

**THE EFFECTS OF MODERN CONSTITUTIONAL
SENTENCING LAW AND *NATALE, FRANKLIN AND ABDULLAH*
ON NEW JERSEY SENTENCING LAW AND RELATIONSHIP TO
THE LEGISLATIVE INTENT BEHIND THE NEW JERSEY
CRIMINAL SENTENCING CODE**

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I. Introduction

Modern sentencing law has been reformulated due to a wave of federal and state sentencing cases that have been decided over the past five years. The first of these cases was *Apprendi v. New Jersey*.¹ In *Apprendi*, the U.S. Supreme Court found that New Jersey's "hate crime" law violated the Due Process Clause of the Fourteenth Amendment² and the notice and jury trial guarantees of the Sixth Amendment³ because it allowed a judge to find facts by a lower standard of proof than would be required of a jury and to increase a defendant's sentence beyond the "statutory maximum" for that particular crime.⁴ The Court thus held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."⁵ Justice O'Connor filed a noteworthy dissent expressing disapproval of the Court's decision because it undermined the power of legislatures to define criminal offenses and sentences following therefrom.⁶ This notion would come to influence the Court in deciding future sentencing cases.

Four years later, in *Blakely v. Washington*,⁷ the Court clarified what "statutory maximum" means for *Apprendi* purposes. This means that the "statutory maximum" is the highest possible sentence a judge may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant,"⁸ meaning that the "statutory maximum" is the maximum sentence a judge may impose *without* finding any additional facts, not *after* finding additional facts.⁹

The next term, the Court held in *United States v. Booker*,¹⁰ that *Blakely* applies to the Federal Sentencing Guidelines because there

¹ 530 U.S. 466 (2000).

² U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

³ U.S. CONST. amend. VI, § 1 ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . and to be informed of the nature and cause of the accusation. . . .")

⁴ See O. Dean Sanderford, *The Feeney Amendment, United States v. Booker, and New Opportunities for the Courts and Congress*, 83 N.C. L. REV. 736, 743-44 (2005).

⁵ *Apprendi*, 530 U.S. at 490.

⁶ See *id.* at 525 (O'Connor, J., dissenting).

⁷ 542 U.S. 296 (2004).

⁸ *Id.* at 303.

⁹ *Id.*

¹⁰ 543 U.S. 220 (2005).

was no significant distinction between the Guidelines' and Washington's sentencing scheme.¹¹ To remedy this constitutional defect in the Guidelines, the Court severed sections 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e) (the former making the Guidelines binding on district court judges and the later requiring *de novo* appellate review of sentencing determinations), along with any cross references to those statutes, from the Sentencing Reform Act of 1984 ("SRA").¹² These actions made the Guidelines advisory rather than mandatory and replaced *de novo* review of sentencing determinations with an "unreasonableness" standard of review.¹³

Seven months later, the Supreme Court of New Jersey decide a trilogy of cases applying the principles formulated in *Apprendi*, *Blakely* and *Booker*. In *State v. Natale*,¹⁴ the Court eliminated the presumptive term from New Jersey's sentencing process, holding that since the presumptive term was the statutory maximum under *Apprendi*, a sentence above that term based solely on judicial fact-finding of aggravating factors (other than recidivism) would violate the Sixth Amendment.¹⁵ In *State v. Abdullah*,¹⁶ the Court applied *Apprendi* and *Blakely* and held that imposing a consecutive sentence for murder and burglary does not go over the statutory maximum for *Blakely* or *Apprendi* purposes;¹⁷ however, the Court urged that "when imposing either consecutive or concurrent sentences, 'the focus should be on the fairness of the overall sentence,' and that they should articulate the reasons for their decisions with specific reference to the *Yarbough*¹⁸ factors."¹⁹ Finally, in *State v. Franklin*,²⁰ the Court held that the second-offender provision of the New Jersey Graves Act,²¹ which permitted "the imposition of an extended term based on judicial fact-finding by a preponderance of evidence, violates a defendant's Sixth Amendment right to trial by jury and Fourteenth Amendment right to due process" in the same manner as did the 'hate crime' statute struck down in *Apprendi*.²² Despite New Jersey's clear reliance on

¹¹ See *id.* at 221.

¹² See *id.* at 259.

¹³ See *id.* at 259-61.

¹⁴ 184 N.J. 458 (2005).

¹⁵ See *id.* at 466.

¹⁶ 184 N.J. 497 (2005).

¹⁷ See *id.* at 514.

¹⁸ *State v. Yarbough*, 100 N.J. 627 (1985).

¹⁹ *Abdullah*, 184 N.J. at 515 (quoting *State v. Miller*, 108 N.J. 112, 122 (1987)).

²⁰ 184 N.J. 516 (2005).

²¹ See The Graves Act, *infra* note 180.

²² See *Franklin*, 184 N.J. at 540.

Apprendi, *Blakely* and *Booker*, the question still remains as to whether the recent changes to New Jersey's criminal sentencing scheme, in light of *Apprendi*, *Blakely* and *Booker*, uphold the legislative intent behind the New Jersey Sentencing Code.

Part II of this note will examine history behind the Sentencing Reform Act of 1984 and the promulgation of the Federal Sentencing Guidelines. Part III will provide the legislative history behind the New Jersey Criminal Sentencing Act. Part IV will provide in-depth synopses of the *Apprendi*, *Blakely* and *Booker* cases, and demonstrate how each moved federal sentencing law away from a pure determinate sentencing scheme. Part V will provide similar synopses for the *Natale*, *Franklin* and *Abdullah* cases. Part VI will address whether *Natale*, *Franklin* and *Abdullah* were proper applications of the principles laid down in *Apprendi*, *Blakely* and *Booker*; collectively analyze the effects of those case trilogies on New Jersey's sentencing scheme; and determine whether such changes bolster or undermine the legislative intent behind the New Jersey scheme. Finally, Part VII will conclude whether current New Jersey criminal sentencing law is best for New Jersey, and ultimately whether the objectives underlying the New Jersey Sentencing Code are likely to survive in light of current judicial trends in interpreting constitutional sentencing principles.

II: The Sentencing Reform Act of 1984 ("SRA") and Promulgation of the Federal Sentencing Guidelines

The SRA and subsequent creation of the Guidelines were the products of years of Congressional debate over the core goals of federal criminal sentencing law.²³ Before the SRA, rehabilitation was the prevailing theory of criminal punishment.²⁴ Rehabilitation was based on the beliefs that "first . . . inmates should be provided an incentive for betterment, and, second, that experts—not judges—should determine when sufficient improvement had taken place."²⁵ Thus, federal judges possessed "virtually unfettered discretion" in sentencing in order to ensure the interest that a criminal's sentence should be fitted to his or her particular needs.²⁶ Yet by the 1970s the

²³ See Sanderford, *supra* note 4, at 743-44.

²⁴ See Jonathan Chiu, *United States v. Booker: The Demise of Mandatory Federal Sentencing Guidelines and The Return of Indeterminate Sentencing*, 39 U. RICH. L. REV. 1311, 1312-13 (2005).

²⁵ See *id.*

²⁶ See Sanderford, *supra* note 4, at 741.

rehabilitation model began to decline in popularity. Empirical research collected during this time reported that “unfounded disparities existed on both federal and state levels in the sentencing and parole systems,”²⁷ and the cause of such sentencing disparities was regarded as the “unguided discretion” that judges possessed under the indeterminate sentencing scheme that existed at the time.²⁸

Both liberals and conservatives agreed on key aspects of sentencing in need of reform, namely that similarly situated criminals no longer receive drastically dissimilar sentences (as a result of judicial and parole discretion), that rehabilitation should be de-emphasized, and that indeterminate sentencing should be replaced with “truth in sentencing” whereby the sentencing term imposed would actually be served.²⁹ Reformers also championed having an expert “sentencing commission” study sentencing and develop guidelines “which judges would be required to follow in ordinary cases” and depart from “in atypical cases,” and parole “would be abolished to ensure honesty in sentencing.”³⁰ Following the passage of sentencing guidelines in Minnesota in 1980, Pennsylvania in 1982, and Washington in 1984, Congress passed the SRA in 1984.³¹ The Act created the U.S. Sentencing Commission, an independent agency within the judicial branch, which promulgated the Federal Sentencing Guidelines (hereafter “the Guidelines”) in 1987.³²

The SRA ordered the Commission to create guidelines to accomplish certain goals.³³ The SRA eliminated parole in the federal

²⁷ Chiu, *supra* note 24, at 1314.

²⁸ Sanderford, *supra* note 4, at 742.

²⁹ See David Yellen, *Saving Federal Sentencing Reform After Apprendi, Blakely and Booker*, 50 VILL. L. REV. 163, 166 (2005).

³⁰ *Id.* at 167.

³¹ *Id.*

³² See Chiu, *supra* note 24, at 1315-17.

³³ The SRA ordered the Commission to establish guidelines that would: Provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

Sanderford, *supra* note 4, at 744-45. For a criticism of the goals of the SRA, see Kevin R. Reitz, *Michael Torny and The Structure of Sentencing Laws*, 86 J. CRIM. & CRIMINOLOGY 1585 (1996) (citing MICHAEL TORNY, SENTENCING MATTERS, 71 (Oxford University Press 1996), (“the guidelines developed by the U.S. Sentencing Commission . . . are the most controversial and disliked sentencing reform initiative in U.S. history.”)).

criminal system and essentially created a determinate sentencing scheme. In order to analyze criminal sentencing and the SRA, it is essential to understand how the Guidelines work. In criminal jury trials, after the jury has returned a verdict or after any plea bargains are made, the judge receives a "presentence report" from a U.S. probation officer containing facts which may or may not have been pleaded and proved to a jury.³⁴

To calculate the sentence, the judge must first consult the Guidelines to determine the base offense level for the relevant crime, and then determine "whether any circumstances of the commission of a crime justify increasing or decreasing the offense level."³⁵ The judge has fact-finding power for such aggravating or mitigating factors by a preponderance of the evidence.³⁶ Sentencing factors

The core objections are that the [federal] guidelines are too rigid and too harsh, and too often force judges and lawyers to choose between imposing sentences that are widely perceived as unjust or trying to achieve just results by means of hypocritical circumventions. Judges are forced by the guidelines to choose between their obligations to do justice and their obligations to enforce the law.

Id. at 92. For a critique of the Federal Sentencing Guidelines, see Katie Stith and Jose A. Carbanes, *To Fear Judging No More: Recommendations for the Federal Sentencing Guidelines*, 2 FED. SENT'G REP. 187 (1999).

The federal Sentencing Guidelines were born of a naïve commitment to the ideal of rationality, an enduring faith in bureaucratic administration, and an uneasiness with the very concept of official discretion. In practice, the Guidelines juridify . . . criminal sentencing law by encumbering it with minute formal distinctions and administrative detail. The Guidelines' neoclassical preoccupation with artificial order may seem like an anachronistic, eighteenth century attempt to mechanize justice, and their enactment and persistence surely represents the continuing triumph of the administrative state. Grounded in a fear of judging, the Guidelines seek not to channel the exercise of informed judicial discretion, but to repress judgment and replace it with a calculus of justice.

Id. at 187.

³⁴ See Chiu, *supra* note 24, at 1317-18.

³⁵ *Id.* at 1318.

³⁶ See U.S. SENT'G GUIDELINES MANUAL, § 3 (2005). This chapter lists "Adjustments" (aggravating and mitigating factors) to be made to sentences. Examples include the following:

- 1) "defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels." § 3A1.1(a).
- 2) "If (1) the victim was (A) a government officer or employee; (B) a former government officer or employee; or (C) a member of immediate family of a person described in subdivision (A) or (B); and (2) the offense of conviction was motivated by such status, increase by 3 levels." § 3A1.2(a).
- 3) "If a victim was physically restrained in the course of the offense, increase by

(including both aggravating and mitigating) are distinguished from elements of a separate crime in that the former are “a fact that was not found by a jury but that could affect the sentence imposed by a judge,”³⁷ whereas an element of separate a crime is a fact “that exposes a defendant to a punishment greater than otherwise legally prescribed.”³⁸

After computing the offense level, the judge examines the criminal history of the defendant per the Guideline “categories,” which range from Criminal History Category I to VI.³⁹ Once the judge determines the offense level and criminal history category, he or she then looks to a “Sentencing Table” to find the range in which the defendant falls. If the judge does not find any aggravating or mitigating circumstances adequately addressed by the Sentencing Commission in formulating the Guidelines, the judge must impose a sentence within the applicable Guideline range.⁴⁰ The judge however cannot, under any circumstances, impose a sentence above the statutory maximum for the crime for which the defendant is convicted.⁴¹ In 1989, the United States Supreme Court upheld the constitutionality of the SRA and the U.S. Sentencing Commission in

2 levels.” § 3A1.3.

- 4) “If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense is less than level 32, increase to level 32.” § 3A1.4(a).
- 5) “If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.” § 3B1.2(a).
- 6) “If defendant was a minor participant in any criminal activity, decrease by 2 levels.” § 3B1.2(b).
- 7) “If the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer, increase by 2 levels.” § 3C1.2.

A preponderance of the evidence is the typical standard of proof utilized in sentencing decisions.

In criminal cases in the United States, the standard of proof required to find the defendant guilty is ‘proof beyond a reasonable doubt.’ The use of this standard to adjudicate guilt complicates jury sentencing. The first complication is reconciling the standard of proof for guilt with the standard of proof for sentencing. In most modern sentencing schemes, the standard of proof is lower than proof beyond a reasonable doubt; usually, it is preponderance of the evidence, although sometimes it might be clear and convincing evidence.

Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 685 (2004)

³⁷ *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

³⁸ *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.9 (2000).

³⁹ See generally Chiu, *supra* note 24, at 1318-19.

⁴⁰ See Sanderford, *supra* note 4, at 745.

⁴¹ See Chiu, *supra* note 24, at 1319.

Mistretta v. United States,⁴² rejecting contentions that Congress violated the non-delegation doctrine “by granting the Sentencing Commission excessive legislative authority and the separation of powers doctrine by placing the Sentencing Commission in the judicial branch.”⁴³

III. *The Legislative History of the New Jersey Criminal Sentencing Act*

The New Jersey Criminal Sentencing Code (“New Jersey Code”), although enacted on August 10, 1978⁴⁴ before the Legislature passed the SRA, is nonetheless remarkably similar and encompasses many of the fundamental theories underlying the SRA. First, and perhaps most importantly, the purposes of the New Jersey Code are nearly identical to those of the Guidelines, such as promoting deterrence of criminal behavior and safe guarding against arbitrary punishment.⁴⁵

⁴² 488 U.S. 361 (1989).

⁴³ Chiu, *supra* note 24, at 1319-20 (citing generally *Mistretta*, 488 U.S. at 371-79, 380-411).

⁴⁴ See *State v. Maguire*, 84 N.J. 508, 521 (1980).

⁴⁵ The purposes of the New Jersey sentencing provisions are stated in N.J. STAT. ANN. § 2C:1-2(b) (2005):

- (1) To prevent and condemn the commission of offenses;
- (2) To promote the correction and rehabilitation of offenders;
- (3) To insure the public safety by preventing the commission of offenses through the deterrent influence of sentences imposed and the confinement of offenders when required in the interest of public protection;
- (4) To safeguard offenders against excessive, disproportionate or arbitrary punishment;
- (5) To give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
- (6) To differentiate among offenders with a view to a just individualization in their treatment;
- (7) To advance the use of generally accepted scientific methods and knowledge in sentencing offenders; and
- (8) To promote restitution to victims.

Id. The purposes of the SRA are similar:

Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for 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;

The New Jersey Code's underlying goal of fairness in sentencing is reflected in N.J. Stat. Ann. § 2C:1-2(c)⁴⁶ which states that the Code "shall be construed according to the fair import of [its] terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this section"⁴⁷ Furthermore, the discretionary powers that the Code grants, when not expressly dictated by statutory language, shall be excised "to further the general purposes" of the New Jersey Code.⁴⁸

Until enactment of the New Jersey Code in 1978, New Jersey had not specifically identified the aims of punishment or established a consistent framework for sentencing discretion, which resulted in "judges identifying various aggravating and mitigating factors to be considered in fixing a sentence . . . and by requiring an express statement of reasons for the particular disposition . . . to facilitate meaningful appellate review."⁴⁹ Moreover, the State legislature recognized a "senseless and indefensible variety of sentences prescribed for offenses,"⁵⁰ under the previous system, leading to a "total absence of sensible classification of the seriousness of different crimes."⁵¹ Consequently, the New Jersey Code established a system of grading offenses, which the Legislature noted was invaluable "as a matter of fairness between offenders far apart in the spectrum of social danger and as a desirable legislative control of the discretion of sentencing judges."⁵² Such grading is similar to the sentencing table in the Guidelines, which is based upon a particular defendant's criminal history and offense level for a particular crime. The Legislature, in fashioning the New Jersey Code, provided that crime "would be defined with precision and specific offenses would carry specified sentences" which could be modified based on the presence of aggravating or mitigating factors.⁵³ This constituted an offense-

(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 . . .

18 U.S.C. § 3553(a)(2) (2005).

⁴⁶ N.J. STAT. ANN. § 2C:1-2.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See Maguire*, 84 N.J. at 530-31.

⁵⁰ *Id.* at 531 n.16.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *State v. Hodge*, 95 N.J. 369, 375 (1984) (citing ZIMRING, MAKING THE PUNISHMENT FIT THE CRIME: A CONSUMER'S GUIDE TO SENTENCING REFORM, 327, 330-31

oriented approach to sentencing rather than the pre-Code approach of balancing “defendant’s capacity for rehabilitation with other purposes of punishment.”⁵⁴

The New Jersey Code operates and guides judicial discretion through a system that grades crimes into four degrees and imposes a presumptive term of imprisonment for sentencing.⁵⁵ There is a presumption of non-imprisonment for a first-time offender convicted of a fourth-degree or third-degree crime.⁵⁶ In setting a sentence, if the “mitigating and aggravating factors are in equipoise,” the presumptive term applies, but where the court is “clearly convinced that the mitigating factors substantially outweigh the aggravating factors, and when the interest of justice demands,” the court may either reduce a sentence or, in the case of a first- or second-degree crime, impose a sentence within the sentencing range of crimes one degree lower.⁵⁷ For first-degree and second-degree crimes however, the presumption is operative regardless of whether a defendant has lived a crime-free life.⁵⁸ The court presumptions of imprisonment to first- and second-degree convictions are as follows: the presumption for first-degree convictions is fifteen years and the presumption for second-degree convictions is seven years.⁵⁹ The one exception for imposing a presumption of imprisonment for first-degree or second-degree crimes is when the trial judge is satisfied that “having regard to the character and condition of the defendant . . . imprisonment would be a serious injustice which overrides the need to deter such conduct by others.”⁶⁰ Of course, the New Jersey Code recognizes that for some crimes presumptive sentencing is inappropriate, and, therefore, makes exceptions for crimes such as murder and kidnapping.⁶¹

(H. Gross & A. von Hirsh eds., 1981).

⁵⁴ *Id.* at 378.

⁵⁵ *State v. Evers*, 175 N.J. 355, 387 (2003).

⁵⁶ *See id.* at 387-88.

⁵⁷ *Id.* (citing N.J. STAT. ANN. § 2C:44-1(e)).

⁵⁸ *See id.* at 388.

⁵⁹ *See id.* at 387.

⁶⁰ *Id.* at 388 (citing N.J. STAT. ANN. § 2C:44-1(d)).

⁶¹ *See State v. Maguire*, 84 N.J. 508, 526 (1980) (holding that “under the Code the crime of murder is subject to a discretionary extended term of life imprisonment without separate proof of the specific enhancement criteria in section 2C:44-3”).

IV. Apprendi, Blakely and Booker: The United States Supreme Court Retreats from Pure Determinate Sentencing Scheme

Apprendi addressed the issue of whether a judge, following a jury verdict, could constitutionally increase a defendant's sentence for a crime above the statutory maximum.⁶² Charles C. Apprendi fired several gunshots into the home of an African-American family that had recently moved into a previously all-white neighborhood in Vineland, N.J.⁶³ When questioned by authorities, Apprendi made a statement (which he later recanted) that, despite the fact that he did not personally know the victims, he did not want them in the neighborhood because they were black.⁶⁴ Apprendi eventually entered into a plea agreement whereby he pleaded guilty to a third-degree offense and two counts of second-degree possession of a firearm.⁶⁵ Pursuant to the plea agreement, the State reserved the right to, and eventually did make a request for an "enhanced" sentence for the second-degree offense (possession of a firearm for an unlawful purpose) on the basis that it was committed with a biased purpose.⁶⁶ At an evidentiary hearing, the trial judge found by a preponderance of the evidence that Apprendi acted "with a purpose to intimidate."⁶⁷ Such a finding authorized the judge to impose an "extended term" based upon the New Jersey "hate crime" statute⁶⁸ in effect at that time.⁶⁹ Thus, even though the crime for which the court convicted Apprendi had a statutory maximum of 10 years, the trial judge imposed a twelve-year sentence.⁷⁰ Apprendi appealed, and

⁶² See Erron W. Smith, *Apprendi v. New Jersey: The United States Supreme Court Restricts Judicial Sentencing Discretion and Raises Troubling Constitutional Questions Concerning Sentencing Statutes and Reforms Nationwide*, 54 ARK L. REV. 649, 702 (2001) (describing the *Apprendi* decision as "the most significant case to be decided by the Court in the year 2000" having "wide-ranging implications" with "inevitable litigation and appeals . . . sure to come in its wake").

⁶³ See *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000).

⁶⁴ See *id.*

⁶⁵ See *id.* at 469-70.

⁶⁶ See *id.* at 470.

⁶⁷ *Id.* at 471.

⁶⁸ N.J. STAT. ANN. § 2C:44-3(e) (2005) (providing for an extended term of imprisonment if the judge finds, by a preponderance of evidence, that "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity").

⁶⁹ See *Apprendi v. New Jersey*, 530 U.S. 466, 471 (2000).

⁷⁰ See *id.*

after both the Appellate Division and the New Jersey Supreme Court affirmed the judgment, he petitioned the United States Supreme Court which granted certiorari.⁷¹

The U.S. Supreme Court reversed the judgment of the New Jersey Supreme Court and remanded the case for further proceedings.⁷² The Court determined that New Jersey's "hate crime" statute violated the Due Process Clause of the Fourteenth Amendment and the notice and jury trial guarantees of the Sixth Amendment because it permitted a judge to impose a sentence beyond the statutory maximum based on a preponderance of the evidence instead of on the facts that a jury finds beyond a reasonable doubt.⁷³ Justice Stevens, writing for the majority, declared that such a procedure is "a tail which wags the dog of the substantive offense."⁷⁴ Thus, to prevent judges from increasing criminal sentences beyond statutory maximums based on a preponderance of the evidence standard instead of a reasonable doubt standard, the Court held that any facts, other than those of prior criminal convictions, that may potentially increase a particular criminal sentence beyond its statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.⁷⁵

Justice O'Connor filed a lengthy dissent that is noteworthy because it set forth the notion that the legislature is the appropriate body to make determinations regarding fact-finding pertaining to elements of a crime.⁷⁶ Justice O'Connor posited that the Court cast aside the "traditional cautious approach" to sentencing in favor of a bright-line rule which severely hinders the power of legislatures "to define criminal offenses and the sentences that follow from convictions thereunder."⁷⁷ To adopt the rule that the majority created would effectively nullify all of the work that went into the sentencing reform movement for the past 30 years⁷⁸ because the determinate sentencing scheme created by the SRA already greatly

⁷¹ See *id.* at 471-74.

⁷² See *id.* at 497.

⁷³ See Chiu, *supra* note 24, at 1322.

⁷⁴ *Apprendi*, 530 U.S. at 495 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)).

⁷⁵ See *id.* at 490.

⁷⁶ See *id.* at 487 (describing how even a formalistic reading of the Court's holding supports the proposition that such a rule is not required and the legislature may still remove the assessment of certain facts from juries and subject them to a standard of proof lower than reasonable doubt).

⁷⁷ *Id.* at 525 (O'Connor, J., dissenting).

⁷⁸ See Smith, *supra* note 62, at 657.

constrains a judge's discretion on sentencing within the relevant statutory maximum.⁷⁹ Creating a rule that cuts against legislative reform regarding sentencing negates efforts by Congress to ensure the constitutional rights of defendants at sentencing.⁸⁰ Furthermore, Justice O'Connor stated that the negative consequence that would follow *Apprendi* would be an excessive amount of petitions by defendants seeking to overturn their convictions based on *Apprendi*.⁸¹ Justice Breyer also filed a dissent that supplemented Justice O'Connor's discussion of the practical problems of the Court's holding by stating that "there are, to put it simply far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury."⁸² Justice Breyer also agreed that the Court's holding undermined legislative efforts to make the sentencing system more uniform because having a jury determination of sentencing-related facts would make the system unworkable and ultimately less fair.⁸³

Blakely, the next case in the *Apprendi* line, is the most important of those cases because in it the Court clarified the meaning of "statutory maximum" for *Apprendi* purposes and indicated that both federal and state sentencing guidelines could potentially be invalid under *Apprendi*. In *Blakely*, Ralph Howard Blakely pleaded guilty to second-degree kidnapping involving domestic violence and use of a firearm for the abduction of his estranged wife Yolanda.⁸⁴ The facts admitted in Blakely's plea agreement, which were only the elements of the two aforementioned offenses, implicated a maximum sentence of 53 months for Blakely.⁸⁵ Washington's criminal sentencing code, in relevant part,⁸⁶ provided that second-degree kidnapping was a Class B felony and that no person convicted of a Class B felony would receive a sentence over 10 years.⁸⁷ Washington's criminal sentencing

⁷⁹ See *Apprendi*, 530 U.S. at 548 (O'Connor, J., dissenting).

⁸⁰ Indeed it is ironic that the Court, in the name of constitutional rights meant to protect criminal defendants from the potentially arbitrary exercise of power by prosecutors and judges, appears to rest its decision on a principle that would render unconstitutional efforts by Congress and the state legislatures to place constraints on that very power in the sentencing context.

Id. at 550 (O'Connor, J., dissenting).

⁸¹ See *id.* at 551 (O'Connor, J., dissenting).

⁸² See *id.* at 557 (Breyer, J., dissenting).

⁸³ See *id.* at 565 (Breyer, J., dissenting).

⁸⁴ See *Blakely v. Washington*, 542 U.S. 296, 298 (2004).

⁸⁵ See *id.*

⁸⁶ WASH. REV. CODE ANN. § 9.94A.120(2) (2005).

⁸⁷ See *Blakely*, 542 U.S. at 299.

code also provided that a judge may be able to impose a sentence beyond the standard range if the judge found “substantial and compelling reasons justifying an exceptional sentence.”⁸⁸ Washington’s criminal sentencing code also listed a number of aggravating factors that justify such a departure.⁸⁹ After hearing

⁸⁸ *See id.* (quoting WASH. REV. CODE ANN. § 9.94A.120(2)).

⁸⁹ WASH. REV. CODE ANN. § 9.94A.390, recodified to 9.94A.535(2) (2005):

(2) Aggravating Circumstances

- (a) The defendant’s conduct during the commission of the current offense manifested deliberate cruelty to the victim.
- (b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.
- (c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.
- (d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:
 - (i) The current offense involved multiple victims or multiple incidents per victim;
 - (ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;
 - (iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or
 - (iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.
- (e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:
 - (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;
 - (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;
 - (iii) The current offense involved the manufacture of controlled substances for use by other parties;
 - (iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;
 - (v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or
 - (vi) The offender used his or her position or status to

Yolanda's description of the kidnapping at a sentencing hearing, the judge imposed an sentence of 90 months.⁹⁰ The judge found that Blakely had acted with "deliberate cruelty," and this was one of the statutorily enumerated grounds for imposing an enhanced sentence.⁹¹ Blakely objected, but the judge stuck to his initial ruling, and the Washington Court of Appeals affirmed the judge's sentence.⁹² The Washington Supreme Court denied discretionary

facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

- (f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.
- (g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.
- (h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:
 - (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;
 - (ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or
 - (iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.
- (i) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.
- (j) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.
- (k) The offense resulted in the pregnancy of a child victim of rape.
- (l) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.
- (m) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.
- (n) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

Id.

⁹⁰ See *Blakely*, 542 U.S. at 300.

⁹¹ *Id.*

⁹² See *id.* at 301.

review, but the United States Supreme Court granted certiorari.⁹³

In an opinion authored by Justice Scalia, the Court reversed the judgment of the Washington Court of Appeals and remanded the case for further proceedings.⁹⁴ The Court first rejected the State's argument that the relevant "statutory maximum" was the 10 years for Class B felonies and, instead, stated that the relevant statutory maximum was 53 months based on the facts admitted in the plea agreement.⁹⁵ The basis for this determination lay in the Court's holding, which stated that the "statutory maximum," for *Apprendi* purposes, is the highest possible sentence a judge may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."⁹⁶ In other words, Justice Scalia concluded that the "statutory maximum" is the maximum sentence a judge may impose *without* finding any additional facts, not *after* finding additional facts.⁹⁷ Thus, it was impossible for the lower court judge to impose a 90-month sentence on Blakely because the facts Blakely admitted in the guilty plea justified only a 49-month to 53-month sentence, and reasons for imposing exceptional sentences cannot include factors used to compute the standard range sentence for the offense.⁹⁸ And because Blakely's "deliberate cruelty" was not part of the statutory definition of the offense with which he was charged and because he made no such admission to acting with "deliberate cruelty," Blakely's sentence could not be raised without a jury finding "deliberate cruelty" beyond a reasonable doubt.⁹⁹

The Court did not recognize as constitutionally significant the distinction between *Apprendi* and *Blakely*. The "statutory maximum" in *Apprendi* was formally laid out in the language of the statute under which the defendant was convicted and the "functional equivalent of the normal range" (maximum possible sentence based upon admissions in Blakely's plea agreement) expressed in *Blakely*.¹⁰⁰ Furthermore, the Court refused to discuss the Guidelines because they were not specifically before the Court.¹⁰¹ Finally, Justice Scalia

⁹³ *Id.*

⁹⁴ *See id.* at 314.

⁹⁵ *See id.* at 303.

⁹⁶ *Blakely*, 542 U.S. at 303.

⁹⁷ *See id.* at 304.

⁹⁸ *See id.* at 303-04 (quoting *Washington v. Gore*, 21 P.3d 262, 277 (Wash. 2001)).

⁹⁹ *See Yellen, supra* note 29, at 171.

¹⁰⁰ *See id.*

¹⁰¹ *See Blakely*, 542 U.S. at 305 n.9 ("The United States, as *amicus curiae* . . . notes the differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are

reiterated the importance of the Sixth Amendment right to a jury trial, emphasizing that such right is meant to ensure the people's "control in the judiciary"¹⁰² and that a judge cannot impose any sentence not authorized by a jury finding of fact.¹⁰³ The core holding of *Blakely* is that the court interpreted the "statutory maximum" rule from *Apprendi* to mean "the maximum sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," thus confusing scholars,¹⁰⁴ creating a split in lower federal court applications,¹⁰⁵ and inevitably paving the way for the *Booker* decision.¹⁰⁶

constitutionally significant. . . . The Federal Guidelines are not before us, and we express no opinion on them.").

¹⁰² See *id.* at 306.

¹⁰³ See Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 711 (2005).

¹⁰⁴ See Yellen, *supra* note 29, at 170-71 (discussing the predicted outcome of *Blakely* while it was being heard: "although at the time, most experts did not expect the Court to follow through in this manner . . . *Blakely* sent shockwaves through the federal criminal justice system.").

¹⁰⁵ See *id.* ("The lower federal courts quickly split on the question . . .").

¹⁰⁶ See Amanda Farnsworth, *United States v. Booker: How Should Congress Play the Ball?* 83 DENV. U. L. REV. 579, 586 (2005) ("*Blakely* was the final step in a series of cases that led to the inevitable holding of *Booker*."); see Ian Weinstein, *The Revenge of Mullaney v. Wilbur: United States v. Booker and the Reassertion of Judicial Limits on Legislative Power to Define Crimes*, 84 OR. L. REV. 393, 429-30 (2005).

Once the door closed on the meaning and scope of the phrase 'facts that increase the prescribed range of penalties,' the major hope to save the Federal Sentencing Guidelines was the argument that they were not statutes. . . . But that argument did not garner five votes on the Supreme Court. *United States v. Booker* followed directly from *Blakely* and, by that point, the interesting and hard questions were remedial, not doctrinal.

Id.; see Kelli F. Robinson, *Judicially Determined Facts Used to Impose Exceptional Sentence Violates Defendant's Constitutional Rights*, 35 CUMB. L. REV. 219, 229-30 (2004/2005) ("The *Blakely* decision will affect many different groups of people including sentencing judges, prosecutors, criminal defense attorneys and both federal and state legislatures. . . . The *Blakely* decision has created massive uncertainty in the criminal justice system."). See generally Rachel E. Barkow, *Recharging The Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 97 (2003) (discussing the importance of the jury right in the context of plea bargains and the dangers of government power if such right is not adequately safeguarded).

The jury trial guarantee is still relevant in the plea bargaining context, then, because it defines the parameters of the bargaining terms. If the chance of acquittal is high enough . . . the case is more likely to go to trial because the prosecutor cannot offer a deal with terms favorable enough for the defendant to accept.

Thus, the anticipated outcome at trial governs the plea bargain. It is therefore critically important that the jury's power at trial is not undermined because, to the extent the jury's authority is eroded, plea bargaining is largely unconstrained and the government can name its

The same justices who dissented in *Apprendi* dissented again in *Blakely*, and Justice O'Connor reiterated many of the same disapprovals voiced in the *Apprendi* dissents and elaborated what they perceive to be judicial undermining of legislative efforts. The principle thrust of Justice O'Connor's dissent was the Court's undermining of legislative efforts to curb judicial sentencing discretion. Justice O'Connor began by theorizing that the law of *Apprendi* and *Blakely* will force Congress and the states to drastically cut down or eliminate altogether their sentencing guideline schemes, effectively negating the past 20 years of sentencing reform.¹⁰⁷ After a discussion of the history of the SRA and its general benefits of notice to defendants,¹⁰⁸ Justice O'Connor equated the majority's contention that the case's issue is whether determinate sentencing can be implemented in a way that respects the Sixth Amendment,¹⁰⁹ with imposing a "constitutional tax" on the legislature; should the legislature want to ensure consideration of factors traditionally designated as sentencing factors (i.e. behavior during trial), it must either have these issues tried to a jury or vest more discretion in the judge to account for them.¹¹⁰ Such alternatives would substantially frustrate the goal of curbing judicial discretion. Justice O'Connor further explained the similarities that exist between the Washington sentencing scheme struck down by the majority and the Guidelines and hinted that should the Guideline provisions that require increases in sentencing ranges based upon judicial fact-finding ever come before the Court they will likely be struck down as well.¹¹¹ If

price without any oversight.

Id.

¹⁰⁷ See *Blakely*, 542 U.S. at 314 (O'Connor, J., dissenting).

¹⁰⁸ See *id.* at 314-18.

¹⁰⁹ *Id.* at 308 ("This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.").

¹¹⁰ See *id.* at 318-20 (O'Connor, J., dissenting).

¹¹¹ *Id.* at 325 (O'Connor, J., dissenting):

Washington's scheme is almost identical to the upward departure regime established by 18 U.S.C. § 3553(b) [18 USC § 3553(b)] and implemented in USSG § 5K2.0. If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack. The provision struck down here [in *Blakely*] provides for an increase in the upper bound of the presumptive sentencing range if the sentencing court finds, "considering the purpose of [the Act], that there are substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code Ann. § 9.94A.120 (2000). . . . The Court flatly rejects respondent's argument that such soft constraints, which still allow Washington judges to exercise a substantial amount of discretion, survive *Apprendi*. . . . This suggests that the hard constraints

Justice O'Connor had a choice between a case-by-case approach considering Bill of Rights values, and those of the sentencing reform movement, or what she labeled "a rigid rule that destroys everything in its path," she stated that she would choose the former.¹¹²

Justice O'Connor's prediction regarding the Guidelines came close to coming true in *United States v. Booker* which was the set of consolidated cases in which the Court invalidated the provisions of the SRA that made the Guidelines binding upon the judiciary, and instead rendered the Guidelines advisory. Freddie Booker was charged with, and convicted by a jury, of possession with intent to distribute at least 50 grams of crack pursuant to 21 U.S.C. § 841(a)(1)¹¹³ based upon the fact that he possessed 92.5 grams.¹¹⁴ The statutory minimum for that crime was 10 years and the maximum was life in prison.¹¹⁵ The Guidelines required the judge to select a base sentence of no less than 210 months but not more than 262 months in prison, yet at the post-trial sentencing proceeding the judge found by a preponderance of the evidence that Booker had an additional 566 grams of crack and had obstructed justice.¹¹⁶ Based upon those factual findings, the Guidelines mandated that the judge pick a sentence not less than 360 months and not greater than life in prison. The judge sentenced Booker to 30 years in prison. The United States Court of Appeals for the Seventh Circuit overturned Booker's conviction, holding that this application of the Guidelines conflicted with *Apprendi*.¹¹⁷

Respondent Ducan FanFan's situation was similar to Booker's in that he was convicted under the same statute and subject to a term higher than the applicable Guideline range because the judge found additional facts for which the Guidelines required that FanFan's sentence be enhanced beyond that authorized by the jury verdict alone.¹¹⁸ However, the judge in FanFan's proceeding decided that he could not apply the relevant Guideline provisions "which involve

found throughout chapters 2 and 3 of the Federal Sentencing Guidelines [USSG § 2K2.1, USSG § 2B1.1, and USSG § 3C1.1], which require increase in the sentencing range upon specified factual findings, will meet the same fate.

Id.

¹¹² See *id.* at 321 (O'Connor, J., dissenting).

¹¹³ 21 U.S.C. § 841(a)(1) (2005).

¹¹⁴ *United States v. Booker*, 543 U.S. 220, 227 (2005).

¹¹⁵ *Id.* (citing § 841(b)(1)(A)(iii)).

¹¹⁶ *Id.*

¹¹⁷ See *id.* at 227-28.

¹¹⁸ See *id.* at 228.

drug quantity and role enhancement” and instead followed the Guideline provisions that did not implicate the Sixth Amendment by imposing a sentence based solely upon FanFan’s guilty verdict.¹¹⁹

The Court’s majority opinion was divided into two parts—Justice Stevens authored Part I (the “Constitutional” opinion) and Justice Breyer authored Part II (the “Remedial” opinion)—which collectively held that *Blakely* applies to the Guidelines and so, the two provisions of the SRA that make the Guidelines mandatory must be severed in order to “operate in a manner consistent with congressional intent”; the Guidelines are now merely advisory.¹²⁰ Justice Stevens cited Justices O’Connor’s dissent in *Blakely* to first point out that there is no distinction between the Guidelines and the Washington sentencing system at issue in *Blakely* insofar as both sets of sentencing provisions are mandatory and impose binding requirements on all judges to fact find at sentencing.¹²¹ Justice Stevens noted that if the Guidelines were not binding on all district judges, the entire problem could have been avoided.¹²² He also noted that the availability of departures in limited circumstances did not avoid an *Apprendi* problem because those departures are not available in most cases, thus the judge is bound to impose a Guideline range sentence in those instances too.¹²³ The fact that the Guidelines were promulgated by an independent commission rather than Congress was of no significance because “the principles behind the jury trial rights are equally applicable” and those rights are implicated whenever a judge is bound by a particular set of rules to impose a sentence beyond the statutory maximum.¹²⁴ Justice Stevens finally rejected the Government’s argument that requiring proof of sentencing factors beyond a reasonable doubt would transform the Guidelines into a code which defined elements of criminal offenses and thereby unconstitutionally grant legislative authority to the Commission. Justice Stevens reaffirmed the Court’s holding in *Mistretta*¹²⁵ and stated that the Commission’s authority to identify facts relevant to sentencing and deduce their potential impacts is the same regardless of whether such facts carry the “element of a crime” label or

¹¹⁹ *See id.*

¹²⁰ *Booker*, 543 U.S. at 226-27, 246.

¹²¹ *See id.* at 233.

¹²² *Id.* at 234.

¹²³ *See id.*

¹²⁴ *See id.* at 226-27.

¹²⁵ *See Mistretta*, 488 U.S. 361, 412 (1989) (holding that the Sentencing Reform Act of 1984 is constitutional along with the Federal Sentencing Commission that the Act established).

“sentencing factor” label.¹²⁶ Finally, Justice Stevens reaffirmed *Apprendi* and made clear that the interests in fairness protected by the right to a jury trial outweigh any interest in having trials performed quickly.¹²⁷

Justice Breyer’s “remedial opinion,” rather than imposing a jury trial requirement suggested by Justice Stevens,¹²⁸ corrected the Sixth Amendment violation in the Guidelines by severing from the SRA 18 U.S.C. §§ 3553(b)(1) and 3742(e), thereby rendering the Guidelines advisory yet requiring sentencing courts to “consider Guidelines ranges” and formulate “sentence[s] in light of other statutory concerns.”¹²⁹ Justice Breyer’s approach centered on an examination of the legislative intent in passing the SRA and sought to determine what type of remedy Congress would have intended had it known about the Sixth Amendment violations in the Guidelines.¹³⁰ First, the Court held that the jury trial requirement was not compatible with the legislative intent in creating the Guidelines.¹³¹ The majority’s remedial opinion presented five reasons supporting this conclusion: (1) the SRA’s history evidences a legislative intent to have judges, not juries, make sentencing decisions;¹³² (2) a jury trial requirement would undermine the SRA’s goal of sentencing uniformity by preventing judges from examining the real conduct of defendants in order to tailor appropriate sentences;¹³³ (3) the jury trial requirement “would create a system far more complex” in practical terms “than Congress could have intended”;¹³⁴ (4) plea bargaining would thus diminish sentencing uniformity by leading to sentences not primarily based on the real conduct of the defendant but rather factors involved in criminal trials;¹³⁵ and (5) Congress did not intend to

¹²⁶ *Booker*, 543 U.S. at 241-42.

¹²⁷ *Id.* at 244.

¹²⁸ *Id.* at 284-85 (Stevens, J., dissenting).

Rather than engage in a wholesale rewriting of the SRA, I would simply allow the Government to continue doing what it has done since this Court handed down *Blakely*—prove any fact that is *required* to increase a defendant’s sentence under the Guidelines to a jury beyond a reasonable doubt. As I have already discussed, a requirement of jury factfinding for certain issues can be implemented without difficulty in the vast majority of cases.

Id.

¹²⁹ *Id.* at 245-46.

¹³⁰ *Id.* at 246.

¹³¹ *See id.* at 248.

¹³² *See Booker*, 543 U.S. at 250.

¹³³ *See id.* at 252-53.

¹³⁴ *Id.* at 254.

¹³⁵ *Id.* at 256 (“plea bargaining would likely lead to sentences that gave greater

enact the Guidelines in order to make it more difficult to adjust sentences upward than downward,¹³⁶ which is effectively what a jury trial requirement would do by increasing time and costs involved with trials and sentencing decisions. After thus concluding that 18 U.S.C. § 3553(b)(1) must be severed because it mandated that judges impose sentences in accordance with the Guidelines, Justice Breyer then went on to excise 18 U.S.C. § 3742(e) which had set the standard of appellate review of sentencing decisions as *de novo*.¹³⁷ The primary reason for doing so was § 3742(e)'s extensive references to § 3553(b)(1) which, unlike the rest of the Act's provisions, made § 3742(e) unable to function independently of § 3553(b)(1).¹³⁸ However, Justice Breyer held that past practice, statutory language, and principles of justice implicitly mandated an "unreasonableness" standard of review, which the Court then held to be the appropriate standard henceforth for sentencing decisions.¹³⁹ Justice Breyer concluded the "remedial opinion" by holding that the district courts, while not bound by the Guidelines anymore, are required to "consult" and "account" for them during sentencing,¹⁴⁰ and that the Court's holdings from this case apply "to all cases on direct review."¹⁴¹

V. *Natale, Franklin and Abdullah: The New Jersey Trilogy of Sentencing Cases*

On August 2, 2005, the New Jersey Supreme Court decided three cases¹⁴² that mirror the *Apprendi*, *Blakely* and *Booker* line. The key decision was *State v. Natale*,¹⁴³ in which the New Jersey Supreme Court eliminated the presumptive term from New Jersey's sentencing

weight . . . to the skill of counsel, the policies of the prosecutor, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime.").

¹³⁶ *Id.* at 257.

¹³⁷ *See id.* at 259.

¹³⁸ *Booker*, 543 U.S. at 260.

¹³⁹ We infer appropriate review standards from related statutory language, the structure of the statute, and the 'sound administration of justice.' And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for 'unreasonableness.'

Id. at 260-61.

¹⁴⁰ *Id.* at 264.

¹⁴¹ *Id.* at 268.

¹⁴² *State v. Abdullah*, 184 N.J. 497 (2005); *State v. Franklin*, 184 N.J. 516 (2005); *State v. Natale*, 184 N.J. 458 (2005).

¹⁴³ *See Natale*, 184 N.J. at 466.

scheme and provided important bases for its two accompanying decisions in *State v. Franklin* and *State v. Abdullah*. In *Natale*, Michael Natale, after hearing from his girlfriend that she planned to return to her estranged husband, brutalized her with a series of beatings and other violent acts and nearly killed her.¹⁴⁴ Natale was indicted for a series of crimes, but ultimately only convicted of second-degree aggravated assault, third-degree terrorist threats, and third-degree criminal restraint.¹⁴⁵ Before sentencing, the trial court found four aggravating factors,¹⁴⁶ and based upon those findings, the Court sentenced Natale to nine years on the second-degree aggravated assault. Combined with his other convictions, Natale received an aggregate sentence of 14 years.¹⁴⁷ But under the New Jersey Early Release Act¹⁴⁸ (hereafter “NERA”), Natale was required to serve 85 percent of his second-degree aggravated assault conviction without parole eligibility.¹⁴⁹ After a series of appeals and remands, the Appellate Division eventually vacated the trial court’s sentences on grounds that the trial court could not impose sentences exceeding the presumptive terms based on the jury verdicts alone¹⁵⁰ for Natale’s offenses¹⁵¹ because the increased sentence was based on judicial fact-

¹⁴⁴ *Id.* at 466-67.

¹⁴⁵ *See id.* at 467-68.

¹⁴⁶ N.J. STAT. ANN. § 2C:44-1(a) (2005) (listing the four aggravating factors that the Court considered, and found, in imposing its sentence):

- (1) The nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner;
- (2) The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance;
- (3) The risk that the defendant will commit another offense;
-
- (9) The need for deterring the defendant and others from violating the law

¹⁴⁷ *See Natale*, 184 N.J. at 469.

¹⁴⁸ N.J. STAT. ANN. § 2C:43-7.2 (2005).

¹⁴⁹ *See Natale*, 184 N.J. at 469.

¹⁵⁰ *See id.* at 470 (citing generally N.J. STAT. ANN. § 2C:44-1(f) (“When imposing a sentence of imprisonment, the court ‘shall impose’ the presumptive term ‘unless preponderance of aggravating or mitigating factors, as set forth in [N.J.S.A. 2C:44-1] a and b., weighs in favor of a higher or lower term’ within the statutory range.”)).

¹⁵¹ N.J. STAT. ANN. § 2C:44-1(f) (2005) (listing seven years as the presumptive term for second-degree aggravated assault and four years as the presumptive term for both third-degree terroristic threats and third-degree criminal restraint).

findings of the four aforementioned aggravating factors, not jury findings.¹⁵² Thus, the Appellate Division held New Jersey's sentencing scheme to be unconstitutional because it permitted increases in the presumptive sentences based on judicial fact-finding of aggravating factors by a preponderance of the evidence rather than having a jury determine those facts beyond a reasonable doubt.¹⁵³ The New Jersey Supreme Court granted certification to hear issues on the constitutionality of judicial fact-finding that raises a sentence above the presumptive term.¹⁵⁴

Natale's principle argument to the New Jersey Supreme Court was that the presumptive terms in New Jersey's sentencing scheme were the true "statutory maximums" for Sixth Amendment purposes and that the aggravating factors upon which he was sentenced should have been submitted to a jury.¹⁵⁵ The State countered that the presumptive terms were not "statutory maximums" authorized by the jury's verdict and that judges have traditionally exercised discretion in sentencing (within the statutory range) without being restrained by the presumptive terms.¹⁵⁶ Following a discussion of *Apprendi*, *Blakely*, and *Booker*, the court clarified that the presumptive term was the "statutory maximum" for *Apprendi* purposes because the New Jersey Code mandated that the presumptive term was the maximum sentence that could be given based on a jury verdict or guilty plea and before any judicial fact-finding.¹⁵⁷ Because such a system of presumptive sentencing allowed sentencing beyond the "statutory maximum" based on judicial fact-finding, New Jersey's sentencing scheme violated *Apprendi*, *Blakely*, and *Booker* and hence the Sixth Amendment.¹⁵⁸ In light of this finding, the Court, to preserve the Code's goal of uniformity in sentencing, went on to hold that the proper remedy is severance of "offending provisions" (the ones dealing with the presumptive terms) because the Code provides for "a strong judicial role in sentencing" and hence intended judges, not juries, to impose uniform sentences.¹⁵⁹ The Court thus eliminated the presumptive term from New Jersey's sentencing scheme and made the "statutory maximum" (authorized by a jury verdict or facts

¹⁵² See *Natale*, 184 N.J. at 470.

¹⁵³ See *id.*

¹⁵⁴ See *id.* at 471.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 472.

¹⁵⁷ See *id.* at 484.

¹⁵⁸ See *Natale*, 184 N.J. at 484.

¹⁵⁹ See *id.* at 486.

admitted during a guilty plea) the top of the sentencing range for the crime charged.¹⁶⁰ The Court justified its remedy by positing that judges would still balance aggravating and mitigating factors, just no longer from a “fixed point of statutory [presumption],” and stated its confidence that judges would begin balancing aggravating and mitigating factors from the middle of the applicable sentencing range and ultimately arrive at a uniform and fair sentence.¹⁶¹

State v. Abdullah imposed a limitation on *Natale*.¹⁶² In *Abdullah*, the Court held that the imposition of consecutive sentences for murder and burglary did not violate the *Apprendi/Blakely* “statutory maximum” principle. Abdul Aleem Abdullah was indicted for multiple counts¹⁶³ arising out of the murder of his ex-girlfriend, whom he had discovered was involved in a relationship with his cousin.¹⁶⁴ Abdullah was convicted by a jury on all counts and, after a judge found four aggravating factors,¹⁶⁵ was sentenced to life imprisonment “with a thirty-year parole disqualifier on his murder conviction and to a consecutive ten-year prison term with a five-year parole disqualifier on one of the second-degree burglary convictions.”¹⁶⁶ Abdullah appealed, arguing that because there was no jury determination of the facts essential to imposing upon him the maximum term for each count of his sentence his Sixth Amendment right was violated pursuant to *Blakely*.¹⁶⁷ The Appellate Division affirmed the trial court’s ruling, denying Abdullah’s appeal based on three grounds: (1) the aggravating factors found by the trial court

¹⁶⁰ See *id.* at 487.

¹⁶¹ See *id.* at 488.

¹⁶² See generally *State v. Abdullah*, 184 N.J. 497, 514-15 (2005) (discussing how there is no jury fact-finding requirement per *Blakely* and *Yarborough* to impose consecutive sentences because the sentencing range is the maximum sentence for each offense added to every other offense).

¹⁶³ See *id.* at 500 (listing counts charged in the indictment as “murder N.J.S.A. 2C:11-3(a)(1), (2) (count one), . . . second-degree burglary, N.J.S.A. 2C:18-2 (counts two and three), third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (counts four and five), and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (counts six and seven).”).

¹⁶⁴ See *id.*

¹⁶⁵ *Id.* at 502 (“trial court identified four aggravating factors: ‘the nature and circumstances of the offense . . . including whether or not it was committed in an especially heinous, cruel, or depraved manner,’ N.J.S.A. 2C:44-1(a)(1); ‘the risk . . . that defendant will commit another offense,’ N.J.S.A. 2C:44-1(a)(3); the ‘extent’ and ‘seriousness’ of ‘defendant’s prior criminal record,’ N.J.S.A. 2C:44-1(a)(6); and ‘the need [to] deter[] . . . defendant and others from violating the law,’ N.J.S.A. 2C:44-1(a)(9).”).

¹⁶⁶ *Id.* at 502.

¹⁶⁷ See *id.* at 503.

arose out of Abdullah's prior convictions thus could be used to impose a penalty for burglary above the seven-year presumptive term; (2) imposing life imprisonment for murder did not violate *Blakely* because murder has no presumptive term under N.J. Stat. Ann. § 2C:44-1(f) which states the sentencing range for murder as thirty years to life imprisonment; and (3) Sixth Amendment rights under *Apprendi* and *Blakely* do not necessitate jury determinations of "facts necessary for the imposition of parole ineligibility or consecutive terms."¹⁶⁸

The New Jersey Supreme Court disagreed with the Appellate Division's conclusion, and stated that the sentencing court relied on the "heinous, cruel, or depraved nature of the crime" as a basis for increasing Abdullah's sentence for burglary above the presumptive term.¹⁶⁹ The problem was that this fact was not specifically found by a jury, and per *Natale*, only a jury finding would have justified increasing Abdullah's sentence as such. Therefore, the burglary conviction was remanded for re-sentencing with the requirement that the court articulate specific sentencing factors it considered, and their respective weights, in coming to its sentence.¹⁷⁰ With regard to Abdullah's murder conviction, the Court agreed with the Appellate Division that there was no presumptive term for murder in New Jersey's sentencing Code, and because of that absence, there was no "de facto ceiling" (as the presumptive term was for burglary) below life imprisonment for murder.¹⁷¹ Thus, the trial court was within its discretion to impose a term of life imprisonment based on its analysis of applicable sentencing factors, and did not violate Abdullah's Sixth Amendment rights.¹⁷²

Next, the Court upheld the trial court's imposition of a five-year period of parole ineligibility for Abdullah's second-degree burglary conviction "based upon facts neither admitted by defendant nor found by the jury" because, although the same sentencing factors are balanced in imposing consecutive sentences,¹⁷³ the Legislature did

¹⁶⁸ See *Abdullah*, 184 N.J. at 503-04.

¹⁶⁹ *Id.* at 505.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 507-08.

¹⁷² *Id.* at 508.

¹⁷³ See *State v. Stanton*, 176 N.J. 75, 91, 95-96 (2003) (holding that there was no federal or state constitutional barrier to judicial imposition of a mandatory minimum sentence based on judicial fact-findings); See also *Harris v. United States*, 536 U.S. 545, 568 (2002) (upholding the constitutionality of a statute authorizing a judge, based on judicial fact-findings, to impose a minimum term of imprisonment within the range sanctioned by the jury verdict); *McMillan v. Pennsylvania*, 477 U.S. 79, 84-

not intend those factors to be “elements of a crime, nor were they transformed into constitutional elements when the judge used them to justify imposing a parole disqualifier.”¹⁷⁴ Thus, N.J. Stat. Ann. § 2C:43-6(b) did not violate a defendant’s due process or jury trial rights, yet the Court still required that courts clearly lay out on the record the aggravating factors that substantially outweighed any mitigating factors.¹⁷⁵ Finally, the Court addressed the issue of Abdullah’s consecutive sentences for murder and burglary. Given that under the New Jersey sentencing scheme there was no presumption regarding concurrent sentences, the Court held that the maximum sentence authorized by the jury verdict was “the aggregate of sentences for multiple convictions,” meaning the sum of the maximum sentences for each offense.¹⁷⁶ Yet when imposing concurrent or consecutive sentences, the Court held that judges should state the reasons for their decisions based upon the criteria developed in *State v. Yarbough*¹⁷⁷ in order “to bring rationality and

86 (1986) (affirming the constitutionality of a Pennsylvania statute that authorized a judge to sentence a convicted felon to a five-year mandatory-minimum term).

¹⁷⁴ See *Abdullah*, 184 N.J. at 511-12.

¹⁷⁵ See *id.* at 511.

¹⁷⁶ *Id.* at 513-14.

¹⁷⁷ *State v. Miller*, 108 N.J. 112, 121 (1987) (stating the criteria to be followed by courts “in exercising discretion in deciding whether to impose consecutive or concurrent sentences when a defendant is convicted of multiple offenses” are found in *Yarbough*. The *Yarbough* factors are as follows:

- (1) there can be no free crimes in a system for which the punishment shall fit the crime;
- (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
- (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
 - (a) the crimes and their objectives were predominantly independent of each other;
 - (b) the crimes involved separate acts of violence or threats of violence;
 - (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
 - (d) any of the crimes involved multiple victims;
 - (e) the convictions for which the sentences are to be imposed are numerous;
- (4) there should be no double counting of aggravating factors;
- (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and
- (6) there should be an overall outer limit on the accumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term, if eligible) that could be imposed for the two most serious offenses.

Yarbough, 100 N.J. at 643-44.

uniformity” to the sentencing process.¹⁷⁸ Because the trial court imposed consecutive sentences on the basis of separate guilty jury verdicts for each of Abdullah’s offenses, which put Abdullah on notice that he could be potentially sentenced to the sum of the maximum possible sentences for all of his crimes, the trial court’s imposition of a consecutive sentence did not violate *Apprendi* or *Blakely* and hence did not violate the Sixth Amendment.¹⁷⁹

In *State v. Franklin*, the New Jersey Supreme Court overturned a sentence under the Graves Act.¹⁸⁰ Defendant Franklin killed the lover of his estranged wife, threatened to kill his wife immediately thereafter, tied her and his children up, and was about to kill them when his wife escaped and dialed 911.¹⁸¹ Franklin was indicted and acquitted of all gun-related offenses with which he was charged, but was convicted of second-degree passion/provocation manslaughter, which had a sentencing range of five-to-ten years.¹⁸² The trial court judge at sentencing found by a preponderance of the evidence, despite the jury not finding such, that Franklin did possess a gun when he committed his crime, making it a Graves Act offense and subjecting Franklin to a higher sentence. The Graves Act makes

¹⁷⁸ *Abdullah*, 184 N.J. at 513.

¹⁷⁹ *See id.* at 514.

¹⁸⁰ The Graves Act, N.J. STAT. ANN. § 2C:43-6 (2005), states, in pertinent part, that: A person who has been convicted under 2C:39-4a. of possession of a firearm with intent to use it against the person of another, or of a crime under any of the following sections: 2C:11-3, 2C:11-4, 2C:12-1b., 2C:13-1, 2C:14-2a., 2C:14-3a., 2C:15-1, 2C:18-2, 2C:29-5, who, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a firearm as defined in 2C:39-1f., shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole. The minimum terms established by this section shall not prevent the court from imposing presumptive terms of imprisonment pursuant to 2C:44-1f.(1) except in cases of crimes of the fourth degree.

A person who has been convicted of an offense enumerated by this subsection and who used or possessed a firearm during its commission, attempted commission or flight therefrom and who has been previously convicted of an offense involving the use or possession of a firearm as defined in 2C:44-3d., shall be sentenced by the court to an extended term as authorized by 2C:43-7c., notwithstanding that extended terms are ordinarily discretionary with the court.

Id.

¹⁸¹ *See State v. Franklin*, 184 N.J. 516, 521-23 (2005).

¹⁸² *See id.* at 523-25.

“possession of a firearm” while committing certain designated offenses a sentencing factor. If the judge at sentencing finds this factor, then the judge is obligated to impose a parole ineligibility term for first-time offenders. For second-time offenders the judge must impose both a parole disqualifier and sentence that defendant to an extended term beyond the statutory maximum.¹⁸³ Thus, the judge sentenced Franklin to a 20-year term based upon that obligation, the fact that this was his second Graves Act conviction, and other aggravating factors found.¹⁸⁴ Franklin appealed, arguing that his possession or use of a gun (which was found by the judge) was the functional equivalent of an element of a greater crime, and thus needed to be submitted to a jury and proven beyond a reasonable doubt.¹⁸⁵

The New Jersey Supreme Court began its opinion by discussing the mechanics of the Graves Act, concluding that through the Act, the New Jersey Legislature essentially created a greater crime of “first-degree passion provocation manslaughter while armed.” Yet instead of labeling gun possession as one of the essential elements of that crime, the Legislature made it a sentencing factor to be found by a judge rather than a jury.¹⁸⁶ Based on the fundamental principle that all elements of an offense must be charged in an indictment and proven to a jury beyond a reasonable doubt, and in light of the *Apprendi* holding distinguishing sentencing factors from elements of a crime,¹⁸⁷ the Court held the second-offender provision of the Graves Act to be a “carbon copy of the hate crime statute declared unconstitutional in *Apprendi*.”¹⁸⁸ The Graves Act essentially allowed judicial fact-finding, by a preponderance of evidence, to turn a second-degree crime into a first-degree crime.¹⁸⁹ Thus, if the State

¹⁸³ See *id.* at 529-530.

¹⁸⁴ The trial court identified four aggravating factors: ‘the risk that the defendant will commit another offense,’ . . . ‘the extent of the defendant’s prior criminal record’ . . . ‘the need for deterring the defendant and others from violating the law’ . . . and ‘defendant committed the offense against a person who he knew or should have known was 60 years of age or older. . . .’

Id. at 525.

¹⁸⁵ See *id.* at 527.

¹⁸⁶ See *id.* at 531.

¹⁸⁷ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

¹⁸⁸ *State v. Franklin*, 184 N.J. 516, 533 (2005).

¹⁸⁹ See *id.*

desired to extend Franklin's sentence beyond the statutory maximum for the crime for which he was convicted, it would have had to allege gun possession in the indictment (thereby charging a higher offense) and have it proven beyond a reasonable doubt.¹⁹⁰ The State's argument that, pursuant to the judge's finding, it was "implicit in the record" that Franklin possessed a gun, was rejected based on failure to allege possession in the indictment; in the Court's words, "[e]ven overwhelming evidence of guilt is not a substitute for failing to charge an element of an offense."¹⁹¹

VI. Analysis of Natale, Franklin and Abdullah on the New Jersey Sentencing Law—Is the Legislative Intent Behind the New Jersey Sentencing Code Upheld or Undermined?

Natale, Franklin, and Abdullah are essential to analyzing the New Jersey Code because while applying the constitutional sentencing law articulated in *Apprendi, Blakely* and *Booker* to eliminate constitutional defects in the Code, *Natale, Franklin, and Abdullah* undermine the legislative intent behind the Code, particularly the goal to eliminate arbitrary sentencing. The New Jersey trilogy's proper applications of the principles laid down in *Apprendi, Blakely* and *Booker* begs a deeper discussion of whether the trilogy is deferential to New Jersey state sentencing law and what *Natale, Franklin, and Abdullah* will mean for future New Jersey sentencing law. Ultimately, *Natale, Franklin* and *Abdullah* properly apply federal constitutional sentencing law, yet they undermine the legislative intent behind the New Jersey Sentencing Code by (1) creating conditions that foster arbitrary sentencing, (2) delegating more power to judges than the Code intended, and (3) effectively allowing judges to treat every crime as they would murder when sentencing within statutory ranges.

A. *The New Jersey Trilogy is a Proper Application of the Principles Laid Down in Apprendi, Blakely, and Booker.*

Natale, Franklin, and Abdullah are each proper applications of the relevant portions of the principles laid down in *Apprendi, Blakely, and Booker*. *Franklin* is a straightforward application of *Apprendi* to another New Jersey hate crime statute. Both cases struck down New Jersey sentencing statutes that, if left intact, subjected the respective

¹⁹⁰ See *id.* at 534.

¹⁹¹ *Id.* at 535.

defendants to sentences beyond "statutory maximums" on the basis of judicial fact-finding by a preponderance of the evidence.¹⁹² In *Apprendi*, the Court struck down New Jersey's hate crime statute¹⁹³ because it allowed judges to impose sentences for a particular crime beyond the New Jersey statutory maximum sentence through fact-finding under a lesser standard of proof (preponderance of the evidence) than the beyond a reasonable doubt standard required initially for conviction.¹⁹⁴ The Court found that judicial fact-finding was permissible in contexts where such findings can possibly increase a defendant's sentence beyond the statutory maximum. The Court articulated that the Fourteenth Amendment's prohibition of any deprivation of liberty without due process of law and the Sixth Amendment's trial-by-jury right, when read together, entitle a defendant to a jury determination of every element of the crime charged beyond a reasonable doubt.¹⁹⁵ New Jersey's "hate crime" law permitted a judge to increase a sentence for any particular crime if he found by a preponderance of evidence that the crime was committed with the purpose to intimidate on the basis of race, color, creed, handicap, etc. even if such intent was not alleged to the jury during trial.¹⁹⁶ In accordance with the Court's holding, that statute had to be invalidated.

Similarly, in *Franklin*, Justice Albin's majority opinion struck down New Jersey's Graves Act because it allowed the judge to sentence Franklin to 20 years when the maximum statutory sentence for his crime was 10 years, based on a judicial finding, by a preponderance of the evidence, that Franklin possessed a gun with intent to intimidate.¹⁹⁷ Justice Albin observed the similarity between the statutes struck down in *Apprendi* and *Franklin*. He stated, "in all relevant respects, the second-offender provision of the Graves Act is a carbon copy of the hate crime statute declared unconstitutional in *Apprendi*," because, like the hate crime statute in *Apprendi*, the Graves Act permitted judicial preponderance of the evidence fact-finding "to turn a second-degree offense into a first-degree offense" and

¹⁹² See *Franklin*, 184 N.J. at 540; See *Apprendi v. New Jersey*, 530 U.S. 466, 491-92 (2000).

¹⁹³ See *Apprendi*, 530 U.S. at 490.

¹⁹⁴ See *Chiu*, *supra* note 24, at 1322.

¹⁹⁵ *Apprendi*, 530 U.S. at 477 (citing *In Re Winship*, 397 U.S. 358, 364 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.")).

¹⁹⁶ See *Apprendi*, 530 U.S. at 491-492.

¹⁹⁷ See *Franklin*, 184 N.J. at 532-33.

“possession of a gun under the Graves Act was ‘the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.’”¹⁹⁸ *Apprendi* and *Franklin* assure that a defendant’s ultimate sentence will not be based upon the discretion of a judge to find more facts, which may or may not have been proven at trial by jury, and limit sentencing to those facts that have been proven to a jury beyond a reasonable doubt. Also, facts which do not have the potential to increase punishment for that crime beyond the maximum sentence prescribed by the legislature may be found by a judge.

In *Natale*, the New Jersey Supreme Court relied upon the U.S. Supreme Court’s holding in *Booker*¹⁹⁹ and struck down New Jersey’s presumptive term because the New Jersey Sentencing Code contained mandatory judicial fact-finding provisions which were similar to the Guideline provisions invalidated in *Booker*.²⁰⁰ The Court in *Natale*, insofar as its application of constitutional sentencing law

¹⁹⁸ *Id.* (citing *Apprendi*, 530 U.S. at 494).

¹⁹⁹ *United States v. Booker*, 543 U.S. 220, 227 (2005) (“the Court concludes that in light of this [*Blakely*] holding, two provisions of the *Sentencing Reform Act of 1984* (SRA) that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent.”); *id.* at 233 (“As the dissenting opinions in *Blakely* recognized, there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case.”); *id.* at 235 (“*Booker*’s case illustrates the mandatory nature of the Guidelines. . . . Under these facts, the Guidelines . . . authorized a sentence of 210-262 months. . . . *Booker*’s actual sentence, however, was 360 months. . . . To reach this sentence, the judge found facts beyond those found by the jury.”); *id.* at 234 (“At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. Were this the case, there would be no *Apprendi* problem. Importantly, however, departures are not available in every case, and in fact are unavailable in most.”); *id.* at 237-39 (“In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance. . . . Regardless of whether the legal basis of the accusation is in a statute or guidelines promulgated by an independent commission, the principles behind the jury trial right are equally applicable.”); *see* *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (“We conclude that in creating the Sentencing Commission . . . Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches. . . . Accordingly, we hold the Act [SRA] is constitutional.”); *Booker*, 543 U.S. at 241 (“ . . . the Commission’s authority to identify the facts relevant to sentencing decisions and to determine the impact of such facts on federal sentences is precisely the same whether one labels such facts ‘sentencing factors’ or ‘elements’ of crimes.”); *Id.* at 244 (“But the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the *Sixth Amendment*—has always outweighed the interest in concluding trials swiftly.”).

²⁰⁰ *See* *State v. Natale*, 184 N.J. 458, 484 (2005).

was concerned (and not the remedy it chose to correct the constitutional defect it found), correctly found that a central provision of the New Jersey Sentencing Code violated *Apprendi* and struck the provision accordingly. Because the New Jersey Legislature mandated that before any *additional* fact-finding, the maximum sentence that could be imposed was the presumptive term, the Court correctly identified the presumptive term as the “statutory maximum” under *Blakely*.²⁰¹ Since judges were allowed to sentence above the presumptive term based on their findings of aggravating or mitigating factors by a preponderance of the evidence,²⁰² the presumptive term violated *Apprendi*. The New Jersey scheme could not continue to operate in such an unconstitutional manner. In striking the presumptive term, the Court correctly applied *Apprendi* and *Blakely* so as to reinforce the principle that a defendant cannot constitutionally receive sentences above the “statutory maximum” based on facts not found beyond a reasonable doubt, thus ridding the Code of a constitutional defect. An alternative to striking the presumptive term, of course, would have been to substitute jurors for judges in determining the existence of aggravating factors. However, the Court rejected this solution by citing to similar reasoning used in *Booker* that such fact-finding by jurors “would lead to separate, costly, unwieldy, and perhaps protracted penalty trials at the conclusion of guilt-phase trials.”²⁰³

Abdullah is another proper application of *Apprendi* and *Blakely* pertaining to the crime of murder. The Court in *Abdullah* held that sentencing a defendant convicted of murder to a term of life imprisonment did not violate *Apprendi* or *Blakely* because the Code specifically exempted murder from its presumptive term sentencing scheme.²⁰⁴ As long as the judge balances sentencing factors within the statutory range (which in New Jersey is thirty years to life imprisonment) and imposes sentence accordingly, the sentence does not violate a defendant’s Sixth Amendment jury trial right. Therefore, the Court correctly found that there was no violation of *Apprendi* or *Blakely* because the defendant was sentenced within the applicable statutory range for murder based on its consideration of the applicable sentencing factors.²⁰⁵ The Court also established that the “statutory maximum” was prescribed high because the legislature

²⁰¹ See *Blakely v. Washington*, 542 U.S. 296 (2004).

²⁰² See *Natale*, 184 N.J. at 484.

²⁰³ *Id.* at 487 (citing *Booker*, 543 U.S. at 252-54).

²⁰⁴ See *State v. Abdullah*, 184 N.J. 497, 507 (2005).

²⁰⁵ See *id.* at 512.

intended to punish murder harshly. Finally, the Court found no *Blakely* violation in imposing consecutive sentences for murder and burglary. The “maximum potential sentence authorized by the jury verdict is the aggregate of sentences for multiple convictions” because every criminal committing multiple offenses knows, based on the jury’s findings, that he is risking a sentence exceeding the statutory maximum for just one crime.²⁰⁶ Unlike a “trial court that engages in fact-finding as the basis for exceeding the sentence authorized by a jury’s verdict,” a court imposing consecutive sentences supported by the “jury’s separate guilty verdicts for each offense” is sentencing based on judicial fact-finding within the statutory maximum for each crime. Therefore, imposing consecutive or concurrent sentences as such does not violate *Apprendi* or *Blakely* and comports with constitutional sentencing law.

B. Despite Eliminating the Constitutional Defect in the Code, the New Jersey Trilogy’s Remedy Undermines the Legislative Intent Behind the Code in Effect by Bringing About Results That Foster Arbitrary Sentencing

Paradoxically, the New Jersey trilogy correctly applies Supreme Court sentencing law to sever constitutional defects. It also brings about the precise results which the New Jersey Legislature sought to avoid by implementing the Code. The particular purpose of the Code which the New Jersey trilogy purports to uphold, yet in actuality damages, is “to safeguard offenders against excessive, disproportionate or arbitrary punishment.”²⁰⁷ The intent in passing the federal SRA also includes that same purpose and a thorough meaning of legislative intent to eliminate arbitrary sentencing can be developed by examining the SRA’s history. The Federal Sentencing Commission recognized one of Congress’ goals in passing the SRA (which ultimately lead to the Commission promulgating the Guidelines) was seeking “uniformity in sentencing by narrowing the wide disparity in sentences” imposed by different courts for the same crimes by similar defendants. In addition, it acknowledged Congress’ objective in seeking proportionality (or fairness) by giving defendants appropriately different sentences depending upon how severe their criminal conduct was.²⁰⁸ In other words, the SRA was not passed so

²⁰⁶ See *id.* at 514.

²⁰⁷ N.J. STAT. ANN. § 2C:1-2(4) (2005).

²⁰⁸ Sanderford, *supra* note 4, at 746; see also Nancy Gertner, *Distinguished Jurist-In-Residence Lecture: Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569,

that every defendant who committed a certain crime received the *same* sentence, but rather so that defendants who committed the same crime had their sentences based on the substance of their conduct in committing that crime within a stated sentencing range for that particular crime.²⁰⁹ Thus, in theory, the goal was to avoid having a sentence for a particular defendant, based on the same facts, be extremely high if “Judge A” sentenced him, yet extremely low if “Judge B” sentenced him. Similarly, the New Jersey Legislature’s creation of an offense-based sentencing code based on presumptive terms that judges can sentence outside of only after finding statutorily articulated aggravating or mitigating factors limits judicial discretion. This avoids arbitrary sentences and imposes sentences based on the provisions expressed by the Legislature with regard to each offense.²¹⁰

Natale is the most problematic New Jersey case in upholding “uniformity” and eliminating arbitrary sentencing. Although the New Jersey Supreme Court correctly recognized the *Apprendi* problem inherent in the Code’s presumptive term sentencing system,²¹¹ it remedied the constitutional defect in the Code by striking the presumptive term which produced non-uniformity in sentences.²¹² This was exactly the type of effect that the Code intended to eliminate. Prior to the Code, judges had the power to sentence for a particular offense anywhere within the statutory range based upon various aggravating or mitigating factors previously identified by judges—the Legislature had not yet established a consistent framework for curtailing such judicial discretion either.²¹³ Thus, it was possible for two different judges hearing the same case to impose sentences at completely different ends of the statutory range because there was no determinate legislative scheme to prevent such arbitrary decision-making. Consequently, the Code was enacted in order to

574 (“the Commission would use the approach of ‘limited retribution’ to set the maximum and minimum sentences for offenses and to rank punishments depending on the characteristics of the offense and offenders.”).

²⁰⁹ See *Booker*, 543 U.S. at 251 (“Second, Congress’ basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction.”).

²¹⁰ See *State v. Roth*, 95 N.J. 334, 354 (1984) (“This Criminal Code is intended to make sentencing more definitive. . . . It is designed to reduce the possibility of one judge giving a stiff sentence and another a light sentence for similar crimes.” (Statement of Gov. Byrne, August 10, 1978) (emphasis supplied)).

²¹¹ See discussion *supra* Part VI(A).

²¹² See *State v. Natale*, 184 N.J. 458, 478 (2005).

²¹³ See *State v. Maguire*, 84 N.J. 508, 530-31 (1980).

make sentencing more determinate vis-à-vis an offense-based determinate scheme rather than rely on judges simply balancing defendant's need for rehabilitation against the necessity of punishment.

In eliminating the presumptive term, the Court in *Natale* also effectively eliminated much of the determinateness the Code brought to sentencing and largely returned New Jersey sentencing to its pre-1978 form. The Court's reasoning as to why eliminating the presumptive term promotes uniformity in sentencing is flawed in several respects. The Court first bases its decision to sever the presumptive term on the fact that the Code provides for a "strong judicial role in sentencing"²¹⁴ and "delegates to judges, not juries, the consideration of aggravating [and mitigating] factors for the purposes of imposing fair and uniform sentences."²¹⁵ Although the Code may provide for a judicial role in sentencing, the Legislature had in mind a *particular* type of judicial role when it enacted the Code, namely, one in which sentencing was offense-based and largely determined by having judges begin finding legislatively prescribed sentencing factors from a fixed statutory point and imposing sentences accordingly.²¹⁶

The elimination of the presumptive term completely undermines the judicial role and effectively gives judges much of their pre-Code discretion. There is no longer any fixed point from which New Jersey judges must begin their sentencing analysis. Therefore it appears that a judge is free to sentence a defendant anywhere within the statutory range when they properly find the aggravating or mitigating factors prescribed by the legislature. Additionally, since there is no fixed point from which a judge must begin his fact-finding, problems related to the restraint of judges and legislatively prescribed aggravating or mitigating factors remain. Hypothetically, one judge may choose to begin his balancing near the bottom of the statutory range, while another may choose to begin from the middle. Assuming that both judges found the same sentencing factors and gave them the same weight, the sentences imposed by each would be largely dissimilar based simply on each judge's arbitrary decision as to where to begin fact-finding. Prior to the Code, judicial fact-finding at sentencing was specifically premised on the notion of rehabilitation and parole—judges balanced defendants' need for rehabilitation against the need for

²¹⁴ *Roth*, 95 N.J. at 352

²¹⁵ *Natale*, 184 N.J. at 486.

²¹⁶ *See supra* note 53.

punishment.²¹⁷ Uncontrolled judicial discretion in formulating sentences was the primary problem. Although New Jersey's sentencing scheme is now an offense-based system rather than a rehabilitation-based system (despite New Jersey's retention of the possibility of parole, unlike the federal system), *Natale* has to an extent re-created the pre-Code problem of allowing judges to have uncontrolled discretion to balance facts in sentencing. Thus, the pre-Code problem of judges sentencing arbitrarily is still very much alive.

The Court based its decision to strike the presumptive term on the following rationale:

Although judges will continue to balance the aggravating and mitigating factors, they will no longer be *required* to do so from the fixed point of a statutory presumption. We suspect that many, if not most, judges will pick the middle of the sentencing range as a logical starting point for the balancing process and decide that if the aggravating and mitigating factors are in equipoise, the midpoint will be an appropriate sentence. . . . Although no inflexible rule applies, reason suggests that when the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range. . . . We are confident the judge's obligation to justify the sentence by referencing the mitigating and aggravating factors will continue to bring rationality to the process and minimize disparate sentencing.²¹⁸

In other words, the Court chose to remedy a violation of the constitutional rule from *Apprendi* (which was intended to prevent *judicial* abuses of a defendant's Sixth Amendment trial-by-jury right that came about when judges imposed higher sentences than constitutionally acceptable) by effectively giving itself sentencing discretion that had been previously expressly eliminated by the Legislature. In essence, the Court's basis for this decision was simply that it believed that judges would not take advantage of the new system and thus would not sentence arbitrarily.

It appears illogical and impractical to rely on mere speculation and faith that judges will simply begin their sentencing determinations from the former presumptive terms. Since they are not required to follow a sentencing regime, it is likely that unrestrained sentencing within the statutory range (so long as the judge properly finds legislatively prescribed factors) will result in

²¹⁷ *Id.*

²¹⁸ *Natale*, 184 N.J. at 488.

arbitrarily imposed sentencing. The overall reason why the Code was enacted was because legislatures could not trust judges, with virtually unrestrained discretion, to not sentence arbitrarily. Although there are no existing studies which have statistically analyzed the effects of the New Jersey Code on judges, an analogous federal study reveals that judicial compliance with the Guidelines post-*Booker* has markedly declined.²¹⁹ Although the Code is a state law statute and the Guidelines are federal law statutory enactment, the pre-*Natale* presumptive term Code is analogous to the pre-*Booker* mandatory Guidelines in that both are former mandatory sentencing enactments which courts believe judges will continue to utilize in sentencing. Based upon the post-*Booker* compliance trends, there is not much hope that New Jersey judges will continue to sentence beginning from the former presumptive terms simply because it was previously mandated to be the logical starting point for beginning the balancing process. Finally, appellate review of sentences under the Code²²⁰ is unavailing. The arbitrary sentencing problems remains since the appellate courts are unable to substitute their own judgment for that of the trial court when the balancing the trial court judge performed

²¹⁹ For a statistical analysis of post-*Booker* compliance with the guidelines, see Frank O. Bowman III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal System After Booker*, 43 *Houston L. Rev.* 279, 298 (2006) (observing that following *Booker* “the percentage of cases sentenced within range dropped in every circuit. . . . Eight of the twelve circuits experienced declines in the percentage of sentences within range greater than the national average.”); (“Only the relatively modes declines in the case-rich Fifth, Tenth, and Eleventh held the overall national rate of within-guidelines sentences above 61%.”) *Id.*

The district data show even greater variation in responses to *Booker*. More than 90% of all districts reported lower percentages of sentences within range after *Booker*, but guidelines compliance in a few districts actually went up. Among the vast majority of districts in which compliance declined, some experience only minor drops, but in others the change was dramatic.

Id. at 19.

²²⁰ The Court did impose a check on the traditional role of the judge in the form of appellate review standard of reasonableness. *Natale*, 184 N.J. at 488 (2005) (“The touchstone is that the sentence must be a reasonable one in light of all the relevant factors considered by the court.” . . . “Trial judges still must identify the aggravating and mitigating factors and balance them to arrive at a fair sentence.”). But the Court stated that appellate courts would be “bound to affirm a sentence, even if [they] would have arrived at a different result, as long as the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record.” *Id.* at 489 (citing *State v. Johnson*, 117 N.J. 10, 15 (1989)). *But see* Chiu, *supra* note 24, at 1339 (citing *United States v. Booker*, 543 U.S. 220, 303 (2005) (Scalia, J. dissenting) (criticizing the majority’s remedial decision to “rescue from nullification a statutory scheme designed to eliminate discretionary sentencing [by] discarding the provisions that eliminate discretionary sentencing” as ironic).

was supported by competent credible evidence in the record. Thus, *Natale* undermines the Code's intent to eliminate arbitrary sentencing because it does not solve the problem of different judges being able to potentially impose highly disparate sentences upon the same facts and offender.

Abdullah is important to discuss in analyzing how *Natale* does not promote the elimination of arbitrary sentencing. *Abdullah* illustrates how the New Jersey Supreme Court's remedy in *Natale* effectively allows judges to sentence under the Code as if every crime were murder. By holding that since there is no presumptive term for murder a judge may sentence anywhere within the applicable statutory range based on sentencing factors,²²¹ the New Jersey Supreme Court essentially stated that (assuming a jury verdict has been rendered and the applicable statutory range is facilitated) a judicially imposed sentence based on fact-finding by a preponderance of evidence anywhere within the statutory maximum gives adequate notice to defendants accused of murder of their sentences.²²² Assuming no appeal by a defendant, such a sentence, as long as it met such conditions, would be permissible in that it was a discretionary decision by a judge based upon weighing sentencing factors articulated by legislative sentencing schemes and would be in line with legislative intent in punishing murder.

The Court's reasoning in *Abdullah* is in line with the legislative intent behind the Code in punishing murder because the Court gave deference to the legislature's express choices to allow judges to treat the crime of murder more harshly and give judges more sentencing discretion. First, the Code defined the crime of murder very broadly in order to "include not only conduct formerly classified as first degree murder . . . but also much of what was formerly termed second degree murder."²²³ The Court in *Abdullah*, in not finding any *Apprendi*, *Blakely* or *Booker* violations in the Code's sentencing provisions for murder, reiterates that the legislature specifically exempts murder from the presumptive sentencing scheme.²²⁴ The fact that the Court gave complete deference to this choice

²²¹ See *State v. Abdullah*, 184 N.J. 497, 507-08 (2005).

²²² [A]n indeterminate sentencing 'system that says the judge may punish burglary with 10 to 40 years' is constitutionally permissible because in such a system 'every burglar knows he is risking 40 years in jail.' Under such a system, a judge may 'rule on those facts he deems important to the exercise of his sentencing discretion' within the statutory range.

Id. at 508 (citing *Blakely v. Washington*, 542 U.S. 296, 309 (2004)).

²²³ *State v. Maguire*, 84 N.J. 508, 514 (1980).

²²⁴ See *supra* note 171.

demonstrates its premise that murder is to be treated harshly and that judicial discretion in sentencing murderers anywhere from thirty years to life imprisonment.²²⁵ This discretion upholds the Code's purposes of punishment, deterrence, and insuring the public safety.²²⁶

The original draft of the 1978 bill for the Code eliminated both the death penalty and life imprisonment as available punishments for murder, but this underwent extensive amendments before its final approval, and ultimately the enacted version retained life imprisonment as an available punishment.²²⁷ The fact that the "proposed abolition of life imprisonment as an available punishment for murder was considered and rejected by the Legislature"²²⁸ demonstrates clear intent to punish murder harshly and allow wide discretion in sentencing anywhere from thirty years up to life imprisonment. Moreover, the Code and a death penalty bill were both passed in the summer of 1978, and although the latter was vetoed by the governor in October of that same year. The proximity of the initial passing of both bills is noteworthy because "it would be incongruous for a Legislature favoring the reinstatement of the death penalty to enact a new Penal Code that reduces the prison sentence for murder."²²⁹

Abdullah's outcome is distinguishable from that of *Natale* in that the defendant in *Abdullah* was charged with murder, whereas in *Natale* there was no such charge against the defendant.²³⁰ *Abdullah* does not present a problem in terms of upholding the legislative intent behind the Code because the legislature had specifically exempted murder from presumptive term sentencing and made the statutory range for that crime very wide (thirty years to life imprisonment) in order to punish it harshly.²³¹ Thus, there was no *Apprendi* or *Blakely* violation if the judge sentences murder anywhere within the statutory range of thirty years to life imprisonment because every murderer knows he is risking life imprisonment.²³² Although the Code drafters specifically prescribed murder as an exception from presumptive term sentencing, the Court in *Natale*, in striking

²²⁵ See N.J. STAT. ANN. § 2C:11-3(b) (2005).

²²⁶ See §§ 2C:1-2(1), (3), and (6).

²²⁷ *Maguire*, 84 N.J. at 522-23.

²²⁸ *Id.* at 523.

²²⁹ *Id.* at 521 (1980) (citing *State v. Hubbard*, 176 N.J. Super. 174 (Resent. Panel 1980)).

²³⁰ See *supra* notes 145 and 163.

²³¹ See *State v. Abdullah*, 184 N.J. 497, 507 (2005).

²³² *Id.* at 508.

the presumptive term altogether, has essentially allowed judges to punish every crime as they would murder. So long as the judge now sentences within the applicable statutory range for the offense at issue, the sentence is permissible and the appellate courts are bound to affirm it "as long as the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record."²³³ Unlike murder, however, not all crimes are violent crimes, and not all crimes have a history of being punished as harshly as murder. The legislature never gave judges the power to sentence other crimes the way it sentences murder. Thus, *Natale's* striking of the presumptive term completely undermines the intent of the Code because judges are essentially now allowed to sentence indeterminately within the statutory range, which was a problem the Code was created to remedy.

VII. Conclusion

The New Jersey Supreme Court's *Natale*, *Franklin* and *Abdullah* criminal sentencing trilogy has remedied a constitutional defect in the New Jersey Sentencing Code yet has simultaneously undermined the intent of the Code to eliminate arbitrary sentencing and has given judges much of the power they possessed before the Code's enactment. These New Jersey cases are beneficial in that they recognize violations of constitutional sentencing law that impinge upon defendant's Sixth Amendment trial-by-jury rights and so eliminate those violations accordingly. The detriment of the New Jersey trilogy lies, however, in the remedy the New Jersey Supreme Court has chosen to fix the Code's constitutional defects: elimination of presumptive term sentencing. Not only has the Court's remedy undermined the over-arching goal of the Code (eliminating arbitrary sentencing), but it has opened the door to more disparity in sentences imposed from judge to judge and less predictability as to the sentence within the statutory range that a convicted defendant will receive. Perhaps more distressing is that the judge, rather than the legislature, seems to be gaining a more prominent role in formulating sentences constrained merely by the legislatively prescribed sentencing factors that they may consider. Judges potentially have the power to sentence within the statutory range for every crime as they would for murder. This is an outcome that was

²³³ *State v. Natale*, 184 N.J. 458, 489 (2005) (citing *State v. O'Donnell*, 117 N.J. 210, 215 (1989)).

not intended by the legislature and not desirable for New Jersey in light of the sentencing reform movement of the late twentieth century. Ultimately, New Jersey will need tighter legislative controls on judicial discretion, despite the elimination of the presumptive term, if it wishes to eliminate the problems that the Code originally tried to eliminate.