.55.175(e) is amended to read:

(e) If the three-judge panel determines under (b) of this section that manifest injustice would result from imposition of **a sentence within** the presumptive **range** [TERM] and the panel also finds that the defendant has an exceptional potential for rehabilitation and that a sentence of less than the presumptive **range** [TERM] should be imposed because of the defendant's exceptional potential for rehabilitation, the panel

(1) shall sentence the defendant **within** [TO] the presumptive **range** [TERM] required under AS 12.55.125 **or as permitted under AS 12.55.155**;

(2) shall order the defendant under AS 12.55.015 to engage in appropriate programs of rehabilitation; and

(3) may provide that the defendant is eligible for discretionary parole under AS 33.16.090 during the second half of the sentence imposed under this subsection if the defendant successfully completes all rehabilitation programs ordered under (2) of this subsection.

*** Sec. 25.** AS 12.55.185 is amended by adding a new paragraph to read:

(18) "active term of imprisonment" has the meaning given in AS 12.55.127.

*** Sec. 26.** AS 33.05.070 is amended by adding new subsections to read:

(c) At any time within the probation period, a police officer certified by the Alaska Police Standards Council may detain a probationer if the police officer has reasonable suspicion that the probationer has recently violated or may imminently violate a probation condition relating to one of the topics set out in (d) of this section. The police officer may also arrest the probationer without a warrant if the police officer has probable cause to believe that the probationer has violated a probation condition relating to one of the topics set out in (d) of this section.

(d) The conditions that permit a police officer to detain or arrest a probationer or parolee without a warrant under AS 33.16.240 and (c) of this section are those conditions imposed by the court, or the parole board, relating to

(1) geographic limitations on the probationer's movements;

(2) possessing or consuming controlled substances under state or federal law;

(3) possessing firearms;

(4) possessing or consuming alcoholic beverages, or being in a place where they are sold or served;

(5) operating or driving a motor vehicle; or

(6) other conduct that creates an imminent public danger or threatens serious harm to persons or property.

* **Sec. 27.** AS 33.16.085(a) is amended to read:

(a) Notwithstanding a presumptive, mandatory, or mandatory minimum term **or sentence** a prisoner may be serving or any restriction on parole eligibility under AS 12.55, a prisoner who is serving a term of at least 181 days, may, upon application by the prisoner or the commissioner, be released by the board on special medical parole if the board determines that

(1) the prisoner has not been convicted of an offense under AS 11.41.410 - 11.41.425 or 11.41.434 - 11.41.438 and the prisoner is severely medically or cognitively disabled as certified in writing by a physician licensed under AS 08.64

(2) a reasonable probability exists that

(A) the prisoner will live and remain at liberty without violating any laws or conditions imposed by the board;

(B) because of the prisoner's severe medical or cognitive disability, the prisoner will not pose a threat of harm to the public if released on parole; and

(C) release of the prisoner on parole would not diminish the seriousness of the crime;

(3) the prisoner

(A) was not suffering from the severe medical or cognitive disability at the time the prisoner committed the offense or parole or probation violation for which the prisoner is presently incarcerated; or

(B) was suffering from the severe medical or cognitive disability at the time the prisoner committed the offense or parole or probation violation for which the prisoner is presently incarcerated and the medical or cognitive disability has progressed so that the likelihood of the prisoner's committing the same or a similar offense is low;

(4) the care and supervision that the prisoner requires can be provided in a more medically appropriate or cost-effective manner than by the department;

(5) the prisoner is incapacitated to an extent that incarceration does not impose significant additional restrictions on the prisoner;

(6) the prisoner is likely to remain subject to the severe medical or cognitive disability throughout the entire period of parole or to die and there is no reasonable expectation that the prisoner's medical or cognitive disability will improve noticeably; and

(7) an appropriate discharge plan has been formulated that addresses basic life domains of the prisoner, including care coordination, housing, eligibility for public benefits, and health care, including necessary medication.

*** Sec. 28.** AS 33.16.090 is repealed and reenacted to read:

Sec. 33.16.090. Eligibility for discretionary parole and minimum terms to be served. (a) A prisoner sentenced to an active term of imprisonment of at least 181 days may, in the discretion of the board, be released on discretionary parole if the prisoner has served the amount of time specified under (b) of this section, except that

(1) a prisoner sentenced to one or more mandatory 99-year terms under AS 12.55.125(a) or one or more definite terms under AS 12.55.125(*l*) is not eligible for consideration for discretionary parole;

(2) a prisoner is not eligible for consideration of discretionary parole if made ineligible by order of a court under AS 12.55.115;

(3) a prisoner imprisoned under AS 12.55.086 is not eligible for discretionary parole unless the actual term of imprisonment is more than one year.

(b) A prisoner eligible under (a) of this section who is sentenced

(1) to a single sentence under AS 12.55.125(a) or (b) may not be released on discretionary parole until the prisoner has served the mandatory minimum term under AS 12.55.125(a) or (b), one-third of the active term of imprisonment imposed, or any term set under AS 12.55.115, whichever is greatest;

(2) to a single sentence within or below a presumptive range set out in AS 12.55.125(c), (d)(2) - (4), (e)(3) and (4), or (i), and has not been allowed by the three-judge panel under AS 12.55.175 to be considered for discretionary parole release, may not be released on discretionary parole until the prisoner has served the term imposed, less good time earned under AS 33.20.010;

(3) to a single sentence under AS 12.55.125(c), (d)(2) - (4), (e)(3) and (4), or (i), and has been allowed by the three-judge panel under AS 12.55.175 to be

considered for discretionary parole release during the second half of the sentence, may not be released on discretionary parole until

(A) the prisoner has served that portion of the active term of imprisonment required by the three-judge panel; and

(B) in addition to the factors set out in AS 33.16.100(a), the board determines that

(i) the defendant has successfully completed all rehabilitation programs ordered by the three-judge panel that were made available to the prisoner; and

(ii) the prisoner would not constitute a danger to the public if released on parole;

(4) to a single enhanced sentence under AS 12.55.155(a) that is above the applicable presumptive range, may not be released on discretionary parole until the prisoner has served the greater of the following:

(A) an amount of time, less good time earned under AS 33.20.010, equal to the upper end of the presumptive range plus one-fourth of the amount of time above the presumptive range; or

(B) any term set under AS 12.55.115;

(5) to a single sentence under any other provision of law, may not be released on discretionary parole until the prisoner has served at least one-fourth of the active term of imprisonment, any mandatory minimum sentence imposed under any provision of law, or any term set under AS 12.55.115, whichever is greatest;

(6) to concurrent sentences, may not be released on discretionary parole until the prisoner has served the greatest of

(A) any mandatory minimum sentence or sentences imposed under any provision of law;

(B) any term set under AS 12.55.115; or

(C) the amount of time that is required to be served under (1) - (5) of this subsection for the sentence imposed for the primary crime, had that been the only sentence imposed;

(7) to consecutive or partially consecutive sentences, may not be

released on discretionary parole until the prisoner has served the greatest of

(A) the composite total of any mandatory minimum sentence or sentences imposed under any provision of law, including AS 12.55.127;

(B) any term set under AS 12.55.115; or

(C) the amount of time that is required to be served under (1) - (5) of this subsection for the sentence imposed for the primary crime, had that been the only sentence imposed, plus one-quarter of the composite total of the active term of imprisonment imposed as consecutive or partially consecutive sentences imposed for all crimes other than the primary crime.

(c) As used in this section,

(1) "active term of imprisonment" has the meaning given in AS 12.55.185;

(2) "primary crime" has the meaning given in AS 12.55.127.

*** Sec. 29.** AS 33.16.100 is amended by adding a new subsection to read:

(e) If the parole board considers an application for discretionary parole, and denies parole because the prisoner does not meet the standards in (a) of this section, the board may make a prisoner ineligible for further consideration of discretionary parole, or may require that additional time be served before the prisoner is again eligible for consideration for discretionary parole.

*** Sec. 30.** AS 33.16.240(c) is amended to read:

(c) **In addition to the powers granted to a police officer under (g) of this section, a** [A] parole officer may, without a warrant, arrest a parolee for a violation of parole only if there is danger to the public, if there is a likelihood that the parolee will flee, or if the parolee committed a crime in the presence of the parole officer.

*** Sec. 31.** AS 33.16.240 is amended by adding a new subsection to read:

(g) At any time within the period of parole supervision, a police officer certified by the Alaska Police Standards Council may detain a parolee if the officer has reasonable suspicion that the person has recently violated or may imminently violate a parole condition relating to one of the topics set out in AS 33.05.070(d). The officer may also arrest the parolee without a warrant if the officer has probable cause to believe that the person has violated a parole condition relating to one of the topics

set out in AS 33.05.070(d).

*** Sec. 32.** AS 12.55.125(k); AS 33.16.100(c), and 33.16.100(d) are repealed.

*** Sec. 33.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. Sections 1, 4, 6, 26, and 29 - 31 of this Act apply to offenses committed before, on, or after the effective date of this Act. Sections 2, 3, 5, 7 - 25, and 27 - 28 of this Act apply to offenses committed on or after the effective date of this Act. References to prior offenses or convictions in secs. 8 - 21 of this Act include offenses committed before, on, or after the effective date of this Act.

*** Sec. 34.** This Act takes effect immediately under AS 01.10.070(c).

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB78-LAW-CDCO-1-21-
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to the content of indictments, sentencing, probation, and parole..."
RDU CRIMINAL
Component CDCO
Sponsor Representative Samuels
Requester House Judiciary
Component No.

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 Department of Law does not anticipate a fiscal impact from passage of this legislation.

Prepared by: Kathryn A. Daughhetee, Director
Phone 465-5427
Division Administrative Services
Date/Time 1/21/05 8:42 AM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 1/21/2005
Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB078-DPS-AST-01-24-05
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: An Act relating to content of indictments, sentencing, probation and parole
RDU: Alaska State Troopers
Component: AST Detachments
Sponsor: Representative Samuels
Requester: House Judiciary
Component No.: 2325

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)*

Passage of this bill will have no fiscal impact on the Department of Public Safety. The expected increase in the number of arrests for this violation can be handled by available staff. Provisions of this bill will help enforce and insure that probationer's and parolee's are complying with their conditions. It also outlines a reasonable standard for arrest of probation/parole violations.

Prepared by: Lieutenant Todd Sharp
Phone: 907-465-3223
Division: Alaska State Troopers
Date/Time: 1/24/05 11:29 AM
Approved by: Commissioner William Tandeske
Date: 1/24/2005
Agency: Department of Public Safety

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 78
() Publish Date:

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: Rep. Samuels, McGuire, Hawker
Requester: House 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)*

HB78 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 HB78 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 1/24/05 10:51 AM
Approved by: Portia Parker, Deputy Commissioner — Date 1/24/2005
Agency: Department of Corrections

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB78
() Publish Date:

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: Rep. Samuels, McGuire, Hawker
Requester: House 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)*

HB78 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 HB78 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: Sharleen Griffin, Acting Director — Phone 465-4641
Division: Administrative Services — Date/Time 1/24/05 10:50 AM
Approved by: Portia Parker, Deputy Commissioner — Date 1/24/2005
Agency: Department of Corrections

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 78
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An act relaing to criminal law...
RDU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: Reps. Samuels, McGuire,
Requester: House Judiciary
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	•	•	•	•	•	•
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	•	•	•	•	•	•

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 amends the criminal sentencing code in an attempt to comply with the U.S. Supreme Court decision in Blakely v. Washington. The Public Defender Agency's operations will be fiscally impacted, but it is not possible to predict with any accuracy the amount of the impact, therefore an indeterminate note is submitted. The fiscal impact includes: 1) protracted litigation challenging the constitutionality of several aspects of this bill; 2) more defendants who previously received a presumptive sentence without probation will receive sentences that include suspended time and probation; this will result in an increase in PD appointments on petitions to revoke probation for violations of conditions of probation; 3) more cases will go to jury trial because of the increased presumptive ranges and if conviction results at trial, more appeals from those convictions will result. This bill does not address the predictable increase in PD appointments to old cases addressing the impact of Blakely on previously imposed sentences, which may be addressed separately.

Prepared by: Linda K. Wilson, Deputy Director
Phone (907)334-4416
Division: Public Defender Agency
Date/Time 1/24/05 10:21 AM
Approved by: Mike Tibbles, Deputy Commissioner
Date 1/24/2005
Agency: Department of Administration

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 78
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An act relaing to criminal law...
RDU: Legal and Advocacy Services
Component: Office of Public Advocacy
Sponsor: Reps Samuels, McGuire, Hawker
Requester: House Judiciary
Component No.: 43

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	*	*	*	*	*	*
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	*	*	*	*	*	*

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 amends the criminal sentencing code in an attempt to comply with the U.S. Supreme Court decision in Blakely v. Washington. The Office of Public Advocacy's budget will be impacted, but it is not possible to predict with any accuracy the amount of the impact, therefore an indeterminate note is submitted. This legislation increases sentences across the board, adds some uncertainty to a defendant's sentences, and allows probationary sentences where they were not authorized previously. When sentencing consequences increase for criminal conduct, or uncertainty is added to the process, litigation necessarily increases. Because of the increased presumptive ranges, more cases will go to trial. Because of uncertainty in what a defendant may receive if he pleads, more cases will go to trial. Finally, more defendants who previously received a presumptive sentence without probation will receive sentences that include suspended time and probation and this will result in an increase in OPA appointments on petitions to revoke probation. The fiscal impact will be felt both with increased staff and contractor costs.

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Approved by: Mike Tibbles, Deputy Commissioner
Date 1/24/2005
Agency: Department of Administration

LEXSEE 530 US 466

CHARLES C. APPRENDI, JR. v. NEW JERSEY

No. 99-478

SUPREME COURT OF THE UNITED STATES

530 U.S. 466; 120 S. Ct. 2348; 147 L. Ed. 2d 435; 2000 U.S. LEXIS 4304; 68 U.S.L.W. 4576; 2000 Cal. Daily Op. Service 5061; 2000 Daily Journal DAR 6749; 2000 Colo. J. C.A.R. 3722; 13 Fla. L. Weekly Fed. S 457

March 28, 2000, Argued
June 26, 2000, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

DISPOSITION: *159 N. J. 7, 731 A. 2d 485*, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner sought a writ of certiorari to the Supreme Court of New Jersey, which affirmed petitioner's sentence under *N.J. Stat. Ann. § § 2C:43-7(a)(3)*, 2C:44-3(e) (2000), authorizing an extended term of imprisonment for hate crime.

OVERVIEW: Petitioner pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of the third-degree offense of unlawful possession of an antipersonnel bomb. The state trial court enhanced the sentence under *N.J. Stat. Ann. § § 2C:43-7(a)(3)*, 2C:44-3(e) (2000), finding by a preponderance of the evidence that petitioner acted with a purpose to intimidate an individual or group of individuals because of race. The sentence was affirmed on appeal. On writ of certiorari, the court reversed the judgment because the procedure was an unacceptable departure from the jury tradition. The Due Process Clause of U.S. Const. amend. XIV required that a jury on the basis of proof beyond a reasonable doubt make the factual determination authorizing an increase in the maximum prison sentence.

OUTCOME: The judgment of the state supreme court was reversed because it was unconstitutional to remove from the jury the assessment of facts that increased the prescribed range of penalties to which petitioner was exposed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses > Weapons > Possession

[HN1] *N.J. Stat. Ann. § 2C:39-4(a)* classifies the possession of a firearm for an unlawful purpose as a "second-degree" offense. Such an offense is punishable by imprisonment for between five and ten years. § 2C:43-6(a)(2).

Criminal Law & Procedure > Sentencing > Adjustments

[HN2] *N.J. Stat. Ann. § 2C:44-3(e)*, a "hate crime" law, provides for an "extended term" of imprisonment if the trial court finds, by a preponderance of the evidence, that the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.

Criminal Law & Procedure > Sentencing > Adjustments

[HN3] The extended term authorized by *N.J. Stat. Ann. § 2C:43-7(a)(3)*, the "hate crime" law, for second-degree offenses is imprisonment for between 10 and 20 years.

Criminal Law & Procedure > Sentencing > Imposition > Factors

Constitutional Law > Procedural Due Process > Scope of Protection

[HN4] Under the Due Process Clause of U.S. Const. amend. V and the notice and jury trial guarantees of U.S. Const. amend. VI, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial

[HN5] U.S. Const. amend. XIV provides for the proscription of any deprivation of liberty without due process of law, and U.S. Const. amend. VI guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. Taken together, these rights indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

Constitutional Law > Procedural Due Process > Scope of Protection

[HN6] The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial
Criminal Law & Procedure > Sentencing > Imposition > Factors

[HN7] 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. With that exception, it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Criminal Law & Procedure > Scienter > Specific Intent

[HN8] According to *N.J. Stat. Ann. § 2C:2-2(b)(1)*, a person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result.

SYLLABUS: Petitioner Apprendi fired several shots into the home of an African-American family and made a statement -- which he later retracted -- that he did not want the family in his neighborhood because of their race. He was charged under New Jersey law with, *inter alia*, second-degree possession of a firearm for an unlawful purpose, which carries a prison term of 5 to 10 years. The count did not refer to the State's hate crime statute, which provides for an enhanced sentence if a trial judge finds, by a preponderance of the evidence, that the defendant committed the crime with a purpose to intimidate a person or group because of, *inter alia*, race. After Apprendi pleaded guilty, the prosecutor filed a motion to enhance the sentence. The court found by a preponderance of the evidence that the shooting was racially motivated and sentenced Apprendi to a 12-year term on the firearms count. In upholding the sentence, the appeals court rejected Apprendi's claim that the Due Process Clause requires that a bias finding be proved to a jury beyond a reasonable doubt. The State Supreme Court affirmed.

Held: The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Pp. 7-31.

(a) The answer to the narrow constitutional question presented -- whether Apprendi's sentence was permissible, given that it exceeds the 10-year maximum for the offense charged -- was foreshadowed by the holding in *Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215*, that, with regard to federal law, the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. The Fourteenth Amendment commands the same answer when a state statute is involved. Pp. 7-9.

(b) The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *E.g., In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068.* The historical foundation for these principles extends down centuries into the common law. While judges in this country have long exercised discretion in sentencing, such discretion is bound by the range of sentencing options prescribed by the legislature. See, *e.g., United States v. Tucker, 404 U.S. 443, 447, 30 L. Ed. 2d 592, 92 S. Ct. 589.* The historic inseparability of verdict and judgment and the consistent limitation on judges' discretion highlight the novelty of a scheme that removes the jury from the determination of a fact that exposes the defendant to a penalty exceeding the

maximum he could receive if punished according to the facts reflected in the jury verdict alone. Pp. 9-18.

(c) *McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411*, was the first case in which the Court used "sentencing factor" to refer to a fact that was not found by the jury but could affect the sentence imposed by the judge. In finding that the scheme at issue there did not run afoul of *Winship*'s strictures, this Court did not budge from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, *477 U.S. at 85-88*, and (2) a state scheme that keeps from the jury facts exposing defendants to greater or additional punishment may raise serious constitutional concerns, *477 U.S. at 88. Almendarez-Torres v. United States, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219* -- in which the Court upheld a federal law allowing a judge to impose an enhanced sentence based on prior convictions not alleged in the indictment -- represents at best an exceptional departure from the historic practice. Pp. 19-24.

(d) In light of the constitutional rule expressed here, New Jersey's practice cannot stand. It allows a jury to convict a defendant of a second-degree offense on its finding beyond a reasonable doubt and then allows a judge to impose punishment identical to that New Jersey provides for first-degree crimes on his finding, by a preponderance of the evidence, that the defendant's purpose was to intimidate his victim based on the victim's particular characteristic. The State's argument that the biased purpose finding is not an "element" of a distinct hate crime offense but a "sentencing factor" of motive is nothing more than a disagreement with the rule applied in this case. Beyond this, the argument cannot succeed on its own terms. It does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict, as does the sentencing "enhancement" here. The degree of culpability the legislature associates with factually distinct conduct has significant implications both for a defendant's liberty and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment. That the State placed the enhancer within the criminal code's sentencing provisions does not mean that it is not an essential element of the offense. Pp. 25-31.

159 N.J. 7, 731 A.2d 485, reversed and remanded.

COUNSEL:

Joseph D. O'Neill argued the cause for petitioner.

Edward C. DuMont argued the cause for the United States, as amicus curiae, by special leave of court.

Lisa S. Gochman argued the cause for respondent.

JUDGES: STEVENS, J., delivered the opinion of the Court, in which SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. SCALIA, J., filed a concurring opinion. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined as to Parts I and II. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined.

OPINIONBY: STEVENS

OPINION:

[*468] **[***442]** **[**2351]** JUSTICE STEVENS delivered the opinion of the Court.

[*LEdHR1A]** [1A] **[***LEdHR2A]** [2A] [HN1] A New Jersey statute classifies the possession of a firearm for an unlawful purpose as a "second-degree" offense. *N. J. Stat. Ann. § 2C:39-4(a)* (West 1995). Such an offense is punishable by imprisonment for "between five years and 10 years." § 2C:43-6(a)(2). [HN2] A separate statute, described by that State's Supreme Court as a "hate crime" law, provides for an "extended term" of imprisonment if the trial judge finds, by a preponderance of the evidence, that "the defendant **[*469]** in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *N. J. Stat. Ann. § 2C:44-3(e)* (West Supp. 2000). [HN3] The extended term authorized by the hate crime law for second-degree offenses is imprisonment for "between 10 and 20 years." § 2C:43-7(a)(3).

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

I

At 2:04 a.m. on December 22, 1994, petitioner Charles C. Apprendi, Jr., fired several .22-caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood in Vineland, New Jersey. Apprendi was promptly arrested and, at 3:05 a.m., admitted that he was the shooter. After further questioning, at 6:04 a.m., he made a statement -- which he later retracted -- that even though he did not know the occupants of the house personally, "because they are black in color he does not want them in

the neighborhood." *159 N.J. 7, 10, 731 A.2d 485, 486 (1999).* [**2352]

A New Jersey grand jury returned a 23-count indictment charging Apprendi with four first-degree, eight second-degree, six third-degree, and five fourth-degree offenses. The charges alleged shootings on four different dates, as well as the unlawful possession of various weapons. None of the counts referred to the hate crime statute, and none alleged that Apprendi acted with a racially biased purpose.

The parties entered into a plea agreement, pursuant to which Apprendi pleaded guilty to two counts (3 and 18) of second-degree possession of a firearm for an unlawful purpose, [*470] N. J. Stat. Ann. § 2C:39-4a (West 1995), and one count (22) of the third-degree offense of unlawful possession of an antipersonnel bomb, § 2C:39-3a; the prosecutor dismissed [***443] the other 20 counts. Under state law, a second-degree offense carries a penalty range of 5 to 10 years, § 2C:43-6(a)(2); a third-degree offense carries a penalty range of between 3 and 5 years, § 2C:43-6(a)(3). As part of the plea agreement, however, the State reserved the right to request the court to impose a higher "enhanced" sentence on count 18 (which was based on the December 22 shooting) on the ground that that offense was committed with a biased purpose, as described in § 2C:44-3(e). Apprendi, correspondingly, reserved the right to challenge the hate crime sentence enhancement on the ground that it violates the United States Constitution.

At the plea hearing, the trial judge heard sufficient evidence to establish Apprendi's guilt on counts 3, 18, and 22; the judge then confirmed that Apprendi understood the maximum sentences that could be imposed on those counts. Because the plea agreement provided that the sentence on the sole third-degree offense (count 22) would run concurrently with the other sentences, the potential sentences on the two second-degree counts were critical. If the judge found no basis for the biased purpose enhancement, the maximum consecutive sentences on those counts would amount to 20 years in aggregate; if, however, the judge enhanced the sentence on count 18, the maximum on that count alone would be 20 years and the maximum for the two counts in aggregate would be 30 years, with a 15-year period of parole ineligibility.

After the trial judge accepted the three guilty pleas, the prosecutor filed a formal motion for an extended term. The trial judge thereafter held an evidentiary hearing on the issue of Apprendi's "purpose" for the shooting on December 22. Apprendi adduced evidence from a psychologist and from seven character witnesses who testified that he did not [*471] have a reputation for racial bias. He also took the stand himself, explaining that the incident was an unintended consequence of overindulgence in alcohol, denying that he was in any way biased against African-Americans, and denying that his statement to the police had been accurately described. The judge, however, found the police officer's testimony credible, and concluded that the evidence supported a finding "that the crime was motivated by racial bias." App. to Pet. for Cert. 143a. Having found "by a preponderance of the evidence" that Apprendi's actions were taken "with a purpose to intimidate" as provided by the statute, *id.* at 138a, 139a, 144a, the trial judge held that the hate crime enhancement applied. Rejecting Apprendi's constitutional challenge to the statute, the judge sentenced him to a 12-year term of imprisonment on count 18, and to shorter concurrent sentences on the other two counts.

Apprendi appealed, arguing, *inter alia*, that the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt, *In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).* Over dissent, the Appellate Division of the Superior Court of New Jersey upheld the enhanced sentence. [**2353] *304 N.J. Super. 147, 698 A.2d 1265 (1997).* Relying on our decision in *McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986),* the appeals court found that the state legislature decided to make the hate crime enhancement a [***444] "sentencing factor," rather than an element of an underlying offense -- and that decision was within the State's established power to define the elements of its crimes. The hate crime statute did not create a presumption of guilt, the court determined, and did not appear "tailored to permit the . . . finding to be a tail which wags the dog of the substantive offense." *304 N.J. Super. at 154, 698 A.2d at 1269* (quoting *McMillan, 477 U.S. at 88).* Characterizing the required finding as one of "motive," the court described it as a traditional "sentencing factor," one not considered an "essential [*472] element" of any crime unless the legislature so provides. *304 N.J. Super. at 158, 698 A.2d at 1270.* While recognizing that the hate crime law did expose defendants to "greater and additional punishment," *304 N.J. Super. at 156, 698 A.2d at 1269* (quoting *McMillan, 477 U.S. at 88),* the court held that that "one factor standing alone" was not sufficient to render the statute unconstitutional, *Ibid.*

A divided New Jersey Supreme Court affirmed. *159 N.J. 7, 731 A.2d 485 (1999).* The court began by explaining that while due process only requires the State to prove the "elements" of an offense beyond a reasonable doubt, the mere fact that a state legislature has placed a criminal component "within the sentencing provisions" of the criminal code "does not mean that the

finding of a biased purpose to intimidate is not an essential element of the offense." *Id. at 20, 731 A.2d at 492.* "Were that the case," the court continued, "the Legislature could just as easily allow judges, not juries, to determine if a kidnapping victim has been released unharmed." *Ibid.* (citing state precedent requiring such a finding to be submitted to a jury and proved beyond a reasonable doubt). Neither could the constitutional question be settled simply by defining the hate crime statute's "purpose to intimidate" as "motive" and thereby excluding the provision from any traditional conception of an "element" of a crime. Even if one could characterize the language this way -- and the court doubted that such a characterization was accurate -- proof of motive did not ordinarily "increase the penal consequences to an actor." *Ibid.* Such "labels," the court concluded, would not yield an answer to Apprendi's constitutional question. *Ibid.*

While noting that we had just last year expressed serious doubt concerning the constitutionality of allowing penalty-enhancing findings to be determined by a judge by a preponderance of the evidence, *Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215* **[*473]** *(1999),* the court concluded that those doubts were not essential to our holding. Turning then, as the appeals court had, to *McMillan*, as well as to *Almendarez-Torres v. United States, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998),* the court undertook a multifactor inquiry and then held that the hate crime provision was valid. In the majority's view, the statute did not allow impermissible burden shifting, and did not "create a separate offense calling for a separate penalty." *159 N.J. at 24, 731 A.2d at 494.* Rather, "the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor." *Ibid. 731 A.2d at 494-495.* As had the appeals court, the majority recognized that the state statute was unlike that in *McMillan* inasmuch as it increased the maximum penalty to **[***445]** which a defendant could be subject. But it was not clear that this difference alone would "change the constitutional calculus," especially where, as here, "there is rarely any doubt whether the defendants committed the crimes with the purpose of intimidating the victim on the basis of race or ethnicity." *159 N.J.* **[**2354]** *at 24-25, 731 A.2d at 495.* Moreover, in light of concerns "idiosyncratic" to hate crime statutes drawn carefully to avoid "punishing thought itself," the enhancement served as an appropriate balance between those concerns and the State's compelling interest in vindicating the right "to be free of invidious discrimination." *159 N.J. at 25-26, 731 A.2d at 495.*

The dissent rejected this conclusion, believing instead that the case turned on two critical characteristics: (1) "a defendant's mental state in committing the subject offense . . . necessarily involves a finding so integral to the charged offense that it must be characterized as an element thereof"; and (2) "the significantly increased sentencing range triggered by . . . the finding of a purpose to intimidate" means that the purpose "must be treated as a material element [that] must be found by a jury beyond a reasonable doubt." **[*474]** *Id. at 30, 731 A.2d at 498.* In the dissent's view, the facts increasing sentences in both *Almendarez-Torres* (recidivism) and *Jones* (serious bodily injury) were quite distinct from New Jersey's required finding of purpose here; the latter finding turns directly on the conduct of the defendant during the crime and defines a level of culpability necessary to form the hate crime offense. While acknowledging "analytical tensions" in this Court's post-*Winship* jurisprudence, the dissenters concluded that "there can be little doubt that the sentencing factor applied to this defendant -- the purpose to intimidate a victim because of race -- must fairly be regarded as an element of the crime requiring inclusion in the indictment and proof beyond a reasonable doubt." *159 N.J. at 51, 731 A.2d at 512.*

We granted certiorari, *528 U.S. 1018, 120 S. Ct. 525, 145 L. Ed. 2d 407 (1999),* and now reverse.

II

II **[***LEdHR1B]** [1B] **[***LEdHR2B]** [2B]It is appropriate to begin by explaining why certain aspects of the case are not relevant to the narrow issue that we must resolve. First, the State has argued that even without the trial judge's finding of racial bias, the judge could have imposed consecutive sentences on counts 3 and 18 that would have produced the 12-year term of imprisonment that Apprendi received; Apprendi's actual sentence was thus within the range authorized by statute for the three offenses to which he pleaded guilty. Brief for Respondent 4. The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count. The finding is legally significant because it increased -- indeed, it doubled -- the maximum range within which the judge could exercise his discretion, converting what otherwise was a maximum 10-year sentence on that count into a minimum sentence. The sentences on counts 3 and 22 have no more relevance to our disposition than the dismissal of the remaining 18 counts. **[*475]**

Second, although the constitutionality of basing an enhanced sentence on racial bias was argued in the New Jersey courts, that issue was not **[***446]** raised here. n1 The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is. The strength of the state interests that are

served by the hate crime legislation has no more bearing on this procedural question than the strength of the interests served by other provisions of the criminal code.

n1 *We have previously rejected a First Amendment challenge to an enhanced sentence based on a jury finding that the defendant had intentionally selected his victim because of the victim's race. Wisconsin v. Mitchell, 508 U.S. 476, 480, 124 L. Ed. 2d 436, 113 S. Ct. 2194 (1993).*

Third, we reject the suggestion by the State Supreme Court that "there is rarely any doubt" concerning the existence of the biased purpose that will support an enhanced sentence, *159 N.J. at 25, 731 A.2d* **[**2355]** *at 495.* In this very case, that issue was the subject of the full evidentiary hearing we described. We assume that both the purpose of the offender, and even the known identity of the victim, will sometimes be hotly disputed, and that the outcome may well depend in some cases on the standard of proof and the identity of the factfinder.

Fourth, because there is no ambiguity in New Jersey's statutory scheme, this case does not raise any question concerning the State's power to manipulate the prosecutor's burden of proof by, for example, relying on a presumption rather than evidence to establish an element of an offense, cf. *Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975); Sandstrom v. Montana, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979),* or by placing the affirmative defense label on "at least some elements" of traditional crimes, *Patterson v. New York, 432 U.S. 197, 210, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).* The prosecutor did not invoke any presumption to buttress the evidence of racial bias and did not claim that Apprendi had the burden of disproving an improper motive. The question whether Apprendi had a constitutional right to **[*476]** have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.

Our answer to that question was foreshadowed by our opinion in *Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999),* construing a federal statute. [HN4] We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *526 U.S. at 243, n. 6.* The Fourteenth Amendment commands the same answer in this case involving a state statute.

III

[*LEdHR2C]** [2C]In his 1881 lecture on the criminal law, Oliver Wendell Holmes, Jr., observed: "The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed." n2 New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural **[***447]** safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

n2 O. Holmes, The Common Law 40 (M. Howe ed. 1963).

[*LEdHR1C]** [1C] **[***LEdHR3A]** [3A] [HN5] At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial **[*477]** jury," Amdt. 6. n3 Taken **[**2356]** together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin, 515 U.S. 506, 510, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995);* see also *Sullivan v. Louisiana, 508 U.S. 275, 278, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993); Winship, 397 U.S. at 364* ([HN6] "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

[*LEdHR1D]** [1D]

n3 Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. He relies entirely on the fact that the "due process of law" that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to a trial by jury, *Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968),* and

the right to have every element of the offense proved beyond a reasonable doubt, *In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).* That Amendment has not, however, been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" that was implicated in our recent decision in *Almendarez-Torres v. United States, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998).* We thus do not address the indictment question separately today.

[*LEdHR3B]** [3B]As we have, unanimously, explained, *Gaudin, 515 U.S. at 510-511,* the historical foundation for our recognition of these principles extends down centuries into the common law. "To guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter Blackstone) (emphasis added). See also *Duncan v. Louisiana, 391 U.S. 145, 151-154, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968).* **[*478]**

Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. "The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.' C. McCormick, Evidence § 321, pp. 681-682 (1954); see also 9 J. Wigmore, Evidence § 2497 (3d ed. 1940)." *Winship, 397 U.S. at 361.* We went on to explain that the reliance on the "reasonable doubt" standard among common-law jurisdictions "'reflects **[***448]** a profound judgment about the way in which law should be enforced and justice administered.'" *397 U.S. at 361-362* (quoting *Duncan, 391 U.S. at 155).*

Any possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court n4 as it existed during the years surrounding our Nation's founding. As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly . . . and *that there may be no doubt as to the judgment which should be given*, if the defendant be convicted." J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) (emphasis added). The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime. See 4 Blackstone **[*479]** 369-370 (after verdict, and barring a defect in the indictment, pardon or benefit of clergy, "the court *must pronounce that judgment, which the law hath annexed to the crime*" (emphasis added)).

n4 "After trial and conviction are past," the defendant is submitted to "judgment" by the court, 4 Blackstone 368 -- the stage approximating in modern terms the imposition of sentence.

[2357]**

Thus, with respect to the criminal law of felonious conduct, "the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence (unless he thought in the circumstances that the sentence was so inappropriate that he should invoke the pardon process to commute it)." Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700-1900, pp. 36-37 (A. Schioppa ed. 1987). n5 As Blackstone, among many others, has made clear, n6 "the judgment, **[*480]** though pronounced or awarded by the judges, is not their determination **[***449]** or sentence, but the determination and sentence of the law." 3 Blackstone 396 (emphasis deleted). n7

n5 As we suggested in *Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999),* juries devised extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant. *526 U.S. at 245* ("This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone

described as 'pious perjury' on the jurors' part. 4 Blackstone 238-239").

n6 As the principal dissent would chide us for this single citation to Blackstone's third volume, rather than his fourth, *post*, at 3 (dissenting opinion), we suggest that Blackstone himself directs us to it for these purposes. See 4 Blackstone 343 ("The antiquity and excellence of this [jury] trial, for the settling of civil property, has before been explained at large." See *id.* at 379 ("Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And, if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases!") 4 *id.* at 343 ("And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property"); 4 *id.* at 344 ("What was said of juries in general, and the trial thereby, in *civil* cases, will greatly shorten our present remarks, with regard to the trial of *criminal* suits; indictments, informations, and appeals").

n7 The common law of punishment for misdemeanors -- those "smaller faults, and omissions of less consequence," 4 Blackstone 5 -- was, as we noted in *Jones, 526 U.S. at 244*, substantially more dependent upon judicial discretion. Subject to the limitations that the punishment not "touch life or limb," that it be proportionate to the offense, and, by the 17th century, that it not be "cruel or unusual," judges most commonly imposed discretionary "sentences" of fines or whippings upon misdemeanant offenders. J. Baker, Introduction to English Legal History 584 (3d ed. 1990). Actual sentences of imprisonment for such offenses, however, were rare at common law until the late 18th century, *ibid.*, for "the idea of prison as a punishment would have seemed an absurd expense," Baker, Criminal Courts and Procedure at Common Law 1550-1800, in Crime in England 1550-1800, p. 43 (J. Cockburn ed. 1977).

This practice at common law held true when indictments were issued pursuant to statute. Just as the circumstances of the crime and the intent of the defendant at the time of commission were often essential elements to be alleged in the indictment, so too were the circumstances mandating a particular punishment. "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown *170]." Archbold, Pleading and Evidence in Criminal Cases, at 51. If, then, "upon an indictment under the statute, the prosecutor proves the felony to have been committed, but fail in proving it to have been committed under **[**2358]** the circumstances specified in the statute, the **[*481]** defendant shall be convicted of the common-law felony only." *Id.* at 188. n8

n8 To the extent the principal dissent appears to take issue with our reliance on Archbold (among others) as an authoritative source on the common law of the relevant period, *post*, at 3-4, we simply note that Archbold has been cited by numerous opinions of this Court for that very purpose, his Criminal Pleading treatise being generally viewed as "an essential reference book for every criminal lawyer working in the Crown Court." Biographical Dictionary of the Common Law 13 (A. Simpson ed. 1984); see also Holdsworth, The Literature of the Common Law, in 13 A History of English Law 464-465 (A. Goodhart & H. Hanbury eds. 1952).

[*LEdHR4A]** [4A]We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case. See, *e.g.*, *Williams v. New York, 337 U.S. 241, 246, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949)* ("Both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed *within limits fixed by law*" (emphasis added)). As in *Williams*, our periodic recognition of judges' broad discretion **[***450]** in sentencing -- since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range, Note, The Admissibility of Character Evidence in Determining Sentence, *9 U. Chi. L. Rev. 715 (1942)* --

has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature. See, *e.g.*, *United States v. Tucker, 404 U.S. 443, 447, 30 L. Ed. 2d 592, 92 S. Ct. 589 (1972)* (agreeing that "the Government is also on solid ground in asserting that a **[*482]** sentence imposed by a federal district judge, *if within statutory limits*, is generally not subject to review" (emphasis added)); *Williams, 337 U.S. at 246, 247* (explaining that, in contrast to the guilt stage of trial, the judge's task in sentencing is to determine, "within fixed statutory or constitutional limits[,] the type and extent of punishment after the issue of guilt" has been resolved). n9

n9 See also 1 J. Bishop, Criminal Law § § 933-934(1) (9th ed. 1923) ("With us legislation ordinarily fixes the penalties for the common law offences equally with the statutory ones . . . . Under the common-law procedure, the court determines in each case what *within the limits of the law* shall be the punishment, -- the question being one of discre-tion") (emphasis added); *id.* § 948 ("If the law has given the court a discretion as to the punishment, it will look in pronouncing sentence into any evidence proper to influence a judicious magistrate to make it heavier or lighter, yet not to exceed the limits fixed for what of crime is within the allegation and the verdict. Or this sort of evidence may be placed before the jury at the trial, if it has the power to assess the punishment. But in such a case the aggravating matter must not be of a crime separate from the one charged in the indictment, -- a rule not applicable where a delinquent offence under an habitual criminal act is involved") (footnotes omitted).

[*LEdHR4B]** [4B]

The principal dissent's discussion of *Williams*, *post*, at 24-26, fails to acknowledge the significance of the Court's caveat that judges' discretion is constrained by the "limits fixed by law." Nothing in *Williams* implies that a judge may impose a more severe sentence than the maximum authorized by the facts found by the jury. Indeed, the commentators cited in the dissent recognize precisely this same limitation. See *post*, at 23 (quoting K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998) ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion . . .,permitting the sentencing judge to impose any term of imprisonment and any fine *up to the statutory maximum*" (emphasis added)); Lynch, Towards A Model Penal Code, Second (Federal?), *2 Buff. Crim. L. Rev. 297, 320 (1998)* (noting that judges in discretionary sentencing took account of facts relevant to a particular offense "within the spectrum of conduct covered by the statute of conviction")).

[2359]** **[***LEdHR2D]** [2D]The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from **[*483]** the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. n10

[*LEdHR2E]** [2E]

n10 In support of its novel view that this Court has "long recognized" that not all facts affecting punishment need go to the jury, *post*, at 1-2, the principal dissent cites three cases decided within the past quarter century; and each of these is plainly distinguishable. Rather than offer any historical account of its own that would support the notion of a "sentencing factor" legally increasing punishment beyond the statutory maximum -- and JUSTICE THOMAS' concurring opinion in this case makes clear that such an exercise would be futile -- the dissent proceeds by mischaracterizing our account. The evidence we describe that punishment was, by law, tied to the offense (enabling the defendant to discern, barring pardon or clergy, his punishment from the face of the indictment), and the evidence that American judges have exercised sentencing discretion within a legally prescribed range (enabling the defendant to discern from the statute of indictment what maximum punishment conviction under that statute could bring), point to a single, consistent conclusion: The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition "elements" of a separate legal offense.

[*LEdHR3C]** [3C] **[***LEdHR5A]** [5A]We do not suggest that trial practices cannot change in the course **[***451]** of centuries and still remain true to the principles that emerged from the Framers' fears "that the

jury right could be lost not only by gross denial, but by erosion." *Jones, 526 U.S. at 247-248.* n11 But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable **[*484]** doubt. As we made clear in *Winship*, the "reasonable doubt" requirement "has a vital role in our criminal procedure for cogent reasons." *397 U.S. at 363.* Prosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction." *Ibid.* We thus require this, among other, procedural protections in order to "provide concrete substance for the presumption of innocence," and to reduce the risk of imposing such deprivations erroneously. *Ibid.* If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not -- at the moment the State is put to proof of those circumstances -- be deprived of protections that have, until that point, unquestionably attached.

n11 As we stated in *Jones*, "One contributor to the ratification debates, for example, commenting on the jury trial guarantee in Art. III, § 2, echoed Blackstone in warning of the need 'to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY.' A [New Hampshire] Farmer, No. 3, June 6, 1788, quoted in The Complete Bill of Rights 477 (N. Cogan ed. 1997)." *526 U.S. at 248.*

[*LEdHR1E]** [1E] **[***LEdHR3D]** [3D]Since *Winship*, we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, "to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Almendarez-Torres, 523 U.S. at 251* (SCALIA, J., dissenting). This was a primary lesson of *Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975)*, in which we invalidated a Maine statute that presumed that a defendant who acted with an intent **[**2360]** to kill possessed the "malice aforethought" necessary to constitute the State's murder offense (and therefore, was subject to that crime's associated punishment of life imprisonment). The statute placed the burden on the defendant of proving, in rebutting the statutory presumption, that he acted with a lesser degree of culpability, such as in the heat of passion, to win a reduction in the offense from murder to manslaughter (and thus a reduction of the maximum punishment of 20 years).

The State had posited in *Mullaney* that requiring a defendant to prove heat-of-passion intent to overcome a presumption **[*485]** of murderous intent did not implicate *Winship* protections because, upon conviction of either offense, **[***452]** the defendant would lose his liberty and face societal stigma just the same. Rejecting this argument, we acknowledged that criminal law "is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability" assessed. *421 U.S. at 697-698.* Because the "*consequences*" of a guilty verdict for murder and for manslaughter differed substantially, we dismissed the possibility that a State could circumvent the protections of *Winship* merely by "redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *421 U.S. at 698.* n12

N12 Contrary to the principal dissent's suggestion, *post*, at 8-10, *Patterson v. New York, 432 U.S. 197, 198, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977)*, posed no direct challenge to this aspect of *Mullaney*. In upholding a New York law allowing defendants to raise and prove extreme emotional distress as an affirmative defense to murder, *Patterson* made clear that the state law still required the State to prove every element of that State's offense of murder and its accompanying punishment. "No further facts are either presumed or inferred in order to constitute the crime." *432 U.S. at 205-206.* New York, unlike Maine, had not made malice aforethought, or any described *mens rea*, part of its statutory definition of second-degree murder; one could tell from the face of the statute that if one intended to cause the death of another person and did cause that death, one could be subject to sentence for a second-degree offense. *432 U.S. at 198.* Responding to the argument that our view could be seen "to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes," the Court made clear in the very next breath that there were "obviously constitutional limits beyond which the States may not go in this regard." *432 U.S. at 210.*

IV

It was in *McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986),* that this Court, for the first time, coined the term "sentencing factor" to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge. That case involved a challenge to the State's Mandatory **[*486]** Minimum Sentencing Act, *42 Pa. Cons. Stat. § 9712* (1982). According to its provisions, anyone convicted of certain felonies would be subject to a mandatory minimum penalty of five years imprisonment if the judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" in the course of committing one of the specified felonies. *477 U.S. at 81-82.* Articulating for the first time, and then applying, a multifactor set of criteria for determining whether the *Winship* protections applied to bar such a system, we concluded that the Pennsylvania statute did not run afoul of our previous admonitions against relieving the State of its burden of proving guilt, or tailoring the mere form of a criminal statute solely to avoid *Winship*'s strictures. *477 U.S. at 86-88.*

[*LEdHR3E]** [3E]We did not, however, there budge from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, *477 U.S. at 85-88,* and (2) that a state scheme that keeps from the jury facts that "expose [defendants] to greater or additional punishment," *477 U.S. at 88,* may raise serious constitutional concern. As we explained: **[**2361]**

"Section 9712 neither alters the maximum penalty for the crime **[***453]** committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. . . . The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense. Petitioners' claim that visible possession under the Pennsylvania statute is 'really' an element of the offenses for which they are being punished -- that Pennsylvania has in effect defined a new set of upgraded felonies -- would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment, **[*487]** cf. *18 U.S.C. § 2113*(d) (providing separate and greater punishment for bank robberies accomplished through 'use of a dangerous weapon or device'), but it does not." *477 U.S. at 87-88.* n13

n13 The principal dissent accuses us of today "overruling *McMillan.*" *Post,* at 11. We do not overrule *McMillan.* We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict -- a limitation identified in the *McMillan* opinion itself. Conscious of the likelihood that legislative decisions may have been made in reliance on *McMillan,* we reserve for another day the question whether *stare decisis* considerations preclude reconsideration of its narrower holding.

Finally, as we made plain in *Jones* last Term, *Almendarez-Torres v. United States, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998),* represents at best an exceptional departure from the historic practice that we have described. In that case, we considered a federal grand jury indictment, which charged the petitioner with "having been 'found in the United States . . . after being deported,'" in violation of *8 U.S.C. § 1326*(a) -- an offense carrying a maximum sentence of two years. *523 U.S. at 227.* Almendarez-Torres pleaded guilty to the indictment, admitting at the plea hearing that he had been deported, that he had unlawfully reentered this country, and that "the earlier deportation had taken place 'pursuant to' three earlier 'convictions' for aggravated felonies." *Ibid.* The Government then filed a presentence report indicating that Almendarez-Torres' offense fell within the bounds of § 1326(b) because, as specified in that provision, his original deportation had been subsequent to an aggravated felony conviction; accordingly, Almendarez-Torres could be subject to a sentence of up to 20 years. Almendarez-Torres objected, contending that because the indictment "had not mentioned his earlier aggravated felony convictions," he could be sentenced to no more than two years in prison. *Ibid.* **[*488]**

[*LEdHR1F]** [1F]Rejecting Almendarez-Torres' objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of *Winship* in that case. Because Almendarez-Torres had *admitted* the three earlier convictions for aggravated felonies -- all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own -- no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court. Although our conclusion in that case was based in part **[***454]** on our application of the criteria we had invoked in *McMillan,* the specific question decided concerned the sufficiency of the indictment. More important, as *Jones* made crystal clear, *526 U.S. at 248-249,* our conclusion in *Almendarez-Torres* turned heavily upon the fact that the additional sentence to which the defendant was subject was "the prior commission of a serious crime." *523 U.S. at 230;* see also *526 U.S. at 243* (explaining that "recidivism . . .

is a traditional, if not the most traditional, basis for a sentencing court's increasing **[**2362]** an offender's sentence"); *526 U.S. at 244* (emphasizing "the fact that recidivism 'does not relate to the commission of the offense . . . '"); *Jones, 526 U.S. at 249-250, n. 10* ("The majority and the dissenters in *Almendarez-Torres* disagreed over the legitimacy of the Court's decision to restrict its holding to recidivism, but both sides agreed that the Court had done just that"). Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range. n14

n14 The principal dissent's contention that our decision in *Monge v. California, 524 U.S. 721, 141 L. Ed. 2d 615, 118 S. Ct. 2246 (1998),* "demonstrates that *Almendarez-Torres* was" something other than a limited exception to the jury trial rule is both inaccurate and misleading. *Post,* at 14. *Monge* was another recidivism case in which the question presented and the bulk of the Court's analysis related to the scope of double jeopardy protections in sentencing. The dissent extracts from that decision the majority's statement that "the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence." *524 U.S. at 729.* Far from being part of "reasoning essential" to the Court's holding, *post,* at 13, that statement was in response to a dissent by JUSTICE SCALIA on an issue that the Court itself had, a few sentences earlier, insisted "was neither considered by the state courts nor discussed in petitioner's brief before this Court." *524 U.S. at 728.* Moreover, the sole citation supporting the *Monge* Court's proposition that "the Court has rejected" such a rule was none other than *Almendarez-Torres;* as we have explained, that case simply cannot bear that broad reading. Most telling of *Monge*'s distance from the issue at stake in this case is that the double jeopardy question in *Monge* arose because the State had failed to satisfy its own statutory burden of proving beyond a reasonable doubt that the defendant had committed a prior offense (and was therefore subject to an enhanced, recidivism-based sentence). *524 U.S. at 725* ("According to California law, a number of procedural safeguards surround the assessment of prior conviction allegations: Defendants may invoke the right to a jury trial . . .;the prosecution must prove the allegation beyond a reasonable doubt; and the rules of evidence apply"). The Court thus itself warned against a contrary double jeopardy rule that could "create disincentives that would diminish these important procedural protections." *524 U.S. at 734.*

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Even though it is arguable that *Almendarez-Torres* was incorrectly decided, n15 and that a logical application of our reasoning today should apply if the recidivist issue were **[*490]** contested, Apprendi does not contest **[***455]** the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

n15 In addition to the reasons set forth in JUSTICE SCALIA's dissent, *523 U.S. at 248-260,* it is noteworthy that the Court's extensive discussion of the term "sentencing factor" virtually ignored the pedigree of the pleading requirement at issue. The rule was succinctly stated by Justice Clifford in his separate opinion in *United States v. Reese, 92 U.S. 214, 232-233, 23 L. Ed. 563 (1876):* "The indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." As he explained in "speaking of that principle, Mr. Bishop says it pervades the entire system of the adjudged law of criminal procedure, as appears by all the cases; that, wherever we move in that department of our jurisprudence, we come in contact with it; and that we can no more escape from it than from the atmosphere which surrounds us. 1 Bishop, Cr. Pro., 2d ed., sect. 81; Archbold's Crim. Plead., 15th ed., 54; 1 Stark Crim. Plead., 236; 1 Am. Cr. Law, 6th rev. ed., sect. 364; *Steel v. Smith, 1 Barn. & Ald. 99.*"

[*LEdHR1G]** [1G] **[***LEdHR6A]** [6A]In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones.* [HN7] Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond **[**2363]** the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we

endorse the statement of the rule set forth in the concurring opinions in that case: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *526 U.S. at 252-253* (opinion of STEVENS, J.); see also *526 U.S. at 253* (opinion of SCALIA, J.). n16

[*LEdHR1H]** [1H]

n16 The principal dissent would reject the Court's rule as a "meaningless formalism," because it can conceive of hypothetical statutes that would comply with the rule and achieve the same result as the New Jersey statute. *Post*, at 17-20. While a State could, hypothetically, undertake to revise its entire criminal code in the manner the dissent suggests, *post*, at 18 -- extending all statutory maximum sentences to, for example, 50 years and giving judges guided discretion as to a few specially selected factors within that range -- this possibility seems remote. Among other reasons, structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged "to make its choices concerning the substantive content of its criminal laws with full awareness of the consequence, unable to mask substantive policy choices" of exposing all who are convicted to the maximum sentence it provides. *Patterson v. New York, 432 U.S. at 228-229, n. 13* (Powell, J., dissenting). So exposed, "the political check on potentially harsh legislative action is then more likely to operate." *Ibid.*

In all events, if such an extensive revision of the State's entire criminal code were enacted for the purpose the dissent suggests, or if New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not, *post*, at 20), we would be required to question whether the revision was constitutional under this Court's prior decisions. See *Patterson, 432 U.S. at 210; Mullaney v. Wilbur, 421 U.S. 684, 698-702, 44 L. Ed. 2d 508, 95 S. Ct. 1881.*

[*LEdHR6B]** [6B]

Finally, the principal dissent ignores the distinction the Court has often recognized, see, *e.g., Martin v. Ohio, 480 U.S. 228, 94 L. Ed. 2d 267, 107 S. Ct. 1098 (1987)*, between facts in aggravation of punishment and facts in mitigation. See *post*, at 19-20. If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the Judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. See *supra*, at 16-17. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

[*491]

V

[*LEdHR2F]** [2F]The New Jersey statutory **[***456]** scheme that Apprendi asks us to invalidate allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that New Jersey provides for crimes of the first degree, *N. J. Stat. Ann. § 2C:43-6(a)(1)* (West 1999), based upon the judge's finding, by a preponderance of the evidence, that the defendant's "purpose" for unlawfully possessing the weapon was "to intimidate" his victim on the basis of a particular characteristic the victim possessed. In light of the constitutional rule explained **[*492]** above, and all of the cases supporting it, this practice cannot stand.

New Jersey's defense of its hate crime enhancement statute has three primary components: (1) the required finding of biased purpose is not an "element" of a distinct hate crime offense, but rather the traditional "sentencing factor" of motive; (2) *McMillan* holds that the legislature can **[**2364]** authorize a judge to find a traditional sentencing factor on the basis of a preponderance of the evidence; and (3) *Almendarez-Torres* extended *McMillan's* holding to encompass factors that authorize a judge to impose a sentence beyond the maximum provided by the substantive statute under which a defendant is charged. None of these persuades us that the constitutional rule that emerges from our history and case law should incorporate an exception for this New Jersey statute.

[*LEdHR2G]** [2G]New Jersey's first point is nothing more than a disagreement with the rule we apply today. Beyond this, we do not see how the argument can succeed on its own terms. The state high court evinced substantial skepticism at the suggestion that the hate crime statute's "purpose to intimidate" was simply an inquiry into "motive." We share that skepticism. The text of the statute requires the factfinder to determine whether the defendant possessed, at the time he committed the subject act, a "purpose to intimidate" on account of, *inter alia*, race. By its very terms, this statute mandates an examination of the defendant's state of mind -- a concept known well to the criminal law as the defendant's *mens rea*. n17 It makes no difference in identifying the nature **[*493]** of this finding that Apprendi was also required, in order to receive the sentence he did for weapons possession, to have possessed the weapon with a "purpose to use [the weapon] unlawfully against the person or property of another," § 2C:39-4(d). A second *mens rea* requirement **[***457]** hardly defeats the reality that the enhancement statute imposes of its own force an intent requirement necessary for the imposition of sentence. On the contrary, the fact that the language and structure of the "purpose to use" criminal offense is identical in relevant respects to the language and structure of the "purpose to intimidate" provision demonstrates to us that it is precisely a particular criminal *mens rea* that the hate crime enhancement statute seeks to target. The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element." n18

n17 Among the most common definitions of *mens rea* is "criminal intent." Black's Law Dictionary 1137 (rev. 4th ed. 1968). That dictionary unsurprisingly defines "purpose" as synonymous with intent, *id.* at 1400, and "intent" as, among other things, "a state of mind," *id.* at 947. But we need not venture beyond New Jersey's own criminal code for a definition of purpose that makes it central to the description of a criminal offense. [HN8] As the dissenting judge on the state appeals court pointed out, according to the New Jersey Criminal Code, "[a] person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result." *N. J. Stat. Ann. § 2C:2-2(b)(1)* (West 1999). The hate crime statute's application to those who act "with a *purpose to intimidate* because of" certain status-based characteristics places it squarely within the inquiry whether it was a defendant's "conscious object" to intimidate for that reason.

[*LEdHR2H]** [2H]

n18 Whatever the effect of the State Supreme Court's comment that the law here targets "motive," *159 N.J. 7, 20, 731 A.2d 485, 492 (1999)* -- and it is highly doubtful that one could characterize that comment as a "binding" interpretation of the state statute, see *Wisconsin v. Mitchell, 508 U.S. at 483-484* (declining to be bound by state court's characterization of state law's "operative effect"), even if the court had not immediately thereafter called into direct question its "ability to view this finding as merely a search for motive," *159 N.J. at 21, 731 A.2d at 492* -- a State cannot through mere characterization change the nature of the conduct actually targeted. It is as clear as day that this hate crime law defines a particular kind of prohibited *intent*, and a particular intent is more often than not the *sine qua non* of a violation of a criminal law.

When the principal dissent at long last confronts the actual statute at issue in this case in the final few pages of its opinion, it offers in response to this interpretation only that our reading is contrary to "settled precedent" in *Mitchell. Post,* at 31. Setting aside the fact that Wisconsin's hate crime statute was, in text and substance, different from New Jersey's, *Mitchell* did not even begin to consider whether the Wisconsin hate crime requirement was an offense "element" or not; it did not have to -- the required finding under the Wisconsin statute was made by the jury.

[*494] **[**2365]** **[***LEdHR2I]** [2I] **[***LEdHR4C]** [4C]The foregoing notwithstanding, however, the New Jersey Supreme Court correctly recognized that it does not matter whether the required finding is characterized as one of intent or of motive, because "labels do not afford an acceptable answer." *159 N.J. at 20, 731 A.2d at 492.* That point applies as well to the constitutionally novel and elusive distinction between "elements" and "sentencing factors." *McMillan, 477 U.S. at 86* (noting that the sentencing factor -- visible possession of a firearm -- "might well have been included as an element of the enumerated offenses"). Despite what appears to us the clear "elemental" nature of the factor here, the relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict? n19

[*LEdHR4D]** [4D]

n19 This is not to suggest that the term "sentencing factor" is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense. See *post*, at 5 (THOMAS, J., concurring) (reviewing the relevant authorities).

[*LEdHR5B]** [5B] **[***LEdHR2J]** [2J]As the New Jersey Supreme Court itself understood in rejecting the argument that the required "motive" finding was simply a "traditional" sentencing factor, proof of motive did not ordinarily "increase the penal consequences to an actor." *159 N.J. at 20, 731 A.2d at 492.* Indeed, the effect of New Jersey's sentencing "enhancement" here is unquestionably to turn a second-degree offense into a first- degree offense, under the State's own criminal code. The law **[***458]** thus runs directly into our warning in *Mullaney* that *Winship* is **[*495]** concerned as much with the category of substantive offense as "with the degree of criminal culpability" assessed. *421 U.S. at 698.* This concern flows not only from the historical pedigree of the jury and burden rights, but also from the powerful interests those rights serve. The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment.

The preceding discussion should make clear why the State's reliance on *McMillan* is likewise misplaced. The differential in sentence between what Apprendi would have received without the finding of biased purpose and what he could receive with it is not, it is true, as extreme as the difference between a small fine and mandatory life imprisonment. *Mullaney, 421 U.S. at 700.* But it can hardly be said that the potential doubling of one's sentence -- from 10 years to 20 -- has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance. When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as "a tail which wags the dog of the substantive offense." *McMillan, 477 U.S. at 88.*

New Jersey would also point to the fact that the State did not, in placing the required biased purpose finding in a sentencing enhancement provision, create a "separate offense calling for a separate penalty." *Ibid.* As for this, we agree wholeheartedly with the New Jersey Supreme Court that merely because the state legislature placed its hate crime sentence "enhancer" "within the sentencing provisions" of the criminal code "does not mean that the finding of a biased purpose to intimidate is not an essential element of **[**2366]** the offense." *159 N.J. at 20, 731 A.2d at 492.* Indeed, **[*496]** the fact that New Jersey, along with numerous other States, has also made precisely the same conduct the subject of an independent substantive offense makes it clear that the mere presence of this "enhancement" in a sentencing statute does not define its character. n20

n20 Including New Jersey, *N. J. Stat. Ann. § 2C:33-4* (West Supp. 2000) ("A person commits a crime of the fourth degree if in committing an offense [of harassment] under this section, he acted with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation or ethnicity"), 26 States currently have laws making certain acts of racial or other bias freestanding violations of the criminal law, see generally F. Lawrence, Punishing Hate: Bias Crimes Under American Law 178-189 (1999) (listing current state hate crime laws).

New Jersey's reliance on *Almendarez-Torres* is also unavailing. The reasons supporting an exception from the general rule for the statute construed in that case do not apply to the New Jersey statute. Whereas recidivism "does not relate to the commission of the offense" itself, *523 U.S. at 230, 244,* New Jersey's biased purpose inquiry goes precisely to what happened in the "commission of the offense." Moreover, there is a vast difference between accepting the **[***459]** validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.

Walton v. Arizona, 497 U.S. 639, 647-649, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990); 497 U.S. at 709-714 (STEVENS, J., dissenting). For reasons we have explained, the capital cases are not controlling: **[*497]**

"Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed . . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge." *Almendarez-Torres, 523 U.S. at 257, n. 2* (SCALIA, J., dissenting) (emphasis deleted).

See also *Jones, 526 U.S. at 250-251; post*, at 25-26 (THOMAS, J., concurring). n21

[*LEdHR2K]** [2K]

n21 The principal dissent, in addition, treats us to a lengthy disquisition on the benefits of determinate sentencing schemes, and the effect of today's decision on the federal Sentencing Guidelines. *Post*, at 23-30. The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held. See, *e.g., Edwards v. United States, 523 U.S. 511, 515, 140 L. Ed. 2d 703, 118 S. Ct. 1475 (1998)* (opinion of BREYER, J., for a unanimous court) (noting that "of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. *$[United States Sentencing Guidelines Manual] § 5G1.1.*").

* * *

The New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system. Accordingly, the judgment of the **[**2367]** Supreme Court of New Jersey is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CONCURBY: SCALIA; THOMAS

CONCUR:

[*498] JUSTICE SCALIA, concurring.

I feel the need to say a few words in response to JUSTICE BREYER's dissent. It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State -- and an increasingly bureaucratic **[***460]** part of it, at that.) The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

As for fairness, which JUSTICE BREYER believes "in modern times," *post*, at 1, the jury cannot provide: I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years -- and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted governor if his sentence is commuted). Will there be disparities? Of course. But the criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens.*

In JUSTICE BREYER's bureaucratic realm of perfect equity, by contrast, the facts that determine the length of sentence to which the defendant is exposed will be determined to exist (on a more-likely-than-not basis) by a single employee of the State. It is certainly arguable (JUSTICE BREYER argues it) that this sacrifice of prior protections is worth it. But it is not arguable that, just because one thinks it is a better system, it must be, or is even more likely to be, the system envisioned by a Constitution that guarantees trial by jury. What ultimately demolishes the case for the dissenters **[*499]** is that they are unable to say what the right to trial by jury *does* guarantee if, as they assert, it does not guarantee -- what it has been assumed to guarantee throughout our history -- the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.

JUSTICE BREYER proceeds on the erroneous and all-too-common assumption that the Constitution means

what we think it ought to mean. It does not; it means what it says. And the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury" has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins as to Parts I and II, concurring.

I join the opinion of the Court in full. I write separately to explain my view that the Constitution requires a broader rule than the Court adopts.

I

This case turns on the seemingly simple question of what constitutes a "crime." Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an **[**2368]** impartial jury of the State and district wherein the crime shall have been committed." Amdts. **[***461]** 5 and 6. See also Art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury"). With the exception of the Grand Jury Clause, see *Hurtado v. California, 110 U.S. 516, 538, 28 L. Ed. 232, 4 S. Ct. 111 (1884)*, the Court has held that these protections apply in state prosecutions, *Herring v. New York, 422 U.S. 853, 857, 45 L. Ed. 2d 593, 95 S. Ct. 2550, and n. 7 (1975)*. Further, the Court has held that due process requires that the jury find **[*500]** beyond a reasonable doubt every fact necessary to constitute the crime. *In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)*.

All of these constitutional protections turn on determining which facts constitute the "crime" -- that is, which facts are the "elements" or "ingredients" of a crime. In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under *Winship*, proved beyond a reasonable doubt). See J. Story, Commentaries on the Constitution § § 928-929, pp. 660-662, § 934, p. 664 (1833); J. Archbold, Pleading and Evidence in Criminal Cases *41, *99-*100 (5th Am. ed. 1846) (hereinafter Archbold). n1

n1 JUSTICE O'CONNOR mischaracterizes my argument. See *post*, at 5-6 (dissenting opinion). Of course the Fifth and Sixth Amendments did not codify common law procedure wholesale. Rather, and as Story notes, they codified a few particular common-law procedural rights. As I have explained, the scope of those rights turns on what constitutes a "crime." In answering that question, it is entirely proper to look to the common law.

Thus, it is critical to know which facts are elements. This question became more complicated following the Court's decision in *McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986)*, which spawned a special sort of fact known as a sentencing enhancement. See *ante*, at 11, 19, 28. Such a fact increases a defendant's punishment but is not subject to the constitutional protections to which elements are subject. JUSTICE O'CONNOR's dissent, in agreement with *McMillan* and *Almendarez-Torres v. United States, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998)*, takes the view that a legislature is free (within unspecified outer limits) to decree which facts are elements and which are sentencing enhancements. *Post*, at 2.

Sentencing enhancements may be new creatures, but the question that they create for courts is not. Courts have **[*501]** long had to consider which facts are elements in order to determine the sufficiency of an accusation (usually an indictment). The answer that courts have provided regarding the accusation tells us what an element is, and it is then a simple matter to apply that answer to whatever constitutional right may be at issue in a case -- here, *Winship* and the right to trial by jury. A long line of essentially uniform authority addressing accusations, and stretching from the earliest reported cases after the founding until well into the 20th century, establishes that the original understanding of which facts are elements was even broader than the rule that the Court adopts today.

This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a **[***462]** fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact -- of whatever sort, including the fact of a prior conviction -- the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand **[**2369]** larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact -- such as a fine that is proportional to the value of stolen goods --

that fact is also an element. No multi-factor parsing of statutes, of the sort that we have attempted since *McMillan*, is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

II

A

Cases from the founding to roughly the end of the Civil War establish the rule that I have described, applying it to **[*502]** all sorts of facts, including recidivism. As legislatures varied common-law crimes and created new crimes, American courts, particularly from the 1840's on, readily applied to these new laws the common-law understanding that a fact that is by law the basis for imposing or increasing punishment is an element. n2

n2 It is strange that JUSTICE O'CONNOR faults me for beginning my analysis with cases primarily from the 1840's, rather from the time of the founding. See *post*, at 5-6 (dissenting opinion). As the Court explains, *ante*, at 11-13, and as she concedes, *post*, at 3 (O'CONNOR, J., dissenting), the very idea of a sentencing enhancement was foreign to the common law of the time of the founding. JUSTICE O'CONNOR therefore, and understandably, does not contend that any history from the founding supports her position. As far as I have been able to tell, the argument that a fact that was by law the basis for imposing or increasing punishment might not be an element did not seriously arise (at least not in reported cases) until the 1840's. As I explain below, from that time on -- for at least a century -- essentially all authority rejected that argument, and much of it did so in reliance upon the common law. I find this evidence more than sufficient.

Massachusetts, which produced the leading cases in the antebellum years, applied this rule as early as 1804, in *Commonwealth* v. *Smith*, 1 Mass. *245, and foreshadowed the fuller discussion that was to come. Smith was indicted for and found guilty of larceny, but the indictment failed to allege the value of all of the stolen goods. Massachusetts had abolished the common-law distinction between grand and simple larceny, replacing it with a single offense of larceny whose punishment (triple damages) was based on the value of the stolen goods. The prosecutor relied on this abolition of the traditional distinction to justify the indictment's omissions. The court, however, held that it could not sentence the defendant for the stolen goods whose value was not set out in the indictment. *Id.* at *246-*247.

The understanding implicit in *Smith* was explained in *Hope v. Commonwealth, 50 Mass. 134 (1845)*. Hope was indicted for and convicted of larceny. The larceny statute at **[*503]** issue retained the single-offense structure of the statute addressed in *Smith*, and established two levels of sentencing based on whether the value of the stolen property exceeded $ 100. The statute was structured similarly to the statutes that we addressed **[***463]** in *Jones v. United States, 526 U.S. 227, 230, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)*, and, even more, *Castillo* v. *United States*, *ante*, at __ (slip op., at 2), in that it first set out the core crime and then, in subsequent clauses, set out the ranges of punishments. n3 Further, the statute **[**2370]** opened by referring simply to "the offence of larceny," suggesting, at least from the perspective of our post-*McMillan* cases, that larceny was the crime whereas the value of the stolen property was merely a fact for sentencing. But the matter was quite simple for the Massachusetts high court. Value was an element because punishment varied with value:

"Our statutes, it will be remembered, prescribe the punishment for larceny, with reference to the value of the property stolen; and for this reason, as well as because it is in conformity with long established practice, the court are of opinion that the value of the property alleged to be stolen must be set forth in the indictment." *50 Mass. at 137.*

Two years after *Hope*, the court elaborated on this rule in a case involving burglary, stating that if "certain acts are, by force of the statutes, made punishable with greater severity, when accompanied with aggravating circumstances," then **[*504]** the statute has "created two grades of crime." *Larned v. Commonwealth, 53 Mass. 240, 242 (1847)*. See also *id. at 241* ("There is a gradation of offences of the same species" where the statute sets out "various degrees of punishment").

n3 The Massachusetts statute provided: "Every person who shall commit the offence of larceny, by stealing of the property of another any money, goods or chattels [or other sort of property], if the property stolen shall exceed the value of one hundred dollars, shall be punished by imprisonment in the state prison, not more than five years, or by fine not exceeding six hundred dollars, and imprisonment in the county jail, not more than two years; and if the property stolen shall not exceed the value of one hundred dollars, he shall be punished by imprisonment in the state prison or the county jail, not more than

one year, or by fine not exceeding three hundred dollars." Mass. Rev. Stat., ch. 126, § 17 (1836).

Conversely, where a fact was *not* the basis for punishment, that fact was, for that reason, not an element. Thus, in *Commonwealth v. McDonald, 59 Mass. 365 (1850)*, which involved an indictment for attempted larceny from the person, the court saw no error in the failure of the indictment to allege any value of the goods that the defendant had attempted to steal. The defendant, in challenging the indictment, apparently relied on *Smith* and *Hope*, and the court rejected his challenge by explaining that "as the punishment . . . does not depend on the amount stolen, there was no occasion for any allegation as to value in this indictment." *59 Mass. at 367.* See *Commonwealth v. Burke, 94 Mass. 132, 183 (1866)* (applying same reasoning to completed larceny from the person; finding no trial error where value was not proved to jury).

Similar reasoning was employed by the Wisconsin Supreme Court in *Lacy v. State, 15 Wis. 13 (1862)*, in interpreting a statute that was also similar to the statutes at issue in *Jones* and *Castillo*. The statute, in a single paragraph, outlawed arson of a dwelling house at night. Arson that killed someone was punishable by life in prison; arson that did not kill anyone was punishable by 7 to 14 years in prison; arson of a house in which no person was lawfully dwelling was **[***464]** punishable by 3 to 10 years. n4 The court had no trouble **[*505]** concluding that the statute "creates three distinct statutory offenses," 15 Wis. at *15, and that the lawful presence of a person in the dwelling was an element of the middle offense. The court reasoned from the gradations of punishment: "That the legislature considered the circumstance that a person was lawfully in the dwelling house when fire was set to it most **[**2371]** material and important, and as greatly aggravating the crime, is clear from the severity of the punishment imposed." *Id.* at *16. The "aggravating circumstances" created "the higher statutory offenses." *Id.* at *17. Because the indictment did not allege that anyone had been present in the dwelling, the court reversed the defendant's 14-year sentence, but, relying on *Larned, supra*, the court remanded to permit sentencing under the lowest grade of the crime (which was properly alleged in the indictment). 15 Wis. at *17.

n4 The Wisconsin statute provided: "Every person who shall willfully and maliciously burn, in the night time, the dwelling house of another, whereby the life of any person shall be destroyed, or shall in the night time willfully and maliciously set fire to any other building, owned by himself or another, by the burning whereof such dwelling house shall be burnt in the night time, whereby the life of any person shall be destroyed, shall suffer the same punishment as provided for the crime of murder in the second degree; but if the life of no person shall have been destroyed, he shall be punished by imprisonment in the state prison, not more than fourteen years nor less than seven years; and if at the time of committing the offense there was no person lawfully in the dwelling house so burnt, he shall be punished by imprisonment in the state prison, not more than ten years nor less than three years." Wis. Rev. Stat., ch. 165, § 1 (1858). The punishment for second-degree murder was life in prison. Ch. 164, § 2.

Numerous other state and federal courts in this period took the same approach to determining which facts are elements of a crime. See *Ritchey v. State, 7 Blackf. 168, 169 (Ind. 1844)* (citing *Commonwealth* v. *Smith*, 1 Mass. *245 (1804), and holding that indictment for arson must allege value of property destroyed, because statute set punishment based on value); *Spencer v. State, 13 Ohio 401, 406, 408 (1844)* (holding that value of goods intended to be stolen is not "an ingredient of the crime" of burglary with intent to steal, because punishment under statute did not depend on value; contrasting larceny, in which "value must be laid, and value proved, that the jury may find it, and the court, by that means, know whether it is grand or petit, and apply the grade of punishment the statute awards"); *United States v. Fisher, 25 F. Cas. 1086 (CC Ohio 1849)* (McLean, J.) ("A carrier **[*506]** of the mail is subject to a higher penalty where he steals a letter out of the mail, which contains an article of value. And when this offense is committed, the indictment must allege the letter contained an article of value, which aggravates the offense and incurs a higher penalty"); *Brightwell v. State, 41 Ga. 482, 483 (1871)* ("When the law prescribes a different punishment for different phases of the same crime, there is good reason for requiring the indictment to specify which of the phases the prisoner is charged with. The record ought to show that the defendant is convicted of the offense for which he is sentenced"). Cf. *State v. Farr, 46 S.C. L. 24, 12 Rich. 24, 29 (S. C. App. 1859)* (where two statutes barred purchasing corn from a slave, and one referred to purchasing from slave who lacked a permit, absence of permit was not an element, because both statutes had the same punishment).

Also demonstrating the common-law approach to determining elements **[***465]** was the well-established rule that, if a statute increased the punishment of a common-law crime, whether felony or

misdemeanor, based on some fact, then that fact must be charged in the indictment in order for the court to impose the increased punishment. Archbold *106; see *id.* at *50; *ante*, at 13-14. There was no question of treating the statutory aggravating fact as merely a sentencing enhancement -- as a nonelement enhancing the sentence of the common-law crime. The aggravating fact was an element of a new, aggravated grade of the common-law crime simply because it increased the punishment of the common-law crime. And the common-law crime was, in relation to the statutory one, essentially just like any other lesser included offense. See Archbold *106.

Further evidence of the rule that a crime includes every fact that is by law a basis for imposing or increasing punishment comes from early cases addressing recidivism statutes. As JUSTICE SCALIA has explained, there was a tradition of treating recidivism as an element. See *Almendarez-Torres, 523 U.S. at 256-257, 261* (dissenting opinion). That tradition **[*507]** stretches back to the earliest years of the Republic. See, *e.g., Commonwealth v. Welsh, 4 Va. 57 (1817); Smith* v. *Commonwealth*, 14 Serg. & Rawle 69 (Pa. 1826); see also Archbold *695-*696. For my purposes, however, what is noteworthy is not so much the fact of that tradition as the reason for it: Courts treated the fact of a prior conviction just as any other fact that increased the punishment by law. By the same reasoning that the courts employed **[**2372]** in *Hope*, *Lacy*, and the other cases discussed above, the fact of a prior conviction was an element, together with the facts constituting the core crime of which the defendant was charged, of a new, aggravated crime.

The two leading antebellum cases on whether recidivism is an element were *Plumbly v. Commonwealth, 43 Mass. 413 (1841)*, and *Tuttle v. Commonwealth, 68 Mass. 505 (1854)*. In the latter, the court explained the reason for treating as an element the fact of the prior conviction:

"When the statute imposes a higher penalty upon a second and third conviction, respectively, it makes the prior conviction of a similar offence a part of the description and character of the offence intended to be punished; and therefore the fact of such prior conviction must be charged, as well as proved. It is essential to an indictment, that the facts constituting the offence intended to be punished should be averred." *68 Mass. at 506.*

The court rested this rule on the common law and the Massachusetts equivalent of the Sixth Amendment's Notice Clause. *Ibid.* See also *Commonwealth v. Haynes, 107 Mass. 194, 198 (1871)* (reversing sentence, upon confession of error by attorney general, in case similar to *Tuttle*).

Numerous other cases treating the fact of a prior conviction as an element of a crime take the same view. They make clear, by both their holdings and their language, that when a statute increases punishment for some core crime based on the fact of a prior conviction, the core crime and **[*508]** the fact of the prior crime together create a new, aggravated crime. *Kilbourn v. State, 9 Conn. 560, 563 (1833)* ("No person ought to be, or can be, **[***466]** subjected to a cumulative penalty, without being charged with a cumulative offence"); *Plumbly, supra, at 414* (conviction under recidivism statute is "one conviction, upon one aggregate offence"); *Hines v. State, 26 Ga. 614, 616 (1859)* (reversing enhanced sentence imposed by trial judge and explaining, "The question, whether the offence was a second one, or not, was a question for the jury . . . . The allegation [of a prior offence] is certainly one of the first importance to the accused, for if it is true, he becomes subject to a greatly increased punishment"). See also *Commonwealth v. Phillips, 28 Mass. 27, 33 (1831)* ("Upon a third conviction, the court may sentence the convict to hard labor for life. The punishment is to be awarded upon that conviction, and for the offence of which he is then and there convicted").

Even the exception to this practice of including the fact of a prior conviction in the indictment and trying it to the jury helps to prove the rule that that fact is an element because it increases the punishment by law. In *State v. Freeman, 27 Vt. 523 (1855)*, the Vermont Supreme Court upheld a statute providing that, in an indictment or complaint for violation of a liquor law, it was not necessary to allege a prior conviction of that law in order to secure an increased sentence. But the court did not hold that the prior conviction was not an element; instead, it held that the liquor law created only minor offenses that did not qualify as crimes. Thus, the state constitutional protections that would attach were a "crime" at issue did not apply. *27 Vt. at 527;* see *Goeller v. State, 119 Md. 61, 66-67, 85 A. 954, 956 (1912)* (discussing *Freeman*). At the same time, the court freely acknowledged that it had "no doubt" of the general rule, particularly as articulated in Massachusetts, that "it is necessary to allege the former conviction, in the indictment, when a higher **[*509]** sentence is claimed on that account." *Freeman, supra, at 526.* Unsurprisingly, then, a leading treatise explained *Freeman* as only "apparently" contrary to the general rule and as involving a "special statute." 3 F. Wharton, Criminal Law § 3417, p. 307, n. *r* (7th rev. ed. 1874) (hereinafter Wharton). In addition, less **[**2373]** than a decade after *Freeman*, the same Vermont court held that if a defendant charged with a successive violation of the liquor laws contested identity -- that is, whether the person in the record of the prior conviction was the same as the defendant -- he should be permitted to have a jury

resolve the question. *State v. Haynes, 35 Vt. 570, 572-573 (1863).* (*Freeman* itself had anticipated this holding by suggesting the use of a jury to resolve disputes over identity. See *27 Vt. at 528.)* In so holding, *Haynes* all but applied the general rule, since a determination of identity was usually the chief factual issue whenever recidivism was charged. See Archbold *695-*696; see also, *e.g., Graham v. West Virginia, 224 U.S. 616, 620-621, 56 L. Ed. 917, 32 S. Ct. 583 (1912)* (defendant had been convicted under three different names). n5

n5 Some courts read *State v. Smith, 42 S.C. L. 460, 8 Rich. 460 (S. C. App. 1832),* a South Carolina case, to hold that the indictment need not allege a prior conviction in order for the defendant to suffer an enhanced punishment. See, *e.g., State v. Burgett, 22 Ark. 323, 324 (1860)* (so reading *Smith* and questioning its correctness). The *Smith* court's holding was somewhat unclear because the court did not state whether the case involved a first or second offense -- if a first, the court was undoubtedly correct in rejecting the defendant's challenge to the indictment, because there is no need in an indictment to negate the existence of any prior offense. See *Burgett, supra, at 324* (reading indictment that was silent about prior offenses as only charging first offense and as sufficient for that purpose). In addition, the *Smith* court did not acknowledge the possibility of disputes over identity. Finally, the extent to which the court's apparent holding was followed in practice in South Carolina is unclear, and subsequent South Carolina decisions acknowledged that *Smith* was out of step with the general rule. See *State v. Parris, 89 S.C. 140, 141, 71 S.E. 808, 809 (1911); State v. Mitchell, 220 S.C. 433, 434-436, 68 S.E.2d 350, 351-352 (1951).*

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B

An 1872 treatise by one of the leading **[***467]** authorities of the era in criminal law and procedure confirms the common-law understanding that the above cases demonstrate. The treatise condensed the traditional understanding regarding the indictment, and thus regarding the elements of a crime, to the following: "The indictment must allege whatever is in law essential to the punishment sought to be inflicted." 1 J. Bishop, Law of Criminal Procedure 50 (2d ed. 1872) (hereinafter Bishop, Criminal Procedure). See *id.* § 81, at 51 ("The indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted"); *id.* § 540, at 330 ("The indictment must . . . contain an averment of every particular thing which enters into the punishment"). Crimes, he explained, consist of those "acts to which the law affixes . . . punishment," *id.* § 80, at 51, or, stated differently, a crime consists of the whole of "the wrong upon which the punishment is based," *id.* § 84, at 53. In a later edition, Bishop similarly defined the elements of a crime as "that wrongful aggregation out of which the punishment proceeds." 1 J. Bishop, New Criminal Procedure § 84, p. 49 (4th ed. 1895).

Bishop grounded his definition in both a generalization from well-established common-law practice, 1 Bishop, Criminal Procedure § § 81-84, at 51-53, and in the provisions of Federal and State Constitutions guaranteeing notice of an accusation in all criminal cases, indictment by a grand jury for serious crimes, and trial by jury. With regard to the common law, he explained that his rule was "not made apparent to our understandings by a single case only, but by all the cases," *id.* § 81, at 51, and was followed "in all cases, without one exception," *id.* § 84, at 53. To illustrate, he observed that there are

"various statutes whereby, when . . . assault is committed with a particular intent, or with a particular **[*511]** weapon, or the like, it is subjected to a particular corresponding punishment, heavier than that for common assault, or differing from it, pointed out by the statute. And **[**2374]** the reader will notice that, in all cases where the peculiar or aggravated punishment is to be inflicted, the peculiar or aggravating matter is required to be set out in the indictment." *Id.* § 82, at 52.

He also found burglary statutes illustrative in the same way. *Id.* § 83, at 52-53. Bishop made no exception for the fact of a prior conviction -- he simply treated it just as any other aggravating fact: "[If] it is sought to make the sentence heavier by reason of its being [a second or third offence], the fact thus relied on must be averred in the indictment; because the rules of criminal procedure require the indictment, in all cases, to contain an averment of every fact essential to the punishment sought to be inflicted." 1 J. Bishop, Commentaries on Criminal Law § 961, pp. 564-565 (5th ed. 1872).

The constitutional provisions provided further support, in his view, **[***468]** because of the requirements for a proper accusation at common law and because of the common-law understanding that a proper jury trial required a proper accusation: "The idea of a jury trial, as it has always been known where the common law prevails, includes the allegation, as part of the machinery of the trial . . . . An accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the