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Writing the Book[er] on Blakely: The Challenge to the Federal Sentencing Guidelines

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NOTE

WRITING THE *BOOK[ER]* ON *BLAKELY*: THE CHALLENGE TO THE FEDERAL SENTENCING GUIDELINES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation.

U.S. Constitution¹

I. INTRODUCTION

On June 24, 2004, in a five-to-four decision,² the United States Supreme Court created what Justice Sandra Day O'Connor later called "a [number] 10 earthquake"³ in the world of federal sentencing—holding that the maximum sentences, as enhanced by aggravating factors in sentencing guidelines, could be no longer than the maximum sentence which could have been imposed for the crime without additional findings by a judge.⁴ While the case originated in the State of Washington⁵ and, therefore, involved application of that state's laws, news articles speculated that *Blakely v. Washington*⁶ could spell the end of the Federal Sentencing Guidelines.⁷ Weblogs (also referred to as "blogs" or "blawgs," in the case of some dealing with the law) heralded the news,⁸ and at least one blog was devoted to *Blakely*.⁹

1. U.S. Const. amend. VI.

2. *Blakely v. Wash.*, 124 S. Ct. 2531 (2004) (Scalia, J., delivered the opinion of the Court, in which Stevens, Souter, Thomas, and Ginsburg, JJ., joined. O'Connor, J., dissenting, in which Breyer, J., joined, and in which Rehnquist, C.J., and Kennedy, J., joined except as to Part IV-B. Kennedy, J., dissenting, in which Breyer, J., joined. Breyer, J., dissenting, in which O'Connor, J., joined).

3. Erik Luna, *Reprieve on Sentencing Guidelines?* Washington Times (D.C.) B04 (Aug. 8, 2004).

4. *Blakely*, 124 S. Ct. at 2537 (majority opinion). For enhancements based on prior convictions, *Blakely* followed the course set in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and followed by *Apprendi v. New Jersey*, 530 U.S. 466, 490–91 (2000), and continued to carve out an exception, requiring no finding of fact by the jury. *Blakely*, 124 S. Ct. at 2536. While *Blakely* does nothing to disturb that exemption, the Court has granted certiorari in a case that challenges that exception. See *Shepard v. U.S.*, 125 S. Ct. 1254 (2005). Four of the five Justices comprising the majority opinion in *Blakely* dissented in *Almendarez-Torres*; only Justice Thomas joined in that majority opinion. *Almendarez-Torres*, 523 U.S. 224.

5. *Blakely*, 124 S. Ct. at 2534.

6. 124 S. Ct. 2531 (2004).

7. Adam Liptak, *Sentencing Decision's Reach Is Far and Wide*, 153 N.Y. Times 16 (June 27, 2004).

8. See e.g. Douglas A. Berman, *Sentencing Law and Policy*, <http://sentencing.typepad.com> (accessed Oct. 15, 2004); *Blakely Blawg*, <http://blakelyblawg.blogspot.com> (last updated July 13, 2004).

9. *Blakely Blawg*, *supra* n. 8. This blog has since ceased posting, and now directs readers to Douglas A.

In the wake of the decision, the United States Department of Justice maintained that *Blakely* should have no adverse effect on the Federal Sentencing Guidelines,¹⁰ yet “*Blakely-ized*”¹¹ its indictments. Federal courts were divided regarding *Blakely*’s impact on the Federal Guidelines.¹²

Less than a week after the Court’s opinion in *Blakely*, District Court Judge Paul Cassell ruled in *United States v. Croxford*¹³ that the defendant could not be sentenced under the Federal Sentencing Guidelines since the prosecution had requested two enhancements that would involve judge-found facts.¹⁴ With this ruling, Judge Cassell effectively held that *Blakely* had made the Federal Sentencing Guidelines unconstitutional, at least in these circumstances.

Shortly thereafter, in *United States v. Booker*¹⁵ the Seventh Circuit Court of Appeals held that *Blakely* applied to the Federal Sentencing Guidelines, making them unconstitutional when sentences were enhanced based on judge-found facts.¹⁶ Within days, the Fifth Circuit Court of Appeals held that *Blakely* did *not* apply to the United States Sentencing Guidelines because the “‘maximum punishments’ are those defined and authorized by Congress in the United States Code”¹⁷ rather than any maximum sentence specific to the Federal Sentencing Guidelines.¹⁸

Initially a number of federal district courts found the Guidelines unconstitutional.¹⁹ Some held the Federal Sentencing Guidelines wholly unconstitutional,²⁰ while others found them salvageable through severability.²¹ Those holding the Guidelines unconstitutional, whether in whole or in part, disagreed about how sentences should be determined post-*Blakely*. Some preferred a return to indeterminate sentencing using the

Berman’s blog, *Sentencing Law and Policy*, *supra* n. 8.

10. Memo. from James Comey, Dep. Atty. Gen., U.S. Dept. Just., to All Fed. Prosecutors, *Departmental Legal Positions and Policies in Light of Blakely v. Washington* 1–2, http://sentencing.typepad.com/sentencing_and_policy/files/dag_blakely_memo_7204.pdf (2004) [hereinafter Memo. from James Comey].

11. The adjective, “*Blakely-ized*,” is being used to describe modifications made to various aspects of criminal proceedings to assure that they do not run afoul of *Blakely*. “*Blakely-ized*” indictments are those in which prosecutors have alleged all facts to be considered for sentencing.

12. See e.g. *U.S. v. Pineiro*, 377 F.3d 464, 473 (5th Cir. 2004), *cert. granted, vacated*, 125 S. Ct. 1003 (2005); *U.S. v. Koch*, 383 F.3d 436 (6th Cir. 2004), *cert. granted, vacated*, 125 S. Ct. 1944 (2005); *U.S. v. Booker*, 375 F.3d 508 (7th Cir. 2004), *aff’d and remanded*, *U.S. v. Booker*, 125 S. Ct. 738, 769 (2005); *U.S. v. Ameline*, 376 F.3d 967 (9th Cir. 2004); *U.S. v. Zompa*, 326 F. Supp. 2d 176 (D. Me. 2004); *U.S. v. Fanfan*, 2004 WL 1723114 (D. Me. June 28, 2004), *vacated and remanded*, *Booker*, 125 S. Ct. at 769; *U.S. v. Mueffelman*, 327 F. Supp. 2d 79 (D. Mass. 2004); *U.S. v. Sisson*, 326 F. Supp. 2d 203 (D. Mass. 2004); *U.S. v. Croxford*, 2004 U.S. Dist. LEXIS 12156 (D. Utah June 29, 2004).

13. 2004 U.S. Dist. LEXIS 12156 (D. Utah 2004).

14. *Id.* at *40.

15. 375 F.3d 508 (7th Cir. 2004).

16. *Id.* at 508, 514–15.

17. *Pineiro*, 377 F.3d at 473.

18. *Id.*

19. See e.g. *Zompa*, 326 F. Supp. 2d 176; *Fanfan*, 2004 WL 1723114; *Mueffelman*, 327 F. Supp. 2d 79; *Sisson*, 326 F. Supp. 2d 203; *U.S. v. Landgarten*, 325 F. Supp. 2d 235 (E.D.N.Y. 2004), *vacated*, 325 F. Supp. 2d 235 (2004); *U.S. v. Medas*, 323 F. Supp. 2d 436 (E.D.N.Y. 2004); *U.S. v. Agett*, 327 F. Supp. 2d 899 (E.D. Tenn. 2004); *Croxford*, 2004 U.S. Dist. LEXIS 12156; *U.S. v. Lockett*, 325 F. Supp. 2d 673 (E.D. Va. 2004); *U.S. v. Shamblin*, 323 F. Supp. 2d 757 (S.D.W. Va. 2004).

20. See e.g. *Mueffelman*, 327 F. Supp. 2d at 82; *Medas*, 323 F. Supp. 2d at 436.

21. See e.g. *Zompa*, 326 F. Supp. 2d at 178; *Fanfan*, 2004 WL 1723114 at **11–12; *Shamblin*, 323 F. Supp. 2d at 765–66.

Federal Sentencing Guidelines as actual *guidelines* rather than as mandates.²² Others believed the Guidelines were still valid so long as the sentence imposed would not exceed the maximum presumptive sentence.²³ Still other courts suspended sentencing pending clarification from the United States Supreme Court.²⁴

Since their inception, the Federal Sentencing Guidelines have been challenged in the Supreme Court numerous times.²⁵ While they withstood each of these attacks,²⁶ the earlier challenges had not involved a Sixth Amendment challenge.²⁷ Most believed that the Guidelines could not survive this latest challenge intact.²⁸ While Justice Antonin Scalia's dissent in *Mistretta v. United States*²⁹ might be considered foreshadowing of his majority opinion in *Blakely*,³⁰ the Court's decisions in *Apprendi v. New Jersey*³¹ and *Ring v. Arizona*³² may be viewed as the opening salvos in the sentencing revolution that broke out after the *Blakely* decision.³³

Apprendi enunciated the importance of the jury in making determinations that would deprive individuals of their liberty,³⁴ holding 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."³⁵ Two years later, in *Ring*, the Court held that an Arizona law allowing judges to impose the death penalty after a judicial finding of certain enumerated aggravating factors was incompatible with *Apprendi* and with the Sixth Amendment.³⁶ Still two years later, the Court delivered its *Blakely* decision—possibly the *coup de grâce* for sentencing guideline schemes, both state and federal. Less than two months later, the U.S. Supreme

22. See e.g. *Mueffelman*, 327 F. Supp. 2d at 96; *Sisson*, 326 F. Supp. 2d at 204.

23. See e.g. *Zompa*, 326 F. Supp. 2d at 178; *U.S. v. Thompson*, 324 F. Supp. 2d 1273, 1275 (D. Utah 2004).

24. Douglas A. Berman, *Booker/Blakely Backup*, http://sentencing.typepad.com/sentencing_law_and_policy/2004/11/emblakelyembo.html (Nov. 23, 2004).

25. See *U.S. v. King*, 328 F. Supp. 2d 1276, 1281 (M.D. Fla. 2004) (citing *Edwards v. U.S.*, 523 U.S. 511 (1998); *U.S. v. Watts*, 519 U.S. 148 (1997); *Witte v. U.S.*, 515 U.S. 389 (1995); *Stinson v. U.S.*, 508 U.S. 36 (1993); *Mistretta v. U.S.*, 488 U.S. 361 (1989)).

26. *King*, 328 F. Supp. 2d at 1281, 1281 n. 10.

27. *Id.* at 1281; *contra Booker*, 375 F.3d at 516–17 (Easterbrook, J., dissenting).

28. Tony Mauro, *Justices Ready to Apply Blakely to Federal Guidelines?* 30 Conn. L. Trib. 10 (Oct. 11, 2004); Tony Mauro, *Court Seems Apt to Discard Guidelines*, 232 N.Y. L.J. 1 (Oct. 5, 2004).

29. 488 U.S. 361 (1989).

30. See *id.* at 413. In his dissent, Scalia referred to the Federal Sentencing Commission as a new branch of the government, "a sort of junior-varsity Congress." *Id.* at 427. He suggested that such a branch might, at times, be desirable, but noted that being desirable does not make a thing constitutional. *Id.* He warned "in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous." *Id.*

31. 530 U.S. 466 (2000).

32. 536 U.S. 584 (2002).

33. Michael Kirkland, *On Law: So You Say You Want a Revolution*, <http://washingtontimes.com/upi-breaking/20041008-121416-8437r.htm> (Oct. 8, 2004).

34. In *Apprendi*, the defendant, who had fired shots into the home of an African-American family, 530 U.S. at 469, received an enhanced sentence in excess of the statutory maximum for his crime, based on the judge's finding, by a preponderance of the evidence, that Apprendi's actions were racially motivated and "were taken 'with a purpose to intimidate.'" *Id.* at 471.

35. *Id.* at 490.

36. *Ring*, 536 U.S. at 609. The Court reasoned that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* (citation omitted).

Court granted certiorari to two cases, one from the Seventh Circuit³⁷ and one from the District Court of Maine in the First Circuit.³⁸ The question in each was whether *Blakely* applies to the Federal Sentencing Guidelines and, if so, what to do about it. In an unusual move, the Court put these cases on a fast track, consolidating them and scheduling a hearing for October 4, 2004.³⁹

Speculation abounded after the hearing⁴⁰ as to when the Court would issue its opinion in *United States v. Booker* and *United States v. Fanfan*. Due to the importance of the case and its already expedited treatment, expectations were that the opinion would be issued before the end of the year.⁴¹ There was even a prediction that it would be issued before Thanksgiving.⁴² Despite predictions to the contrary, the Court issued its opinion on January 12, 2005.⁴³ The opinion was both predictable and unpredictable. Two majority opinions were issued, each with a five-to-four vote.⁴⁴ The “merits opinion”⁴⁵ came as no great surprise,⁴⁶ holding that “the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines.”⁴⁷ The Court’s “remedial opinion”⁴⁸ declared that the Federal Sentencing Guidelines were no longer mandatory, but were, instead, advisory.⁴⁹ In *Blakely*, Justice O’Connor predicted that “[t]he ‘effect’ of [the *Blakely*] decision will be greater judicial discretion and less uniformity in sentencing.”⁵⁰ The Court’s *Booker* remedy bears out the first part of her prediction—

37. *Booker*, 375 F.3d 508.

38. *Fanfan*, 2004 WL 1723114.

39. *U.S. v. Booker*, 542 U.S. 956 (2004); *U.S. v. Fanfan*, 542 U.S. 956 (2004).

40. See e.g. Howard J. Bashman, *How Appealing*, http://www.legalaffairs.org/howappealing/2004_12_01_appellateblog_archive.html#110295749846105182 (Dec. 13, 2004) (noting that since neither Justice Stevens nor Scalia had yet authored a majority opinion for the October 2004 argument session, one of them had been assigned the *Booker/Fanfan* opinions, and predicting the opinion would be handed down in January 2005); Douglas A. Berman, *Sentencing Law and Policy, Will It Be Today, or Another Month of Waiting?* http://sentencing.typepad.com/sentencing_law_and_policy/2004/12/will_it_be_toda.html (Dec. 13, 2004); Douglas A. Berman, *Sentencing Law and Policy, Wolf! Wolf! ... I Mean Booker and Fanfan*, http://sentencing.typepad.com/sentencing_law_and_policy/2004/12/wolf_wolf_i_mea.html (Dec. 3, 2004); Douglas A. Berman, *Sentencing Law and Policy, Tomorrow's the Big Day?* http://sentencing.typepad.com/sentencing_law_and_policy/2004/11/tomorrows_the_b.html (Nov. 8, 2004); Douglas A. Berman, *Sentencing Law and Policy, When Will Booker and Fanfan Be Decided?* http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/when_will_emboo.html (Aug. 20, 2004) [hereinafter Berman, *When Will Booker and Fanfan Be Decided?*]; Marty Lederman, *Booker/Fanfan Timing Tealeaf?* http://www.goldsteinhowe.com/blog/archive/2004_11_28_SCOTUSblog.cfm#110185763350700617 (Nov. 30, 2004).

41. Douglas A. Berman, *Sentencing Law and Policy, Not So Fast?* http://sentencing.typepad.com/sentencing_law_and_policy/2004/11/no_so_fast.html (Nov. 8, 2004).

42. Berman, *When Will Booker and Fanfan Be Decided?* *supra* n. 40 (predicting that the cases will be decided “after Halloween, but before Thanksgiving”).

43. *Booker*, 125 S. Ct. at 738.

44. *Id.*

45. Justice Stevens delivered the “merits opinion,” joined by Justices Scalia, Souter, Thomas, and Ginsburg.

46. David Stout, *Supreme Court Rules Judges are Not Bound by Sentencing Rules*, <http://www.nacdl.org/public.nsf/mediasources/20050112c> (Jan. 12, 2005).

47. *Booker*, 125 S. Ct. at 746 (Stevens, J., delivered the opinion of the Court in part, in which Scalia, Souter, Thomas, and Ginsburg, JJ., joined [hereinafter (merits opinion)]).

48. Justice Breyer delivered the “remedial opinion,” joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Ginsburg.

49. *Booker*, 125 S. Ct. at 756 (Breyer, J., delivered the opinion of the Court in part, in which Rehnquist, C.J., and O’Connor, Kennedy, and Ginsburg, JJ., joined [hereinafter (remedial opinion)]).

50. 124 S. Ct. at 2543 (O’Connor, J., dissenting, in which Breyer, J., joined, and in which Rehnquist, C.J.,

judges now have greater discretion in sentencing. Whether they exercise that discretion in a way that lessens uniformity in sentencing remains to be seen.

This article will look at both the *Blakely* and *Booker* opinions. Part II will review *Blakely v. Washington*, the case that brought heightened attention to the Federal Sentencing Guidelines. Part III will outline the development of the Federal Sentencing Guidelines, compare those Guidelines to the guidelines used in the state of Washington that were the subject of the *Blakely* decision, and briefly address how severability might have preserved constitutionality. Part IV will discuss the various federal courts' responses to *Blakely* as it applied to the Federal Sentencing Guidelines pre-*Booker*. Part V will explore several pre-*Booker* proposals for a solution to the challenge brought by *Blakely*. *United States v. Booker* and *United States v. Fanfan*, the two cases that resulted in the Federal Sentencing Guidelines becoming advisory rather than mandatory, will be reviewed in Part VI, with Part VII discussing the federal courts' application of the *Booker* opinions, specifically regarding the degree to which the now advisory Federal Sentencing Guidelines should affect sentencing. Finally, Part VIII will conclude that the post-*Booker* sentencing landscape is, so far, rather similar to the pre-*Blakely* sentencing landscape and ask whether it is appropriate that the status quo remain or whether changes need to be made to curb discretion and/or to enhance Sixth Amendment protection.

II. BLAKELY V. WASHINGTON

A. The Trial Court

The case that triggered the recent upheaval, *Blakely v. Washington*,⁵¹ began with a troubled man and a troubled marriage. Ralph Howard Blakely, Jr., had been diagnosed with various disorders including paranoid schizophrenia.⁵² He and his wife, Yolanda, married in 1973.⁵³ Twenty-two years later, Yolanda filed for divorce.⁵⁴ Apparently wanting to convince her to dismiss the divorce, in 1998, Blakely abducted Yolanda at knifepoint, confining her in a wooden box in his pickup truck.⁵⁵ Blakely also involved the couple's thirteen-year-old son, requiring him to follow the truck in a car.⁵⁶ Blakely convinced the son to do so by threatening to hurt the child's mother with a shotgun.⁵⁷ The child escaped at a gas station and attempted to get help, but Blakely was able to leave and ultimately took Yolanda to Montana.⁵⁸ Blakely stopped at a friend's house and was later arrested after his friend called the police.⁵⁹

and Kennedy, J., joined except as to Part IV-B [hereinafter (O'Connor dissent)]).

51. 124 S. Ct. 2531.

52. *Id.* at 2534 (majority opinion).

53. *Id.*

54. *State v. Blakely*, 47 P.3d 149, 152 (Wash. App. Div. 2002).

55. *Blakely*, 124 S. Ct. at 2534.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

Blakely made a plea agreement with the State of Washington.⁶⁰ In entering his plea, Blakely admitted nothing other than the elements of kidnapping, domestic violence, and use of a firearm.⁶¹ In return, he was charged with “second-degree [kidnapping] involving domestic violence and use of a firearm.”⁶² The original charge had been first-degree kidnapping,⁶³ which, as charged, included the intent to inflict extreme mental distress.⁶⁴ Second-degree kidnapping does not include that intent.⁶⁵

Although the State recommended a sentence of 49 to 53 months,⁶⁶ the judge, using a provision in Washington law that allowed him to impose a longer sentence if he found reason to justify it,⁶⁷ sentenced Blakely to 90 months,⁶⁸ citing “deliberate cruelty” as the reason for the increase.⁶⁹ Blakely objected to the 37-month increase in his anticipated sentence, and the judge subsequently held a bench hearing.⁷⁰ During the three days of the hearing, a police officer and medical experts testified, as did Blakely, his wife, and their son.⁷¹ After the hearing, the sentence remained at 90 months, with the judge still citing “deliberate cruelty” as the reason for the upward departure from the State’s recommendation.⁷²

B. Court of Appeals of Washington

Blakely appealed.⁷³ Citing *Apprendi*,⁷⁴ Blakely argued that the facts must have been submitted to a jury and have met the reasonable doubt standard before he could be given an exceptional sentence.⁷⁵ The Washington Court of Appeals held that *Apprendi* did not apply and affirmed the lower court’s ruling,⁷⁶ relying on a recent Washington Supreme Court case⁷⁷ holding “that *Apprendi* does not apply to factual determinations that support reasons for exceptional sentences upward.”⁷⁸

In addition to the *Apprendi* issue, Blakely’s appeal to the Washington Court of Appeals raised several other issues. One involved judicial discretion. Blakely contended that the prosecutor had violated the plea agreement by advocating for an exceptional sentence upward.⁷⁹ The appeals court made repeated reference to the trial judge’s

60. *Blakely*, 124 S. Ct. at 2534–35.

61. *Id.*

62. *Id.* at 2534.

63. *Id.*

64. *Blakely*, 47 P.3d at 158.

65. *Id.*

66. *Blakely*, 124 S. Ct. at 2535.

67. Wash. Rev. Code Ann. § 9.94A.120(2) (West 2000).

68. *Blakely*, 124 S. Ct. at 2535.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 2536.

73. *Blakely*, 47 P.3d 151.

74. *Apprendi*, 530 U.S. 466.

75. *Blakely*, 47 P.3d at 159.

76. *Id.*

77. *Id.* (citing *State v. Gore*, 21 P.3d 262 (Wash. 2001)).

78. *Id.*

79. *Id.* at 155.

apparent predisposition to sentence enhancement⁸⁰ and found that the prosecutor had assiduously refrained from crossing the line into advocating the sentence enhancement.⁸¹ Instead, the prosecutor consistently recommended a sentence at the high end of the standard range.⁸² Completely on his own, the judge sought to increase Blakely's sentence beyond that indicated by the guidelines and sought by the prosecutor.⁸³

Blakely also tried to show that the court, in increasing his sentence, had considered facts that would establish first-degree kidnapping and, thus, had violated the state's "real facts doctrine,"⁸⁴ which prohibits the sentencing court from basing an extraordinary sentence on facts that would establish a more serious crime.⁸⁵ Blakely equated the trial judge's finding of "deliberate cruelty" with "intent to inflict extreme mental distress," an element of first degree kidnapping.⁸⁶ Blakely's plea⁸⁷ had been to second-degree kidnapping. The appeals court distinguished between "deliberate cruelty" and "intent to inflict extreme mental distress,"⁸⁸ but chose to sidestep the "real facts" issue by finding that the exceptional sentence was supported by domestic violence factors⁸⁹ alone as the aggravating factors.⁹⁰ While simple domestic violence⁹¹ was stipulated in the plea Blakely entered, that stipulation alone was insufficient under Washington law to increase

80. The appellate court referred to the lower court's observation that "the evidentiary hearing was probably an 'exercise in futility,' because there was no dispute that Mr. Blakely put his wife in an apple wood box and kept her there in the presence of [her son,] Ralph," *Blakely*, 47 P.3d at 156 (citation omitted), and observed, "Apparently the trial court intended to impose an exceptional sentence based on the record, regardless of the State's recommendation." *Id.* The appellate court concluded that "the sentencing court's conclusion from the start [was] that undisputed facts in the record supported an exceptional sentence based on domestic violence and deliberate cruelty." *Id.* at 157.

81. *Id.* at 155–57.

82. *Id.*

83. *Blakely*, 47 P.3d at 156.

84. *Id.* at 157–58.

85. *Id.*

86. *Id.* at 158.

87. Charges were amended to "one count of second degree domestic violence kidnapping with a deadly weapon enhancement and one count of second degree domestic violence assault. In exchange for the amended charges and a recommendation for a sentence in the high end of the standard range, Mr. Blakely agreed to an *Alford* plea of guilty." *Id.* at 153 (footnote omitted); *Blakely*, 47 P.3d at 153 n. 2 ("See *North Carolina v. Alford*, 400 U.S. 25 (1970) (a defendant may plead guilty while disputing the facts alleged by the prosecution)." (citations omitted)).

88. *Id.* at 158.

89. The *Blakely* court noted:

The real facts statute specifically allows the court to consider acts of domestic violence that involve deliberate cruelty or intimidation of the victim as well as acts of domestic violence committed in the presence of the victim's or offender's minor child. Because the trial court found that these aggravating circumstances also supported a departure from the standard range, the exceptional sentence is justified as a matter of law.

Id. (citation and footnote omitted).

90. *Id.*

91. The amended charges included domestic violence, but without specifying deliberate cruelty, intimidation, or being committed in the presence a child of either the victim or offender. *Id.* at 158. The latter factors were found by the court as aggravating circumstances. *Blakely*, 47 P.3d at 158.

the standard range of the sentence.⁹² Blakely's sentence was increased by nearly 70%⁹³ based on the judge's finding of "domestic violence with deliberate cruelty."⁹⁴

C. *The United States Supreme Court*

1. The Majority Opinion

Stating, "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,"⁹⁵ the Supreme Court reversed the lower court's judgment.⁹⁶ In so holding, the Court emphasized that the relevant "statutory maximum" 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.*"⁹⁷ While the appellee had argued that the maximum sentence for second degree kidnapping was ten years under Washington law,⁹⁸ the Court held that the maximum sentence was limited to 53 months,⁹⁹ since that was the upper end of the standard of 49 to 53 months,¹⁰⁰ the sentence for the crime to which he pled.

Justice Scalia's majority opinion in *Blakely*—which has been described as "both majestic and mysterious"¹⁰¹—repeatedly looked back to historical roots for the right to trial by jury.¹⁰² His opinion in this case should come as no surprise to those familiar with his prior dissents and concurrences.¹⁰³ From 1998 through 2004, ideas expressed in

92. *Blakely*, 124 S. Ct. at 2535 n. 3.

93. *Id.* at 2539–40. The additional 37 months to which Blakely was sentenced is 69.8% of the 53 month maximum under the standard range.

94. *Blakely*, 47 P.3d at 158 n. 3. Although both the Supreme Court and the Washington Court of Appeals referred to "domestic violence with deliberate cruelty" as the aggravating factor on which the enhanced sentence was affirmed, *Blakely*, 124 S. Ct. at 2535 n. 4; *Blakely*, 47 P.3d at 158 n. 3, the appeals court decision's "Facts" section indicated that "the trial court . . . imposed an exceptional sentence of 90 months for the kidnapping, citing the aggravating factors of deliberate cruelty and commission of domestic violence in the presence of a minor child." *Blakely*, 47 P.3d at 154.

95. *Blakely*, 124 S. Ct. at 2537.

96. *Id.* at 2543.

97. *Id.* at 2537 (emphasis in original).

98. *Id.*

99. *Id.* at 2543.

100. *Blakely*, 124 S. Ct. at 2535.

101. Douglas A. Berman, *Examining the Blakely Earthquake and Its Aftershocks*, 16 Fed. Senten. Rpt. 307, 308 (2004).

102. Justice Scalia commented:

This rule [from *Apprendi*] reflects two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,' and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.'

Blakely, 124 S. Ct. at 2536 (citation omitted, ellipses in original). He goes on further to suggest "Our Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury." *Id.* at 2543.

103. In his concurring opinion in *Ring*, Justice Scalia wrote: "What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed." 536 U.S. at 612 (emphasis in original). In *Apprendi*, he wrote:

I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years—and that if, upon conviction, he gets anything less

Justice Scalia's dissenting opinions¹⁰⁴ have come to be the majority opinion expressed in *Blakely*: that no defendant shall be deprived of liberty for any longer than the maximum sentence allowed by the jury's findings of guilt beyond a reasonable doubt.¹⁰⁵ Justice Scalia made it plain that he did not want to entrust the fate of defendants to the State,¹⁰⁶ of which the judiciary is a part.¹⁰⁷ At the end of the Court's *Blakely* opinion, Justice Scalia noted,

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," rather than a lone employee of the State.¹⁰⁸

than that he may thank the mercy of a tenderhearted judge . . . Will there be disparities? Of course. But the criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens.*

530 U.S. at 498 (emphasis in original) (Scalia, J., concurring). In 1999, Justice Scalia contended that "it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." *Jones v. U.S.*, 526 U.S. 227, 253 (1999) (Scalia, J., concurring). Dissenting in *Monge v. California*, he asked:

Suppose that a State repealed all of the violent crimes in its criminal code and replaced them with only one offence, "knowingly causing injury to another," bearing a penalty of 30 days in prison, but subject to a series of "sentencing enhancements" authorizing additional punishment up to life imprisonment or death on the basis of various levels of *mens rea*, severity of injury, and other surrounding circumstances. Could the State then grant the defendant a jury trial, with requirement of proof beyond a reasonable doubt, solely on the question whether he "knowingly cause[d] injury to another," but leave it for the judge to determine by a preponderance of the evidence whether the defendant acted intentionally or accidentally, whether he used a deadly weapon, and whether the victim ultimately died from the injury the defendant inflicted?

524 U.S. 721, 738 (1998) (bracket in original) (Scalia, Souter & Ginsburg, JJ., dissenting). He asserted that for constitutional purposes, when a defendant was found guilty of a crime carrying a maximum sentence of seven years, but sentenced to eleven years as a result of sentencing enhancements, the additional four-year sentence constituted conviction of a new crime. *Id.* at 740–41. In *Almendarez-Torres*, Justice Scalia contended that "[i]t would not be, as the Court claims, 'anomalous' to require jury trial for a factor increasing the maximum sentence." *Almendarez-Torres*, 523 U.S. at 257 n. 2 (Scalia, Stevens, Souter & Ginsburg, JJ., dissenting).

104. See e.g. *Monge*, 524 U.S. at 738, 740–41; *Almendarez-Torres*, 523 U.S. at 248. Scalia observed:

That it is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject is clear enough from our prior cases resolving questions on the margins of this one.

Id. at 251.

105. *Blakely*, 124 S. Ct. at 2536–37, 2543.

106. *Id.* at 2538–39 ("[The right to a jury trial] is no mere procedural formality, but a fundamental reservation of 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."); *id.* at 2539 n. 10 ("[T]he 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."); *id.* at 2540 ("[T]he 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.")

107. *Id.* at 2543 ("There is not one shred 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.")

108. *Blakely*, 124 S. Ct. at 2543 (citation omitted).

2. The Dissenting Opinions

In stark contrast, the dissent in *Blakely* believed that the decision would consolidate sentencing power in both state and federal judiciaries, since legislatures were apt to either significantly modify or completely abandon their sentencing guidelines.¹⁰⁹ The result would increase both judicial discretion and disparity in sentencing.¹¹⁰ This disparity in sentencing is precisely what led to the adoption of sentencing guidelines by Washington in 1981.¹¹¹ The same concerns led other states and the federal government to enact guidelines systems.¹¹² The majority opinion in *Blakely*, according to the dissenters “casts constitutional doubt over them all” and will “wreak [havoc] on trial courts across the country.”¹¹³

Having concerns beyond disparity in sentencing and havoc wrought on trial courts, Justice Breyer wrote a separate dissenting opinion in which he outlined several possible options legislatures might take regarding sentencing.¹¹⁴ He concluded, “[T]he 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.”¹¹⁵

Countering Justice Scalia’s reliance on the historical roots of the right to a jury trial, Justice Breyer offered additional historical perspective, noting, “Neither Bishop nor any other historical treatise writer . . . 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.”¹¹⁶ Further, since structured sentencing schemes did not exist in the nineteenth century, history is silent regarding the practice.¹¹⁷ Rather than violating the Sixth Amendment’s assurance of the right to a jury trial, Justice Breyer argued that structured sentencing guidelines “enhanc[e] and giv[e] 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.”¹¹⁸

The dissent took issue with the majority’s definition of “statutory maximum sentence.” According to the majority, the “statutory maximum sentence” is limited to the maximum sentence that can be imposed without additional findings.¹¹⁹ The dissent maintained that the “statutory maximum sentence” is the sentence set by the legislature for the crime.¹²⁰ Dissenters feared that the change in definition would spell the end for

109. *Id.* at 2543 (O’Connor dissent).

110. *Id.*

111. *Id.* at 2544.

112. *Id.* at 2548–49.

113. *Blakely*, 124 U.S. at 2549.

114. *Id.* at 2551–60 (Breyer, J., dissenting, in which O’Connor, J., joined [hereinafter (Breyer dissent)]).

115. *Id.* at 2558.

116. *Id.* at 2559.

117. *Id.* at 2559–60.

118. *Blakely*, 124 S. Ct. at 2560 (Breyer dissent).

119. *Id.* at 2537 (majority opinion).

120. *Id.* at 2547 (O’Connor dissent) (“Washington’s Sentencing Reform Act did not alter the statutory maximum sentence to which petitioner was exposed. 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

both state and federal sentencing guidelines as they currently existed, since “[i]f the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would.”¹²¹

III. SENTENCING GUIDELINES: FEDERAL AND STATE OF WASHINGTON

Two primary questions were considered to try to predict whether the rule of *Blakely* would be extended to invalidate provisions in the Federal Sentencing Guidelines requiring judges to enhance sentences based on facts neither presented to a jury nor considered by it, but instead found by the judges themselves. First, could the Federal Sentencing Guidelines be sufficiently distinguished from the Washington guidelines to limit *Blakely*'s reach? Second, if they could not, must the Federal Sentencing Guidelines fall in their entirety, as unconstitutional, or could they be preserved by severing portions deemed unconstitutional?

A. Distinguishing the Sentencing Guidelines

The position of the Department of Justice,¹²² and that of the United States Sentencing Commission,¹²³ was that the federal guidelines system was distinguishable from that in Washington, thereby protecting it from the reach of *Blakely*. Despite a contrary position in the government's amicus brief in *Blakely*,¹²⁴ the Solicitor General, in *Booker* and *Fanfan*, took the position that the Federal Sentencing Guidelines were distinguishable from those in Washington.¹²⁵ He based this distinction on the Federal Sentencing Guidelines' having been written by the U.S. Sentencing Commission rather than by Congress, while the state sentencing guidelines in Washington were enacted into law by the state legislature.¹²⁶

The dissent in *Blakely*¹²⁷ and the United States in its amicus brief in *Blakely*¹²⁸ found no important differences between the two systems and asserted that if the Washington system violated the Sixth Amendment of the U.S. Constitution, so did the federal system. While the majority in *Blakely* took no position regarding the Federal Guidelines, noting, “The Federal Guidelines are not before us, and we express no opinion on them,”¹²⁹ it seemed unlikely that the Court would be able to find a significant

prison.”); *id.* at 2559 (Breyer dissent) (“In this case, the statute provides that kidnapping may be punished by up to 10 years’ imprisonment.”).

121. *Id.* at 2550 (O’Connor dissent); *Blakely*, 124 U.S. at 2561 (Breyer dissent) (“Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how.”).

122. Memo. from James Comey, *supra* n. 10, at 1–2.

123. Br. of Amicus Curiae U.S. Senten. Commn. at 10–11, *Booker*, 125 S. Ct. 738 (available at 2004 WL 1950330 at **10–11).

124. Br. of U.S. as Amicus Curiae at 29–30, *Blakely*, 124 S. Ct. 2531 (available at 2004 WL 177025 at **29–30).

125. Petr. Br. at 12, 14–38, *Booker*, 125 S. Ct. 738 (The United States filed only one brief for the consolidated cases.) (available at 2004 WL 1967056 at **12, 14–38).

126. *Id.*

127. 124 S. Ct. at 2549–50 (O’Connor dissent); *id.* at 2561 (Breyer dissent).

128. *Id.* at 2538 n. 9 (majority opinion).

129. *Id.*

distinction between the statutory guidelines in Washington and the administrative Federal Guidelines.¹³⁰

1. History and Authority of the Guidelines

The U.S. Sentencing Guidelines, usually referred to as the Federal Sentencing Guidelines, were promulgated as a result of the Sentencing Reform Act of 1984¹³¹ and went into effect November 1, 1987.¹³² Until then, similar crimes could earn defendants widely disparate sentences, depending in large part on the discretion of individual judges.¹³³ In an effort to combat such inconsistency,¹³⁴ Congress authorized the U.S. Sentencing Commission to devise a system to be used in sentencing.¹³⁵

With similar motivation, the State of Washington, three years earlier, had passed its own Sentencing Reform Act.¹³⁶ This act established a Sentencing Guidelines Commission that was charged with developing guidelines for determinate sentencing for adults.¹³⁷ Under the Washington law, the guidelines that were developed by the commission were then recommended to the legislature for adoption by statute.¹³⁸ Enacted by the state's legislature in 1983, Washington's sentencing guidelines became effective in 1984.¹³⁹ Since then, they have been amended by the state's legislature in nearly every session.¹⁴⁰ Such frequent amendments may compromise uniformity in sentencing since two defendants' sentences may differ based on which guidelines were in effect when they were sentenced.

Unlike Washington's state sentencing guidelines, the Federal Sentencing Guidelines are not submitted to Congress to be adopted by statute. Instead, in the federal sentencing scheme, Congress determines the maximum sentence for particular crimes and the Sentencing Commission establishes guidelines to be used to determine the actual sentence.¹⁴¹ The original Federal Guidelines became effective November 1, 1987 and in each succeeding year, amendments to those Guidelines have become effective each November 1. While neither the original Guidelines, nor the amendments, have required

130. Kevin R. Reitz, *Model Penal Code: Sentencing Report to the Council 10* (October 7, 2004) (available at http://sentencing.typepad.com/sentencing_law_and_policy/files/mpc_report_to_the_council_2004_for_blog.doc) (last accessed Apr. 10, 2006) ("Most observers think it unlikely that the Court will find any constitutional distinction between statutory and administrative guidelines, and some even consider the argument frivolous.").

131. Pub. L. No. 98-473, 98 Stat. 1987 (1984).

132. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 228 (1993).

133. *Blakely*, 124 S. Ct. at 2554 (Breyer dissent); Interview by *Talk of the Nation* with James Comey, Dep. Atty. Gen. (NPR Aug. 3, 2004) (radio broadcast, transcr. available at <http://www.npr.org/transcripts>).

134. U.S. Senten. Commn., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* iv, http://www.ussc.gov/15_year/15_year_study_full.pdf (Nov. 2004).

135. 98 Stat. at 2017.

136. Wash. St. Senten. Commn., *Sentencing Reform Act: Historical Background*, <http://www.sgc.wa.gov/Informational/historical.htm> (last accessed Apr. 28, 2006).

137. *Id.* The commission's duties expanded to include juvenile sentencing in 1996. *Id.*

138. *Id.*

139. *Id.*

140. Wash. St. Senten. Commn., *supra* n. 136.

141. Congress has also established "mandatory minimum" sentences for some crimes.

explicit approval by Congress, they are, nonetheless, controlled by Congress.¹⁴² Congress may change the Guidelines at any time.¹⁴³ Recently, as part of the 2003 PROTECT Act,¹⁴⁴ Congress directly amended the Federal Sentencing Guidelines. This amendment, known as the Feeney Amendment, after its author, Representative Tom Feeney,¹⁴⁵ significantly restricted judges' discretion to depart *downward* from the Federal Sentencing Guidelines¹⁴⁶ and changed the standard for appellate review of sentencing to *de novo*.¹⁴⁷

2. The Basic Workings of the Guidelines

Designed to bring uniformity to sentencing, the state sentencing guidelines in Washington use the seriousness of the offense and the criminal history of the offender to arrive at a "standard" or "presumptive" sentencing range.¹⁴⁸ The upper end of this range is what the Supreme Court defined as the "statutory maximum sentence" in *Blakely*.¹⁴⁹ The Washington guidelines allowed the trial court to deviate from the presumptive sentence "[w]hen substantial and compelling reasons exist."¹⁵⁰

The Federal Sentencing Guidelines comprise an elaborate factoring grid under which points are added for the presence of various factors. These factors include prior convictions, use of a gun in the commission of a crime, quantity of illegal drugs possessed,¹⁵¹ and whether the defendant was the leader in a conspiracy.¹⁵² As with the guidelines in Washington, the goal has been to bring uniformity to sentencing so that similar crimes, committed in similar ways, by similarly situated defendants receive similar sentences.

3. "Real Facts Doctrine" and "Real Conduct" or "Real Offense"

One specific difference between the two sets of guidelines is Washington's "real facts doctrine."¹⁵³ Washington law will not allow judges to impose sentences based on facts that would either establish a more serious crime than the one for which the defendant was convicted, or establish additional crimes for which the defendant had not

142. *Blakely*, 124 S. Ct. at 2549 (O'Connor dissent) ("Congress has unfettered control to reject or accept any particular guideline.").

143. See 28 U.S.C. § 994(p) (2000); *Mistretta*, 488 U.S. at 393–94 ("[T]he Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit.").

144. *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*, Pub. L. No. 108-21, 117 Stat. 650 (2003).

145. Republican United States Representative from Florida.

146. The Feeney Amendment limits judicial discretion to depart downward from presumptive sentences and provides for information gathering on a judge by judge basis to track downward departures.

147. *Booker*, 125 S. Ct. at 786 (Stevens, J., dissenting in part, in which Souter, J., joined, and in which Scalia, J., joined except for Part III and footnote 17 [hereinafter (Stevens dissent from remedial opinion)]).

148. Wash. St. Senten. Commn., *supra* n. 136.

149. 124 S. Ct. at 2537 (majority opinion).

150. Wash. St. Senten. Commn., *supra* n. 136.

151. *Shamblin*, 323 F. Supp. 2d at 760–61. In drug cases, quantities of other drugs are equated to generally larger quantities of marijuana. *Id.* at 761.

152. *Fanfan*, 2004 WL 1723114 at *2.

153. *Blakely*, 124 S. Ct. at 2550 (O'Connor dissent); *Blakely*, 47 P.3d at 158.

been convicted.¹⁵⁴ In contrast, the Federal Sentencing Guidelines not only allow such facts, but also encourage them.¹⁵⁵

One provision for which upward departures from presumptive sentences under the Federal Sentencing Guidelines is for the “real conduct” or “real offense.” This is the way in which a sentence could be enhanced under the Federal Sentencing Guidelines from a 262-month sentence based on a conviction for “possessing with intent to distribute at least 50 grams of cocaine base”¹⁵⁶ to a 360-month sentence after additional fact finding by the judge.¹⁵⁷ Based on presentencing reports, not subject to the rules of evidence or cross examination,¹⁵⁸ judges have found it more likely than not that a defendant had possessed and/or trafficked a larger amount of methamphetamine,¹⁵⁹ or possessed both cocaine powder and cocaine base (crack cocaine).¹⁶⁰ Similarly, increases in sentencing may occur in crimes involving money, where a judge determines the total amount of money involved and thereby increases the sentence.¹⁶¹ Uncharged conduct has increased one-half of all sentences according to one study.¹⁶² Since the burden of proof is lower for determining “relevant conduct” than for conviction,¹⁶³ even acquitted charges have been used to enhance sentences.¹⁶⁴

This difference between Washington’s state sentencing guidelines and the Federal Sentencing Guidelines was unlikely to prevent application of *Blakely* to the Federal Guidelines. Justice O’Connor, in her *Blakely* dissent, said that rather than making the Federal Sentencing Guidelines immune to *Blakely*, the differences that exist between the Federal Sentencing Guidelines and those in Washington make the *Blakely* decision more likely to apply to the Federal Sentencing Guidelines.¹⁶⁵

B. Severability

A statute or provision of Congress can sometimes be salvaged through severability when the Court judges the statute or provision unconstitutional. If the Court can find a way to sever the unconstitutional portions, the remainder may stand as valid. Congress may include a severability clause to make it clear to the courts that it wants the statutes salvaged even if parts are found unconstitutional. However, failure to include a severability clause does not tip the balance in favor of non-severability.¹⁶⁶

154. See *Blakely*, 47 P.3d at 158.

155. See *Blakely*, 124 S. Ct. at 2557 (Breyer dissent).

156. *Booker*, 375 F.3d at 509; see also *id.* at 510.

157. *Booker*, 375 F.3d at 509.

158. Br. of Amicus Curiae for the Wash. Leg. Found. & Allied Educ. Found. at 8, *Booker*, 125 S. Ct. 738 (available at 2004 WL 2112281 at *8) [hereinafter D.C. Br.].

159. See e.g. *Ameline*, 376 F.3d at 969.

160. See e.g. *Pineiro*, 377 F.3d at 466–67; *Booker*, 375 F.3d at 509.

161. D.C. Br. at 9–10, *Booker*, 125 S. Ct. 738 (available at 2004 WL 2112281 at **9–10).

162. *Id.* at **8–9 (citing Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 94 (2003)).

163. Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523, 524, 548 (1993).

164. Barry L. Johnson, *If at First You Don’t Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153, 154–55 (1996); Reitz, *supra* n. 163, at 546.

165. See *Blakely*, 124 S. Ct. at 2549 (O’Connor dissent).

166. Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 Fed. Senten. Rpt. 316, 318 (quoting *Alaska*

The Federal Sentencing Reform Act of 1984 contains no severability clause.¹⁶⁷ Generally, however, severability is favored because the Court “should refrain from invalidating more of the statute than is necessary.”¹⁶⁸ Therefore, severability is determined by whether Congress would have passed the legislation without the portion that would be severed.¹⁶⁹ There has been no clear-cut consensus as to whether Congress would have passed the Sentencing Reform Act if it did not include the provision for sentence enhancements based on facts found by the judge rather than by the jury.¹⁷⁰ Federal court cases after *Blakely* were divided on the issue.

IV. FEDERAL COURT RESPONSES TO *BLAKELY*¹⁷¹

A. Mostly Restrained Opinions from the Courts of Appeals

As predicted in the *Blakely* dissents,¹⁷² the decision caused turmoil within the federal courts. Both the Seventh and Ninth Circuits held that *Blakely* applies to the Federal Sentencing Guidelines.¹⁷³ The Sixth Circuit initially agreed,¹⁷⁴ but that ruling was vacated and an *en banc* rehearing was ordered.¹⁷⁵ Before that rehearing occurred, the defendant reached a settlement in the case and her attorney asked the Sixth Circuit to drop the appeal.¹⁷⁶ A month later, the Sixth Circuit held that *Blakely* did not require a finding that the Federal Sentencing Guidelines violate the Sixth Amendment.¹⁷⁷

The Fifth Circuit Court of Appeals was the first Circuit Court to apply *Blakely* to the Federal Guidelines.¹⁷⁸ Some of the other circuits followed suit,¹⁷⁹ but were less forceful in their opinions that *Blakely* did not apply to the Federal Sentencing Guidelines. While the Fifth Circuit reached that conclusion by its own analysis, other circuits generally took a “wait and see” position, holding that there was no current effect on the Guidelines and directing their district courts to continue sentencing under the Guidelines as they did before *Blakely*.¹⁸⁰

Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987)).

167. *Id.* at 318, 318 n. 44 (2004) (noting however, “A 1996 amendment to 18 U.S.C. § 3563, addressing conditions of probation, did include a severability provision.”).

168. *Id.* at 318 (internal quotation marks omitted) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)).

169. *Id.*

170. *See id.*

171. Two websites, *Sentencing Law and Policy*, Berman, *supra* n. 8, and *USSGUIDE.COM*, <http://www.ussguide.com/members/BulletinBoard/Blakely> (last accessed Sept. 23, 2005), were particularly helpful in keeping up with court decisions involving *Blakely*. The latter website no longer provides public access; copies on file with author.

172. *Blakely*, 124 S. Ct. at 2548 (O’Connor dissent); *id.* at 2561–62 (Breyer dissent).

173. *Booker*, 375 F.3d 508; *Ameline*, 376 F.3d 967.

174. *U.S. v. Montgomery*, 2004 U.S. App. LEXIS 14384 (6th Cir. July 14, 2004).

175. *U.S. v. Montgomery*, 2004 U.S. App. LEXIS 15017 **1–2 (6th Cir. July 19, 2004).

176. *USSGUIDE.COM*, *Blakely: Opinions and other Information, Sixth Circuit*, <http://www.ussguide.com/members/BulletinBoard/Blakely/06CA/index6CA.cfm> (Sept. 23, 2005) (copy on file with author).

177. *Koch*, 383 F.3d 436.

178. *Pineiro*, 377 F.3d at 465.

179. *See e.g. U.S. v. Mincey*, 380 F.3d 102 (2d Cir. 2004); *U.S. v. Hammoud*, 378 F.3d 426 (4th Cir. 2004) (en banc, per curiam), *vacated*, 125 S. Ct. 1051 (2005); *U.S. v. Reese*, 382 F.3d 1308 (11th Cir. 2004).

180. *See e.g. Mincey*, 380 F.3d at 106 (directing the courts of the Circuit to “continue fully to apply the

1. Distinguishing the Federal Sentencing Guidelines

In the courts of appeals, there was little effort to distinguish the Federal Guidelines from those of the state of Washington, even in those courts that found the Federal Guidelines unaffected by *Blakely*. The Sixth Circuit noted that “the ‘statutory maximum’ at issue in *Blakely* arose from a statute, and the Sentencing Guidelines are not statutes,”¹⁸¹ but acknowledged that “both have the force of law and both bind courts.”¹⁸² While it questioned whether being promulgated by an agency would prove to be a sufficient distinction to save the Federal Sentencing Guidelines in the cases before the U.S. Supreme Court,¹⁸³ the court concluded, “it at least undermines the view that *Blakely* compels us to invalidate the Sentencing Guidelines.”¹⁸⁴

The Fifth Circuit opinion was somewhat more forceful.¹⁸⁵ Asserting that prior Court cases have noted “constitutionally meaningful differences between Guidelines ranges and United States Code maxima,”¹⁸⁶ Chief Judge King said, “[W]e cannot conclude that *Blakely*—which explicitly reserved comment on the Guidelines—has abolished the distinction’s importance.”¹⁸⁷

When Freddie Joe Booker took his appeal to the Seventh Circuit, Judge Easterbrook found that the Federal Sentencing Guidelines were unaffected by the *Blakely* decision.¹⁸⁸ Noting that both *Apprendi* and *Blakely* use the phrase “statutory maximum”¹⁸⁹ and that “*Blakely* arose from a need to designate one of two statutes as the ‘statutory maximum,’”¹⁹⁰ he took the position that the “statutory maximum” at the federal level refers to the maximum provided in the United States Code rather than the maximum provided in the U.S. Sentencing Guidelines.¹⁹¹

2. Severability

The Seventh Circuit Court of Appeals was the first Circuit to hold that the *Blakely* holding affected the Federal Sentencing Guidelines.¹⁹² Soon thereafter, the Ninth

Guidelines” “unless and until the Supreme Court rules otherwise”); *Hammoud*, 378 F.3d at 426 (directing the district courts to continue sentencing under the Guidelines as pre-*Blakely*); *Reese*, 382 F.3d at 1312 (“In light of . . . the Supreme Court’s express avoidance of this issue with respect to the Guidelines in the *Blakely* opinion itself, we decline to conclude that *Blakely* compels an alteration of the established view of the Guidelines as a tool for channeling the sentencing court’s discretion within a crime’s minimum and maximum sentence provided in the United States Code, with that maximum being the only constitutionally relevant maximum sentence. . . . [D]istrict courts should continue to sentence pursuant to the Guidelines until such time as the Supreme Court rules on this issue.”).

181. *Koch*, 383 F.3d at 441.

182. *Id.*

183. *Id.*

184. *Id.* (emphasis in original).

185. *Pineiro*, 377 F.3d 464.

186. *Id.* at 470.

187. *Id.* at 473.

188. *Booker*, 375 F.3d at 519 (Easterbrook, J., dissenting).

189. *Id.*

190. *Id.* at 518.

191. *Id.* at 517–19.

192. *Id.* at 510 (majority opinion).

Circuit followed suit.¹⁹³ Each court stopped short of finding the Guidelines wholly unconstitutional.

The *Booker* court remanded the case for resentencing but made no decision regarding severability, stating “that is an issue for consideration on remand should it be made an issue by the parties.”¹⁹⁴ Noting that the Department of Justice “believes that if *Blakely* is applicable to the guidelines, the ‘entire system’ of the guidelines ‘must fall,’”¹⁹⁵ the court acknowledged that it was possible that “the requirement that the sentencing judge make certain findings that shall operate as the premise of the sentence and that he make them on the basis of the preponderance of the evidence, may not be severable from the substantive provisions of the guidelines.”¹⁹⁶ The court speculated that Congress might abandon determinate sentencing in favor of a return to indeterminate sentencing if the result of determinate sentencing was shorter average sentences due to a requirement that facts enhancing a sentence had to be proven beyond a reasonable doubt.¹⁹⁷

The *Ameline* court found that the provisions violating the *Blakely* holding were severable.¹⁹⁸ Asserting that severance would not hinder Congress’s goal to produce consistency in sentencing, Judge Paez wrote, “[W]ere we to hold that *Blakely* precludes application of the Guidelines as a whole, we would do far greater violence to Congress’ intent than if we merely excised the unconstitutional procedural requirements.”¹⁹⁹

B. District Court Responses

While the courts of appeals, for the most part, took a rather passive “wait and see” position, the district courts were more vocal.²⁰⁰ Perhaps this should have been expected. It is the district courts that have the responsibility of imposing sentences under the Federal Sentencing Guidelines. Many of the district judges have used the Guidelines throughout their entire career on the federal bench.²⁰¹

The courts’ approaches varied greatly. While some held that *Blakely* did not render the Federal Sentencing Guidelines unconstitutional,²⁰² many held that *Blakely*

193. *Ameline*, 376 F.3d at 967–70.

194. *Booker*, 375 F.3d at 515.

195. *Id.* at 514–15 (citing Memo. from James Comey, *supra* n. 10, at 3).

196. *Id.* at 515.

197. *See id.*

198. 376 F.3d at 980–81.

199. *Id.* at 982.

200. *See e.g. U.S. v. Toro*, 335 F. Supp. 2d 268 (D. Conn. 2004); *Zompa*, 326 F. Supp. 2d 176; *Fanfan*, 2004 WL 1723114; *Mueffelman*, 327 F. Supp. 2d 79; *Sisson*, 326 F. Supp. 2d 203; *Landgarten*, 325 F. Supp. 2d 235; *U.S. v. Khan*, 325 F. Supp. 2d 218 (E.D.N.Y. 2004); *Medas*, 323 F. Supp. 2d 436; *U.S. v. Emmenegger*, 329 F. Supp. 2d 416 (S.D.N.Y. 2004); *U.S. v. Marrero*, 325 F. Supp. 2d 453 (S.D.N.Y. 2004); *U.S. v. Einstman*, 325 F. Supp. 2d 373 (S.D.N.Y. 2004).

201. *Einstman*, 325 F. Supp. 2d at 381.

202. *See e.g. U.S. v. Paris*, 2004 U.S. Dist. LEXIS 16401 at *4 (D. Kan. July 27, 2004) (agreeing with *Pineiro*, 377 F.3d 464, and saying it would “announce alternative sentences in the event that *Blakely* is finally determined to have some impact on federal sentences”); *U.S. v. Olivera-Hernandez*, 328 F. Supp. 2d 1185, 1187 (D. Utah 2004) (finding “that *Blakely* and its reasoning do not (yet) apply to the federal sentencing statutes”).

rendered the Federal Sentencing Guidelines wholly unconstitutional.²⁰³ Still others found that, while there might be unconstitutional provisions in the Federal Sentencing Guidelines, those provisions could be severed from the whole, leaving at least part of the Guidelines intact.²⁰⁴ Decisions discussing severability were split in how they would sever the Guidelines and which parts would remain viable.

1. Distinguishing the Federal Sentencing Guidelines

As in the courts of appeal, there was little attempt to distinguish the Federal Sentencing Guidelines from those in Washington. While acknowledging that the Federal Guidelines are generally written by a commission rather than a legislative body, most courts saw that as an illusory distinction. One judge, however, announced that the Federal Sentencing Guidelines would be applied as they had been before *Blakely* and pointed out that “the Sentencing Guidelines may . . . defy present expectations of their impending demise. A distinction, however fine, may be drawn between the Federal Guidelines and the State of Washington’s Guidelines. Other issues could become involved. A vote could switch. And so on.”²⁰⁵

2. Severability

Some district courts found that if *Blakely* applied to the Federal Sentencing Guidelines, the Guidelines must fall entirely. Other courts found that severing the portion that made them unconstitutional could salvage the Guidelines. For some of these courts,²⁰⁶ the solution was to continue using the Guidelines for all sentencing without imposing any sentences longer than the presumptive maximums.²⁰⁷ This generally meant that these judges were imposing sentences without upward departures, though at

203. See e.g. *King*, 328 F. Supp. 2d at 1278; *U.S. v. Carter*, 2004 U.S. Dist. LEXIS 14433 at **3–4 (C.D. Ill. July 23, 2004); *Mueffelman*, 327 F. Supp. 2d at 82; *Sisson*, 326 F. Supp. 2d at 205; *Marrero*, 325 F. Supp. 2d at 456; *Einstman*, 325 F. Supp. 2d at 375 (holding “the necessary implication of *Blakely* is that the [U.S. Sentencing Guidelines] as they currently exist must be unconstitutional”); *id.* at 380 (“I agree wholeheartedly with the Government’s position that the [U.S. Sentencing Guidelines] are not severable, so the unconstitutionality of the provisions concerning the judicial factfinding of sentencing enhancements necessarily means that the entire [U.S. Sentencing Guidelines] scheme falls.”); *U.S. v. Harris*, 325 F. Supp. 2d 562, 563–64 (W.D. Pa. 2004).

204. E.g. *Zompa*, 326 F. Supp. 2d at 178; *Fanfan*, 2004 WL 1723114 at *5 (“I conclude that perhaps the Supreme Court can find a way to explain away *Blakely* in its language and its reasoning, but as a trial Judge and a sentencing Judge, I cannot. I must take it as it is written. I will leave it to higher courts to tell me it does not mean exactly what it says. . . . [F]ollowing *Blakely*, I conclude that it is unconstitutional for me to apply the federal guideline enhancements.”); *Khan*, 325 F. Supp. 2d 218, 219–20 (citations omitted) (“*Blakely* does not—as some have speculated—constitute the death knell of the Federal Sentencing Guidelines. *Blakely* does provide Congress, the courts and the Sentencing Commission with an opportunity and obligation to reevaluate and revise the Guidelines. . . . *Blakely*’s reintroduction of the jury into the present sentencing process suggests the desirability of making the Guidelines discretionary guideposts—as their name implies—rather than mandatory precepts, inflexible commands.”); *Shamblin*, 323 F. Supp. 2d at 766–68; *id.* at 768 (determining to impose only the maximum presumptive sentence without enhancements, “[a]t 240 months, Shamblin’s sentence represented much that is wrong about the Sentencing Guidelines; at 12 months, it is almost certainly inadequate. My duty, however, is only to apply the law as I find it.”).

205. *Olivera-Hernandez*, 328 F. Supp. 2d at 1187.

206. See e.g. *Toro*, 335 F. Supp. 2d 268; *Zompa*, 326 F. Supp. 2d 176; *Fanfan*, 2004 WL 1723114; *Landgarten*, 325 F. Supp. 2d 235; *Montgomery*, 324 F. Supp. 2d 1266; *Shamblin*, 323 F. Supp. 2d 757.

207. “Statutory maximum,” by the *Blakely* definition, is the maximum sentence that could be imposed under the Guidelines using only facts found by a jury or pled to by the defendant.

least one judge opted for empanelling a sentencing jury to determine the facts necessary for enhancement.²⁰⁸ For other courts, severability essentially meant using the Federal Sentencing Guidelines only for those sentences in which enhancement was not an issue and returning to indeterminate sentencing for the others.²⁰⁹ This was the approach used in *United States v. Croxford*.²¹⁰

Croxford was one of the first post-*Blakely* district court decisions, coming just five days after the *Blakely* decision.²¹¹ In it, Judge Paul Cassell found that *Blakely* applied to the Federal Sentencing Guidelines, rendering them entirely unconstitutional as applied to sentences enhanced due to judge-found facts.²¹² He outlined three possible paths a court might take in such a case and determined that the “only viable one”²¹³ was to return to indeterminate sentencing. He then handled the sentencing of the defendant “as the courts handled sentencing before the Guidelines—by making a full examination of the relevant evidence and imposing an appropriate sentence within the broad range set by Congress.”²¹⁴ Although he abandoned the Federal Sentencing Guidelines in *Croxford*, Judge Cassell later imposed a Guidelines sentence in *United States v. Thompson*²¹⁵ and said that where there were no enhancements based on judge-found facts, there was no constitutional issue.²¹⁶

V. PRE-BOOKER PROPOSALS FOR THE FUTURE OF SENTENCING

In the aftermath of *Blakely*, dialogue opened regarding sentencing and “present[ed] a remarkable opportunity to build upon the federal sentencing reform experiences of the last two decades.”²¹⁷ Unfortunately, the proposals were not terribly imaginative.

208. See *Landgarten*, 325 F. Supp. 2d at 235–36.

209. See e.g. *Thompson*, 324 F. Supp. 2d 1273; *Croxford*, 2004 U.S. Dist. LEXIS 12156.

210. 2004 U.S. Dist. LEXIS 12156.

211. *Fanfan*, 2004 WL 1723114, was decided one day earlier and with a very different outcome—sentencing the defendant to 78 months, the “relevant statutory maximum” for the jury verdict, rather than the 188 to 235 month range which enhancements would have rendered under the Guidelines without *Blakely*. On June 30, 2004, the *Sisson* court announced the court’s return to drawing criminal cases and stated that

it shall treat the Guidelines as unconstitutional in all cases In other words, in all cases, the Court shall handle the sentencing as courts handled sentencing before the Guidelines—by making a full examination of an individual defendant’s personal character, family responsibilities, medical and mental condition, criminal record, and the particular circumstances surrounding the crime and imposing an appropriate sentence within the broad range set by Congress, after deep reflection informed by his experience in life and in the law. . . . The Guidelines are to be considered as guidelines and not as mandates which have destroyed traditional judicial discretion.

326 F. Supp. 2d at 205 (citations omitted).

212. *Croxford*, 2004 U.S. Dist. LEXIS 12156 at **22, 31.

213. *Id.* at **33–34.

214. *Id.* at *40.

215. 324 F. Supp. 2d 1273 (D. Utah 2004).

216. *Id.* at 1275–76.

217. Douglas A. Berman et al., Sen. Comm. on Jud., Written Test., *Go Slow: A Recommendation for Responding to Blakely v. Washington in the Federal System 1* (July 13, 2004) (available at [http://sentencing.typepad.com/sentencing_law_and_policy/files/final_bermanmillerderdemleitnerwright_blakely_sen.%20Jud.%20Comm.%20Testimony%20%20\(7.13.04\).pdf](http://sentencing.typepad.com/sentencing_law_and_policy/files/final_bermanmillerderdemleitnerwright_blakely_sen.%20Jud.%20Comm.%20Testimony%20%20(7.13.04).pdf)).

A. *From Blakely*

In his dissent in *Blakely*, Justice Breyer set out three options for sentencing after *Blakely*: (1) a determinate sentencing system in which each crime would carry the same sentence without variation,²¹⁸ (2) an indeterminate sentencing system as existed before sentencing reform wherein time served was at the discretion of the judge and parole boards,²¹⁹ and (3) a sentencing system with guidelines from which judges could depart downward, but under which no upward departures could be made unless aggravating facts had been proven to a jury beyond a reasonable doubt.²²⁰ Justice Breyer dismissed a possible fourth option, previously set out by Justice O'Connor in *Apprendi*.²²¹ Under that option, legislatures would rewrite their statutes to incorporate very high sentences and provide mitigating rather than aggravating factors that would allow downward departures from the high presumptive sentences.²²²

None of these proposed solutions met with Justice Breyer's approval. The determinate system "assures uniformity, but at intolerable costs"²²³ because it would lose the flexibility "to treat different cases differently."²²⁴ Additionally, prosecutors would have more power to manipulate sentencing and put further pressure on defendants to reach plea agreements.²²⁵ The second option, a return to indeterminate sentencing, would bring the hazards of tremendous sentencing disparities, while providing no protection to defendants and no assurance that their fate would be determined by a jury.²²⁶

Justice Breyer was most critical of the third option—using juries to determine facts needed for upward departures from the presumptive sentence. This option could also involve redefining crimes to include various sentencing factors—a "complex charge offense" system.²²⁷ According to Justice Breyer, this system would put defendants at a disadvantage both in plea bargaining and at trial, particularly if states required defendants to either plea to all elements charged or proceed to trial.²²⁸ Providing juries to determine the facts needed for enhanced sentencing was deemed too costly and unwieldy.²²⁹ Further, it could only be workable if the rate of plea agreements remained high.²³⁰ Justice Breyer observed, "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."²³¹

218. *Blakely*, 124 S. Ct. at 2552–53 (Breyer dissent).

219. *Id.* at 2553–54.

220. *Id.* at 2554.

221. *Id.* at 2558 (citing *Apprendi*, 530 U.S. at 541–42 (O'Connor, J., dissenting)).

222. *Id.* at 2558.

223. *Blakely*, 124 S. Ct. at 2553.

224. *Id.*

225. *Id.*

226. *Id.* at 2554.

227. *Id.* at 2555.

228. *Blakely*, 124 S. Ct. at 2555.

229. *Id.* at 2556.

230. *Id.* at 2556–57.

231. *Id.* at 2557 (emphasis in original).

B. The “Bowman Fix” or “Topless Guidelines”²³²

Soon after *Blakely* was decided, Professor Frank Bowman²³³ sent a memorandum to the U.S. Sentencing Commission²³⁴ suggesting what has become known as the “Bowman Fix.”²³⁵ The memorandum proposed that sentence ranges under the Federal Sentencing Guidelines be increased to the maximum sentence set by Congress for each crime.²³⁶ The purported effect would be to return the functioning of the Federal Sentencing Guidelines to nearly the same way in which they functioned before *Blakely*.²³⁷ Professor Bowman suggested that the Commission might recommend that sentences generally not exceed the minimum sentence by more than 25% or 6 months²³⁸ unless there was at least one factor present that is currently included in the Guidelines as a reason for an upward departure.²³⁹ This recommendation would not be binding and failure to follow the recommendation would not be appealable.²⁴⁰ This lack of appealability might protect the revised Guidelines from the reach of *Blakely*.²⁴¹

If judges were to follow the non-binding recommendation that sentence not exceed 25% of the minimum sentence, the Bowman Fix would effectively maintain the pre-*Blakely* status quo. However, judges would not be required to do so; therefore, the Bowman Fix is, in reality, a return to indeterminate sentencing wherein judges handle sentencing “as [they did] before the Guidelines—by making a full examination of the relevant evidence and imposing an appropriate sentence within the broad range set by Congress.”²⁴² The Federal Sentencing Guidelines would be merely advisory. Viewed this way, it is difficult to see how the Bowman Fix is any different from the proposals of those who would see the Guidelines fall in their entirety.

The essential flaw in the Bowman Fix is that it circumvents the philosophy of *Blakely* rather than finding a way that determinate sentencing “can be implemented in a way that respects the Sixth Amendment.”²⁴³ *Blakely* and *Apprendi* were about a defendant’s right to know the cost of his crime at the time he was committing it and his right to have a jury find the facts used to deprive him of liberty. Even if the non-binding

232. While his proposal has been called the “Bowman Fix” by many, Professor Frank Bowman prefers to call them “topless guidelines.” U.S. Senten. Commn., *Blakely and the Federal Sentencing Guidelines: Public Hearing, Panel Two* (Nov. 17, 2004) (available at http://www.uscc.gov/hearings/11_17_04/111704-paneltwo.pdf).

233. M. Dale Palmer Professor of Law at Indiana University School of Law.

234. Memo. from Frank Berman, Prof., Ind. Univ. Sch. L., to U.S. Senten. Commn., *Blakely v. Washington 7–8* (June 27, 2004) (available at <http://www.ussguide.com/members/BulletinBoard/Blakely/FrankBowman06-27-04.pdf>) (copy on file with author) [hereinafter Memo. from Frank Berman].

235. Douglas A. Berman, *Sentencing Law and Policy, The Brewing Battle Over the Bowman Fix*, http://sentencing.typepad.com/sentencing_law_and_policy/2004/11/the_brewing_bat.html (Nov. 18, 2004).

236. Memo. from Frank Berman, *supra* n. 234, at 7–8.

237. *Id.* at 7.

238. This is the way in which current sentencing ranges are determined under the Federal Sentencing Guidelines—the top of the range is no more than 25% or 6 months greater than the lower end. 28 U.S.C. § 994(b)(2) (2000).

239. Memo. from Frank Berman, *supra* n. 234, at 8.

240. *Id.*

241. *Id.*

242. *Croxford*, 2004 U.S. Dist. LEXIS 12156 at *40.

243. *Blakely*, 124 S. Ct. at 2540 (majority opinion).

nature of the “25% rule”²⁴⁴ under the Bowman Fix did not create sufficient right in the defendant to that maximum sentence, it would create uncertainty regarding the cost of the crime, defeating *Blakely*’s goal.

Further, while the Bowman Fix might seem to preserve the Federal Sentencing Guidelines, it would allow judges a range of discretion that the Federal Sentencing Guidelines were meant to curtail. Under Professor Bowman’s proposal, judges would operate with a non-binding recommendation that they limit their sentences to the 25% rule. It is essential to his proposal that this recommendation be non-binding; otherwise, it could again lead to presumptive sentences being deemed to be the relevant statutory maximum.²⁴⁵ Yet, the lack of appellate review for failure to adhere to the recommendation and the broad range of sentencing options between the minimum Guidelines sentence and the maximum set by Congress would set the stage for the same sort of judicial discretion that led to great disparity in sentencing before the Sentencing Reform Act. Rather than actually preserving the Federal Sentencing Guidelines, the Bowman Fix might completely destroy them as they were conceived by Congress.²⁴⁶ In essence, the Bowman Fix is no different from proposals that would strike down the Federal Sentencing Guidelines system and return to indeterminate sentencing in all cases, retaining the Federal Sentencing Guidelines as mere advisory guidelines.

VI. *UNITED STATES V. BOOKER* AND *UNITED STATES V. FANFAN*

August 2, 2004, the Supreme Court granted certiorari to two cases in which lower court judges had concluded that *Blakely* applied to the Federal Sentencing Guidelines.²⁴⁷ The Court consolidated the two cases into one and set aside two hours for oral argument on the first day of its next term—October 4, 2005.²⁴⁸

A. *From the Seventh Circuit: United States v. Booker*

A jury found Freddie Joe Booker guilty of possession of at least 50 grams of cocaine with the intent to distribute.²⁴⁹ Based on the jury’s verdict, Booker’s sentence under the Federal Sentencing Guidelines would have been 262 months.²⁵⁰ Instead, the judge sentenced him to 360 months,²⁵¹ 98 months more than the standard range provided for in the Guidelines. The judge based this upward departure from the presumptive sentencing range on two things: first, he found that, in addition to possessing 92.5 grams

244. The top of the range being no more than 25% or 6 months greater than the lower end.

245. See D.C. Br. at 7–8, *Booker*, 125 S. Ct. 738 (available at 2004 WL 2112281 at **7–8); Stephanos Bibas, Assoc. Prof., U. Iowa College L., Panel Remarks, *U.S. Senten. Commn. Pub. Hrg., Panel Two, A View from Academia* (D.C., Nov. 16, 2004) (available at http://www.uscc.gov/hearings/11_16_04/111604-paneltwo.pdf).

246. Cf. Br. of Amicus Curiae of Natl. Assn. Crim. Def. Law. at 21–22, *Booker*, 125 S. Ct. 738 (available at 2004 WL 2112280 at **21–22).

247. *Booker*, 375 F.3d 508; *Fanfan*, 2004 WL 1723114.

248. *U.S. v. Fanfan*, 125 S. Ct. 12 (2004); *U.S. v. Booker*, 125 S. Ct. 11 (2004).

249. *Booker*, 375 F.3d at 509.

250. *Id.* at 510.

251. *Id.* at 509.

of crack, Booker had distributed 566 grams; second, he found that Booker had obstructed justice.²⁵²

The appellate court concluded that the defendant had the right to have a jury determine the facts that had been used to enhance his sentence to 360 months.²⁵³ It offered two solutions: the government could agree to a sentence of 262 months, which would require no additional fact-finding, or there could be a sentencing hearing in which any facts used to enhance the sentence would need to be found by a jury beyond a reasonable doubt.²⁵⁴ The court stated, “There is no novelty in a separate jury trial with regard to the sentence.”²⁵⁵

B. From the District Court of Maine: United States v. Fanfan

June 28, 2004, Judge D. Brock Hornby, sitting on the bench of the United States District Court of Maine, was in the unenviable position of being one of the first federal judges to sentence a federal defendant after the Supreme Court’s *Blakely* opinion.²⁵⁶ Despite the ongoing debate regarding the applicability of *Blakely* to the Federal Sentencing Guidelines, he chose to proceed with Ducan Fanfan’s²⁵⁷ sentencing, saying that further delay would be unfair to the defendant.²⁵⁸ Instead, he opted to “do the best I can with the Supreme Court decision.”²⁵⁹

A jury had found the defendant guilty of a conspiracy involving 500 grams of cocaine powder or more.²⁶⁰ The court was considering a sentence of 188 to 235 months.²⁶¹ That was an enhanced sentence based on additional amounts of cocaine, including some crack cocaine, and Fanfan’s “leadership role in the conspiracy.”²⁶² These “facts” were not found by the jury.²⁶³ Although Judge Hornby had his own opinions and had made findings regarding those facts,²⁶⁴ concluding that the Guidelines range should be 188 to 235 months, he then concluded that he could not increase the sentence beyond what would have been imposed under the Guidelines based solely on the verdict²⁶⁵ and limited the sentence to 78 months.²⁶⁶

Having earlier quoted the *Blakely* majority opinion that “a judge [who] inflicts punishment that the jury’s verdict alone does not allow . . . exceeds his proper

252. *Id.*

253. *Id.* at 509, 514. Judge Easterbrook dissented from the majority. See *supra* nn. 188–191 and accompanying text.

254. *Booker*, 375 F.3d at 514.

255. *Id.*

256. *Blakely* was decided June 24, 2004.

257. There are discrepancies in the spelling of Fanfan’s first name. Some documents use “Ducan,” while others use “Duncan.” For the purposes of this article he will be referred to as “Ducan.”

258. *Fanfan*, 2004 WL 1723114 at *1.

259. *Id.*

260. *Id.* at *2.

261. *Id.*

262. *Id.*

263. *Fanfan*, 2004 WL 1723114 at **2–3.

264. *Id.* at *2 (findings based on the trial, testimony, presentence report, and sentencing hearing testimony).

265. *Id.* at *3.

266. *Id.* at *5.

authority,”²⁶⁷ Judge Hornby returned to the words of that opinion, pointing out that he was the lone employee of the State and that, in this case, the defendant would have been deprived of much more than three more years of his liberty.²⁶⁸

“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.”²⁶⁹

The United States filed a notice of appeal to the First Circuit Court of Appeals.²⁷⁰ A petition for writ of certiorari was filed with the U.S. Supreme Court on July 21, 2004.²⁷¹

C. *From the Supreme Court: United States v. Booker and United States v. Fanfan*

In granting certiorari, the Court consolidated *Booker* and *Fanfan*. Two questions were presented to the Court:

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.
2. If the answer to the first question is “yes,” the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.²⁷²

Rather than issuing one opinion to answer both questions, as is usual, the Court issued two opinions. Each addressed a different question. Only one Justice joined in both opinions—Justice Ginsburg. To distinguish between the two opinions, the opinion addressing the Sixth Amendment violation has been referred to as the “merits opinion,” while the opinion addressing the remedy has been referred to as the “remedial opinion.”

1. The Merits Opinion

Unsurprisingly, on the first question, the answer was “yes” by a narrow majority. Justices Stephens, Scalia, Souter, Thomas, and Ginsburg, the same five Justices who formed the majority opinion in *Blakely*, found fault with the application of the Federal Sentencing Guidelines in *Booker*.²⁷³ These were the same Justices who formed the bare majority in *Jones v. United States*²⁷⁴ and *Apprendi* and who were part of the larger

267. *Id.* at *2 (internal quotation marks omitted) (quoting *Blakely*, 124 S. Ct. at 2537).

268. *Fanfan*, 2004 WL 1723114 at *3.

269. *Id.* at *3 (quoting *Blakely*, 124 S. Ct. at 2543).

270. Pet. for Cert. at 4, *Fanfan*, 125 S. Ct. 12 (available at 2004 WL 1638205 at *4).

271. *Id.*

272. Petr. Br. at I, *Booker*, 125 S. Ct. 738 (available at 2004 WL 1967056 at *1).

273. 125 S. Ct. 738, 746. “*Booker*” is commonly used to refer to both *United States v. Booker* and *United States v. Fanfan*, which were consolidated into one opinion.

274. 526 U.S. 227 (1999) (considering a federal carjacking statute and holding that the degree of harm to the

majority in *Ring*. Predictably, as with *Blakely* and *Apprendi*, Chief Justice Rehnquist and Justices Breyer, O'Connor, and Kennedy disagreed with the conclusion of the majority regarding the applicability of the Sixth Amendment.

a. *The Majority Opinion*

Finding no significant distinction between the Federal Sentencing Guidelines and the Washington system that was the focus of *Blakely*, the Court held that the trial court violated Booker's right to a jury trial when it used judge-found facts to increase Booker's sentence beyond the maximum sentence allowed under Federal Sentencing Guidelines using only the facts found by a jury.²⁷⁵ Asserting that "[i]t has been settled throughout our history that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged,'"²⁷⁶ the Court continued to say that a criminal defendant has the constitutional right to insist upon a jury's determination of his guilt for every element of the crime.²⁷⁷ The Court found the use of the term "sentencing enhancement" unpersuasive in determining whether a fact was an element of the crime or a sentencing factor.²⁷⁸ "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."²⁷⁹

b. *The Dissenting Opinion*

Justice Breyer wrote a short opinion dissenting from the merits opinion.²⁸⁰ It was the only opinion dissenting from the merits opinion. Chief Justice Rehnquist and Justices O'Connor and Kennedy joined in that dissent, which noted that all had "previously explained at length why we cannot accept the Court's constitutional analysis."²⁸¹

Disputing the majority's assertion that history supports a "right to jury trial"²⁸² regarding sentencing facts, Justice Breyer maintained that there was little historical support for the merits opinion except in *Apprendi* and *Blakely*.²⁸³ He harkened back to his dissent in *Blakely* in pointing out the risks involved in the Court's merit opinion: "unwieldy trials, a two-tier jury system, a return to judicial sentencing discretion, or the replacement of sentencing ranges with specific mandatory sentences."²⁸⁴

victim was not merely a sentencing provision, but was, instead, an element of the crime).

275. *Booker*, 125 S. Ct. at 746–56 (merits opinion).

276. *Id.* at 748 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

277. *Id.* (quoting *U.S. v. Gaudin*, 515 U.S. 506, 511 (1995)).

278. *Id.* at 748–49 (citing *Ring*, 536 U.S. at 602, 605; *Apprendi*, 530 U.S. at 476, 478; *Jones*, 526 U.S. 227).

279. *Id.* at 756.

280. *Booker*, 125 S. Ct. at 802–07 (Breyer, J., dissenting in part, in which Rehnquist, C.J., and O'Connor and Kennedy, JJ., joined [hereinafter (Breyer dissent from merits opinion)]).

281. *Id.* at 803.

282. *Id.* (internal quotation marks omitted).

283. *Id.* at 804.

284. *Id.*

Additionally, while none of the dissenting opinions in *Blakely* (including his own) had found a way to preserve the Federal Sentencing Guidelines by distinguishing them from those in Washington,²⁸⁵ Justice Breyer attempted to do so in his dissent in *Booker*, pointing out that the Federal Sentencing Guidelines are administrative rather than statutory, while the guidelines in Washington were statutory.²⁸⁶ Seizing upon the “real facts doctrine” in Washington and the lack of such a doctrine in the Federal Sentencing Guidelines, Justice Breyer found a sufficient distinction to eliminate extension of *Blakely* to *Booker*.²⁸⁷ In her dissent in *Blakely*, Justice O’Connor (who joined in Justice Breyer’s dissent to the merits opinion) had specifically referred to the “real facts doctrine” before observing, “If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would.”²⁸⁸

2. The Remedial Opinion

While the merits opinion was not surprising, the remedial opinion was.²⁸⁹ Several remedy options had been proposed in the face of the likelihood that *Booker* would extend *Blakely*’s reach to the Federal Sentencing Guidelines.²⁹⁰ None of these proposals was adopted by the Court. Instead the Court chose to make the previously mandatory Federal Sentencing Guidelines advisory.²⁹¹

The remedial majority was comprised of the four dissenters from *Apprendi*, *Blakely*, and the *Booker* merits opinion—Chief Justice Rehnquist and Justices Breyer, Kennedy, and O’Connor—and one more: Justice Ginsburg. One might conclude that, of the nine Justices, only Justice Ginsburg was happy with *Booker* since she alone joined in each majority’s opinion. She did not, however, write an opinion of her own, so there is no real explanation of why she chose to extend the reach of *Apprendi* and *Blakely* to the Federal Sentencing Guidelines and then chose to remedy the constitutional problem by making those Guidelines advisory rather than mandatory.

a. The Majority Opinion

While recognizing that Congress, in writing the Sentencing Reform Act, envisioned a system of mandatory guidelines, the Court found that system an option unavailable after the Court’s merits opinion,²⁹² stating that the “holding is fundamentally inconsistent with the judge-based sentencing system that Congress enacted into law.”²⁹³ The Court concluded that if Congress had anticipated the jury trial requirement resulting

285. *Booker*, 125 S. Ct. at 749 (merits opinion); see also *Blakely*, 124 S. Ct. at 2550 (O’Connor dissent); *id.* at 2561 (Breyer dissent).

286. *Booker*, 125 S. Ct. at 805 (Breyer dissent from merits opinion).

287. *Id.* at 807.

288. *Blakely*, 124 S. Ct. at 2550.

289. See e.g. Timothy Lynch, *One Cheer for United States v. Booker*, in *Cato Supreme Court Review, 2004–2005*, at 215, 225 (Mark K. Moller ed., Cato Inst. 2005) (available at <http://www.cato.org/pubs/scr/docs/2005/usvbooker.pdf>).

290. See *supra* pts. IV, V.

291. *Booker*, 125 S. Ct. at 756–57 (remedial opinion).

292. *Id.* at 767.

293. *Id.* at 768.

from the merits opinion, it “would not have passed the same Sentencing Act.”²⁹⁴ The Court, therefore, determined that it must excise portions of that act to comply with the Court’s merits opinion requirement while, at the same time “refrain[ing] from invalidating more of the statute than is necessary.”²⁹⁵

In determining that the best course was to make the Federal Sentencing Guidelines advisory, the Court explained that historically, judges had sentenced defendants in a way that punished the real conduct involved in a crime rather than simply the crime for which the defendant had been convicted.²⁹⁶ Using juries in the manner envisioned by most of the merits majority—to find every fact necessary to increase the sentence range under the Federal Sentencing Guidelines—would destroy the system.²⁹⁷ Judges could no longer use information included in presentencing reports to increase sentences.²⁹⁸ The Court noted that this would “weaken the tie between a sentence and an offender’s real conduct.”²⁹⁹ The Sentencing Reform Act was enacted to reduce disparity in sentencing and assure that similar crimes, committed in similar ways, were punished similarly.³⁰⁰ Maintaining the ability to punish real conduct was deemed more important than mandatory guidelines to the goal of uniformity in sentencing.³⁰¹

The remedy adopted by the Court rejected the primary remedy offered by the respondents, Booker and Fanfan,³⁰² who proposed essentially the same approach as did Justice Stevens: requiring sentencing ranges under the Federal Guidelines to be determined by facts found by a jury.³⁰³ It also rejected the remedy proposed by the Department of Justice: making the Federal Guidelines advisory *only* in those cases where judicial fact-finding was used to increase the sentence beyond the maximum sentence based on facts found by a jury (or admitted to by the defendant).³⁰⁴ The Court objected to making the Guidelines binding for some cases, but not for all, and noted that the remedy proposed by the Department of Justice was unlikely to promote uniformity in sentencing.³⁰⁵

b. *The Dissenting Opinions*

Justice Stevens authored the primary dissenting opinion to the remedial opinion. His dissent began by observing that neither of the Court’s two opinions found either the Sentencing Reform Act of 1984 or the Federal Sentencing Guidelines inherently

294. *Id.* at 764.

295. *Id.* (internal quotation marks omitted) (quoting *Regan*, 468 U.S. at 652).

296. *Booker*, 125 S. Ct. at 760.

297. *Id.* at 760–63.

298. *Id.* at 760. Information in presentencing reports is frequently, but not always, uncovered after trial.

299. *Id.*

300. *Id.* at 759–60.

301. *Booker*, 125 S. Ct. at 761.

302. *Id.* at 769.

303. *Id.* at 779 (Stevens dissent from remedial opinion).

304. *Id.* at 768 (remedial opinion); see also Petr. Br. at 66–67, *Booker*, 125 S. Ct. 738 (asserting “[T]he Guidelines must rise or fall as a whole”) (available at 2004 WL 1967056 at **66–67). The remedy offered by the Department of Justice was essentially the same as had been advanced by Judge Cassell after *Blakely*. See *supra* nn. 212–216 and accompanying text.

305. *Booker*, 125 S. Ct. at 768.

unconstitutional.³⁰⁶ He pointed directly at the two clauses excised by the remedial opinion,³⁰⁷ saying that neither is “even arguably unconstitutional.”³⁰⁸ Since neither is unconstitutional, there is no authority under which the Court can excise them.³⁰⁹ Calling the remedial opinion an “extraordinary exercise of authority,”³¹⁰ Justice Stevens pointed out that no party to the cases, nor even any of the *amici*, had recommended invalidation of either provision as a means of avoiding violations of the Sixth Amendment under the Federal Sentencing Guidelines.³¹¹

The preferred remedy for the minority would be to require the government to prove to a jury, beyond a reasonable doubt, any fact that was necessary to increase a sentence under the Guidelines.³¹² The Sixth Amendment violation in *Booker* could have been avoided with no changes to the Federal Sentencing Guidelines.³¹³ Had the question of drug quantity been presented to a jury that then found, beyond a reasonable doubt, that Booker had been in possession of 566 grams, the Federal Sentencing Guidelines would have authorized a sentence in the range of 324 to 405 months (based on Booker’s criminal history).³¹⁴ The judge could then have imposed a 360-month sentence without violating the Sixth Amendment.³¹⁵ Even if he reached this sentence based on his own findings that Booker had obstructed justice, there would have been no violation of the Sixth Amendment because the judge-found facts would not have increased Booker’s sentence beyond the 405 months allowed by virtue of the jury’s verdict.³¹⁶ Justice Stevens wrote, “Thus, if the two facts, which in this case actually established two separate crimes, had both been found by the jury, the judicial factfinding that produced the actual sentence would not have violated the Constitution.”³¹⁷

Judge Stevens found the basis for the Court’s remedy to be a questionable assumption that Congress had not anticipated violation of the Sixth Amendment by a system in which defendants received no jury determination of “a factual issue as important as whether Booker possessed the additional 566 grams of crack that exponentially increased the maximum sentence that he could receive.”³¹⁸ He asserted that even if the assumption were correct, it would not justify the Court’s creating “a systemwide remedy that Congress has already rejected and could enact on its own” if it so chose.³¹⁹ “[T]he Court’s creative remedy is an exercise of legislative, rather than

306. *Id.* at 771 (Stevens dissent from remedial opinion).

307. *Id.* (citing 18 U.S.C.A. § 3553(b)(1) (West Supp. 2004) (providing for mandatory application of the Federal Sentencing Guidelines); 18 U.S.C.A. § 3742(e) (West 2000 & Supp. 2004) (providing for appellate review of departures from the Federal Sentencing Guidelines)).

308. *Id.* at 771.

309. *Id.* at 778.

310. *Booker*, 125 S. Ct. at 772.

311. *Id.* at 771.

312. *Id.* at 779.

313. *Id.* at 772.

314. *Id.*

315. *See Booker*, 125 S. Ct. at 772.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

judicial, power.”³²⁰

Justice Stevens noted that, since *Blakely*, the government had been working with the Federal Sentencing Guidelines in ways to avoid potential Sixth Amendment violations.³²¹ If Congress was unhappy with these procedures, Congress could make changes. “Thus, there is no justification for the extreme judicial remedy of total invalidation of any part of the [Sentencing Reform Act] or the Guidelines.”³²²

Instead, Justice Stevens recommended allowing the government to continue prosecuting cases as it had since *Blakely* and, through indictments and juries, prove any facts that were needed to increase defendants’ sentences.³²³ Although the remedial majority gave five reasons that this is unworkable,³²⁴ Justice Stevens countered each one: (1) “the court” does not necessarily refer to the judge, unconstrained by the jury’s findings, but can refer to the judge working with the jury’s findings;³²⁵ (2) judges’ ability to do “real conduct” sentencing will be unaffected except in those cases where its goal is “contrary to the very core of *Apprendi*”³²⁶—“increasing a . . . sentence on the basis of conduct not proved at trial”;³²⁷ (3) since there are only a few cases where “a Guidelines sentence would implicate the Sixth Amendment”³²⁸ and most of them involve issues like firearms, drug quantities, and other determinations that could be easily made by juries, requiring jury findings should not be too complex;³²⁹ (4) plea bargains will be affected just as much by the Court’s remedy as they would be by applying *Blakely* to cases under mandatory Federal Sentencing Guidelines, possibly more so since by making the Guidelines advisory, the Court has “eliminated the certainty of expectations in the plea process,”³³⁰ and while, under Justice Stevens’s remedy, prosecutors would have discretion as to “whether to ‘charge’ a particular fact,”³³¹ prosecutors already exercise significant power and discretion when, in plea bargaining, they negotiate what facts may be used at sentencing,³³² so there is no clear basis for the assertion that prosecutorial power would be increased under Justice Stevens’s remedy; and (5) since the Constitution requires proof beyond a reasonable doubt, the burden of proof for enhancements would be greater than that for reductions, however, since few reductions have been available under the Guidelines and Guidelines ranges provide for a great deal of judicial discretion, the effect of this increased burden is apt to be minimal.³³³

320. *Booker*, 125 S. Ct. at 772.

321. *Id.* at 773–76.

322. *Id.* at 776.

323. *Id.* at 779.

324. *Id.*

325. *Booker*, 125 S. Ct. at 779–80.

326. *Id.* at 780–81.

327. *Id.* at 780.

328. *Id.* at 781.

329. *Id.*

330. *Booker*, 125 S. Ct. at 781.

331. *Id.*

332. *Id.* at 782.

333. *Id.*

Detailing the history of efforts for sentencing reform, the dissent noted, “Congress explicitly rejected . . . proposals for advisory guidelines that had been introduced in [the] past”³³⁴ because its primary goal was to eliminate sentencing disparity.³³⁵ That disparity was, in large part, due to the discretion exercised by judges and parole boards.³³⁶ The remedial majority’s position that Congress expected sentencing disparities to be reduced by judges’ consideration of relevant conduct is inaccurate.³³⁷ The Sentencing Reform Act intended a mandatory system in which judges would consider characteristics of both the real offense and the real offender within the system’s limits.³³⁸ After passage of the Sentencing Reform Act, “Congress has rejected each and every attempt to loosen the rigidity of the Guidelines or vest judges with more sentencing options.”³³⁹ The 2003 PROTECT Act³⁴⁰ required de novo review of all departures from the Federal Sentencing Guidelines, making it clear that Congress intended the Guidelines to be mandatory.³⁴¹ “[T]he majority has erased the heart of the [Sentencing Reform Act] and ignored in their entirety all of the Legislative Branch’s post-enactment expressions of how the Guidelines are supposed to operate.”³⁴²

In a separate dissent, Justice Scalia observed, “The majority’s remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing.”³⁴³

D. *After the Court’s Holding*

While the Court’s decision in *Booker* may provide relief to some defendants, it provided none to either of the respondents. In Freddie Booker’s case, the Seventh Circuit Court of Appeal’s judgment that the trial court’s sentence violated the Sixth Amendment was affirmed and remanded.³⁴⁴ In early May 2005, Booker was sentenced, again, to 360 months in prison.³⁴⁵ The Guidelines sentence previously imposed on Ducan Fanfan by the trial court in Maine did not violate the Sixth Amendment since Judge Hornby had chosen not to use judge-found facts to enhance the sentence, however both parties were allowed to seek resentencing under the system of advisory Guidelines.³⁴⁶ While Fanfan fared better than Booker in terms of the actual length of his sentence, he fared far worse when the new sentence was compared to the one he had

334. *Id.* at 783.

335. *Booker*, 125 S. Ct. at 783.

336. *Id.*

337. *See id.* at 785.

338. *Id.*

339. *Id.* at 786.

340. 117 Stat. 650.

341. *Booker*, 125 S. Ct. at 786.

342. *Id.* at 787.

343. *Id.* at 790 (Scalia and Thomas, JJ., dissenting in part).

344. *Id.* at 769 (remedial opinion).

345. Ed Treleven, *No Benefit From His Landmark Case: Dealer Gets Same Sentence after Court Tosses Sentencing Guidelines*, Wis. St. J. A1 (May 4, 2005).

346. *Booker*, 125 S. Ct. at 769.

received at trial. Previously sentenced to 78 months, in late May 2005, he was sentenced to 210 months.³⁴⁷

VII. WEIGHING IN ON THE GUIDELINES:
FEDERAL COURTS' RESPONSES TO *BOOKER*³⁴⁸

In the first nine months after the *Booker* decision, there have been questions about how courts should implement the decision. Though the Federal Sentencing Guidelines are now advisory rather than mandatory, the U.S. Supreme Court said that, while not bound by the Guidelines, district courts must consider them and “take them into account when sentencing.”³⁴⁹ Just how the courts are to consider the Guidelines was not specified by the Court. The U.S. Code provides a number of factors to be considered in sentencing:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission . . .
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission . . .
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.³⁵⁰

Should the Guidelines be just one of several factors to be considered in sentencing, weighted equally with all the others? Weighted heavily? Or should they be given extraordinary deference and be followed in virtually all cases?

347. Gregory D. Kesich, *After High Court Ruling, Dealer Gets Longer Sentence*, Portland Press Herald (Portland, Me.) B1 (May 25, 2005).

348. Three sources were particularly helpful in keeping abreast of court decisions involving *Booker*: Frances H. Pratt, Research & Writing Attorney, Off. Fed. Pub. Defender, Alexandria, Va., *Sentences After Booker: Imposition and Review, As of July 10, 2005*, http://www.fd.org/pdf_lib/Pratt%20Sentences%20After%20Booker2.pdf (July 10, 2005), and the two websites previously mentioned, *supra* n. 171.

349. *Booker*, 125 S. Ct. at 767.

350. 18 U.S.C. § 3553(a) (2000).

A. *The Courts of Appeals*

Thus far, the courts of appeals generally have not provided any bright-line guidance for how much weight the district courts should accord to the Federal Sentencing Guidelines.³⁵¹ With *United States v. Crosby*,³⁵² the Second Circuit was the first to deliver a post-*Booker* decision.³⁵³ The court said that it would be inappropriate for it to try to resolve all of the issues that would be facing the district courts after *Booker*, even if it could identify them all.³⁵⁴ It did identify “essential aspects of [*Booker*] that concern the selection of sentences,”³⁵⁵ including the requirement to consider the Guidelines along with the other factors listed and generally to determine the applicable Guidelines range before determining a sentence, whether within or without that range.³⁵⁶ However, it did not indicate how much weight should be given to the Guidelines, saying that it would “permit the concept of ‘consideration’ . . . to evolve as district judges faithfully perform their statutory duties.”³⁵⁷ The court noted that the Guidelines were not a “body of casual advice, to be consulted or overlooked at the whim of a sentencing judge,” and, thus, judges must not return to the pre-Guidelines indeterminate sentencing where judges “exercise[d] unfettered discretion to select any sentence within the applicable statutory maximum and minimum.”³⁵⁸ The court warned, however, that “a sentencing judge would commit procedural error by *mandatorily* applying the applicable Guidelines range that was based solely on facts found by a jury or admitted by a defendant.”³⁵⁹

In its first post-*Booker* case, *United States v. Mares*,³⁶⁰ the Fifth Circuit explained its understanding of the Supreme Court’s expectations for sentencing.³⁶¹ When a judge imposes a sentence “within a properly calculated Guideline range,”³⁶² the court will infer that all factors have been considered and the judge will provide little explanation beyond a statement that the sentence is being imposed within the Guidelines range.³⁶³ If the sentence is a “non-Guidelines sentence,”³⁶⁴ the judge will be expected to explain, in

351. This article was written in the fall 2005. Since then, most of the circuit courts have issued decisions involving “reasonableness review.” While an examination of the cases involved would result in an entirely new article, it seems appropriate to mention that the trend among the courts of appeals seems to be toward a presumption that sentences within the Federal Sentencing Guidelines are reasonable. Additionally the courts generally have found above-Guidelines sentences reasonable, while many below-Guidelines sentences have been found unreasonable. Douglas A. Berman, *Sentencing Law and Policy, Reasonableness review round-up . . . calling Justice Scalia*, http://sentencing.typepad.com/sentencing_law_and_policy/2006/02/reasonableness_.html (Feb. 20, 2006).

352. *U.S. v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

353. Pratt, *supra* n. 348, at 3.

354. *Crosby*, 397 F.3d at 106.

355. *Id.* at 113.

356. *Id.*

357. *Id.*

358. *Id.* at 113.

359. *Crosby*, 397 F.3d at 114 (emphasis in original).

360. 402 F.3d 511 (5th Cir. 2005).

361. *Id.* at 517.

362. *Id.* at 519.

363. *Id.*

364. A “non-Guidelines” sentence is a sentence that is determined outside of the Guidelines rather than a sentence that was determined by consulting the Guidelines and then departing up or down from them as

detail, the reasons for the sentence so that the court has sufficient information to review the sentence for reasonableness.³⁶⁵ Thus, apparently, the Fifth Circuit Court of Appeals has determined that Guidelines sentences will be per se reasonable.

In *United States v. Oliver*,³⁶⁶ the Sixth Circuit found that when there were facts supporting enhancements, while those enhancements *could* be applied, it was up to the trial court to determine whether the enhancements *would* be applied.³⁶⁷ Two months later, the court declined to prescribe rigid procedures that district judges must follow in post-*Booker* sentencing, believing that clarification would “evolve on a case-by-case basis.”³⁶⁸

The primary guidance other circuits have provided as to how to balance the Federal Sentencing Guidelines with the other factors they are directed to consider is simply that, while the Guidelines are no longer mandatory, they must be consulted, and an accurately calculated Guidelines sentence is a starting place for imposing a reasonable sentence. Further, if the court imposes a sentence outside the Guidelines, it should explain its reasons so that appellate review for reasonableness is facilitated.³⁶⁹

B. The District Courts

Quick with a response after *Blakely*,³⁷⁰ Judge Cassell was even quicker after *Booker*. The day after the Court issued its opinion in *Booker*, Judge Cassell entered his decision in *United States v. Wilson*.³⁷¹ In it, he concluded that although *Booker* made the Federal Sentencing Guidelines advisory rather than mandatory, “[i]n all but the most unusual cases, the appropriate sentence will be the Guidelines sentence.”³⁷² With detail, Judge Cassell outlined “the substantive considerations that will govern sentences in this court”³⁷³ and then addressed procedures for future sentencing, saying that the court would “continue to follow all procedural components of the Guidelines system.”³⁷⁴ Essentially, the court would continue to use pre-sentencing reports with “Guidelines calculations, including calculations based on the ‘real offense’ involved.”³⁷⁵

Less than a week later, in *United States v. Ranum*,³⁷⁶ Judge Lynn Adelman weighed in on the issue of just how much weight should be accorded to the Federal

provided for in the Guidelines. *Id.* at 519 n.7.

365. *Mares*, 402 F.3d at 519.

366. 397 F.3d 369 (6th Cir. 2005).

367. Pratt, *supra* n. 348, at 4.

368. *U.S. v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005).

369. See e.g. *U.S. v. Gray*, 405 F.3d 227, 244 n. 10 (4th Cir. 2005) (citing *U.S. v. Hughes*, 401 F.3d 540, 546 (4th Cir. 2005)); *U.S. v. George*, 403 F.3d 470, 473 (7th Cir. 2005); *U.S. v. Moreno-Hernandez*, 397 F.3d 1248, 1256 n. 10 (9th Cir. 2005); *U.S. v. Robles*, 408 F.3d 1324, 1328 (11th Cir. 2005).

370. *Croxford*, 324 F. Supp. 2d 1230. *Croxford*, though amended July 7, 2004, was originally decided June 29, 2004—five days after the U.S. Supreme Court issued its *Blakely* opinion.

371. 350 F. Supp. 2d 910 (D. Utah 2005). *Wilson* was handed down on January 13, 2005. *Id.*

372. *Id.* at 914.

373. *Id.* at 925.

374. *Id.*

375. *Wilson*, 350 F. Supp. 2d at 925.

376. *U.S. v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005) (mem.). The defendant was sentenced January 14, 2005. *Id.* at 985. The Memorandum was entered January 19, 2005. *Id.* at 984.

Sentencing Guidelines now that *Booker* had made them advisory.³⁷⁷ In stark contrast to Judge Cassell's view, Judge Adelman found that the Guidelines were to be considered as only one of many sentencing factors.³⁷⁸ He specifically pointed to the requirement that courts impose a sentence that is no longer than necessary to meet the purposes set forth within the U.S. Code.³⁷⁹ While these purposes include reflecting the seriousness of the crime, deterring criminal conduct, protecting the public from the defendant's potential for future crimes, they also include effectively providing training and medical care.³⁸⁰ Further, courts are "to consider . . . the history and characteristics of the defendant; . . . the kinds of sentences available; . . . [and] the need to provide restitution to . . . victims."³⁸¹ Judge Adelman found Judge Cassell's approach in *Wilson* "inconsistent with the holdings of the merits majority in *Booker*, rejecting mandatory guideline sentences based on judicial fact-finding, and the remedial majority in *Booker*, directing courts to consider all of the § 3353(a) factors, many of which the guidelines either reject or ignore."³⁸²

Judge Cassell was afforded an opportunity to quickly respond to *Ranum* after the defendant in *Wilson* filed a motion to reconsider.³⁸³ He maintained that the Guidelines should be given great weight and found fault with the flexible approach in *Ranum*.³⁸⁴ Offender characteristics should continue to be weighed as the Guidelines prescribe: most offender characteristics can be considered when imposing a sentence inside the Guidelines range, though a few—"race, sex, national origin, creed, religion, and socioeconomic status"³⁸⁵—should be forbidden.³⁸⁶ Still others—"family ties and responsibilities, lack of guidance as a youth"³⁸⁷—should be given only moderate weight as the Sentencing Commission has done.³⁸⁸ Noting a "subtext in *Ranum* . . . substantively disagreeing with the Guidelines severity," Judge Cassell speculated that "objections to Guidelines nuances are, in truth, simply a basic difference of opinion about how harshly crimes should be punished."³⁸⁹ But determining the harshness of punishment is a legislative prerogative.³⁹⁰ Judge Cassell expressed concern that if judges fail to exercise their newly available discretion in sentencing to further congressional will, Congress will respond by implementing mandatory minimum sentences to assure the level of punitiveness it has shown that it wants.³⁹¹

377. *Id.* at 985–87.

378. *Id.* at 985.

379. *Ranum*, 353 F. Supp. 2d at 985 (citing 18 U.S.C. § 3553(a)).

380. *Id.* at 985 (citing 18 U.S.C. § 3553(a)(2)).

381. *Id.* (citing 18 U.S.C. §§ 3553(a)(1), (3), (7)).

382. *Id.* at 985–86.

383. *U.S. v. Wilson*, 355 F. Supp. 2d 1269 (D. Utah 2005).

384. *Id.* at 1275.

385. *Id.* at 1277 (footnote omitted).

386. *Id.* at 1277.

387. *Id.* at 1279.

388. *Wilson*, 355 F. Supp. 2d at 1279.

389. *Id.* at 1287.

390. *Id.*

391. *Id.* at 1287–88.

Other district courts had already begun weighing in. While the *Ranum* opinion was still unpublished, Judge Robert Pratt aligned himself with the positions taken by Judge Adelman.³⁹² He explained that while there was wisdom in the Guidelines, there was also wisdom in the other sentencing factors—sometimes conflicting wisdom—and the wisdom in all factors must be considered.³⁹³ *Booker* is “an invitation, not to unmoored decision making, but to the type of careful analysis of the evidence that *should* be considered when depriving a person of his or her liberty.”³⁹⁴ Therefore, the court would assess, “as mandatory considerations,”³⁹⁵ the factors included in title 18, section 3553(a)(1), (3), (4)–(7) of the U.S. Code.³⁹⁶ In *United States v. Wanning*,³⁹⁷ Judge Richard Kopf aligned himself with Judge Cassell and explained why he did not agree with Judge Pratt.³⁹⁸ He found no conflict between statutory sentencing goals and the Guidelines: “Where is the conflict? The Guidelines tell a judge *how* to ‘consider’ age, health, and a myriad other statutorily relevant factors.”³⁹⁹ Judge Kopf asserted that Judge Pratt’s real concern was “that nothing much has changed [and that] the ‘remedial’ opinion in *Booker* has rendered meaningless the ‘merits’ opinion.”⁴⁰⁰ He first explained that if result of *Booker* was little change, that was what the Supreme Court had chosen.⁴⁰¹ He went on to explain that if the Guidelines were not given great deference, the result would be “to return federal sentencing practices to the period before the Guidelines when old white men like me could and did sentence anywhere they wanted so long as they uttered some legal mumbo jumbo.”⁴⁰² Judge Pratt, however, observed that if the Guidelines were presumptive, they would still be mandatory in effect.⁴⁰³

In Oklahoma, Judge Sven Holmes found that “law, policy, and common sense dictate that this Court should exercise its discretion by strictly applying in all cases the Guidelines, modified to satisfy *Blakely*.”⁴⁰⁴ Rather than follow in Judge Cassell’s footsteps, applying the Guidelines “[i]n all but the most unusual cases,”⁴⁰⁵ Judge Holmes would follow them in all cases. However, he apparently disagreed with the Supreme Court’s analysis in *Booker* that Congress would have preferred an advisory system to a modified mandatory one.⁴⁰⁶ Accordingly, he determined that, in his court, a guilty plea would be accepted only if “accompanied by a Sixth Amendment waiver of jury that expressly applies to both guilt or innocence and to sentencing.”⁴⁰⁷ Otherwise,

392. *U.S. v. Myers*, 353 F. Supp. 2d 1026, 1027–28 (S.D. Iowa 2005).

393. *Id.* at 1028–29.

394. *Id.* at 1029 (emphasis in original).

395. *Id.* at 1029.

396. *Id.*; see *supra* n. 350 and accompanying text.

397. 354 F. Supp. 2d 1056 (D. Neb. 2005).

398. *Id.* at 1058–62.

399. *Id.* at 1060–61 (emphasis in original).

400. *Id.* at 1061.

401. *Id.*

402. *Wanning*, 354 F. Supp. 2d at 1062.

403. *Myers*, 353 F. Supp. 2d at 1028.

404. *U.S. v. Barkley*, 369 F. Supp. 2d 1309, 1311 (N.D. Okla. 2005).

405. *Wilson*, 350 F. Supp. 2d at 914.

406. See *Barkley*, 369 F. Supp. 2d at 1315.

407. *Id.* at 1318.

cases would proceed to trial, where “all relevant issues will ensue in accordance with the Sixth Amendment.”⁴⁰⁸ In special cases, the trial would be bifurcated, with guilt or innocence determined at the first trial and sentencing evidence presented at the second one.⁴⁰⁹ In all cases, whether sentencing is based on judicial fact-finding or on the findings of a jury, contested facts must be “established beyond a reasonable doubt in accordance with the federal rules of evidence.”⁴¹⁰ In this way, Judge Holmes will exercise the discretion allowed under *Booker*, “accommodate the Sixth Amendment rights articulated in *Blakely*,” and maintain “the integrity of the federal sentencing system.”⁴¹¹ In the case before him, he noted,

[A] sentence of life imprisonment would be the best, and most accurate, reflection of this jurist’s own personal view of the appropriate sentence. The most reasonable sentence, however, would be a sentence under the Guidelines, which represents my personal views tempered by considerations of propriety and fairness across the system nationwide. Put simply, I reject the notion that my personal views of justice in an isolated case are preferable to the twenty years of collective wisdom represented by the Guidelines.⁴¹²

There is not yet any clear consensus as to how the courts will or should balance the Guidelines with the other sentencing factors. Some district courts have followed Judge Cassell’s lead and have indicated their intention to accord the Guidelines substantial weight.⁴¹³ Others are inclined to balance the Guidelines with the other sentencing factors.⁴¹⁴ While some judges are exercising their restored discretion in sentencing, not all of that discretion is being used to impose sentences lower than those of the Guidelines.⁴¹⁵

VIII. CONCLUSION

The Supreme Court’s action, making the Federal Sentencing Guidelines advisory rather than mandatory, may have one of two different results. Either there will be a return to indeterminate sentencing, wherein each judge exercises personal discretion over what sentence will be imposed within a statutory range of minimum and maximum, thus

408. *Id.*

409. *Id.* at 1319.

410. *Id.* at 1318–19.

411. *Barkley*, 369 F. Supp. 2d at 1318.

412. *Id.* at 1317 (footnote omitted).

413. See e.g. *U.S. v. Peach*, 356 F. Supp. 2d 1018 (D.N.D. 2005).

414. See e.g. *Simon v. U.S.*, 361 F. Supp. 2d 35 (E.D.N.Y. 2005). Other examples include: John Whitrock, who was sentenced to fifteen years in federal prison for bank robbery, even though the recommended sentence under the Federal Sentencing Guidelines was only seven to nine years, Paul Gustafson, *Fishing Hat Bandit Draws 15 Years*, Star Tribune (Minneapolis, Minn.) 1B (Sept. 14, 2005), and Rosalyn McKinney, accused of being part of a conspiracy to distribute illegal drugs, who was “sentenced to 100 hours of community service and four years on probation, with the first six months of it to be spent in a federal halfway house,” Maureen Hayden, *Woman Given Second Chance*, Evansville Courier & Press (Evansville, Ind.) A1 (Sept. 14, 2005). In McKinney’s case, the Guidelines sentencing range was 41–51 months. *Id.*

415. An April 2005 memorandum from the Office of Policy Analysis revealed that 61.4% of sentences were within the Guidelines range, compared to 65% in fiscal year 2002. Memo. from Linda Drazga Maxfield, Off. Policy Analysis, to J. Hinojosa, Chair, U.S. Senten. Commn., *Numbers on Post-Booker Sentencings: Data Extract on April 5, 2003* (Apr. 13, 2005) (available at http://www.uscc.gov/Blakely/booker_041305.pdf). The percentage of sentences above the Guidelines range had more than doubled over 2002. *Id.* Of the total below range sentences, most had been sponsored by the government. *Id.*

risking a return to widely disparate sentencing, or the Guidelines will be presumptively followed, rendering the Court's remedy mere lip service paid to the Sixth Amendment concerns of *Blakely* and *Booker*. If the latter, the remedial opinion will have provided no real solution to the problem. If the former, the Court's remedy will have made good the dissent's dire prediction in *Blakely*.⁴¹⁶ Whenever the issue of unconstitutionality arises, the preferred position is to save the basic entity by severing the offensive parts.⁴¹⁷ The entire statute must fall only if removal of the offending portion would so thwart Congress's intent that it is apparent that the measure would not have been enacted in its modified version.

In enacting the Sentencing Reform Act of 1984, which established the U.S. Sentencing Commission and empowered it with promulgating sentencing guidelines, Congress sought to put an end to disparity in sentencing.⁴¹⁸ Before the Federal Sentencing Guidelines took effect, judges could impose sentences with no explanation of their reasoning or the facts used to determine the sentence. Under the mandatory Federal Sentencing Guidelines, the reasons for *any* departures from the presumptive sentence had to be explicitly stated by the judge and were subject to appellate review. In enacting the "Feeney Amendment," Congress reiterated its commitment to constraining rather than expanding judicial discretion.⁴¹⁹

If *Booker* had applied *Blakely* to doom the Federal Sentencing Guidelines completely, the probable result would be a return to indeterminate sentencing, which would have expanded judicial discretion. However, under the *Booker* Court's remedial opinion, a return to indeterminate sentencing may very well be the result. Since Congress wanted to constrain rather than expand judicial discretion, it seems unlikely that it would have failed to pass the Sentencing Reform Act simply because judges' discretion might be constrained somewhat further than anticipated. The *Booker* Court's remedial majority seems to have missed the point of both *Blakely* and sentencing reform—it expands judicial discretion rather than restricting it. A better remedy would have been to have retained the mandatory nature of the Federal Sentencing Guidelines, but to have modified them in a way that would avoid violating the Sixth Amendment—retaining determinate sentencing in a way that respects the Sixth Amendment.⁴²⁰

If, instead of removing the requirement that judges follow the Federal Sentencing Guidelines, the Court had severed the provision that requires judges, based on their own fact-finding, to enhance sentences beyond the presumptive Guidelines range, the basic structure of the Federal Sentencing Guidelines would remain. The result would further constrain judicial discretion. This is more harmonious with the intent of the Sentencing Reform Act and with *Blakely*. Critics argued that this method of severing the unconstitutional portions of the Guidelines would result in shorter sentences, which they

416. *Blakely*, 124 S. Ct. 2543 (O'Connor dissent) ("The effect of today's decision will be greater judicial discretion and less uniformity in sentencing.").

417. *Regan*, 468 U.S. at 652.

418. U.S. Senten. Commn., *supra* n. 134, at iv, 79.

419. *Bibas*, *supra* n. 245.

420. *Blakely*, 124 S. Ct. at 2540 (majority opinion).

maintained thwarts congressional intent.⁴²¹ While shorter sentences might result from this method, it is not mandatory that they do.

This remedy would not eliminate enhancements for real conduct, but would require that the facts of that conduct be found by a jury or admitted by the defendant. Judicial discretion would not be expanded and the Sixth Amendment would have been respected rather than circumvented. This seems much more in keeping with both the intent of Congress in enacting the Sentencing Reform Act and the opinions of the Court in *Blakely* and in the *Booker* merits opinion. Although many have rejected the concept as too expensive or too cumbersome,⁴²² greater use of juries would allow the Federal Sentencing Guidelines to be mandatory and yet to be used to increase sentences in particularly egregious cases without violating the Sixth Amendment. Juries could be used in two different ways—"pre-verdict" and "post-verdict."

The normal trial jury would be the pre-verdict jury. It would have the responsibility of finding all facts presented to it by the prosecution and rendering a verdict on all of them. This would include a verdict regarding guilt, but would go beyond that to determine whether certain aggravating factors were present. If the factors were present, the judge could then use those findings of facts to impose a sentence in excess of the presumptive sentence. Before *Booker*, this was being done in many federal courtrooms. Prosecutors were "*Blakely*-izing" indictments to include all facts that should be considered for sentencing.

The post-verdict jury would be used only when there were facts that could not be included in the indictment and trial without prejudicing the defendant's case. Examples include cases in which a defense relies on the defendant's not being involved in the crime. It is difficult to argue, "I wasn't there, but if I was, I didn't use a gun," or "That isn't my cocaine, and if it is, it's all powder, no crack."⁴²³ In these cases, when the jury delivers a guilty verdict, there would be an additional hearing to determine those facts the prosecution or judge wants to use to enhance the defendant's sentence. Either the original jury or a newly-empanelled one could be the post-verdict jury, which would then determine whether or not the aggravating factors were present. In this way, sentencing could continue to "tie real punishment to real conduct,"⁴²⁴ but maintain the defendant's rights under the Sixth Amendment by having all the facts used to increase his sentence found by a jury beyond a reasonable doubt.

There might be increased costs for additional fact-finding, whether by the pre-verdict or post-verdict jury. Additional time would be involved in hearing the evidence and in deliberations. Cost considerations would be part of decisions made to seek enhancements, but prosecutors consider the cost of litigation whenever they are considering whether to go to trial or reach a plea agreement. This would be no different. Prosecutors would determine whether it was cost-efficient to seek an enhanced sentence. Sentencing juries are routinely used in death penalty cases since *Ring*; prosecutors would make the same sort of decision in seeking enhancements that they now make in seeking

421. See e.g. *Einstman*, 325 F. Supp. 2d 373.

422. *Blakely*, 124 S. Ct. at 2556 (Breyer dissent).

423. *Id.* at 2556–57.

424. *Id.* at 2557.

the death penalty. Occasions for these decisions may be fewer than most might think. In 2004, less than 5% of all federal sentencing was the result of a trial.⁴²⁵ In the same period, less than 1% of federal sentences imposed were in excess of the presumptive Guidelines sentence.⁴²⁶ It is likely that there would be somewhat fewer if prosecutors faced increased costs and a higher burden of proof.

Punishment for real conduct is something that Justice Breyer has maintained is an essential part of the Congress's goal for the Federal Sentencing Guidelines—so essential that in his view, Congress would have preferred that the Guidelines be only advisory rather than to have modified judges' ability to punish real conduct. "Real conduct" is a euphemism for uncharged conduct that is not subject to the usual requirement of proof beyond a reasonable doubt. Even the evidentiary standards are lowered for real conduct.⁴²⁷ Hearsay is allowed.⁴²⁸ And defendants are deprived of liberty as a result of "facts" found only by a preponderance of the evidence and without complying with the Federal Rules of Evidence. Loss of liberty is something that cannot be corrected.⁴²⁹ Federal sentencing based on real conduct should be curtailed by enacting legislation similar to the "real facts doctrine" in the state of Washington.⁴³⁰ Judge Cassell cited a study in which it was found that most people's ideas of appropriate sentencing ranges for particular crimes were very close to the ranges provided in the Federal Sentencing Guidelines for those crimes.⁴³¹ However, the sentences presented as examples were not sentences enhanced for real conduct.⁴³² It is questionable whether people would find such enhanced sentences palatable if they were aware of their duration and of the manner in which they were reached. Does it not seem fundamentally wrong that, in the United States, where the Constitution guarantees the right to both a trial by jury and due process, people lose years of their lives due to presumptions of real conduct?

It is still too early to tell how much sentencing disparity will result from the remedy in *Booker*. Even if no great disparity results, legislation to limit that discretion should be in order. The current statutory sentencing ranges have been broad to allow the Sentencing Guidelines room in which to be implemented. With judges' discretion now limited only by these broad ranges, there is far too much room for widely disparate sentencing for the same crimes. In the past, with indeterminate sentencing, the parole system acted as a means through which an overly long sentence could be modified. That is no longer the case. Accordingly, statutory sentences should be narrowed and refined, making them more closely tailored to specifically limited crimes. This would limit judicial discretion and would require prosecutors to charge a defendant with the actual crime for which he is ultimately being punished. This is not a matter of not being tough

425. U.S. Senten. Commn., *Sourcebook of Federal Sentencing Statistics* tbl. 11 (2004) (available at <http://www.ussc.gov/ANNRPT/2004/SBTOC04.htm>).

426. *Id.* at tbl. 32, tbl. 45.

427. Reitz, *supra* n. 163, at 548.

428. *Id.* at 549.

429. Jeffrey Cole, *My Afternoon with Alex: An Interview with Judge Kozinski*, 30 Litig. 6, 19 (Summer 2004).

430. *See supra* pt. III(A)(3).

431. *Wilson*, 350 F. Supp. 2d at 917.

432. *Id.*

on crime, but rather being tough on the justice system to assure that it is accurately charging defendants and is diligent in providing evidence that will withstand the higher burden of proof generally required for criminal charges.

Reading the merits opinion in *Booker* and the majority opinion in *Blakely* it seems clear that the Court has expressed a firm commitment to a defendant's right to have a jury decide all facts used to deprive him of liberty. While the way to protect that right will have some costs, the Court and the country should see such costs as a "modest inconvenience."⁴³³

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433. *Blakely*, 124 S. Ct. at 2543 (majority opinion).

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