



11506 HOUSE JUDICIARY

**Attachment D**

ORS § 138.040

1 of 1 DOCUMENT

## OREGON REVISED STATUTES

\*\*\* THIS DOCUMENT IS CURRENT THROUGH THE 2003 REGULAR SESSION OF THE 72ND LEGISLATIVE ASSEMBLY \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH SEPTEMBER 30, 2004 \*\*\*

TITLE 14. PROCEDURE IN CRIMINAL MATTERS GENERALLY  
CHAPTER 138. APPEALS; POST-CONVICTION RELIEF  
APPEALS

## GO TO OREGON REVISED STATUTES ARCHIVE DIRECTORY

## ORS § 138.040 (2003)

138.040. Appeal by defendant generally; reviewable matters.

Except as provided under *ORS 138.050*, the defendant may appeal to the Court of Appeals from a judgment or order described under *ORS 138.053* in a circuit court, and may cross-appeal when the state appeals pursuant to *ORS 138.060 (1)(c)* or *(2)(a)*. The following apply upon such appeal or cross-appeal:

(1) The appellate court may review:

(a) Any decision of the court in an intermediate order or proceeding. (b) Any disposition described under *ORS 138.053* as to whether it:

- (A) Exceeds the maximum allowable by law; or
- (B) Is unconstitutionally cruel and unusual.

(2) If the appellate court determines the disposition imposed exceeds the maximum allowable by law or is unconstitutionally cruel and unusual, the appellate court shall direct the court from which the appeal is taken to impose the disposition that should be imposed.

**HISTORY:** Amended by 1959 c.558 § 36; 1963 c.207 § 1; 1969 c.198 § 62; 1971 c.565 § 19; 1977 c.372 § 13; 1977 c.752 § 1; 1985 c.348 § 1; 1989 c.849 § 4; 2001 c.870 § 6

## PERMANENT EDITION ANNOTATIONS:

## CASENOTES:

1. In General
2. When Appeal Lies
3. Prior to 1963 Amendment

## 1. IN GENERAL

An objection, not made below, to the judge's authority to sit cannot be entertained on appeal. *State v. Whitney*, (1879) 7 Or 386.

This section granting the right of appeal from a judgment on a conviction in a circuit court, refers to a conviction in a criminal action. *Portland v. White*, (1923) 106 Or 169, 211 P 738.

An appeal taken from an order refusing to dismiss the indictment vests jurisdiction in the appellate court. *State v. Jackson*, (1961) 228 Or 371, 365 P2d 294, 89 ALR2d 1225.

During an appeal the lower court cannot proceed in any manner so as to affect the jurisdiction acquired by the appellate court or defeat the right of appellants to prosecute the appeal with effect. *State v. Jackson*, (1961) 228 Or 371, 365 P2d 294; *State v. Garner*, (1963) 233 Or 252, 377 P2d 919. *State v. Jackson*, *supra*, overruling *Johnson v. Circuit Court*, (1932) 140 Or 100, 12 P2d 1027 and *State v. DeGrace*, (1933) 144 Or 159, 72 P2d 896, 90 ALR 232.

This section does not apply in cases of conviction based on a plea of guilty. *State v. Jairl*, (1962) 229 Or 533, 368 P2d 323. Overruling *State v. Lewis*, (1925) 113 Or 359, 230 P2d 543.

An order denying defendant's motion to dismiss the indictment on the ground he has been once in jeopardy for the same offense is not appealable. *State v. Haynes*, (1962) 232 Or 330, 375 P2d 550.

Appellate court has no jurisdiction unless appeal conforms to statutory requirements. *State v. Goodin*, (1970) 1 Or App 559, 465 P2d 487.

Where there was no attempt to review the judgment of conviction, the Supreme Court had no jurisdiction to review the order settling the cost bill. *State v. Fehl*, (1935) 152 Or 104, 52 P2d 1118.

## 2. WHEN APPEAL LIES

A defendant who has paid a fine, though under protest and to avoid going to jail, has satisfied the judgment and cannot appeal. *Washington v. Cleland*, (1907) 49 Or 12, 88 P 305, 124 Am St Rep 1013.

No appeal may be taken from an order of the circuit court denying a motion in the nature of coram nobis, although such order may be reviewed when an appeal is properly taken. *State v. Endsley*, (1958) 214 Or 537, 331 P2d 338.

Defendants had no ground for an appeal from an order denying a motion to dismiss where they failed to move to dismiss before entering a plea of not guilty, moving for a change of venue and announcing they were ready for trial. *Johnston v. Circuit Court*, (1932) 140 Or 100, 12 P2d 1027.

## 3. PRIOR TO 1963 AMENDMENT

An appeal may lie from an order refusing to dismiss an indictment because not brought to trial within the time required by law. *State v. Rosenberg*, (1914) 71 Or 389, 112 P 624; *State v. Hellala*, (1914) 71 Or 391, 142 P 624; *State v. Chapin*, (1915) 74 Or 346, 144 P 1187; *State v. Kuhnhausen*, (1954) 201 Or 478, 266 P2d 698, 272 P2d 225.

The restriction in the civil code that one cannot appeal from a judgment given by consent or for want of an answer is not applicable to a conviction in a criminal action based on a plea of guilty. *Ex Parte Harrell*, (1910) 57 Or 95, 110 P 493.

An appeal may be taken from an order refusing to dismiss an indictment. *In re Von Klein*, (1913) 67 Or 298, 135 P 870.

A defendant whose trial under an indictment has resulted in a mistrial and who has not again been brought to trial, has a plain remedy by appeal. *In re Clark*, (1916) 79 Or 325, 154 P 748, 155 P 187.

Appeals should seasonably be taken from the original denial of a motion for an immediate trial rather than from the second denial upon a renewal of the motion at the beginning of the next term. *State v. Clark*, (1917) 86 Or 464, 168 P 944.

## FURTHER-CITATIONS:

*State v. Way*, (1926) 120 Or 134, 249 P 1045, 251 P 761; *Huffman v. Alexander*, (1953) 197 Or 283, 251 P2d 87, 253 P2d 289; *State v. Gates*, (1962) 230 Or 84, 368 P2d 605; *State v. Hedrick*, (1962) 233 Or 76, 377 P2d 23; *Barnett v. Gladden*, (1964) 237 Or 76, 390 P2d 614; *State v. Cortwright*, (1966) 246 Or 120, 418 P2d 822; *State v. Long*, (1967) 246 Or 394, 425 P2d 528; *Sullivan v. Cupp*, (1969) 1 Or App 388, 462 P2d 455, Sup Ct review denied.

## LAWREV-CITATIONS:

2 OLR 30; 3 OLR 185; 14 OLR 420; 39 OLR 340, 365; 4 WLJ 170.

## CURRENT ANNOTATIONS

## NOTES OF DECISIONS

### In general

Where the appeal is from a judgment in a criminal writ of review proceeding in the circuit court resulting in a judgment of conviction, the proper avenue of appeal is to the Court of Appeals. *Doran v. State*, 270 Or 758, 529 P2d 928 (1974)

Trial court lacked authority to stay period of probation pending outcome of appeal. *State ex rel Dillavou v. Foster*, 273 Or 319, 541 P2d 811 (1975); *State v. Popp*, 118 Or App 508, 848 P2d 134 (1993)

Appeal from suspended sentence is governed by this section, and thus appellate review was precluded where defendant, who had pleaded guilty and received suspended sentence, failed to file his appeal pursuant to ORS 138.040

(alleging excessive sentence) within 30-day period required by ORS 138.071. *State v. Martinez*, 35 Or App 381, 581 P2d 955 (1978), Sup Ct review denied

Imposition of 10 p.m. curfew as condition of probation on 20-year-old woman was not excessive and was reasonably related to effective probation. *State v. Sprague*, 52 Or App 1063, 629 P2d 1326 (1981), Sup Ct review denied

Where defendant was convicted in stipulated facts trial rather than after plea of guilty or no contest, ORS 138.050 was inapplicable and sentence was reviewable on direct appeal under this section and ORS 138.053. *Schultz v. Maass*, 114 Or App 167, 834 P2d 508 (1992)

#### When appeal lies

Appellate court hearing of an appeal by defendant made after verdict but before sentence is inappropriate because the defendant can appeal only from a "judgment" or "judgment on a conviction." *State v. McFarland*, 10 Or App 90, 497 P2d 1283 (1972), Sup Ct review denied

Public Defender lacks standing to prosecute appeal of conviction for driving under influence of intoxicants obtained in absentia and without defendant's authorization. *State v. Lyon*, 36 Or App 255, 584 P2d 345 (1978)

Probation condition alleged by defendant to be unreasonable was reviewable under this section. *State v. Fisher*, 32 Or App 405, 574 P2d 354 (1978), Sup Ct review denied

Probation order is judgment on conviction for purposes of ORS 138.050, and is thus appealable. *State v. Martin*, 282 Or 583, 580 P2d 536 (1978)

Court of Appeals has no jurisdiction over appeal from circuit court affirmance of municipal court convictions, where constitutionality of ordinance or charter provision is not at issue. *City of Klamath Falls v. Winters*, 289 Or 757, 619 P2d 217 (1980)

Since orders denying transcripts are not intermediate orders under this section and since this section does not provide for review of subsequent orders of trial courts, appeals of these matters cannot be taken pursuant to this section, but rather must be brought under ORS 19.010. *State v. Montgomery*, 58 Or App 630, 650 P2d 111 (1982), as modified by 294 Or 417, 657 P2d 668 (1983); *State v. Sullens*, 314 Or 436, 839 P2d 708 (1992)

ORS 138.071 (4) does not allow delayed appeal from juvenile court disposition order placing juvenile under jurisdiction of juvenile court, because such order is not "judgment of conviction." *State ex rel Juv. Dept. v. Hardy*, 93 Or App 584, 763 P2d 406 (1988), Sup Ct review denied

Order of probation is appealable as judgment on conviction, and appeal or review is not limited to whether it exceeds maximum allowable by law or is unconstitutionally cruel and unusual as in case of appeal of sentence. *State v. Carmickle*, 307 Or 1, 764 P2d 290 (1988)

Under this section and ORS 138.050 criminal defendant may appeal from order which revokes his probation and reinstates his previously suspended sentence. *State v. Altman*, 97 Or App 462, 777 P2d 969 (1989)

Where defendant's probation was continued and no sentence was imposed this section, not ORS 138.050, controlled scope of review and court erred in continuing defendant's probation over defendant's request that he be sentenced. *State v. Benway*, 97 Or App 685, 776 P2d 880 (1989)

Where defendant challenged indictment on ground that corrected indictment was returned, challenge is not moot because indictment is valid and may be basis of prosecution notwithstanding existence of separate indictment. *State v. Dunn*, 99 Or App 519, 783 P2d 29 (1989), Sup Ct review denied

Order imposing condition of probation after plea of no contest is reviewable under this section. *State v. Donovan*, 307 Or 461, 770 P2d 581 (1989); *State v. Crocker*, 96 Or App 111, 771 P2d 1026 (1989)

Where final document in criminal case, whether denominated "judgment" or something else, states on its face that trial court intends to impose restitution at future date, that document is not "judgment" from which appeal may be taken under this section because it does not yet contain complete sentence. *State v. Bonner*, 307 Or 598, 771 P2d 272 (1989)

Order denying motion for new trial based on newly discovered evidence or juror misconduct is reviewable on appeal under this statute. *State v. Sullens*, 314 Or 436, 839 P2d 708 (1992)

Where appeal may be taken as matter of statutory right, appellate court retains discretion to dismiss appeal of fugitive from justice. *State v. Sterner*, 124 Or App 439, 862 P.2d 1321 (1993), Sup Ct review denied

LAW REVIEW CITATIONS: 51 OLR 367, 652 (1972)

LexisNexis (R) Notes:

#### CASE NOTES

1. It is a well-settled rule that after jurisdiction has been vested in an appellate court by the taking of an appeal, the lower court cannot proceed in any manner so as to affect the jurisdiction acquired by the appellate court, or defeat the appellant's right to prosecute the appeal with effect. *State v. Jackson*, 228 Or. 371, 365 P.2d 294, 1961 Ore. LEXIS 393, 89 A.L.R.2d 1225 (1961).
2. The trial court did not err in finding the defendant, who was convicted of first degree arson, able to pay \$60,700 in restitution for the destruction of the home involved when defendant attacked the order pursuant to *Or. Rev. Stat. § 138.040* and *Or. Rev. Stat. § 138.050*, but the only argument he made in the trial court was that the court had insufficient facts with which to find that he was able to pay the amount ordered. *State v. Gardner*, 57 Or. App. 404, 679 P.2d 306, 1984 Ore. App. LEXIS 2845 (1984).
3. A sentence of three years for first degree burglary was not excessive where it was within the maximum allowed by law and justified by the circumstances of the case. *State v. Yock*, 49 Or. App. 749, 621 P.2d 592, 1980 Ore. App. LEXIS 3997 (1980).
4. The right of every criminal defendant to appeal from the circuit court is not interfered with by the requirements of former *Or. Rev. Stat. § 138.130* and *138.140* (replaced by *Or. Rev. Stat. § 138.135*) depriving the defendant of credit for time served in jail pending the outcome of his appeal if he elects to serve the waiting period in the county jail rather than serve it in the penitentiary or attempt to make bail. *Sullivan v. Cupp*, 1 Or. App. 388, 462 P.2d 455, 1969 Ore. App. LEXIS 159 (1969).
5. Court of appeals lacked jurisdiction, under *Or. Rev. Stat. § 138.040*, to hear defendants' cross-appeals in a case where the State appealed a district court order granting defendants' motions to dismiss on the ground that they were denied their constitutional right to a speedy trial. The appeal was not an appeal of a pre-trial order suppressing evidence under *Or. Rev. Stat. § 138.060(3)*. *State v. Neal*, 58 Or. App. 180, 647 P.2d 974, 1982 Ore. App. LEXIS 3075 (1982).
6. An order denying a criminal defendant's motion to dismiss the indictment against him is not an appealable order; accordingly, the trial court erred in granting a stay of the proceedings pending determination of an appeal from the denial of a motion to dismiss an indictment. *State v. Haynes*, 232 Or. 330, 375 P.2d 550, 1962 Ore. LEXIS 436 (1962).
7. A defendant was indicted for unlawful possession of marijuana and moved to suppress the marijuana on grounds of unreasonable search; the trial court denied the motion as to a small bag of marijuana taken from the defendant's person

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but sustained the motion as to 25 two-pound marijuana bricks taken from the defendant's car pursuant to a search warrant obtained the morning after his arrest; where the state had appealed from the part of the order suppressing the bricks, the defendant could not appeal from that part of the order denying his motion as to the small bag of marijuana. *State v. Gwinn*, 12 Or. App. 444, 506 P.2d 187, 1973 Ore. App. LEXIS 1055 (1973).

8. The issues a defendant convicted on a plea of guilty may raise are controlled by *Or. Rev. Stat. § 138.050* and may not be taken pursuant to *Or. Rev. Stat. § 138.040*. *State v. Nathan*, 73 Or. App. 524, 698 P.2d 1052, 1985 Ore. App. LEXIS 3127 (1985).

9. Court of appeals lacked jurisdiction, under *Or. Rev. Stat. § 138.040*, to hear defendants' cross-appeals in a case where the State appealed a district court order granting defendants' motions to dismiss on the ground that they were denied their constitutional right to a speedy trial. The appeal was not an appeal of a pretrial order suppressing evidence under *Or. Rev. Stat. § 138.060(3)*. *State v. Neal*, 58 Or. App. 180, 647 P.2d 974, 1982 Ore. App. LEXIS 3095 (1982).

10. *Or. Rev. Stat. § 138.040* allows appeals from a judgment on a conviction, and *Or. Rev. Stat. § 138.020* provides for appeal as a matter of right from a judgment in a criminal action in the situations prescribed by *Or. Rev. Stat. §§ 138.010 to 138.300*, and not otherwise. Accordingly, where a defendant was found not responsible for the crime of theft by reason of mental disease or defect, was placed under the jurisdiction of the Psychiatric Security Review Board, and the case was continued for five years or until the defendant could show that he was entitled to discharge, he was never convicted of a crime, there was no judgment on a conviction from which to appeal, and, thus, the provisions of *Or. Rev. Stat. §§ 138.020 and 138.040* did not apply. *State v. Gangi*, 66 Or. App. 582, 675 P.2d 181, 1984 Ore. App. LEXIS 2617 (1984).

11. Separate sentences that are not improper are nonetheless subject to the strictures against excessive sentences, particularly if made consecutive. *State v. Harris*, 287 Or. 335, 599 P.2d 456, 1979 Ore. LEXIS 1012 (1979).

12. The determination of which factors justify the imposition of an upward departure sentence is within the discretion of the sentencing court. *State v. Alexander*, 114 Or. App. 220, 834 P.2d 521, 1992 Ore. App. LEXIS 1393 (1992).

13. An order continuing probation is appealable and reviewable. *State v. Vaughn*, 105 Or. App. 518, 805 P.2d 733, 1991 Ore. App. LEXIS 173 (1991).

14. A document that revoked a defendant's probation and then ordered that the sentence previously imposed be executed was a "judgment on a conviction" within the meaning of former *Or. Rev. Stat. § 138.040* and was appealable. *State v. Altman*, 97 Or. App. 462, 777 P.2d 969, 1989 Ore. App. LEXIS 838 (1989).

15. Where the defendant pleaded guilty to second-degree rape involving repeated sexual intercourse with his stepdaughter, who was under the age of 14, the court's granting the defendant probation for five years under the imposition of special conditions, including that the defendant not be present in any home, residence, or vehicle in which there were children under the age of 18, was authorized under *Or. Rev. Stat. § 137.540*. *State v. Crocker*, 96 Or. App. 111, 771 P.2d 1026, 1989 Ore. App. LEXIS 390 (1989).

16. If in the judgment of the appellate court the punishment imposed by the sentence appealed from exceeds the maximum sentence allowable by law or is unconstitutionally cruel and unusual, the appellate court shall direct the court from which the appeal is taken to impose the punishment that should be administered. *State v. Donovan*, 307 Or. 461, 770 P.2d 581, 1989 Ore. LEXIS 23 (1989).

17. Conditions of probation are reviewable on appeal. *State v. Sprague*, 52 Or. App. 1063, 629 P.2d 1326, 1981 Ore. App. LEXIS 2861 (1981).
18. The imposition of a 10 p.m. curfew for two years as a condition of probation was reasonably related to the offense, which was harassment, and to the needs of an effective probation where the defendant had a small child and, although only 20, had been in the practice of associating in bars with a group of friends who were immature and had a propensity for causing trouble. *State v. Sprague*, 52 Or. App. 1063, 629 P.2d 1326, 1981 Ore. App. LEXIS 2861 (1981).
19. If probationary conditions diminish constitutionally protected rights, those conditions are tested by the necessities for making the probation effective, i.e., a reasonable relationship to reformation of the offender or protection of the public. *U State v. Sprague*, 52 Or. App. 1063, 629 P.2d 1326, 1981 Ore. App. LEXIS 2861 (1981).
20. *Or. Rev. Stat. § 138.040* provides, in part, that a "judgment placing a defendant on probation shall be deemed a judgment on a conviction"; in the absence of clear legislative intent to restrict this provision to *Or. Rev. Stat. § 138.040*, it was held that this provision makes a probation order a judgment on conviction for the purposes of *Or. Rev. Stat. § 138.050*, and is thus appealable. *State v. Martin*, 282 Or. 583, 580 P.2d 536, 1978 Ore. LEXIS 951 (1978).
21. *Or. Rev. Stat. § 138.050* expressly provides that judgments on conviction may be appealed; thus, when the Legislature added language to *Or. Rev. Stat. § 138.040* making a probation order a judgment on a conviction, it must have contemplated that some probation conditions could be excessive, cruel, or unusual, and thus appealable under *Or. Rev. Stat. § 138.050*. *State v. Martin*, 282 Or. 583, 580 P.2d 536, 1978 Ore. LEXIS 951 (1978).
22. A condition of probation that violates some constitutional provision makes the sentence excessive as a matter of law; even in the absence of constitutional error, a condition of probation may be held to be a clear mistake. *State v. Holm*, 34 Or. App. 503, 579 P.2d 860, 1978 Ore. App. LEXIS 2521 (1978).
23. A condition on a criminal defendant's probation requiring submission to searches by any peace officer was too broad an intrusion on her constitutional rights; accordingly, her cause was demanded for resentencing. *State v. Holm*, 34 Or. App. 503, 579 P.2d 860, 1978 Ore. App. LEXIS 2521 (1978).
24. Under *Or. Rev. Stat. § 138.020* and *Or. Rev. Stat. § 138.040*, an order denying a motion to modify probation conditions is not appealable. *Stacey v. State*, 30 Or. App. 1075, 569 P.2d 640, 1977 Ore. App. LEXIS 1866 (1977).
25. Under *Or. Rev. Stat. § 138.040*, an order of probation is treated as a sentence insofar as a defendant's right to appeal is concerned; accordingly, an order of probation would be similarly treated as a sentence under *Or. Rev. Stat. § 138.530*. *Stacey v. State*, 30 Or. App. 1075, 569 P.2d 640, 1977 Ore. App. LEXIS 1866 (1977).
26. Although he was never sentenced, defendant convicted of criminal activity in drugs who was given a suspended sentence and placed on probation for five years on the condition that he be incarcerated for 180 days in the county jail, had the right to appeal under *Or. Rev. Stat. § 138.040* (1971 version). *State ex rel. Dillavou v. Foster*, 273 Or. 319, 541 P.2d 811, 1975 Ore. LEXIS 324 (1975).
27. Where a criminal defendant pled guilty to the charge against him and was placed on probation on July 23, 1959, and on July 12, 1960, the trial court revoked his probation and then on August 3, 1960, a hearing was held at which the order of probation was vacated and the defendant was sentenced to five years, the court held that the state's argument that the defendant's appeal was untimely when taken on September 14, 1960, was without basis; the defendant's appeal, taken from the order of August 3, 1960, was within the 60-day time limit of former *Or. Rev. Stat. § 138.070* (now *Or. Rev. Stat. § 138.071*). *State v. Gates*, 230 Or. 84, 368 P.2d 605, 1962 Ore. LEXIS 271 (1962).
28. Trial court decision on a post-judgment motion to stay enforcement of a criminal sentence is not appealable by the defendant, nor is it reviewable as an interlocutory order. *State v. Wimber*, 108 Or. App. 1, 814 P.2d 169, 1991 Ore. App.

LEXIS 1041 (1991).

29. Court of Appeals' review of trial court's action is limited to determining whether sentence imposed exceeds maximum allowable or is unconstitutionally cruel and unusual. *State v. Racicot*, 106 Or. App. 557, 809 P.2d 726, 1991 Ore. App. LEXIS 548 (1991).

30. A document that revoked a defendant's probation and then ordered that the sentence previously imposed be executed was a "judgment on a conviction" within the meaning of former Or. Rev. Stat. § 138.040 and was appealable. *State v. Aliman*, 97 Or. App. 462, 777 P.2d 969, 1989 Ore. App. LEXIS 838 (1989).

31. If a final document from which an appeal is taken in a criminal case, whether denominated "judgment" or something else, states on its face that the trial court intends to impose restitution at some future date, that document is not a "judgment" from which an appeal may be taken because it does not yet contain the complete sentence. *State v. Bonner*, 307 Or. 598, 771 P.2d 272, 1989 Ore. LEXIS 120 (1989).

32. If in the judgment of the appellate court the punishment imposed by the sentence appealed from exceeds the maximum sentence allowable by law or is unconstitutionally cruel and unusual, the appellate court shall direct the court from which the appeal is taken to impose the punishment that should be administered. *State v. Donovan*, 307 Or. 461, 770 P.2d 581, 1989 Ore. LEXIS 23 (1989).

33. An order imposing restitution is appealable as a judgment of conviction and not as part of a defendant's sentence. *State v. Smith*, 93 Or. App. 639, 763 P.2d 419, 1988 Ore. App. LEXIS 1720 (1988).

34. The practice in Or. Rev. Stat. § 137.120 which requires that reasons be stated for each sentence imposed for the commission of a felony facilitates appellate review of such sentences. *Branch v. Cupp*, 736 F.2d 533, 1984 U.S. App. LEXIS 20964 (9th Cir. Or. 1984).

35. A sentence of three years for first degree burglary was not excessive where it was within the maximum allowed by law and justified by the circumstances of the case. *State v. Yock*, 49 Or. App. 749, 621 P.2d 592, 1980 Ore. App. LEXIS 3997 (1980).

36. Or. Rev. Stat. § 138.040 provides, in part, that a "judgment placing a defendant on probation shall be deemed a judgment on a conviction"; in the absence of clear legislative intent to restrict this provision to Or. Rev. Stat. § 138.040, it was held that this provision makes a probation order a judgment on conviction for the purposes of Or. Rev. Stat. § 138.050, and is thus appealable. *State v. Martin*, 282 Or. 583, 580 P.2d 536, 1978 Ore. LEXIS 951 (1978).

37. Or. Rev. Stat. § 138.050 expressly provides that judgments on conviction may be appealed; thus, when the Legislature added language to Or. Rev. Stat. § 138.040 making a probation order a judgment on a conviction, it must have contemplated that some probation conditions could be excessive, cruel, or unusual, and thus appealable under Or. Rev. Stat. § 138.050. *State v. Martin*, 282 Or. 583, 580 P.2d 536, 1978 Ore. LEXIS 951 (1978).

38. A condition of probation that violates some constitutional provision makes the sentence excessive as a matter of law; even in the absence of constitutional error, a condition of probation may be held to be a clear mistake. *State v. Holm*, 34 Or. App. 503, 579 P.2d 860, 1978 Ore. App. LEXIS 2521 (1978).

39. A condition on a criminal defendant's probation requiring submission to searches by any peace officer was too broad an intrusion on her constitutional rights; accordingly, her cause was remanded for resentencing. *State v. Holm*, 34 Or. App. 503, 579 P.2d 860, 1978 Ore. App. LEXIS 2521 (1978).

40. Where a criminal defendant pled guilty to the charge against him and was placed on probation on July 23, 1959, and on July 12, 1960, the trial court revoked his probation and then on August 3, 1960, a hearing was held at which the order of probation was vacated and the defendant was sentenced to five years, the court held that the state's argument that the defendant's appeal was untimely when taken on September 14, 1960, was without basis; the defendant's appeal, taken from the order of August 3, 1960, was within the 60-day time limit of former Or. Rev. Stat. § 138.070 (now Or. Rev. Stat.

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§ 138.071). *State v. Gates*, 230 Or. 84, 368 P.2d 605, 1962 Ore. LEXIS 271 (1962).

41. Under *Or. Rev. Stat. § 138.020* and *Or. Rev. Stat. § 138.040*, an order denying a motion to modify probation conditions is not appealable. *Stacey v. State*, 30 Or. App. 1075, 569 P.2d 640, 1977 Ore. App. LEXIS 1866 (1977).

42. Imposition of upward departure sentence based on defendant's persistent involvement in similar offenses was proper despite fact that his prior similar robbery offenses were reflected in his criminal history. *State v. Alexander*, 114 Or. App. 220, 834 P.2d 521, 1992 Ore. App. LEXIS 1393 (1992).

43. Court of Appeals' review of trial court's action is limited to determining whether sentence imposed exceeds maximum allowable or is unconstitutionally cruel and unusual. *State v. Racicot*, 106 Or. App. 557, 809 P.2d 726, 1991 Ore. App. LEXIS 548 (1991).

44. Imposition of upward departure sentence based on defendant's persistent involvement in similar offenses was proper despite fact that his prior similar robbery offenses were reflected in his criminal history. *State v. Alexander*, 114 Or. App. 220, 834 P.2d 521, 1992 Ore. App. LEXIS 1393 (1992).

45. The determination of which factors justify the imposition of an upward departure sentence is within the discretion of the sentencing court. *State v. Alexander*, 114 Or. App. 220, 834 P.2d 521, 1992 Ore. App. LEXIS 1393 (1992).

46. Even though a restitution order is not denominated as a "fine," and may be imposed in addition thereto, any sentence, including the amount of restitution ordered, is subject to appellate review for excessiveness under *Or. Rev. Stat. § 138.040*, a review that is not limited to constitutional standards. *State v. Hart*, 299 Or. 128, 699 P.2d 1113, 1985 Ore. LEXIS 1239 (1985).

47. The practice in *Or. Rev. Stat. § 137.120* which requires that reasons be stated for each sentence imposed for the commission of a felony, facilitates appellate review of such sentences. *Branch v. Culp*, 736 F.2d 533, 1984 U.S. App. LEXIS 20964 (9th Cir. Or. 1984).

48. An order imposing restitution is appealable as a judgment of conviction and not as part of a defendant's sentence. *State v. Smith*, 93 Or. App. 639, 763 P.2d 419, 1988 Ore. App. LEXIS 1720 (1988).

49. Even though a restitution order is not denominated as a "fine," and may be imposed in addition thereto, any sentence, including the amount of restitution ordered, is subject to appellate review for excessiveness under *Or. Rev. Stat. § 138.040*, a review that is not limited to constitutional standards. *State v. Hart*, 299 Or. 128, 699 P.2d 1113, 1985 Ore. LEXIS 1239 (1985).

50. Requiring an arson and burglary defendant to pay \$60,000 in restitution to the victims was not excessive under *Or. Rev. Stat. § 138.040* and *Or. Const. art. I, § 15*; nor was the sentence clearly mistaken or a clear abuse of discretion, considering the defendant's financial resources, his ability to secure employment, his other debts and obligations, and the rehabilitative effect of paying restitution as required by *Or. Rev. Stat. § 137.106(2)*. *State v. DeLoe*, 55 Or. App. 742, 639 P.2d 1293, 1982 Ore. App. LEXIS 2288 (1982).

51. Trial court decision on a post-judgment motion to stay enforcement of a criminal sentence is not appealable by the defendant, nor is it reviewable as an interlocutory order. *State v. Wimber*, 108 Or. App. 1, 814 P.2d 169, 1991 Ore. App. LEXIS 1041 (1991).
52. While the post-conviction statute supersedes the statutory right of habeas corpus, the relief afforded by habeas corpus for denial of constitutional rights is retained; however, the failure to appeal from an adverse ruling in the trial court as to the matter of prior jeopardy waives the defense and it cannot be considered in habeas corpus. *Barnett v. Gladden*, 237 Or. 76, 390 P.2d 614, 1964 Ore. LEXIS 331 (1964).
53. At the time an appeal by a petitioner seeking post-conviction relief is taken, the sentence can be appealed on the basis that it is cruel, unusual, or excessive in light of the nature and background of the offender or the facts and circumstances of the offense; however, where there is absolutely no evidence in the record from which a post-conviction court can find that a sentence appeal by the petitioner would have the remotest chance of success, and the evidence that exists in the record is overwhelmingly to the contrary, the petitioner will not prevail. *Hedin v. Cupp*, 304 Or. 66, 742 P.2d 604, 1987 Ore. LEXIS 1774 (1987).
54. Even if an order denying a petition for a writ of error coram nobis is properly termed an intermediate order under *Or. Rev. Stat. § 138.040*, it is not, for that reason, an appealable order, but at most only such an order as the court is authorized to review on an appeal from the judgment. Where no appeal from the judgment is taken, *Or. Rev. Stat. § 138.040* does not apply, even if it could be relied on when an appeal is taken from a conviction on a plea of guilty. *State v. Endsley*, 214 Or. 537, 331 P.2d 338, 1958 Ore. LEXIS 334 (1958).
55. Appeal from judgment of conviction of crime based solely on denial of motion for a new trial because of newly discovered evidence can be reviewed by the Court of Appeals. *State v. Sullens*, 314 Or. 436, 839 P.2d 708, 1992 Ore. LEXIS 197 (1992).
56. A defendant who has pleaded guilty may appeal after sentencing pursuant to *Or. Rev. Stat. § 138.050*, and *Or. Rev. Stat. § 138.040* authorizes an appeal on identical grounds after judgment of conviction following a plea of not guilty; if, in the judgment of the appellate court, the sentence appealed from is excessive, unusual, or cruel, both statutes state that the appellate court shall direct the court from which the appeal is taken to impose the punishment that should be administered. *State v. Dinkel*, 34 Or. App. 375, 579 P.2d 245, 1978 Ore. App. LEXIS 2476 (1978).
57. Under *Or. Rev. Stat. § 138.040*, an order of probation is treated as a sentence insofar as a defendant's right to appeal is concerned; accordingly, an order of probation would be similarly treated as a sentence under *Or. Rev. Stat. § 138.530*. *Stacey v. State*, 30 Or. App. 1075, 569 P.2d 640, 1977 Ore. App. LEXIS 1866 (1977).
58. A defendant who pleaded guilty to forgery was properly denied the right to appeal on grounds that the trial court erred in failing to dispose of a motion to dismiss the prosecution, in proceeding against the defendant without first having ascertained that good cause was shown for an indictment not returned within 60 days after he was charged, and in imposing sentence on the defendant in the absence of his attorney. *State v. Jairl*, 229 Or. 533, 368 P.2d 323, 1962 Ore. LEXIS 258 (1962).
59. A defendant who pleaded guilty to forgery was properly denied the right to appeal on grounds that the trial court erred in failing to dispose of a motion to dismiss the prosecution, in proceeding against the defendant without first

having ascertained that good cause was shown for an indictment not returned within 60 days after he was charged, and in imposing sentence on the defendant in the absence of his attorney. *State v. Jairl*, 229 Or. 533, 368 P.2d 323, 1962 Ore. LEXIS 258 (1962).

60. Appeal from judgment of conviction of crime based solely on denial of motion for a new trial because of newly discovered evidence can be reviewed by the Court of Appeals. *State v. Sullens*, 314 Or. 436, 839 P.2d 708, 1992 Ore. LEXIS 197 (1992).

61. Where petitioner was convicted in a stipulated facts trial, sentence was reviewable on direct appeal; failure to appeal conviction barred defendant from post-conviction relief. *Schantz v. Maass*, 114 Or. App. 167, 834 P.2d 508, 1992 Ore. App. LEXIS 1385 (1992).

62. An order continuing probation is appealable and reviewable. *State v. Vaughn*, 105 Or. App. 518, 805 P.2d 733, 1991 Ore. App. LEXIS 173 (1991).

63. If a final document from which an appeal is taken in a criminal case, whether denominated "judgment" or something else, states on its face that the trial court intends to impose restitution at some future date, that document is not a "judgment" from which an appeal may be taken because it does not yet contain the complete sentence. *State v. Bonner*, 307 Or. 598, 771 P.2d 272, 1989 Ore. LEXIS 120 (1989).

64. The issues a defendant convicted on a plea of guilty may raise are controlled by *Or. Rev. Stat. § 138.050* and may not be taken pursuant to *Or. Rev. Stat. § 138.040*. *State v. Nathan*, 73 Or. App. 524, 698 P.2d 1052, 1985 Ore. App. LEXIS 3127 (1985).

65. *Or. Rev. Stat. § 138.040* grants appellate jurisdiction generally on a judgment of conviction for a crime. *State v. Clevenger*, 297 Or. 234, 683 P.2d 1360, 1984 Ore. LEXIS 1391 (1984).

66. *Or. Rev. Stat. § 138.040* allows appeals from a judgment on a conviction, and *Or. Rev. Stat. § 138.020* provides for appeal as a matter of right from a judgment in a criminal action in the situations prescribed by *Or. Rev. Stat. §§ 138.010* to *138.300*, and not otherwise. Accordingly, where a defendant was found not responsible for the crime of theft by reason of mental disease or defect, was placed under the jurisdiction of the Psychiatric Security Review Board, and the case was continued for five years or until the defendant could show that he was entitled to discharge, he was never convicted of a crime, there was no judgment on a conviction from which to appeal, and, thus, the provisions of *Or. Rev. Stat. §§ 138.020* and *138.040* did not apply. *State v. Gangi*, 66 Or. App. 582, 675 P.2d 181, 1984 Ore. App. LEXIS 2617 (1984).

67. An order denying a defendant an appeal on his conviction is separately appealable and apparently can also be challenged on an appeal from a judgment of conviction. *State v. Bonner*, 66 Or. App. 1, 672 P.2d 1333, 1983 Ore. App. LEXIS 4009 (1983).

68. The Court of Appeals is the Oregon court primarily responsible for deciding direct criminal appeals. *State v. Horine*, 64 Or. App. 532, 669 P.2d 797, 1983 Ore. App. LEXIS 3448 (1983).

69. On September 24, 1981, the state filed a notice of appeal in a criminal case from a pretrial order granting, in part, the defendant's motion to suppress evidence; on October 1, the defendant filed a notice of cross-appeal; the state moved to dismiss its appeal, and that motion was granted on May 10, 1982; it then moved to dismiss the defendant's cross-appeal, contending that the Court of Appeals loses jurisdiction over a cross-appeal on dismissal of the state's appeal; the Court of Appeals denied the state's motion because a defendant may cross-appeal and once he has filed his notice of cross-appeal within the time permitted the Court of Appeals acquires jurisdiction; the state may not then oust jurisdiction by dismissing its appeal. *State v. Atkinson*, 64 Or. App. 517, 669 P.2d 343, 1983 Ore. App. LEXIS 3458 (1983).

70. It is important to distinguish between orders that may be appealed and orders that are reviewable on appeal. Appealability is not identical with reviewability. Appealability generally is concerned with whether an appeal can be

taken at all. Usually, but not always, appeals lie only from final judgments and orders. Reviewability generally involves the consideration of a variety of rulings and orders made by the court, usually before judgment. Generally, a party seeking review of an order or ruling must have made an appropriate motion or objection in order to lay a foundation for appellate review. *State v. Montgomery*, 294 Or. 417, 657 P.2d 668, 1983 Ore. LEXIS 957 (1983).

71. *Or. Rev. Stat. § 138.040* did not authorize appellate review of a trial court order denying an indigent defendant a verbatim transcript of the trial testimony, since the order denying the transcript came after the judgment of conviction. *State v. Montgomery*, 294 Or. 417, 657 P.2d 668, 1983 Ore. LEXIS 957 (1983).

72. Court of appeals lacked jurisdiction, under *Or. Rev. Stat. § 138.040*, to hear defendants' cross-appeals in a case where the State appealed a district court order granting defendants' motions to dismiss on the ground that they were denied their constitutional right to a speedy trial. The appeal was not an appeal of a pretrial order suppressing evidence under *Or. Rev. Stat. § 138.060(3)*. *State v. Neal*, 58 Or. App. 180, 647 P.2d 974, 1982 Ore. App. LEXIS 3095 (1982).

73. Under *Or. Rev. Stat. § 138.040*, in a criminal case, the denial of a motion in limine to exclude irrelevant or prejudicial evidence can provide the basis for an appeal because such a denial is a decision of the court in an intermediate order or proceeding. *State v. Madison*, 290 Or. 573, 624 P.2d 599, 1981 Ore. LEXIS 690 (1981).

74. Where a criminal defendant was charged with first degree theft but found not responsible because of a mental disease or defect and the court ordered him placed under the jurisdiction of the Psychiatric Security Review Board, the defendant could not appeal under *Or. Rev. Stat. § 138.040* from the order placing him under the Board's jurisdiction, because there was no judgment on a conviction as required by the statute. *State v. Cooper*, 37 Or. App. 443, 587 P.2d 1051, 1978 Ore. App. LEXIS 2234 (1978).

75. Court-appointed defense counsel lacked standing to prosecute an appeal on behalf of his client, who was charged with a traffic infraction, where the record indicated that there was no contact at any time between the defendant and his counsel, and counsel was attempting to appeal without the defendant's authorization and perhaps without his knowledge. *State v. Lyon*, 36 Or. App. 255, 584 P.2d 345, 1978 Ore. App. LEXIS 1840 (1978).

76. Although he was never sentenced, defendant convicted of criminal activity in drugs who was given a suspended sentence and placed on probation for five years on the condition that he be incarcerated for 180 days in the county jail, had the right to appeal under *Or. Rev. Stat. § 138.040* (1971 version). *State ex rel. Dillavou v. Foster*, 273 Or. 319, 541 P.2d 811, 1975 Ore. LEXIS 324 (1975).

77. A defendant was indicted for unlawful possession of marijuana and moved to suppress the marijuana on grounds of unreasonable search; the trial court denied the motion as to a small bag of marijuana taken from the defendant's person but sustained the motion as to 25 two-pound marijuana bricks taken from the defendant's car pursuant to a search warrant obtained the morning after his arrest; where the state had appealed from the part of the order suppressing the bricks, the defendant could not appeal from that part of the order denying his motion as to the small bag of marijuana. *State v. Gwinn*, 12 Or. App. 444, 506 P.2d 187, 1973 Ore. App. LEXIS 1055 (1973).

78. A criminal defendant can appeal only from a "judgment" or "judgment on a conviction;" otherwise, convicted defendants could prosecute separate appeals from verdicts and judgments, with the attendant extra expense and wasted judicial time and procedure; such was not the legislative intent. *State v. McFarland*, 10 Or. App. 90, 497 P.2d 1243, 1972 Ore. App. LEXIS 772 (1972).

79. A criminal defendant was found guilty in a trial and filed a notice of appeal; he was sentenced after oral arguments on appeal had been heard, and there arose a question of whether the Court of Appeals had jurisdiction to hear the appeal before the defendant was sentenced; the Court of Appeals held that the hearing on the notice of appeal, as distinguished from the notice of appeal and filing of briefs, should have awaited the judgment and time for appeal therefrom; however, the order from which the defendant appealed would be affirmed where the record had been completed with the entry of a judgment sentencing the defendant, and all of the issues except those related to the sentence, had been presented on appeal. *State v. McFarland*, 10 Or. App. 90, 497 P.2d 1243, 1972 Ore. App. LEXIS 772 (1972).

80. The right of every criminal defendant to appeal from the circuit court is not interfered with by the requirements of former Or. Rev. Stat. § 138.130 and 138.140 (replaced by Or. Rev. Stat. § 138.135) depriving the defendant of credit for time served in jail pending the outcome of his appeal if he elects to serve the waiting period in the county jail rather than serve it in the penitentiary or attempt to make bail. *Sullivan v. Cupp*, 1 Or. App. 388, 462 P.2d 455, 1969 Ore. App. LEXIS 159 (1969).

81. A question not raised and preserved in the trial court will not be preserved on appeal; accordingly, the Supreme Court would not review a burglary defendant's assignment of error that the state failed to offer evidence sufficient to connect the defendant with the burglary, where the defendant had not raised that issue in the trial court but had abandoned the grounds on which he moved for judgment of acquittal in the trial court. *State v. Long*, 246 Or. 394, 425 P.2d 528, 1967 Ore. LEXIS 590 (1967).

82. A defendant who pleaded guilty to forgery was properly denied the right to appeal on grounds that the trial court erred in failing to dispose of a motion to dismiss the prosecution, in proceeding against the defendant without first having ascertained that good cause was shown for an indictment not returned within 60 days after he was charged, and in imposing sentence on the defendant in the absence of his attorney. *State v. Jairl*, 229 Or. 533, 368 P.2d 323, 1962 Ore. LEXIS 258 (1962).

83. A defendant was indicted for unlawful possession of marijuana and moved to suppress the marijuana on grounds of unreasonable search; the trial court denied the motion as to a small bag of marijuana taken from the defendant's person but sustained the motion as to 25 two-pound marijuana bricks taken from the defendant's car pursuant to a search warrant obtained the morning after his arrest; where the state had appealed from the part of the order suppressing the bricks, the defendant could not appeal from that part of the order denying his motion as to the small bag of marijuana. *State v. Gwinn*, 12 Or. App. 444, 506 P.2d 187, 1973 Ore. App. LEXIS 1055 (1973).

84. Indicted criminal defendants were not entitled to a writ of mandamus under Or. Rev. Stat. § 34.110 to require a circuit judge and district attorney to conduct a preliminary hearing or dismiss the charges against them, where the defendants, if convicted, had a plain, speedy, and adequate remedy on direct appeal under Or. Rev. Stat. §§ 138.020 and 138.040. *State ex rel. Auto. Emporium Inc. v. Murchison*, 289 Or. 265, 611 P.2d 1169, 1980 Ore. LEXIS 930 (1980).

85. Trial court decision on a post-judgment motion to stay enforcement of a criminal sentence is not appealable by the defendant, nor is it reviewable as an interlocutory order. *State v. Wimber*, 108 Or. App. 1, 814 P.2d 169, 1991 Ore. App. LEXIS 1041 (1991).

86. It is important to distinguish between orders that may be appealed and orders that are reviewable on appeal. Appealability is not identical with reviewability. Appealability generally is concerned with whether an appeal can be taken at all. Usually, but not always, appeals lie only from final judgments and orders. Reviewability generally involves the consideration of a variety of rulings and orders made by the court, usually before judgment. Generally, a party seeking review of an order or ruling must have made an appropriate motion or objection in order to lay a foundation for appellate review. *State v. Montgomery*, 294 Or. 417, 657 P.2d 668, 1983 Ore. LEXIS 957 (1983).

87. Or. Rev. Stat. § 138.040 did not authorize appellate review of a trial court order denying an indigent defendant a verbatim transcript of the trial testimony, since the order denying the transcript came after the judgment of conviction. *State v. Montgomery*, 294 Or. 417, 657 P.2d 668, 1983 Ore. LEXIS 957 (1983).

88. Where petitioner was convicted in a stipulated facts trial, sentence was reviewable on direct appeal; failure to appeal conviction barred defendant from post-conviction relief. *Schantz v. Mauss*, 114 Or. App. 167, 834 P.2d 508, 1992 Ore. App. LEXIS 1385 (1992).

## ORS § 138.040

89. If a final document from which an appeal is taken in a criminal case, whether denominated "judgment" or something else, states on its face that the trial court intends to impose restitution at some future date, that document is not a "judgment" from which an appeal may be taken because it does not yet contain the complete sentence. *State v. Bonner*, 307 Or. 598, 771 P.2d 272, 1989 Ore. LEXIS 120 (1989).
90. At the time an appeal by a petitioner seeking post-conviction relief is taken, the sentence can be appealed on the basis that it is cruel, unusual, or excessive in light of the nature and background of the offender or the facts and circumstances of the offense; however, where there is absolutely no evidence in the record from which a post-conviction court can find that a sentence appeal by the petitioner would have the remotest chance of success, and the evidence that exists in the record is overwhelmingly to the contrary, the petitioner will not prevail. *Hedin v. Cupp*, 304 Or. 66, 742 P.2d 604, 1987 Ore. LEXIS 1774 (1987).
91. The trial court did not err in finding the defendant, who was convicted of first degree arson, able to pay \$60,700 in restitution for the destruction of the home involved when defendant attacked the order pursuant to *Or. Rev. Stat. § 138.040* and *Or. Rev. Stat. § 138.050*, but the only argument he made in the trial court was that the court had insufficient facts with which to find that he was able to pay the amount ordered. *State v. Gardner*, 67 Or. App. 404, 679 P.2d 306, 1984 Ore. App. LEXIS 2845 (1984).
92. A rape defendant appealed from the sentencing order entered on April 28, 1981, contending that the trial court erred in refusing to provide a transcript on appeal at public expense; the order denying his motion for a transcript was entered on June 2, 1981; because an order denying a transcript is an "intermediate order," the assignment of error was not properly before the Court of Appeals. *State v. Neal*, 60 Or. App. 322, 654 P.2d 663, 1982 Ore. App. LEXIS 4148 (1982).
93. Conditions of probation are reviewable on appeal. *State v. Sprague*, 52 Or. App. 1063, 629 P.2d 1326, 1981 Ore. App. LEXIS 2861 (1981).
94. Separate sentences that are not improper are nonetheless subject to the strictures against excessive sentences, particularly if made consecutive. *State v. Harris*, 287 Or. 335, 599 P.2d 456, 1979 Ore. LEXIS 1012 (1979).
95. Judgment on a conviction includes an order suspending execution of sentence, and requires that a defendant placed on probation in such an order must appeal from the order within the statutorily mandated time; the sentencing order, even though the sentence is suspended, is a final order for purposes of appellate review, and the appeals period logically runs from the date of the order; the procedure is the same for a defendant who has pled guilty or no contest. *State v. Martinez*, 35 Or. App. 381, 581 P.2d 955, 1978 Ore. App. LEXIS 2832 (1978).
96. Under *Or. Rev. Stat. § 138.020* and *Or. Rev. Stat. § 138.040*, an order denying a motion to modify probation conditions is not appealable. *Stacey v. State*, 30 Or. App. 1075, 569 P.2d 640, 1977 Ore. App. LEXIS 1866 (1977).
97. A criminal defendant was found guilty in a trial and filed a notice of appeal; he was sentenced after oral arguments on appeal had been heard, and there arose a question of whether the Court of Appeals had jurisdiction to hear the appeal before the defendant was sentenced; the Court of Appeals held that the hearing on the notice of appeal, as distinguished from the notice of appeal and filing of briefs, should have awaited the judgment and time for appeal therefrom; however, the order from which the defendant appealed would be affirmed where the record had been completed with the entry of a judgment sentencing the defendant, and all of the issues except those related to the sentence, had been presented on appeal. *State v. McFarland*, 10 Or. App. 90, 497 P.2d 1243, 1972 Ore. App. LEXIS 772 (1972).
98. The order denying a criminal defendant's motion to dismiss the indictment against him on the ground that the district attorney had interviewed the complaining witness more than one year before the indictment was returned and was thus bound to prosecute the defendant at an earlier date was not an appealable order. *State v. Hedrick*, 233 Or. 76, 377 P.2d 23, 1962 Ore. LEXIS 476 (1962).
99. An order denying a criminal defendant's motion to dismiss the indictment against him is not an appealable order; accordingly, the trial court erred in granting a stay of the proceedings pending determination of an appeal from the denial

of a motion to dismiss an indictment. *State v. Haynes*, 232 Or. 330, 375 P.2d 550, 1962 Ore. LEXIS 436 (1962).

100. Under Or. Rev. Stat. § 138.040, in a criminal case, the denial of a motion in limine to exclude irrelevant or prejudicial evidence can provide the basis for an appeal because such a denial is a decision of the court in an intermediate order or proceeding. *State v. Madison*, 290 Or. 573, 624 P.2d 599, 1981 Ore. LEXIS 690 (1981).

101. A question not raised and preserved in the trial court will not be preserved on appeal; accordingly, the Supreme Court would not review a burglary defendant's assignment of error that the state failed to offer evidence sufficient to connect the defendant with the burglary, where the defendant had not raised that issue in the trial court but had abandoned the grounds on which he moved for judgment of acquittal in the trial court. *State v. Long*, 246 Or. 394, 425 P.2d 528, 1967 Ore. LEXIS 590 (1967).

102. While the post-conviction statute supersedes the statutory right of habeas corpus, the relief afforded by habeas corpus for denial of constitutional rights is retained; however, the failure to appeal from an adverse ruling in the trial court as to the matter of prior jeopardy waives the defense and it cannot be considered in habeas corpus. *Barnett v. Gladden*, 237 Or. 76, 390 P.2d 614, 1964 Ore. LEXIS 331 (1964).

103. When a sentence exceeds the maximum allowed by law, the appellate court is bound to direct the lower court to impose the correct punishment. *State v. Carney*, 94 Or. App. 302, 765 P.2d 232, 1988 Ore. App. LEXIS 2144 (1988).

104. While the post-conviction statute supersedes the statutory right of habeas corpus, the relief afforded by habeas corpus for denial of constitutional rights is retained; however, the failure to appeal from an adverse ruling in the trial court as to the matter of prior jeopardy waives the defense and it cannot be considered in habeas corpus. *Barnett v. Gladden*, 237 Or. 76, 390 P.2d 614, 1964 Ore. LEXIS 331 (1964).

#### TREATISES AND ANALYTICAL MATERIALS

1. 1-44 *Oregon Criminal Practice* § 44.15, Chapter 44 SENTENCING, Oregon Criminal Practice.
2. 1-46 *Oregon Criminal Practice* § 46.03, Chapter 46 APPEALS, Oregon Criminal Practice.
3. 1-46 *Oregon Criminal Practice* § 46.13, Chapter 46 APPEALS, Oregon Criminal Practice.

**Attachment E**

N.C. Gen. Stat. § 15A-1444

FOCUS - 7 of 10 DOCUMENTS

GENERAL STATUTES OF NORTH CAROLINA  
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\*\*\* STATUTES CURRENT THROUGH THE 2004 REGULAR SESSION \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH MAY 31, 2004 \*\*\*

CHAPTER 15A. CRIMINAL PROCEDURE ACT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

*N.C. Gen. Stat. § 15A-1444 (2004)*

§ 15A-1444. When defendant may appeal; certiorari

(a) A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.

(a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

(a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:

(1) Results from an incorrect finding of the defendant's prior record level under *G.S. 15A-1340.14* or the defendant's prior conviction level under *G.S. 15A-1340.21*;

(2) Contains a type of sentence disposition that is not authorized by *G.S. 15A-1340.17* or *G.S. 15A-1340.23* for the defendant's class of offense and prior record or conviction level; or

(3) Contains a term of imprisonment that is for a duration not authorized by *G.S. 15A-1340.17* or *G.S. 15A-1340.23* for the defendant's class of offense and prior record or conviction level.

(b) Procedures for appeal from the magistrate to the district court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.

(c) Procedures for appeal from the district court to the superior court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.

(d) Procedures for appeal to the appellate division are as provided in this Article, the rules of the appellate division, and Chapter 7A of the General Statutes. The appeal must be perfected and conducted in accordance with the requirements of those provisions.

(e) Except as provided in subsections (a1) and (a2) of this section and *G.S. 15A-979*, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.

(f) The ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in *G.S. 15A-1422*.

(g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division.

**HISTORY:** 1977, c. 711, s. 1; 1979, c. 760, s. 3; 1981, c. 179, ss. 8, 9; 1993, c. 538, s. 27; 1994, Ex. Sess., c. 24, s. 14(b); 1997-80, s. 4.

**NOTES:**

**OFFICIAL COMMENTARY**

Subsection (a) states the familiar rule of appellate practice that appeal, as a matter of right, is available when final judgment has been entered. (Entry of judgment is defined in *G.S. 15A-101*, by virtue of a concurrent amendment.)

A number of cross references are included in subsections (b), (c), (d) and (f) for the purpose of pointing out as well as locating other appellate rules, trial de novo in misdemeanor cases, and the rules with regard to appeal from motions for appropriate relief.

Subsection (e) carries forward the provisions of G.S. 15-180.2, a 1973 statute, which provide(d) only discretionary review when a defendant has plead guilty or entered a plea of no contest. The exception relates to review of determinations on motions to suppress vital evidence.

As subsection (g) indicates, review by writ of certiorari is available. That discretionary review is necessarily controlled by the rules of the appellate division.

*G.S. 15-179* had provided that the State may appeal in seven enumerated instances. These areas had imposed an effective limitation to appeal on matters of law. The statute here proposed is less complicated in statement and follows the federal revision (Title 18, *U.S. Code*, § 3731) after the case of *United States v. Sisson*, 399 U.S. 267, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970). Appeals by the State have been few in number and it is not contemplated that this provision will substantially change that situation.

**LEGAL PERIODICALS.**—For comment discussing the North Carolina Fair Sentencing Act, see 60 *N.C.L. Rev.* 631 (1982).

For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 *Campbell L. Rev.* 71 (1995).

**CASE NOTES**

**THIS SECTION PROVIDES THE EXCLUSIVE STATUTORY AUTHORITY FOR APPEALS IN CRIMINAL PROCEEDINGS.** *State v. Shoff*, 118 N.C. App. 724, 456 S.E.2d 875 (1995), appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996).

**RELIANCE UPON A SUBSTANTIAL RIGHTS ANALYSIS AS THE BASIS FOR APPELLATE REVIEW** appears contrary to the plain and unambiguous language of the statutes governing criminal appeals. *State v. Shoff*, 118 N.C. App. 724, 456 S.E.2d 875 (1995), appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996).

**CERTIORARI TO REVIEW JUDGMENT IN HABEAS CORPUS.**—By analogy, *G.S. 7A-27(a)*, former *G.S. 15-180.2* and *N.C.R.A.P.*, Rule 21(b) were logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment. *State v. Niccum*, 293 N.C. 276, 238 S.E.2d 141 (1977).

**THE FAIR SENTENCING ACT DID NOT ALLOW APPEAL OF A PRESUMPTIVE SENTENCE AS OF RIGHT** *State v. Cain*, 79 N.C. App. 35, 338 S.E.2d 898, cert. denied, 316 N.C. 380, 342 S.E.2d 899 (1986); *State v. Hardy*, 104 N.C. App. 226, 409 S.E.2d 96 (1991).

Because defendant's sentence for an attempted escape conviction was in the presumptive range he had no direct appeal as a matter of right. *State v. McDonald*, — N.C. App. —, 593 S.E.2d 793 (2004).

**APPEAL UNDER SUBSECTION (A1) OF THIS SECTION** is limited to the issue of whether the sentence entered is supported by evidence introduced at the trial and the sentencing hearing. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

When a convicted felon is given a sentence in excess of the presumptive sentence, he may appeal as a matter of right,

and the only question before the appellate court on such an appeal is whether the sentence is supported by evidence introduced at trial and the sentencing hearing. *State v. Teague*, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

Where defendant was entitled to appeal as of right only in the case in which the sentence exceeds the presumptive, the court neither erred nor abused its discretion in refusing to allow him to appeal in forma pauperis in the other cases. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

The defendant was not entitled to assert, on direct appeal, error relating to his sentence, where the sentence which he received was less than the presumptive term set by former G.S. 15A-1340.4(f)(1) for second degree murder, a Class C felony. *State v. Knight*, 87 N.C. App. 125, 360 S.E.2d 125 (1987), cert. denied, 321 N.C. 476, 364 S.E.2d 662 (1988).

Although G.S. 15A-1444(a1) permits a defendant to appeal the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing, the scope of appellate review is confined to a consideration of those assignments of error set out in the record on appeal. N.C. R. App. P. 10(a). *State v. Smith*, 160 N.C. App. 107, 584 S.E.2d 830 (2003).

**A DEFENDANT WHO HAS BEEN FOUND GUILTY IS ENTITLED UNDER SUBSECTION (A1) TO APPELLATE REVIEW** of the issue of whether his sentence is supported by the evidence presented at trial or during the sentencing hearing. The reviewing court must also determine whether the trial court abused its discretion in weighing the aggravating and mitigating factors. *State v. Summerlin*, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

**WRIT OF CERTIORARI LIMITED.**—While G.S. 15A-1444(e) allows a defendant to petition for writ of certiorari after entering a guilty plea, the appellate court is limited to issuing a writ of certiorari in appropriate circumstances to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1444(c)(3) of an order of the trial court denying a motion for appropriate relief, N.C. R. App. P. 21(a)(1). *State v. Pimental*, 153 N.C. App. 69, 568 S.E.2d 867 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d 163 (2002).

**WRIT OF CERTIORARI AVAILABLE TO DEFENDANT NOT ENTITLED TO APPEAL SENTENCE.**—Pursuant to subsection (a1) of this section, a defendant who had entered a plea of guilty to a felony was not entitled to appeal as a matter of right unless his sentence exceeded the presumptive term set by former G.S. 15A-1340.4; however, he could petition for review of the issue by writ of certiorari. *State v. Farrison*, 117 N.C. App. 429, 451 S.E.2d 332 (1994), cert. granted, 340 N.C. 116, 455 S.E.2d 663 (1995).

Although defendant was not entitled to an appeal as of right after the trial court failed to follow the procedures for accepting a guilty plea, defendant was entitled to review pursuant to a writ of certiorari. *State v. Rhodes*, — N.C. App.—, 592 S.E.2d 731 (2004).

**NO APPEAL OF FINDING OF AGGRAVATION WAS PERMITTED AS OF RIGHT.**—Defendant was not entitled to appeal his sentence as of right under G.S. 15A-1444(e) where he contended that the trial court erred in finding as a non-statutory aggravating factor for sentencing that the murder he pleaded guilty to was committed with malice, premeditation and deliberation. *State v. Pimental*, 153 N.C. App. 69, 568 S.E.2d 867 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d 163 (2002).

Although the defendant who was stripped of her jail credit for time in home detention could not appeal under this section, the court elected to treat her appeal as a petition for writ of certiorari and granted it, pursuant to N.C. R. App., Rule 21. *State v. Jarrigan*, 140 N.C. App. 198, 535 S.E.2d 875 (2000).

**NO APPEAL FROM INTERLOCUTORY ORDER IN CRIMINAL PROCEEDING ABSENT STATUTORY PROVISION.**—In light of the legislature's enactment of subsection (d) of this section and the North Carolina Supreme Court's decision in *State v. Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986), the court of appeals has concluded that the statutory basis, G.S. 1-277, for the holding in *State v. Childs*, 265 N.C. 575, 144 S.E.2d 653 (1965) (per curiam), and dictum in *State v. Bryant*, 280 N.C. 407, 185 S.E.2d 854 (1972), is no longer relevant to the appeal of interlocutory orders in criminal proceedings; accordingly, the court of appeals would decline to follow. *State v. Jones*, 67 N.C. App. 413, 313 S.E.2d 264 (1984); *State v. Montalbano*, 73 N.C. App. 259, 326 S.E.2d 634, cert. denied, 313 N.C. 608, 332 S.E.2d 182 (1985); and *State v. Major*, 84 N.C. App. 421, 352 S.E.2d 862 (1987), insofar as they might allow interlocutory appeals in criminal proceedings based on Childs, Bryant, or G.S. 1-277. *State v. Joseph*, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

Denial of defendant's motion to dismiss, which was based on double jeopardy grounds, was an interlocutory order from which no appeal would lie in absence of statutory provision. *State v. Joseph*, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

WHEN THE LANGUAGE OF SUBSECTION (E) OF THIS SECTION IS READ CONVERSELY, it provides that when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court. It follows that a defendant whose motion to withdraw his plea of guilty, made during the term and on the day following pronouncement of judgment, was denied, is entitled to appeal as a matter of right. *State v. Dickens*, 296 N.C. 76, 261 S.E.2d 183 (1980).

NO CONFLICT WITH § 7A-27(A).—There is no conflict between subsection (e) and G.S. 7A-27(a). *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990).

EVIDENCE OFFERED ON THE HEARING OF A POST-TRIAL MOTION FOR APPROPRIATE RELIEF DOES NOT RELATE BACK so as to justify a holding that the trial judge erroneously instructed the jury at trial. *State v. Leonard*, 300 N.C. 223, 266 S.E.2d 631, cert. denied, 449 U.S. 960, 101 S. Ct. 372, 66 L. Ed. 2d 227 (1980).

DEFENDANT WHO ENTERED A PLEA OF GUILTY TO 10 MISDEMEANORS was not entitled to appeal as a matter of right, since none of the exceptions in G.S. 15A-979 or this section applied. *State v. Noll*, 88 N.C. App. 753, 364 S.E.2d 726 (1988).

DEFENDANT'S PLEA WAS IMPROPERLY CONDITIONED UPON APPELLATE REVIEW OF ISSUES HE WAS NOT ENTITLED TO HAVE REVIEWED.—Although defendant specifically conditioned his entire plea agreement on appellate review, defendant's right to appeal was limited to the motion to suppress evidence and did not provide for review of the other motions because they were not listed under N.C. R. App. P. 21; since defendant was entitled to the benefit of his bargain, his guilty plea was vacated and remanded, which placed defendant back in the position he was in before striking the illegal bargain to appeal issues not properly presented on appeal from his guilty plea. *State v. Jones*, 161 N.C. App. 60, 588 S.E.2d 5 (2003), cert. granted, 357 N.C. 660, 589 S.E.2d 882 (2003).

MOTION TO WITHDRAW GUILTY PLEA WAS PROPERLY DENIED.—Defendant's motion to withdraw his guilty plea and petition for a writ of certiorari were denied where, inter alia: (1) defendant never asserted his legal innocence; (2) the State's evidence of premeditation was not weak; (3) there appeared to be a significant amount of time between the entry of the plea and defendant's desire to change it; (4) defendant was not denied the effective assistance of counsel; and (5) defendant was competent, within the meaning of G.S. 15A-1001(a) (2001), at the time of the entry of his plea. *State v. Ager*, 152 N.C. App. 577, 568 S.E.2d 328 (2002), appeal dismissed, 356 N.C. 616, 577 S.E.2d 29 (2002).

DISMISSAL OF APPEAL.—Defendant's appeal of his conviction on 13 drug-related offenses was dismissed where defendant neither sought to withdraw his guilty plea nor to obtain any other relief by motion in the superior court. *State v. Nanc*, 155 N.C. App. 773, 574 S.E.2d 692 (2003).

APPEAL DISMISSED BECAUSE DEFENDANT WAS NOT ENTITLED TO APPELLATE REVIEW as a matter of right under subsection (a1). *State v. Williams*, 116 N.C. App. 354, 447 S.E.2d 437, cert. denied, 338 N.C. 523, 452 S.E.2d 823 (1994).

Because defendant had no appeal as of right, and had not petitioned for a writ of certiorari, his notice of appeal was a nullity, and the appellate court had no jurisdiction. *State v. Peters*, 122 N.C. App. 504, 470 S.E.2d 545 (1996).

Defendant who could not have raised any of the issues enumerated in subsection (a2) had no right to appeal. *State v. Hamby*, 129 N.C. App. 366, 499 S.E.2d 195 (1998).

Under G.S. 15A-1444(e), a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. *State v. Pimental*, 153 N.C. App. 69, 568 S.E.2d 867 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d 163 (2002).

Where defendant's assignments of error related to the trial court's decision to grant a continuance and the clarity of the charging instrument, the errors were not sentencing issues pursuant to G.S. 15A-1444(a2) and defendant did not have an appeal by right or by certiorari or the entry of a plea of "no contest" to habitual driving while impaired and habitual felon

status. *State v. Moore*, 156 N.C. App. 693, 577 S.E.2d 354 (2003).

Defendant did not have an appeal of right where his arguments were not presented with the denial of a plea withdrawal or a motion to suppress and did not challenge the evidence's sufficiency or the sentencing statutes; review was unavailable as, without an appeal of right or the authority to grant certiorari, the appellate court could not consider the arguments asserted by defendant and had to dismiss the appeal. *State v. Jamerson*, 161 N.C. App. 527, 588 S.E.2d 545 (2003).

**WHERE DEFENDANT DID NOT GIVE TIMELY NOTICE OF APPEAL.**—Where defendant did not move to withdraw a guilty plea pursuant to G.S. 15A-1024, did not give timely notice of appeal pursuant to G.S. 15A-1444, and did not petition for writ of certiorari pursuant to G.S. 15A-1444(e) and N.C. R. App. P. 21(c), any challenge to the original judgment was waived; since defendant waived the right to appeal by consenting to an initial extension of probation under G.S. 15A-1342, the trial court was entitled to revoke defendant's probation and activate the sentence under G.S. 15A-1344(d) after a second violation of probation. *State v. Rush*, 158 N.C. App. 738, 582 S.E.2d 37 (2003).

**WHERE DEFENDANT PLEADED GUILTY TO BEING AN HABITUAL FELON, AND DID NOT MOVE IN THE TRIAL COURT TO WITHDRAW HIS GUILTY PLEA,** defendant was not entitled to an appeal of right from the trial court's ruling. *State v. Young*, 120 N.C. App. 456, 462 S.E.2d 683 (1995).

**SINCE THE COURT WAS NOT REQUIRED UNDER FORMER § 15A-1340.4(B) TO MAKE FINDINGS OF AGGRAVATING AND MITIGATING factors to support the sentence imposed,** defendant had no appeal as of right pursuant to subsection (a1). *State v. Washington*, 116 N.C. App. 318, 447 S.E.2d 799 (1994).

**WHEN A CONVICTED FELON IS GIVEN A SENTENCE IN EXCESS OF THE PRESUMPTIVE RANGE,** he may appeal as a matter of right, and the only question before the appellate court on such an appeal is whether the sentence is supported by evidence introduced at trial and the sentencing hearing. *State v. Weary*, 124 N.C. App. 754, 479 S.E.2d 28 (1996).

**IMPOSITION OF JUDGMENT ON PRAYER FOR JUDGMENT NECESSARY FOR APPEAL.**—Appellate court was unable to address defendant's assignments of error for armed robbery convictions because the trial court never imposed judgment on defendant's prayer for judgment. *State v. Escoto*, 162 N.C. App. 419, 590 S.E.2d 898 (2004), cert. denied, 358 N.C. 378, 598 S.E.2d 138 (2004).

APPLIED in *State v. Ervin*, 38 N.C. App. 261, 248 S.E.2d 91 (1978); *State v. Sinclair*, 45 N.C. App. 586, 263 S.E.2d 811 (1980); *State v. Rivard*, 57 N.C. App. 672, 292 S.E.2d 174 (1982); *State v. Davis*, 58 N.C. App. 330, 293 S.E.2d 658 (1982); *State v. Ahearn*, 59 N.C. App. 44, 295 S.E.2d 621 (1982); *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983); *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983); *State v. Thompson*, 64 N.C. App. 354, 307 S.E.2d 397 (1983); *State v. Aldridge*, 67 N.C. App. 655, 314 S.E.2d 139 (1984); *State v. Howard*, 70 N.C. App. 487, 320 S.E.2d 17 (1984); *State v. Dickey*, 71 N.C. App. 225, 321 S.E.2d 492 (1984); *State v. Johnson*, 71 N.C. App. 607, 322 S.E.2d 810 (1984); *State v. Ford*, 71 N.C. App. 748, 323 S.E.2d 358 (1984); *State v. Heath*, 77 N.C. App. 264, 335 S.E.2d 350 (1985); *State v. Bolinger*, 320 N.C. 596, 359 S.E.2d 459 (1987); *State v. Hester*, 93 N.C. App. 594, 378 S.E.2d 553 (1989); *State v. Golden*, 96 N.C. App. 249, 385 S.E.2d 346 (1989); *State v. Maye*, 104 N.C. App. 437, 410 S.E.2d 8 (1991); *State v. O'Neal*, 116 N.C. App. 390, 448 S.E.2d 306, cert. denied, 338 N.C. 522, 452 S.E.2d 821 (1994); *State v. Linemann*, 135 N.C. App. 734, 522 S.E.2d 781 (1999); *State v. Jones*, 151 N.C. App. 317, 566 S.E.2d 112 (2002), appeal dismissed, 356 N.C. 687, 578 S.E.2d 320 (2003), cert. denied, — U.S.—, 124 S. Ct. 111, 157 L. Ed. 2d 76 (2003).

CITED in *State v. Johnson*, 42 N.C. App. 234, 256 S.E.2d 297 (1979); *State v. Ward*, 46 N.C. App. 200, 264 S.E.2d 737 (1980); *State v. Fennell*, 51 N.C. App. 460, 276 S.E.2d 499 (1981); *Strader v. Allsbrook*, 656 F.2d 67 (4th Cir. 1981); *State v. Gaynor*, 61 N.C. App. 128, 300 S.E.2d 260 (1983); *State v. Hough*, 61 N.C. App. 132, 300 S.E.2d 409 (1983); *State v. Willis*, 61 N.C. App. 244, 300 S.E.2d 829 (1983); *State v. Gaynor*, 61 N.C. App. 128, 300 S.E.2d 260 (1983); *State v. Hough*, 61 N.C. App. 132, 300 S.E.2d 409 (1983); *State v. Willis*, 61 N.C. App. 244, 300 S.E.2d 829 (1983); *State v. Miller*, 64 N.C. App. 618, 307 S.E.2d 843 (1983); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); *State v. Hinnant*, 65 N.C. App. 130, 308 S.E.2d 732 (1983); *State v. Smith*, 65 N.C. App. 420, 309 S.E.2d 1 (1983); *State v. Williams*, 65 N.C. App. 472, 310 S.E.2d 83 (1983); *State v. Jones*, 66 N.C. App. 274, 311 S.E.2d 351 (1984); *State v. Thompson*, 66 N.C. App. 679, 312 S.E.2d 212 (1984); *State v. Coker*, 312 N.C. 432, 323 S.E.2d 343 (1984); *State v. Collier*, 72 N.C. App. 508, 325 S.E.2d 256 (1985); *State v. Williamson*, 72 N.C. App. 557, 326 S.E.2d 37 (1985); *State v. Pait*, 81 N.C. App.

286, 343 S.E.2d 573 (1986); *State v. Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986); *State v. Thompson*, 318 N.C. 395, 348 S.E.2d 798 (1986); *State v. Wright*, 319 N.C. 209, 353 S.E.2d 214 (1987); *State v. Parker*, 319 N.C. 444, 355 S.E.2d 489 (1987); *State v. Carver*, 319 N.C. 665, 356 S.E.2d 349 (1987); *State v. W. I.*, 87 N.C. App. 621, 361 S.E.2d 900 (1987); *State v. Brewer*, 321 N.C. 284, 362 S.E.2d 261 (1987); *State v. Drayton*, 321 N.C. 512, 364 S.E.2d 121 (1988); *State v. Holden*, 321 N.C. 689, 365 S.E.2d 626 (1988); *State v. Taylor*, 322 N.C. 280, 367 S.E.2d 664 (1988); *State v. Smaw*, 96 N.C. App. 98, 384 S.E.2d 304 (1989); *State v. Sanderson*, 327 N.C. 397, 394 S.E.2d 803 (1990); *State v. Absher*, 329 N.C. 264, 404 S.E.2d 848 (1991); *State v. Hawkins*, 110 N.C. App. 837, 431 S.E.2d 503 (1993); *State v. Barnett*, 113 N.C. App. 69, 437 S.E.2d 711 (1993); *State v. Shoff*, 118 N.C. App. 724, 456 S.E.2d 875 (1995), appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), *aff'd*, 342 N.C. 638, 466 S.E.2d 277 (1996); *State v. McBride*, 120 N.C. App. 623, 463 S.E.2d 403 (1995); *State v. Deese*, 127 N.C. App. 536, 491 S.E.2d 682 (1997); *State v. Flowers*, 128 N.C. App. 697, 497 S.E.2d 94 (1998); *State v. Rudisill*, 137 N.C. App. 379, 527 S.E.2d 727 (2000); *State v. Bates*, 140 N.C. App. 743, 538 S.E.2d 597 (2000); *State v. Choppy*, 141 N.C. App. 32, 539 S.E.2d 44 (2000); *State v. China*, 150 N.C. App. 469, 564 S.E.2d 64 (2002), appeal dismissed, 356 N.C. 683, 577 S.E.2d 899 (2003); *State v. Spivey*, 150 N.C. App. 189, 563 S.E.2d 12 (2002), appeal dismissed, cert. denied, 356 N.C. 174, 569 S.E.2d 276 (2002), *aff'd*, 357 N.C. 114, 579 S.E.2d 251 (2003); *State v. Dickson*, 151 N.C. App. 136, 564 S.E.2d 640 (2002); *State v. Murphy*, 152 N.C. App. 335, 567 S.E.2d 442 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d (2002); *State v. Pimental*, 153 N.C. App. 69, 568 S.E.2d 867 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d 163 (2002); *State v. Bivens*, 155 N.C. App. 645, 573 S.E.2d 259 (2002), cert. denied, 356 N.C. 680, 577 S.E.2d 895 (2003).

USER NOTE: For more generally applicable notes, see notes under the first section of this subpart, part, article, or chapter.

**Attachment F**

*Rozkydal v. State*, 938 P.2d 1091

## LEXSEE

MARTHA JO ROZKYDAL, Appellant, v. STATE OF ALASKA, Appellee.

Court of Appeals No. A-6039, No. 1532

COURT OF APPEALS OF ALASKA

938 P.2d 1091; 1997 Alas. App. LEXIS 25

May 30, 1997, Decided

**PRIOR HISTORY: [\*\*1]**

Appeal from the Superior Court, Third Judicial District, Anchorage, Elaine M. Andrews, Judge. Trial Court No. 3AN-94-6192 Cr.

**DISPOSITION:**

Appeal DISMISSED.

**COUNSEL:**

Cynthia L. Strout, Anchorage, for Appellant.

Leonard M. Linton, Jr., Assistant District Attorney, Kenneth J. Goldman, District Attorney, Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

**JUDGES:** Before: Bryner, Chief Judge, and Coats and Mannheimer, Judges.

**OPINION BY: MANNHEIMER****OPINION:**

[\*1092] OPINIO:

MANNHEIMER, Judge.

Martha Jo Rozkydal was convicted of first-degree theft, *AS 11.46.120(a)*, for embezzling over \$125,000 from her employer. She was sentenced to 4 years' imprisonment with 32 months suspended — that is, she received 16 months to serve. Rozkydal has now filed a sentence appeal with this court. The question is whether Rozkydal is entitled to appeal her sentence.

In 1995, the Alaska Legislature limited the right of sentence appeal by amending the sentence appeal statute, *AS 12.55.120(a)*. See SLA 1995, ch. 79, §§ 7-8. Under the current 2 version of the statute, defendants [\*1093] convicted of felonies may appeal [\*\*2] their sentences only if they receive more than 2 years to serve. The pertinent

portion of the statute reads:

A sentence of imprisonment lawfully imposed by the superior court for a term or aggregate terms exceeding two years of unsuspended incarceration for a felony offense ... may be appealed to the court of appeals by the defendant on the ground that the sentence is excessive[.]

At the same time, the legislature enacted a corresponding limit on this court's jurisdiction to hear sentence appeals. See SLA 1995, ch. 79, §§ 11-12. n1

n1 The current version of *AS 22.07.020(b)* provides:

Except as limited in *AS 12.55.120*, the court of appeals has jurisdiction to hear appeals of unsuspended sentences of imprisonment exceeding two years for a felony offense ... on the grounds that the sentence is excessive, or a sentence of any length on the grounds that it is too lenient.

As explained above, Rozkydal received only 16 months to serve. The State therefore asserts that Rozkydal has no right [\*\*3] to appeal her sentence. Rozkydal concedes that the legislature has apparently eliminated her right to appeal her sentence. She argues, however, that the legislature's action denies equal protection of the law to felony defendants who receive 2 years or less to serve. Rozkydal also contends that the legislature's action denies due process of law to these defendants. Finally, Rozkydal contends that, regardless of how the legislature may try to restrict sentence appeals, the judiciary has an inherent power to review criminal sentences.

For the reasons explained in this opinion, we conclude that the legislative changes to *AS 12.55.120(a)* and *AS 22.07.020(b)* are constitutional and that Rozkydal has

no right to appeal her sentence, either to this court or to the supreme court. However, we also conclude that Rozkydal retains the right to petition the Alaska Supreme Court to review her sentence. We therefore dismiss Rozkydal's appeal, but without prejudice to Rozkydal's filing a petition for review in the supreme court.

*The effect of the amendment to AS 12.55.120(a)*

Before addressing Rozkydal's constitutional arguments, it is important to clarify what was accomplished by the 1995 amendment [\*\*4] to the sentence appeal statute. Certain legal concepts are key to our interpretation of the current statute: the definition of a "sentence appeal", and the distinction between an "appeal" and a "petition".

By its terms, AS 12.55.120 deals only with "sentence[s] of imprisonment lawfully imposed by the superior court" that are being appealed "on the ground that the sentence is excessive[.]" In order to interpret this language, we must look to a thirty-year-old decision of the Alaska Supreme Court: *Bear v. State*, 439 P.2d 432 (Alaska 1968).

In *Bear*, the supreme court held that, absent legislative authorization, it had no authority to review a lawful sentence "for abuse of discretion" — that is, for excessive severity or leniency. *Bear*, 439 P.2d at 435. The supreme court did not question its authority to decide cases in which the defendant claimed that the sentence was illegal, or cases in which the defendant claimed that the sentencing procedures were flawed. *Id.* at 436, 438. The issue presented in *Bear* was something different: whether the court had the authority to hear an appeal in which the defendant failed to allege any illegality in the sentence or the [\*\*5] sentencing proceedings, but argued simply that a concededly legal sentence constituted an abuse of sentencing discretion. *Id.* at 434. The court ruled that it had no such authority.

The legislature responded to *Bear* the following year by enacting AS 12.55.120, a statute that explicitly granted the supreme court the authority to entertain sentence appeals. As the House Judiciary Committee explained in its report on the pending legislation (House Bill No. 281):

The majority of the courts have held that where a sentence imposed by a trial judge is within the limits prescribed by statute and otherwise lawful, an appellate court cannot review the discretion the trial judge exercised in determining the sentence. [\*094] even though it may appear in retrospect to have been too severe or too lenient.

Enactment of [this legislation] would provide ... jurisdiction ... for appellate review

of sentences in Alaska.

1969 House Journal 665.

We recognize that the term "sentence appeal" is not always used this narrowly. For instance, under current Alaska appellate practice, the "sentence appeals" filed under Appellate Rule 215 often include allegations that the sentencing proceedings [\*\*6] were irregular or that the sentencing judge erred in making various factual and legal determinations affecting the range of authorized sentences. As an administrative matter, there is generally no problem with handling such appeals under the expedited procedures specified in Appellate Rule 215. In fact, this court encouraged this practice in *Juneby v. State*, 641 P.2d 823, 835 n.18 (Alaska App. 1982).

However, the issue in Rozkydal's case is the scope of AS 12.55.120. In light of the legislative history described above, it is apparent that this statute was meant to authorize and govern a particular kind of appeal: appeals in which the defendant's sole assertion of error is that the sentencing judge abused his or her discretion by imposing too severe a sentence.

Now that we have clarified the type of appellate claim governed by AS 12.55.120, it is also important to clarify the type of restriction that this statute places on a defendant's ability to obtain appellate review of such claims. AS 12.55.120(a) declares that sentences of more than 2 years' imprisonment "may be appealed ... on the ground that the sentence is excessive[.]" To interpret this language, we must distinguish [\*\*7] between an "appeal" and a "petition".

The right of "appeal" means the right to *require* an appellate court to review a lower court's decision. The right of "petition", on the other hand, means the right to *request* an appellate court to review a lower court's decision — a request which the appellate court may grant or deny as it sees fit. See *Kerttula v. Abood*, 686 P.2d 1197, 1200-01 (Alaska 1984); *Morgan v. State*, 635 P.2d 472, 480-81 & n.16 (Alaska 1981); *State v. Browder*, 486 P.2d 925, 929-931 (Alaska 1971).

In *Browder*, the supreme court dealt with a legal question analogous to the one presented in Rozkydal's case. The defendant in *Browder* was being prosecuted for contempt of court (for bringing a shotgun into a courtroom). The district court ruled that *Browder* was entitled to a jury trial, and the State sought appellate review of this ruling by filing a petition for review. One key issue in *Browder* was whether the State could employ a petition for review to seek appellate review of the trial court's ruling.

Under former AS 22.05.010 (as it existed in 1971), the legislature had placed substantial restrictions on the

State's right of appeal in criminal [\*\*8] cases: the State had no right of appeal except "to test the sufficiency of the indictment or [to assert] that the sentence [was] too lenient". See *Browder*, 486 P.2d at 929. Thus, under the governing statute, the State had no right to appeal the district court's jury trial order. Nevertheless, the supreme court concluded that the State could seek judicial review of the lower court's order through a petition for review:

The limitation placed upon the state's right to appeal in a criminal case, found in AS 22.05.010, was intended to apply only to instances where our jurisdiction is ... invoked by appeal. AS 22.05.010 clearly distinguishes between appeals and other forms of review. Appeals are specifically limited, whereas the other forms of review authorized under AS 22.05.010 ... have no limitations placed on them.

*Browder*, 486 P.2d at 930. The supreme court noted that if AS 22.05.010 were construed to prohibit the court from reviewing any ruling in a criminal case except those rulings expressly made appealable, then the statute would raise serious constitutional problems under Article IV, Section 2 of the Alaska Constitution (the provision which declares [\*\*9] the supreme court to be "the highest court of the State, with final appellate jurisdiction"). 486 P.2d at 931.

[\*1095] We believe that the supreme court's decision in *Browder* illuminates the proper construction of AS 12.55.120(a). The statute declares that felony sentences "may be appealed" only if they exceed 2 years to serve. The statute does not mention or purport to limit a defendant's right to petition a higher court for discretionary review of a sentence. Given *Browder's* interpretation of an analogous statute (the statute limiting the State's right of appeal in criminal cases), we conclude that AS 12.55.120(a) should be interpreted in the same way. The statute eliminates certain felony defendants' right to "appeal" their sentence (that is, their right to require an appellate court to review the sentence), but these defendants retain the right to seek discretionary appellate review of a sentence by filing a petition for review. This right is explicitly recognized in Appellate Rule 215(a)(2):

*Right to Seek Discretionary Review.* A defendant may seek discretionary review of an unsuspended sentence of imprisonment which is not appealable ... by filing a petition for review [\*\*10] in the supreme court under Appellate Rule 402.

To summarize: The sentence appeal statute, AS

12.55.120, governs a particular type of appellate claim — instances in which the defendant concedes the legality of his or her sentence but contends that the severity of the sentence constitutes an abuse of discretion. The statute declares that a felony defendant may raise such a claim on appeal only if the challenged sentence exceeds 2 years to serve. However, because the statute does not restrict a defendant's right to petition for discretionary review of a sentence, and because this right is explicitly codified in Appellate Rules 215(a)(2) and 402(a)(1), we conclude that a felony defendant who receives a lesser sentence retains the right to seek discretionary review of that sentence by filing a petition for review in the supreme court.

Thus, under current Alaska statutes and court rules, Rozkydal does not have the right to appeal her 16-month sentence, but she does have the right to petition the supreme court to review it. Against this background, we now assess Rozkydal's constitutional challenges to AS 12.55.120(a).

#### *The constitutionality of AS 12.55.120(a)*

Rozkydal raises three [\*\*11] constitutional challenges to AS 12.55.120(a). One of Rozkydal's arguments is that the judiciary has an inherent authority to review sentences, an authority that the legislature can not eliminate. However, as we explained in the previous section of this opinion, even after the 1995 amendment to AS 12.55.120(a), Alaska law still allows felony defendants who receive sentences of 2 years or less to seek discretionary review of their sentences. Given our construction of AS 12.55.120(a) and the supreme court's enactment of Appellate Rule 215(a)(2), Rozkydal's "inherent authority" argument is moot.

Rozkydal next argues that AS 12.55.120(a) violates the equal protection clause of the Alaska Constitution (Article I, Section 1) because, under the statute, felony defendants sentenced to serve 2 years or less are treated differently from felony offenders sentenced to serve more than 2 years. However, not all differences in treatment violate the equal protection clause. As the supreme court stated in *Gonzales v. Safeway Stores, Inc.*, 882 P.2d 389, 396 (Alaska 1994), the equal protection clause commands the legislature to give the same treatment to "those who are similarly situated":

The [\*\*12] common question in equal protection cases is whether two groups of people who are treated differently are similarly situated and thus entitled to equal treatment. Equal protection jurisprudence concerns itself largely with the reasons for treating one group differently from another[,] ... asking whether a legitimate reason for disparate

treatment exists, and, given a legitimate reason, whether the enactment creating the [different treatment] bears a fair and substantial relationship to that reason. *State, Dep't of Revenue v. Casio*, 858 P.2d 621, 629 (Alaska 1993).

*Gonzales*, 882 P.2d at 396 (footnote omitted).

Rozkydal argues that the recent amendment to the sentence appeal statute has created two groups of felony offenders: those [\*1096] who can obtain appellate review of their sentences, and those who can not. However, as explained in the previous section, AS 12.55.120 does not restrict a defendant's ability to seek appellate review of illegalities in either the sentence or the sentencing process. Moreover, even when a defendant's appellate claim deals solely with the excessiveness of a legal sentence, the combination of AS 12.55.120(a) and Appellate Rule 215(a)(2) still [\*\*13] gives all felony offenders the right to seek judicial review. The distinction drawn by AS 12.55.120(u) involves the right of "appeal" — the right to demand appellate review of a sentence. Under the statute, only felony offenders who receive more than 2 years to serve are entitled to demand appellate review of the sentencing decision, but felony offenders who receive lesser sentences are still entitled to seek discretionary review of the sentencing decision.

For purposes of equal protection analysis, then, the question is whether the legislature can give one group of felony offenders the right of sentence review upon demand, while at the same time requiring a second group of felony offenders to convince the appellate court that their sentence merits review. We note that, from the time sentence appeals were first authorized in Alaska, the right of sentence appeal has always depended on the length of a defendant's sentence. As originally enacted in 1969, AS 12.55.120 limited the right of sentence appeal to defendants who received sentences of 1 year or more. Seven years later, when the supreme court promulgated an appellate rule to govern sentence appeals, the court continued the practice [\*\*14] of denying appeals to defendants who received lesser sentences — although the supreme court's cut-off was 45 days' imprisonment, considerably lower than the legislature's dividing line. See *Johnson v. State*, 816 P.2d 220, 221-22 (Alaska App. 1991). Now, both AS 12.55.120(a) and Appellate Rule 215(a)(1) establish the cut-off for felony sentence appeals at 2 years' imprisonment.

We first must ask whether there is a valid purpose behind the legislature's decision to restrict the right of sentence appeal based on the length of a defendant's sentence. *Gonzales*, *supra*. The legislature's apparent pur-

pose was to reduce the workload of the appellate courts and the workload of the prosecutors and defense attorneys funded by the state government. Rozkydal concedes that the legislature may properly concern itself with the cost and efficiency of state government. However, she contends that such concerns can not justify a statutory classification that denies some felony offenders the right to appellate review of their sentences. The next question, then, is whether the legislature's restriction of sentence appeals bears the necessary "fair and substantial relationship" to the legislature's [\*\*15] goals. *Gonzales*, *supra*.

The aim of sentence review is to identify instances in which a judge has abused his or her admittedly broad sentencing discretion. *State v. Wentz*, 805 P.2d 962, 965 (Alaska 1991); *State v. Chaney*, 477 P.2d 441, 443 (Alaska 1970). In cases brought by defendants, the aim is to identify sentences that are excessive — sentences that are too severe as a matter of law.

The premise underlying any sentence appeal dividing line (whether that line is drawn at 45 days or at 2 years) is that lesser sentences are less likely to be excessive. If lesser sentences are less likely to constitute an abuse of discretion, then there is arguably less justification for conducting a full appellate review of each of these sentences. The legislative history of AS 12.55.120 shows that the legislature relied on this reasoning when it restricted felony sentence appeals to defendants receiving more than 2 years to serve.

Two years' imprisonment is the presumptive term for a second felony offender convicted of a class C felony — the lowest class of felony. See AS 12.55.125(e)(1). When a court sentences a defendant for a C felony, this 2-year presumptive term is the dividing [\*\*16] line under *Austin v. State*, 627 P.2d 657, 657-58 (Alaska App. 1981) — the case in which this court held that a first felony offender's sentence should be more favorable than the presumptive term established for second felony offenders unless the State proves aggravating factors under AS 12.55.155(c) or extraordinary circumstances under AS 12.55.165. See also AS 12.55.125(k).

[\*1097] When the legislature was considering the current 2-year dividing line for felony sentence appeals, the legislature relied on statistical information indicating that ninety percent of appeals from felony sentences of 2 years or less ended in affirmance. See 1995 House Journal 489-490 (reprinting the Governor's transmittal letter accompanying House Bill No. 201, the bill that contained the proposed amendment to AS 12.55.120). Thus, the legislature apparently concluded that felony sentences of 2 years or less were unlikely to constitute an abuse of sentencing discretion.

Rozkydal asserts that, regardless of the legislature's statistics, significant legal errors have often occurred in felony cases where defendants received 2 years or less to serve. In her brief, she lists eleven published opinions from [\*\*17] the years 1981 to 1993, ten decided by this court and one decided by the supreme court, in which felony sentences of 2 years or less were reversed on appeal. However, in each of these cases the defendants' sentences were reversed because of illegalities in the sentencing process. n2 That is, none of these eleven cases was the kind of appeal governed by AS 12.55.120; all of these cases would be appealable under current law.

n2 In eight of these cases — *Lewis v. State*, 845 P.2d 447 (Alaska App. 1993), *Reynolds v. State*, 736 P.2d 1154 (Alaska App. 1987), *Tate v. State*, 711 P.2d 536, 538-540 (Alaska App. 1985), *Shaisnikoff v. State*, 690 P.2d 25, 27-28 (Alaska App. 1984), *Fleener v. State*, 686 P.2d 730, 736-37 (Alaska App. 1984), *Poggas v. State*, 658 P.2d 796, 798 (Alaska App. 1983), *Sears v. State*, 653 P.2d 349, 350 (Alaska App. 1982), and *McManners v. State*, 650 P.2d 414, 416 (Alaska App. 1982) — the defendants' sentences were reversed for violation of the Austin rule (the rule that a first felony offender must receive a sentence more favorable than the presumptive term for second felony offenders unless the sentencing judge finds aggravating factors or extraordinary circumstances).

In *Harlow v. State*, 820 P.2d 307 (Alaska App. 1991), the sentencing judge mistakenly treated the defendant as a second felony offender, when the defendant's prior conviction from another state did not qualify under AS 12.55.145(a) as a prior felony conviction for purposes of Alaska sentencing law. In *DeHart v. State*, 781 P.2d 989, 990-92 (Alaska App. 1989), the sentencing judge mistakenly ruled that the defendant was subject to a presumptive term. And in *Morris v. State*, 630 P.2d 13, 17-18 (Alaska 1981), the court upheld the length of the defendant's sentence but reversed because the sentencing judge utilized an improper legal standard in imposing sentence.

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Rozkydal also contends that, even it could be shown that felony sentences of 2 years or less rarely involve an abuse of sentencing discretion, there would still be some instances of abuse, and it would still be unjust to deny those defendants the opportunity for sentence review. However, as explained above, Alaska law does not deny anyone the opportunity to seek sentence review. Instead, under AS 12.55.120(a) and Appellate Rule 215(a)(2), cer-

tain felony defendants (those who have been sentenced to 2 years or less) must seek sentence review by petition rather than by appeal. The effect of this procedural distinction is to require those defendants who receive lesser sentences to convince the appellate court that there is good reason to hear their case before the criminal justice system devotes the time and money required to pursue and decide a sentence appeal.

The real issue, then, is whether the government violates the equal protection guarantee when it grants a right of sentence appeal to defendants who receive severe sentences, leaving all other defendants with only the right to petition for review of their sentences. Rozkydal cites no authority on this issue. However, as we have [\*\*19] already noted, Alaska law governing sentence appeals (both statutes and court rules) has consistently distinguished among defendants on this very basis — the length of the defendants' sentences — since 1969, the year that sentence appeals were first authorized.

Authority on this issue from other jurisdictions is sparse. However, the cases indicate that a state government may properly create procedural distinctions based on a defendant's sentence.

In *Massie v. Hennessey*, 875 F.2d 1386, 1389 (9th Cir. 1989), the petitioner asserted that California denied him equal protection of the law by providing different appellate procedures for those defendants sentenced to death. The Ninth Circuit upheld California's appellate procedures. In *State v. Delgado*, 161 Conn. 536, 290 A.2d 338, 344-45 (Conn. 1971), [\*\*1098] the Connecticut Supreme Court rejected an equal protection challenge to a statute which authorized sentence appeals for all defendants who received a prison term of at least one year, but which denied sentence appeals to murder defendants sentenced to death or life imprisonment under a special sentencing procedure.

More pertinent to the issue raised in Rozkydal's case, the New Jersey Supreme [\*\*20] Court has upheld an expedited appeal process for sentence appeals — a streamlined procedure in which sentence appeals are decided without briefs, based solely on the record and on oral argument. *State v. Blanco*, 103 N.J. 383, 511 A.2d 600 (N.J. 1986). The Texas Court of Appeals has rejected an equal protection attack on a statute which denies any right of appeal to defendants who receive deferred adjudications (a variant of the same idea as Alaska's suspended imposition of sentence). *Buchanan v. State*, 881 S.W.2d 376, 380 (Tex. App. 1994). And the Washington Court of Appeals has rejected an equal protection challenge to a Washington statute that precludes defendants from appealing their sentence if they receive a sentence within a pre-defined standard range for their offense. *State v.*

*Rousseau*, 78 Wash. App. 774, 898 P.2d 870 (Wash. App. 1995), review denied, 128 Wash. 2d 1011, 910 P.2d 482 (Wash. 1996).

Having considered this matter, we conclude that the Alaska legislature's decision to restrict the right of sentence appeal to felony offenders receiving more than 2 years to serve bears a fair and substantial relationship to a legitimate government purpose. Under the Austin rule, sentences of less than 2 years [\*\*21] need not be supported by aggravating factors or extraordinary circumstances. The information in front of the legislature was that the great majority of these sentences are affirmed on appeal. The legislature could validly conclude that the resources of the appellate courts, the Department of Law, the Public Defender Agency, and the Office of Public Advocacy would be better spent if appellate review of these lesser sentences were discretionary.

For these same reasons, we reject Rozkydal's contention that the legislature's action violated her right to procedural due process. The essence of due process is a "meaningful opportunity to be heard". *Boddie v. Connecticut*, 401 U.S. 371, 377; 91 S. Ct. 780, 785; 28 L. Ed. 2d 113, 118 (1971). Rozkydal has not shown that a petition for review to the supreme court would deny her a meaningful opportunity for sentence review.

We likewise reject Rozkydal's argument that the legislature's action violated substantive due process (that is,

her argument that there was no legitimate government purpose to support the legislature's action). See *Gonzales*, 882 P.2d at 397-98.

We emphasize that our decision is influenced in large measure by our conclusion [\*\*22] that defendants receiving lesser felony sentences retain the right to petition for review under Appellate Rule 215(a)(2). We express no opinion regarding the legislature's authority to preclude all forms of sentence review for specific sentencing ranges or groups of criminal defendants.

#### *Conclusion*

Because Rozkydal received only 16 months to serve, she has no right to appeal her sentence. Accordingly, this appeal is DISMISSED. Rozkydal is entitled, however, to petition the supreme court to review her sentence under Appellate Rule 215(a)(2).

Given the circumstances, we exercise our authority under Appellate Rule 521 to relax Appellate Rule 403(h)(1), the rule that sets the time limits for petitioning for review of a non-appealable sentence. If Rozkydal wishes to petition the supreme court to review the superior court's sentencing decision, the time limits specified in Appellate Rule 403(h)(1) shall be calculated, not from the distribution date of the superior court's judgement, but rather from the date our decision takes effect. See Appellate Rule 512(a)(2).

2 of 4 DOCUMENTS

**RALPH HOWARD BLAKELY, Jr., Petitioner v. WASHINGTON**

No. 02-1632

**SUPREME COURT OF THE UNITED STATES**

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

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

**NOTICE: [\*\*\*1]**

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

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

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

**DISPOSITION:** Reversed and remanded.

**CASE SUMMARY:**

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

**OVERVIEW:** Petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The judge in

the case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because a reason offered to justify an exceptional sentence could be considered only if it took into account factors other than those which were used in computing the standard range sentence for the offense, which in this case included the elements of second-degree kidnapping and the use of a firearm. Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. The jury's verdict alone did not authorize the sentence. The judge acquired that authority only upon finding some additional fact. Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence was invalid.

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

**LexisNexis(R) Headnotes**

***Criminal Law & Procedure > Sentencing > Sentencing Guidelines Generally***

[HN1] In Washington, second-degree kidnapping is a class B felony. *Wash. Rev. Code Ann. § 9A.40.030(3)*.

***Criminal Law & Procedure > Sentencing > Sentencing Ranges***

[HN2] See *Wash. Rev. Code Ann. § 9A.20.021(1)(b)*.

***Criminal Law & Procedure > Sentencing > Sentencing Ranges***

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

*Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review*

*Criminal Law & Procedure > Sentencing > Adjustments*

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

*Criminal Law & Procedure > Sentencing > Imposition > Factors*

[HN5] Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

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

[HN6] The truth of every accusation against a defendant should afterwards be confirmed by the unanimous suffrage of 12 of his equals and neighbors.

*Criminal Law & Procedure > Sentencing > Imposition > Factors*

[HN7] An accusation which lacks any particular fact which the law makes essential to the punishment is no accusation within the requirements of the common law, and it is no accusation in reason.

*Criminal Law & Procedure > Sentencing > Imposition > Factors*

[HN8] The "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

*Criminal Law & Procedure > Sentencing > Imposition > Factors*

[HN9] For Apprendi purposes, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.

*Criminal Law & Procedure > Sentencing > Departures*

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

*Constitutional Law > Criminal Process > Impartial Jury*

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

*Criminal Law & Procedure > Sentencing > Imposition > Factors*

*Criminal Law & Procedure > Sentencing > Adjustments*

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

*Constitutional Law > Criminal Process > Impartial Jury*

*Criminal Law & Procedure > Sentencing > Imposition > Factors*

[HN13] Every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.

**SYLLABUS:**

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

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

*Held:* [\*\*\*2]

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

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

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

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

, reversed and remanded.

#### COUNSEL:

Jeffrey L. Fisher argued the cause for petitioner.

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

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

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

#### OPINIONBY: SCALIA

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

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

1

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

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

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

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

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

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

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[\*\*LEdHR1] [2] [\*\*LEdHR3] [3] The case then proceeded to sentencing. [HN1] In Washington, second-degree kidnaping is a class B felony. § 9A.40.030(3). State law provides that [HN2] "[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years." § 9A.20.021(1)(b). Other provisions of state law, however, further limit the range of sentences a judge may impose. [HN3] *Washington's Sentencing Reform Act* specifies, for petitioner's offense of second-degree kidnaping with a firearm, a "standard range" of 49 to 53 months. See § 9.94A.320 (seriousness level V for second-degree kidnaping); App. 27 (offender score 2 based on § 9.94A.360); § 9.94A.310(1), box 2-V (standard range of 13-17 months); § 9.94A.310(3)(b) (36-month firearm enhancement). n3 A judge may impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence." § 9.94A.120(2). The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. § 9.94A.390. Nevertheless, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those [\*\*7] which are used in computing the standard range sentence for the offense." *State v. Gore*, 143 Wn.2d 288, 315-316, 21 P.3d 262, 277 (2001). [HN4] When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. § 9.94A.120(3). A reviewing court will reverse the sentence if it finds that "under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence." *Gore*, *supra*, at 315, 21 P.3d, at 277 (citing § 9.94A.210(4)).

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

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

[\*\*LEdHR4B] [4B]

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

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

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

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

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

The judge adhered to his initial determination of deliberate cruelty.

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

## II

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

n5 Justice Breyer cites Justice O'Connor's *Apprendi* dissent for the point that this Bishop quotation means only that indictments must

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

## [\*\*LEdHR7B] [7B]

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

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

[\*\*LEdHR1B] [1B] [\*\*LEdHR8] [8] In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. See § 9.94A.420. Our precedents make clear, however, that [HN8] the "statutory maximum" for *Apprendi* purposes is the maximum [\*\*\*14] sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. See *Ring, supra*, at 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428 ("the maximum he would receive if punished according to the facts reflected in the jury verdict alone" (quoting *Apprendi, supra*, at 453, 147 L. Ed. 2d 435, 120 S. Ct. 2348)); *Harris v. United States*, 536 U.S. 545, 563, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (plurality opinion) (same); cf. *Apprendi, supra*, at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, [HN9] the relevant "statutory maximum" is not the maximum sentence a judge [\*\*414] may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.

[\*\*LEdHR1C] [1C] The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the

Washington Supreme Court has explained, "[a] reason offered to justify an exceptional [\*\*\*15] sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense," [\*\*2538] *Gore*, 143 Wn.2d, at 315-316, 21 P.3d, at 277, which in this case included the elements of second-degree kidnaping and the use of a firearm, see § § 9.94A.320, 9.94A.310(3)(b). n7 Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See § 9.94A.210(4). The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).

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

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

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

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

[\*\*LEdHR9B] [9B]

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

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

[\*\*LEdHR10B] [10B]

n9 The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. See Brief for United States as *Amicus Curiae* 25-30. The Federal Guidelines are not before us, and we express no opinion on them.

[\*\*\*18]

III

[\*\*LEdHR1E] [1E] Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of [\*\*2539] power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 *The Complete Anti-Federalist* 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 *Works of John Adams* 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas

Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 *Papers of Thomas Jefferson* 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it [\*\*\*19] is better to leave them out of the Legislative"); *Jones v. United States*, 526 U.S. 227, 244-248, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999). *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

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

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

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

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

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

\*\*\*22]

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

IV

[\*\*LEdHR11] [11] By reversing the judgment below, we are not, as the State would have it, "find[ing] determinate sentencing schemes unconstitutional." Brief for Respondent 34. This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the *Sixth Amendment*. Several policies prompted Washington's adoption of determinate sentencing, including

proportionality to the gravity of the offense and parity among defendants. See *Wash. Rev. Code Ann.* § 9.94A.010 [\*\*417] (2000). Nothing we have said impugns those salutary objectives.

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

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

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

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

[\*\*LEdHR16B] [16B]

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

[\*\*\*27]

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

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

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

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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

utter 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.

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[\*\*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.

**DISSENT BY: 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.

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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 Amendmen.*, 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

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

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

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

The costs are substantial and real. Under the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense. Thus, facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range--such as drug quantity, role in the offense, risk of bodily harm--all must now be charged in an indictment and submitted to a jury. *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1058 (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

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*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 709 (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 (CA DC 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.

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### 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

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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; [10 USC § 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 Summerville*, 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

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*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); § 2C1.1 (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

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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-

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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

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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 Commission 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 I 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. § 21-4 18* (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] I

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

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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 consent[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

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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,

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

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

Neither Bishop nor any other historical treatise writer, however, disputes the proposition that judges historically had discretion to vary the sentence, within the range provided by the statute, based on facts not proved at the trial. See Bishop, *supra*, § 85, at 54 ("[W]ithin the limits of any discretion as to the

punishment which the law may have allowed the judge when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment"); K. Stith & J. Cabranes, *Fear of Judging: Sentencing Guidelines* [\*\*\*438] in the Federal Courts 9 (1998). The modern history of pre-guidelines [\*\*\*79] sentencing likewise indicates that judges had broad discretion to set sentences within a statutory range based on uncharged conduct. Usually, the judge based his or her sentencing decision on facts gleaned from a presentence report, which the defendant could dispute at a sentencing hearing. In the federal system, for example, *Federal Rule of Criminal Procedure* 32 provided that probation officers, who are employees of the Judicial Branch, prepared a presentence report for the judge, a copy of which was generally given to the prosecution and defense before the sentencing hearing. See Stith & Cabranes, *supra*, at 79-80, 221, note 5. See also *ante*, at \_\_\_\_\_, 159 L. Ed. 2d, at 420-421 (O'Connor, J., dissenting) (describing the State of Washington's former indeterminate sentencing law).

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

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

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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 hamstringing 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

124 S. Ct. 2531, \*; 159 L. Ed. 2d 403, \*\*;  
2004 U.S. LEXIS 4573, \*\*\*; 72 U.S.L.W. 4546

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. \_\_\_ (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

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

USCS, Constitution, Amendments 6, 14

L Ed Digest, Jury § 33

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

## Annotation References

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

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



## Alaska State Legislature

Senate Majority Web: [www.akrepublicans.org](http://www.akrepublicans.org)

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

### Fact Sheet for: Senate Bill 56

**Short Title:** CRIMINAL LAW/PROCEDURE/SENTENCING

#### Summary:

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

#### Benefits:

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

#### Background:

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

# Alaska State Legislature

SENATOR  
GENE THERRIAULT

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Senate

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## SPONSOR STATEMENT - CS SENATE BILL 56(JUD)

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

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

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

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

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

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

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

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

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

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

# ALASKA STATE SENATE



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## SENATE JUDICIARY COMMITTEE Senator Ralph Seekins, Chairman

Letter of Intent CS For SB 56 (JUD)

January 17, 2005

It is the intent of the legislature in passing this bill to preserve the basic structure of Alaska's presumptive sentencing system, which is designed to avoid disparate sentences. With this bill the legislature sets out a sentencing framework, subject to judicial adjustment for statutory aggravating or mitigating factors that are determined in a manner that is constitutional under the decision of the U.S. Supreme Court in *Blakely v. Washington*. The single, definite presumptive terms set out in current law can unduly constrain the sentencing process, particularly under the mandates of *Blakely v. Washington*. Although the presumptive terms are being replaced by presumptive ranges, it is not the intent of this bill in doing so to bring about an overall increase in the amount of active imprisonment for felony sentences. Rather, the bill is intended to give judges the authority to impose an appropriate sentence, with an appropriate amount of probation supervision, by taking into account the considerations set out in AS 12.55.005 and 12.55.015.

## SECTIONAL ANALYSIS - CS SENATE BILL 56(JUD)

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

**Section 1** makes it clear that an indictment is valid as long as it complies with all rules of court, even if it does not allege aggravating factors that may later have to be proven to a jury to justify a higher sentence. At the grand jury stage, the state may not be aware of all aggravating factors, and therefore it is unreasonable to expect the indictment to list them. The *Blakely* decision did not require indictments to list aggravating factors, and due process is satisfied as long as the defendant has adequate notice of the factors in advance of trial, which is set out in Section 21 of the bill.

**Section 2** limits the ability of judges to order "periodic" sentences, in which the offender periodically leaves prison and then returns to prison. This type of sentence significantly restricts the ability of prison officials to manage the prison population and to transfer prisoners so as to make the best and most efficient use of prison resources. Most judges are appropriately deferential to the difficulties faced by Alaska prison officials, but some judges use their ability to order "periodic" sentences to allow offenders to go on what amounts to judicially-ordered and unsupervised furloughs from prison. There is a proper place for prison furloughs, but that is best left to prison officials, who can adopt equitable policies that take into account the specific security risks posed by each prisoner and the likely benefits of the furlough. The original intent of "periodic" sentences was to allow defendants to, for example, maintain their employment during the week, and serve a sentence on weekends, or to be released for fishing season and returned to prison when the season is over. The bill thus explicitly limits periodic sentences for defendants who have an employment obligation that preexisted sentencing and the defendant has received a composite sentence of not more than two years to serve. This bill does not interfere with the court's authority under AS 12.55.025(c) to postpone the beginning date for service of a sentence, which allows defendants to complete school or get their affairs in order before they enter prison.

**Section 3** is a technical amendment to remove a reference to a statute repealed by the bill.

**Sections 4 - 5** amend statutes that contain the phrases "presumptive term" or "presumptive sentence" and substitute or add the new concept of "presumptive range" that is adopted in this bill.

**Section 6** codifies current practice of providing an intermediate sanction to probation officers to invoke certain additional conditions such as curfew when supervision requires. This section addresses a judicial Memorandum Opinion Judgment (aka *Husky*) issued in 2004 making it clear that the courts and probation officers may continue using what is known as General Condition of Probation # 12. Under current statutes, the Alaska court of appeals has indicated that it is not clear if judges can allow probation officers to invoke

additional terms of probation without further proceedings in court. This condition allows for better supervision and success of offenders without violating probation.

**Section 7** makes it clear that the higher courts in Alaska cannot reverse a sentence as excessive if a judge imposes a sentence within a statutory range specified in this bill, or imposes a consecutive sentence required by law.

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

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

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

**Section 15** is a conforming technical amendment.

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

**Sections 17-19** contain conforming amendments to account for the change in terminology from presumptive "term" to presumptive "range."

**Section 18** also adds one aggravating factor that allows judges to impose an aggravated sentence if the offender has a long misdemeanor record, specified as five or more convictions for class A misdemeanor crimes. By requiring convictions for class A misdemeanors, the aggravating factor would not be triggered by convictions for many petty offenses such as disorderly conduct and harassment, which are

class B misdemeanors, nor by violations such as minor consuming and traffic offenses.

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

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

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

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

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

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

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

**SENATE COMMITTEE REPORT**  
**First Committee of Referral**

DATE: 1/14/05

FURTHER: Finance

Date of 5-Day Notice: 1/13/2005  
 (in accordance with Uniform Rule 23)

DATE TURNED  
 IN TO OFFICE: 1/20/05

Judiciary Committee considered SENATE BILL NO. 56

**SB 56 CRIMINAL LAW/PROCEDURE/SENTENCING**

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

and recommends:

- be replaced with CS SB 56 (JUD)
- adopt previous CS (    )
- attached amendment(s)
- adopt Letter of Intent by JUD Committee
- further referral to      Committee

<b>Senate Bill:</b>	
<input checked="" type="checkbox"/>	Same Title
<input type="checkbox"/>	New Title
<b>House Bill:</b>	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	Technical Title Change
<input type="checkbox"/>	New Title w/ SCR # <u>    </u>

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#
LAW	1/13/05			X	1
DOC	1/13/05			X	2
DOC	1/13/05			X	3
DPS	1/14/05			X	4
SSUD	1/14/05			X	5

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:		DO PASS	DO NOT PASS	NO REC	AMEND
French				X	
Huggins		X			
Herriault		X			
Seelkins	CHAIR:	X			

# FISCAL NOTE

STATE OF ALASKA  
2005 LEGISLATIVE SESSION

Fiscal Note Number: 0047-LAW-CDCO-12-22-  
Bill Version: CSSB 56 (HUD)  
( ) Publish Date: 1/21

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: LAW  
Title Presumptive Sentencing Bill RDU CRIMINAL  
Component CDCO  
Sponsor Possible Friendly Legislator Component No. \_\_\_\_\_  
Requester \_\_\_\_\_

**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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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: Robert Meiners, Dep. Director Phone 465-5427  
Division Administrative Services Date/Time 12/22/04 2:55 PM  
Approved by: Robert Meiners for Gregg D. Renkes, Attorney General Date 12/22/2004  
Agency Department of Law

# FISCAL NOTE

STATE OF ALASKA  
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2  
Bill Version: CS SB 56 (mo)  
( ) Publish Date: 1/21

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

### Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
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CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0
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### 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
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2005) cost: 0.0

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

### POSITIONS

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

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

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

Prepared by: Sharleen Griffin, Acting Director  
Division: Administrative Services  
Approved by: Portia Parker, Deputy Commissioner  
Agency: Department of Corrections

Phone: 465-4641  
Date/Time: 1/18/05 8:26 AM  
Date: 1/18/2005

# FISCAL NOTE

STATE OF ALASKA  
2005 LEGISLATIVE SESSION

Fiscal Note Number: 3  
Bill Version: SB 56 (700)  
( ) Publish Date: 1/21/05

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

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
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<b>CHANGE IN REVENUES ( )</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
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**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
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2005) cost: 0.0

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

**POSITIONS**

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

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

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

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

# FISCAL NOTE

STATE OF ALASKA  
2005 LEGISLATIVE SESSION

Fiscal Note Number: 4 4  
 Bill Version: CS SB 56 (700)  
 ( ) Publish Date: 1/21

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Public Safety  
 Title An Act relating to content of indictments, RDU Alaska State Troopers  
sentencing, probation and parole Compon: t AST Detachments  
 Sponsor Senators Therriault, Seekins  
 Requester \_\_\_\_\_ 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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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 907-269-4532  
 Division: Alaska State Troopers Date/Time 1/19/05 8:03 AM  
 Approved by: Commissioner William Tandeske Date 1/19/2005  
 Agency: Department of Public Safety

# FISCAL NOTE

STATE OF ALASKA  
2005 LEGISLATIVE SESSION

Fiscal Note Number: 45  
 Bill Version: CS SB 56 (200)  
 ( ) Publish Date: 1/21

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

**Expenditures/Revenues** (Thousands of Dollars)  
 Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**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)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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. There is no anticipated fiscal impact from passage of this legislation.

Prepared by: Senate Judiciary Committee Phone: \_\_\_\_\_  
 Division: \_\_\_\_\_ Date/Time: 1/20/05 7:57 AM  
 Approved by: Senate Judiciary Committee Date: 1/20/2005  
 Agency: Sen. Ralph Seekins

	First Felony	First Felony (special crimes)	Second Felony	Sex Felony with a prior sex felony	Third+ Felony	Sex Felony with two prior sex felonies	Max
Unclassified Sex Offense	(8) to <b>12</b>	weapon or serious injury (10) <b>12 to 16</b>	(15) to <b>20</b>	(20) to <b>30</b>	(25) to <b>35</b>	(30) to <b>40</b>	(40)
A Felony Sex Offense	(5) to <b>8</b>	weapon or serious injury (10) to <b>14</b>	(10) <b>12 to 16</b>	(15) to <b>20</b>	(15) to <b>25</b>	(20) to <b>30</b>	(30)
A Felony	(5) to <b>8</b>	weapon, serious injury, or police victim (7) to <b>11</b>	(10) to <b>14</b>	n/a	(15) to <b>20</b>	n/a	(20)
B Felony Sex Offense	(0, but 1 to 3 by court-made law) <b>2 to 4</b>	n/a	(5) to <b>8</b>	(10) to <b>14</b>	(10) to <b>14</b>	(15) to <b>20</b>	(20)
B Felony	(0, but 1 to 3 by court-made law) <b>1 to 3</b>	crim neg hom of child: (0, but 1 to 3 by court-made law) <b>2 to 4</b>	(4) to <b>7</b>	n/a	(6) to <b>10</b>	n/a	(10)
C Felony Sex Offense	(0) <b>1 to 2</b>	n/a	(2) to <b>5</b>	(3) to <b>6</b>	(3) to <b>6</b>	(6) to <b>10</b>	(10)
C Felony	(0) to <b>2</b>	wanton waste or same-day by guide (1) to <b>2</b>	(2) to <b>4</b>	n/a	(3) to <b>5</b>	n/a	(5)
Numbers in parentheses are the current "presumptive" terms and maximums							
Numbers in <b>bold</b> show the presumptive ranges in the bill							

## **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.

## 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 sen-

tence 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 core structure of something as basic to the justice system as criminal sentencing.

The Court's decision purports to limit judicial discretion; Scalia's opin-

ion 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.

Reform Act of 1984, which sought to make sentencing more predictable. Under the sentencing guidelines that resulted, judges were compelled to plug a variety of factors into a complex formula that would provide a sentencing range. The guidelines are far from perfect: they sometimes produce gross injustices, most often because of mandatory minimums in drug cases, and many judges have chafed at being forced to impose such terms. Indeed, *Blakely* is best understood as part of a judicial backlash against the constraints of determinate sentencing, as the guideline-based system is called. But what a childish backlash it has been.

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

found by a judge. "Other than the fact of a prior conviction," the Court held, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

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

definition an element, so a judge may not consider it in sentencing unless it has been proved to the jury.

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

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

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

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

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

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

*Benjamin Wittes is an editorial writer specializing in*

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# Policy and Practice Review

## 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."<sup>1</sup> 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.<sup>2</sup>

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

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This is the inaugural issue of a new series that will focus on the Supreme Court's powerful, yet profoundly disrupting, decision in *Blakely v. Washington*. Over the next several 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, [dwillhelm@vera.org](mailto:dwillhelm@vera.org), or visit Vera's website at [www.vera.org/ssc](http://www.vera.org/ssc).

Daniel F. Wilhelm  
Director, State Sentencing and Corrections Program

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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.<sup>3</sup>

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## 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.

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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.

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The fallout may also envelop six other states—Arkansas, Delaware, Maryland, Rhode Island,<sup>4</sup> 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.<sup>5</sup> 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."<sup>6</sup> 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.<sup>7</sup>

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 reig. 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.<sup>8</sup>

### **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.

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#### **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

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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.<sup>9</sup> 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.<sup>10</sup> 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.

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*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*.

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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.<sup>11</sup> 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*.<sup>12</sup> As we discuss below, the Kansas model represents one solution to the problem in these states' systems.<sup>13</sup>

#### *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.<sup>14</sup> 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.<sup>15</sup> 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."<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup> 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."<sup>19</sup>

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.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

#### **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.<sup>21</sup> 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."<sup>24</sup>

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*<sup>25</sup> line has explicitly addressed the effect of these rulings on indeterminate sentencing structures such as in Michigan and Pennsylvania.<sup>26</sup> Future rulings will be required to settle how, or if, *Blakely* applies to these states.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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."<sup>31</sup>

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 structural 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.<sup>32</sup> 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.<sup>33</sup>

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,<sup>34</sup> and it appears that most guidelines states use enhanced sentences in only between two percent and nine percent of all cases.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

#### *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.

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## 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?
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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.”<sup>39</sup> 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.<sup>40</sup>

## Notes

<sup>1</sup> *Blakely v. Washington*, 542 U.S. \_\_\_\_; No. 02-1632 (June 24, 2004) slip op. at 7 (emphasis in original).

<sup>2</sup> 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.

<sup>3</sup> As discussed below, Kansas's system is not generally implicated by *Blakely*.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> *Blakely*, slip op. at 12 (O'Connor, J., dissenting).

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

<sup>8</sup> *Id.* at 18.

<sup>9</sup> Wash. Rev. Code § 9.94A.535, 539.

<sup>10</sup> N.C. Gen. Stat. § 15A-1340.13.

<sup>11</sup> Tenn. Code Ann. § 40-35-210.

<sup>12</sup> *State v. Gould*, 23 P.3d 801 (Kan. 2001).

<sup>13</sup> 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*.

<sup>14</sup> N.M. Stat. Ann. § 31-18-15(B), 15.1.

<sup>15</sup> Ohio Rev. Code Ann. § 2929.14(C).

<sup>16</sup> Cal. Penal Code § 1170.

<sup>17</sup> Colo. Rev. Stat. § 18-1.3-401.

<sup>18</sup> Ark. Code Ann. § 16-90-803, 804.

<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> See the companion report, *Legal Considerations*, for a fuller discussion of the Court's reasoning and its implications.

<sup>22</sup> 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.

<sup>23</sup> 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 minimum, for which the judge must provide reasons. Such a system is in no way implicated by *Blakely*.

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

<sup>25</sup> *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.

<sup>26</sup> 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).

<sup>27</sup> 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.

<sup>28</sup> 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.

<sup>29</sup> Kan. Stat. Ann. §21-4718(b).

<sup>30</sup> Justice 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).

<sup>31</sup> 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.

<sup>32</sup> 725 Ill. Comp. Stat. 5/111-3(c-5).

<sup>33</sup> See, for example, Cal. Penal Code §12022.53.

<sup>34</sup> 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.

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

<sup>36</sup> Brief for the United States at 31.

<sup>37</sup> This problem will be discussed in *Legal Considerations*.

<sup>38</sup> 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*.

<sup>39</sup> Practice Manual, Superior Court of the District of Columbia Voluntary Sentencing Guidelines, ch. 5.

<sup>40</sup> *Blakely*, slip op. at 13 (internal quotation marks and citation omitted).

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## Vanessa Tondini

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

-----Original Message-----

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

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

Subject: SB56; HB 78

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

<b>Current Law</b> (Example of 8 Year sentence)	<b>HB78</b>	<b>Proposed Fix to Ensure Average Sentences Reflect Current Law</b>
<p><b>Higher than 8 Years</b> – Based on <i>court findings</i> of aggravators</p> <p><b>8 Years</b> – upon conviction with <i>no court findings</i></p> <p><b>Less than 8 Years</b> – based on court findings of mitigators</p>	<p><b>8-12 Years</b> – upon conviction with <i>no court findings</i></p> <p><b>12 Years and higher</b> – jury trial with findings on aggravators</p> <p><b>Less than 8 Years</b> – based on court findings of mitigators (same)</p>	<p><b>8-12 Years</b> – upon conviction with <i>court findings</i></p> <p><b>12 Years and higher</b> – jury trial with findings on aggravators</p> <p><b>8 Years</b> – upon conviction with <i>no court findings</i></p> <p><b>Less than 8 Years</b> - based on court findings of mitigators (same)</p>

Distributed by Representative Les Gara