Wyoming Law Review

Volume 5 | Number 1 Article 9

January 2005

Criminal Law - The Sixth Amendment Right to Trial by Jury: A Constitutional Guarantee versus the Demise of Sentencing Guidelines

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CRIMINAL LAW – The Sixth Amendment Right to Trial by Jury: A Constitutional Guarantee versus the Demise of Sentencing Guidelines, *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

INTRODUCTION

In 1998, Ralph Howard Blakely, Jr. abducted his wife, Yolanda, from their home in Grant County, Washington.[1] He bound her with duct tape, held her at knifepoint, and forced her into a wooden box in his pickup truck.[2] Blakely also ordered his thirteen-year-old son, Ralphy, to follow in another car, threatening to harm Yolanda if Ralphy did not follow his orders.[3] Ralphy escaped and Blakely was arrested when he showed up at a friend's house in Montana.[4] The State of Washington charged Blakely with first-degree kidnapping, but a plea agreement was reached, reducing the charge to second-degree kidnapping involving domestic violence and use of a firearm.[5] Blakely entered a guilty plea, admitting to second-degree kidnapping, domestic violence, and use of a firearm.[6] In Washington, second-degree kidnapping is a class B felony, for which the punishment cannot exceed ten years.[7] The range that a sentencing judge can impose is further limited by Washington's Sentencing Reform Act, which specifies a standard range of forty-nine to fifty-three months for a second-degree kidnapping with a firearm.[8] A judge may increase the sentence above the standard range if there are "substantial and compelling reasons justifying an exceptional sentence."[9] However, the exceptional sentence can be considered only if the judge "takes into account factors other than those which are used in computing the standard range sentence for the offense."[10]

At Blakely's sentencing hearing, the State recommended a sentence within the standard range of forty-nine to fifty-three months, but the sentenc-

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1. Blakely v. Washington, 124 S. Ct. 2531, 2534 (2004).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 2534-35. Blakely also admitted to second-degree assault involving domestic violence. *Id.* at 2535 n.2. The fourteen-month sentence ran concurrently and was not a relevant issue in the Court's opinion in *Blakely*. *Id.*
7. WASH. REV. CODE ANN. § 9A.40.030(3) (West 2000) (second degree kidnapping is a class B felony); *id.* § 9A.20.021(1)(b) (punishment for a class B felony cannot exceed ten years).
8. *Id.* § 9.94A.320 (West 2000) (idenifying a seriousness level V for second-degree kidnapping); *id.* § 9.94A.360 (calculating the offender score based on a sum of points accured); *id.* §§ 9.94A.310(1), 9.94A.310(3)(b) (specifying the sentence for an offense of second-degree kidnapping with a firearm is within the "standard range" of forty-nine to fifty-three months).
9. *Blakely*, 124 S. Ct. at 2535 (citing WASH. REV. CODE ANN. § 9.94A.120(2) (West 2000)).
10. State v. Gore, 21 P.3d 262, 277 (Wash. 2001).

ing judge rejected this recommendation and imposed an exceptional sentence of ninety months.[11] The judge justified this thirty-seven-month increase beyond the standard maximum on the ground that Blakely had acted with "deliberate cruelty," which is one of the aggravating factors listed in the sentencing statute for departure from the standard sentencing range in domestic-violence cases.[12] Blakely appealed, arguing he was deprived of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.[13] He focused on the United States Supreme Court decision in *Apprendi v. New Jersey*, which provided that a sentence above the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.[14] Conversely, the State argued there was no *Apprendi* violation because the relevant statutory maximum was the ten-year maximum for class B felonies under Washington law and not the fifty-three months defined by the Washington Sentencing Reform Act.[15] The Court of Appeals of Washington affirmed the sentencing judge's exceptional sentence, stating *Apprendi* "does not apply to factual determinations that support reasons for exceptional sentences upward."[16] The Washington Supreme Court denied discretionary review.[17] The United States Supreme Court granted certiorari.[18] In a 5-4 decision, the Supreme Court reversed the decision of the Court of Appeals of Washington, holding the exceptional sentence imposed by the sentencing judge violated Blakely's Sixth Amendment right to trial by jury.[19]

This case note will explore United States Supreme Court decisions regarding the Sixth Amendment right to trial by jury, including decisions about the right to trial by jury, the standard of proof of beyond a reasonable doubt, the role of a sentencing judge, and the constitutionality of state sentencing guidelines schemes. Specifically, this review will focus on the shift from the traditional role of a judge exercising sentencing discretion to the affirmation of a defendant's right to have all facts heard by a jury and determined beyond a reasonable doubt. This case note will detail the Supreme

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

12. *Id.* (citing WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii) (West 2000)). The judge found other aggravating factors, but the Court of Appeals of Washington questioned their validity and affirmed the sentence solely on the finding of domestic violence with deliberate cruelty. *Id.* at 2535 n.4 (citing Washington v. Blakely, 47 P.3d 149, 158-59, 159 n.3 (Wash. Ct. App. 2002)).

13. *Id.* at 2536.

14. Washington v. Blakely, 47 P.3d 149, 159 (Wash. Ct. App. 2002) (citing Apprendi v. New Jersey, 530 U.S. 466 (2000)).

15. *Blakely*, 124 S. Ct. at 2537 (citing WASH. REV. CODE ANN. § 9A.20.021(1)(b) (West 2000)).

16. Washington v. Blakely, 47 P.3d 149, 159, 161 (Wash. Ct. App. 2002). The Court of Appeals of Washington relied on the decision by the Washington Supreme Court in State v. Gore, 21 P.3d 262 (Wash. 2001).

17. Washington v. Blakely, 62 P.3d 889 (Wash. 2003).

18. *Blakely*, 124 S. Ct. at 429.

19. *Id.* at 2534, 2538, 2543.

Court's ruling in *Blakely*, analyze the Court's application of the Sixth Amendment, and demonstrate that the constitutional guarantee of a defendant's right to trial by jury outweighs the practical implications the *Blakely* decision will have on state sentencing guidelines and sentencing reform. Finally, this case note will discuss the implications of *Blakely*, including the effect on other state sentencing guidelines, the effect on the Federal Sentencing Guidelines, and the retroactive application of *Blakely*.

BACKGROUND

The Sixth Amendment of the United States Constitution declares,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[20]

Several landmark cases developed the meaning of the right to trial by jury, including what exactly the right entails, what standard of proof has to be proven to the jury, and if and when a sentencing judge can determine or change a sentence.[21]

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20. U.S. CONST. amend. VI (emphasis added).

21. *See generally* Ring v. United States, 536 U.S. 584 (2002) (holding the Sixth Amendment right to trial by jury applies to both an increase in sentence and the death penalty); Jones v. United States, 526 U.S. 227 (1999) (holding any fact that increases the maximum penalty must be submitted to a jury and proved beyond a reasonable doubt); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (reaffirming the holding in *Jones* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); Almendarez-Torres v. United States, 523 U.S. 224 (1998) (concluding a prior conviction is a penalty provision and therefore does not have to be charged in an indictment); McMillan v. Pennsylvania, 477 U.S. 79 (1986) (concluding in some circumstances proof beyond a reasonable doubt applies to facts not identified as elements); Patterson v. New York, 432 U.S. 197 (1977) (finding a State must only prove beyond a reasonable doubt every ingredient of an offense and nothing further); Mullaney v. Wilbur, 421 U.S. 684 (1975) (holding the standard of proof of beyond a reasonable doubt in a criminal case applies to both an element of the crime and a sentencing factor); *In re* Winship, 397 U.S. 358 (1970) (holding every fact necessary to constitute a crime must be proved beyond a reasonable doubt); Duncan v. Louisiana, 391 U.S. 145 (1968) (holding the fundamental right to trial by jury afforded by the Sixth Amendment applies to the states through the Fourteenth Amendment); Williams v. New York, 337 U.S. 241 (1949) (concluding judges have broad discretion, within statutory limits, to decide the type and extent of punishment).

Right to Trial by Jury

In a 1968 case, *Duncan v. Louisiana*, the United States Supreme Court discussed the fundamental right to trial by jury afforded by the Sixth Amendment and held that this fundamental right applied to the states through the Fourteenth Amendment.[22] The defendant, an African-American, was accused of slapping a white boy.[23] The defendant sought a trial by jury, but the District Court of Louisiana denied the request, concluding the State of Louisiana had proved beyond a reasonable doubt that the defendant had committed battery.[24] The State argued the Constitution does not impose on the States a duty to provide a jury trial in a criminal case, "regardless of the seriousness of the crime or the size of the punishment which may be imposed."[25] Nonetheless, the Court found a jury trial is "fundamental to the American scheme of justice" and therefore the State violated the Constitution when the trial judge refused the defendant's demand for a jury trial.[26] The Court then discussed the expansive history of the right to trial by jury, beginning by stating that a jury trial in criminal cases had existed in England for several centuries.[27] The Court reiterated that the founders of English law decided "'the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'"[28] The Court also found that the constitutions adopted by the original States guaranteed a jury trial and that States entering the Union thereafter protected the right to jury trial in criminal cases.[29] States granted the right to jury trial to prevent oppression by the government, providing "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[30] The right to trial by jury reflects "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."[31] The Court did point out a jury trial has its weak-

22. *Duncan*, 391 U.S. at 149. The Court explained that applying the first eight Amendments to the states represented a new approach to the "incorporation" debate. *Id.* at 150 n.14. In earlier cases, a particular procedural safeguard was required of a state only if a "civilized system" could not be imagined without that protection. *Id.* However, subsequent cases depended on whether the particular procedure was "fundamental" or, in other words, "necessary to an Anglo-American regime of ordered liberty." *Id.* The Court began to hold that States must comply with certain provisions of the Sixth Amendment (i.e., right to a speedy trial, confrontation of witnesses, and the assistance of counsel). *Id.* The Court determined these provisions were fundamental "in the context of the criminal processes maintained by the American States," which led to the Court's inquiry into whether the right to trial by jury should be applied to the states. *Id.*

23. *Id.* at 147.

24. *Id.* at 146-47.

25. *Id.* at 149.

26. *Id.* at 149-50.

27. *Id.* at 151.

28. *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349-50 (Cooley ed. 1899)).

29. *Id.* at 153.

30. *Id.* at 155-56 (citing Singer v. United States, 380 U.S. 24, 31 (1965)).

31. *Id.* at 156.

nesses, such as permitting untrained laymen to determine the facts in the proceeding, and asserted that not every criminal trial held before a judge alone is unfair.[32]

Just two terms later, the Supreme Court, in *In Re Winship*, ruled on the standard of proof that has to be met in a jury trial.[33] In *Winship*, the defendant, a twelve-year-old boy, had entered a locker and stolen $112 from a woman's pocketbook.[34] The New York Family Court rejected the defendant's argument that proof beyond a reasonable doubt was required by the Fourteenth Amendment.[35] The United States Supreme Court addressed the question of whether proof beyond a reasonable doubt is required for due process and fair treatment during the adjudicatory stage of a criminal trial.[36] The Court held that every fact necessary to constitute a crime must be proven beyond a reasonable doubt.[37] The Court found this requirement dates from America's early years as a nation.[38] This requirement is a safeguard of the due process of law, and, as the Court said in *Davis v. United States*, "[n]o man should be deprived of his life . . . unless the jurors who try him are able . . . to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."[39] The Court further emphasized that a person accused of a crime should not be judged by the same standard of proof as in a civil case because it would leave people "in doubt whether innocent men are being condemned."[40]

In subsequent cases, the Court began to explore the role of the sentencing judge and the difference between a sentencing factor and an element of the crime.[41] In *Williams v. New York*, the Court discussed the discretionary power of a sentencing judge.[42] A New York state court jury found the

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32. *Id.* at 156-58 (citing *Singer*, 380 U.S. at 35).
33. *In re* Winship, 397 U.S. 358 (1970).
34. *Id.* at 359-60.
35. *Id.*
36. *Id.* at 359.
37. *Id.* at 364.
38. *Id.* at 361.
39. *Id.* at 363 (quoting Davis v. United States, 160 U.S. 469, 484, 493 (1895)).
40. *Id.* at 363-64.
41. *See generally* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (concluding a prior conviction is a penalty provision and therefore does not have to be charged in an indictment); McMillan v. Pennsylvania, 477 U.S. 79 (1986) (concluding in some circumstances proof beyond a reasonable doubt applies to facts not identified as elements); Patterson v. New York, 432 U.S. 197 (1977) (finding a State must only prove beyond a reasonable doubt every ingredient of an offense and nothing further); Mullaney v. Wilbur, 421 U.S. 684 (1975) (holding the standard of proof of beyond a reasonable doubt in a criminal case applies to both an element of the crime and a sentencing factor); Williams v. New York, 337 U.S. 241 (1949) (concluding judges have broad discretion, within statutory limits, to decide the type and extent of punishment).
42. Williams v. New York, 337 U.S. 241 (1949).

defendant guilty of murder in the first degree.[43] Even though the jury recommended life imprisonment, the trial judge imposed a death sentence.[44] The United States Supreme Court held the defendant was not denied due process, finding that judges have broad discretion, within statutory limits, to decide the type and extent of punishment.[45] The Court found a sentencing judge's task is to determine the type and extent of punishment *after* the issue of guilt has been determined and pointed out that since before American colonies even became a nation, a sentencing judge has had this wide discretion.[46] The Court focused on the notion that punishments should take into account the past life and habits of an offender and emphasized that the "punishment should fit the offender and not merely the crime."[47] The Court stressed a sentencing judge should be free to use out-of-court information and found that the United States Constitution does not restrict the sentencing judge from using this extrinsic information.[48] The dissent disagreed, emphasizing the jury "sits as the representative of the community; its voice is that of the society against which the crime was committed. A judge, even though vested with statutory authority to do so, should hesitate indeed to increase the severity of such a community expression."[49]

The Supreme Court in *Mullaney v. Wilbur* further defined the holding in *Winship*, determining that the standard of proof of beyond a reasonable doubt in a criminal case applies to both elements of the crime and sentencing factors.[50] Elements of a crime are defined as "the constituent parts of a crime."[51] Sentencing factors are defined as factors that bear on punishment, such as "the instrumentality used in committing a violent felony."[52] In *Mullaney*, the defendant had fatally assaulted a man in his hotel room.[53] The defendant argued to the trial court that he was provoked by the man's homosexual advance and therefore the homicide was manslaughter rather than murder because it occurred in the heat of passion.[54] The jury found the defendant guilty of murder.[55] The defendant appealed to the Maine Supreme Judicial Court, arguing he was denied due process by having to prove that he acted in the heat of passion on sudden provocation.[56] In other words, the

43. *Id.* at 242.
44. *Id.*
45. *Id.* at 244-45, 252.
46. *Id.* at 246-47.
47. *Id.* at 247 (citing People v. Johnson, 169 N.E. 619, 621 (N.Y. 1930) (finding that the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime)).
48. *Id.* at 251.
49. *Id.* at 253 (Murphy, J., dissenting).
50. Mullaney v. Wilbur, 421 U.S. 684 (1975).
51. BLACK'S LAW DICTIONARY 538 (7th ed. 1999).
52. McMillan v. Pennsylvania, 477 U.S. 79, 89 (1986).
53. *Mullaney*, 421 U.S. at 685.
54. *Id.*
55. *Id.*
56. *Id.* at 687.

defendant argued he was required to negate the element of malice aforethought.[57] He claimed that, because of the Court's decision in *Winship*, the prosecution is required to prove every element beyond a reasonable doubt.[58] The Maine Supreme Judicial Court rejected this contention, and the United States Supreme Court granted certiorari.[59] The State of Maine argued that *Winship* should not be extended to its case because absence of the heat of passion is not a fact necessary to constitute the *crime* and therefore is within the discretion of the sentencing body and is "not subject to rigorous due process demands."[60] The United States Supreme Court disagreed with the State's argument, stressing *Winship* is not limited to those facts that constitute a crime; otherwise, the State could just redefine the element as a factor that bears solely on the extent of punishment.[61]

The United States Supreme Court later refined its *Mullaney* holding in *Patterson v. New York*, finding a state does not have to "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment."[62] In *Patterson*, the defendant shot his father-in-law after seeing his wife "in a state of semiundress" in the presence of her father.[63] The jury found the defendant guilty of murder.[64] The defendant argued that New York's murder statute was equivalent to the one struck down in *Mullaney*; therefore, his conviction should be reversed.[65] The Court emphasized the prosecution must prove beyond a reasonable doubt "all of the elements included in the definition of

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57. *Id.*

58. *Id.*

59. *Id.* at 688, 690. The Maine Supreme Judicial Court held that murder and manslaughter are not distinct crimes. *Id.* at 688. The court also found a defendant is required to prove he acted in the heat of passion on sudden provocation and *Winship* should not be applied to a factor such as the heat of passion. *Id.* The defendant subsequently petitioned for a writ of habeas corpus in the United States District Court for the District of Maine. *Id.* The District Court concluded *Winship* does not require the defendant to prove he acted in the heat of passion on sudden provocation. *Id.* The Court of Appeals for the First Circuit affirmed. *Id.* at 689. The United States Supreme Court granted certiorari. *Id.* at 690.

60. *Id.* at 696-97, 697 n.23.

61. *Id.* at 698.

62. Patterson v. New York, 432 U.S. 197, 207 (1977).

63. *Id.* at 198.

64. *Id.* at 200.

65. *Id.* at 201. Under the Maine statue in *Mullaney*, persons accused of murder had to prove they acted in the heat of passion on sudden provocation. ME. REV. STAT. ANN. tit. 17, § 2551 (West 1964). The Court in *Mullaney* held that the statute was a violation of due process because it improperly shifted the burden of persuasion from the prosecutor to the defendant. Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975). In *Patterson*, The New York Court of Appeals distinguished the statute in *Mullaney* from the New York statute because the New York statute did not involve a "shifting of the burden to the defendant to disprove any fact essential to the offense charged since the New York affirmative defense of extreme emotional disturbance bears no direct relationship to any element of murder." *Patterson*, 432 U.S. at 201. The United States Supreme Court affirmed this decision. *Id.*

the offense of which the defendant is charged," but the prosecution does not have to prove beyond a reasonable doubt any facts affecting "'the degree of criminal culpability.'"[66] The Court stated the rule in *Mullaney* could potentially undermine legislative reform, deprive legislatures of discretion, and discourage Congress from enacting legislation, which is a "far-reaching effect" the Court did not intend.[67] Therefore, the Court found the rule in *Mullaney* was *only* that a State must prove beyond a reasonable doubt every element of an offense and that it is unnecessary to go further.[68]

Similarly, the Court in *McMillan v. Pennsylvania* examined the difference between the standard of proof when a sentencing factor is involved versus an element of the crime.[69] *McMillan* addressed Pennsylvania's Mandatory Minimum Sentencing Act, which provided that certain factors were not elements but rather sentencing factors that were considered only after the defendant had been found guilty beyond a reasonable doubt.[70] The Sentencing Act provided specifically that a judge could depart downward from a sentence but could not impose a sentence in excess of the statutory maximum.[71] In *McMillan*, each defendant was convicted of one of the Act's enumerated felonies: aggravated assault, voluntary manslaughter, and robbery.[72] Defendant McMillan shot his victim in the right buttock after an argument over a debt; defendant Peterson shot and killed her husband; defendant Dennison shot and seriously wounded an acquaintance; and defendant Smalls robbed a seafood store at gunpoint.[73] The defendants argued that visible possession of a firearm is an element of

66. *Patterson*, 432 U.S. at 210, 215 n.15 (internal citations omitted).

67. *Id.* at 215 n.15. The Court declared *Mullaney's* rule could be interpreted as requiring the prosecution to prove beyond a reasonable doubt any fact affecting criminal culpability, essentially depriving the legislature of allocating the burden of proof and ultimately undermining criminal legislative reform. *Id.* The Court stated the rule might also "discourage Congress from enacting pending legislation to change the felony-murder rule by permitting the accused to prove by a preponderance of the evidence the affirmative defense that the homicide committed was neither a necessary nor a reasonably foreseeable consequence of the underlying felony," which was a far-reaching effect that the Court did not intend. *Id.* (citing S. 1, 94th Cong. (1975)).

68. *Id.* at 215. In other words, facts "constituting any and all affirmative defenses related to the culpability of an accused" do not have to be proved beyond a reasonable doubt. *Id.* at 210. In *Mullaney*, the defendant was wrongly required to negate malice aforethought, which is within the definition of murder, by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation. *Id.* at 200-01, 215. In contrast, Patterson's defense of extreme emotional disturbance bore no relationship to any element of murder and therefore did not have to be proven beyond a reasonable doubt. *Id.* at 201.

69. McMillan v. Pennsylvania, 477 U.S. 79 (1986).

70. *Id.* at 85-86. The Pennsylvania Legislature expressly provided that visible possession of a firearm is not "an element of the crimes enumerated in the mandatory sentencing statute." *Id. See* 42 PA. CONS. STAT. § 9712 (1982) (carrying a mandatory minimum sentence of five years' imprisonment if the sentencing judge found that the defendant visibly possessed a firearm during the commission of the offense).

71. *McMillan*, 477 U.S. at 81-82.

72. *Id.* at 82.

73. *Id.*

that visible possession of a firearm is an element of these felonies and therefore must be proved beyond a reasonable doubt under *Winship* and *Mullaney*.[74] The Court recognized there are constitutional limits to a state's power to prescribe penalties; in some circumstances proof beyond a reasonable doubt applies to facts not identified as elements.[75] Nevertheless, the Court concluded Pennsylvania can treat visible possession of a firearm as a sentencing factor and not as an element of the crime, ultimately noting there is "no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."[76]

Although the Court ruled on the specific issue of recidivism in *Almendarez-Torres v. United States*, it also addressed the difference between a sentencing factor and an element of the crime.[77] The defendant in *Almendarez-Torres* admitted that he had been deported, had unlawfully returned to the United States, and had three earlier convictions for aggravated felonies.[78] The question before the Court was whether, under the federal statute, the defendant's earlier convictions constituted a separate crime or simply authorized an enhanced penalty.[79] The Court concluded that a prior conviction is a penalty provision and therefore does not have to be charged in an indictment.[80] Furthermore, the Court clarified that an indictment must set forth each element of the crime but does not have to set forth sentencing factors.[81] The Court pointed out that a reason for not including a prior conviction as an element is that it "'carries a risk of unfair prejudice to the defendant.'"[82] The Court then clarified its holdings in *Winship*, *Mullaney*, *Patterson*, and *McMillan*.[83] The Court acknowledged *Winship* required proof beyond a reasonable doubt of an element of a crime but found that *Winship* did not consider if and when a fact should be treated as an element.[84] The Court interpreted the *Mullaney* decision as stressing that judges cannot in-

74. *Id.* at 83.
75. *Id.* at 86 (citing Patterson v. New York, 432 U.S. 197 (1977)).
76. *Id.* at 93 (citing Spaziano v. Florida, 468 U.S. 447, 459 (1984)).
77. Almendarez-Torres v. United States, 523 U.S. 224 (1998).
78. *Id.* at 227.
79. *Id.* at 226. The statute authorized a prison term of up to twenty years for an alien "whose removal was subsequent to a conviction for commission of an aggravated felony." 8 U.S.C. § 1326(b)(2) (1996).
80. *Almendarez-Torres*, 523 U.S. at 226-27.
81. *Id.* at 228 (citing Hamling v. United States, 418 U.S. 87, 117 (1974); McMillan v. Pennsylvania, 477 U.S. 79, 84-91 (1986)).
82. *Id.* at 235 (quoting Old Chief v. United States, 519 U.S. 172, 173 (1997)).
83. *Id.* at 240-48 (citing In Re Winship, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt of an element of a crime); Mullaney v. Wilbur, 421 U.S. 684 (1975) (stressing that judges cannot increase a sentence if the factor is not set forth in an indictment and proved beyond a reasonable doubt); Patterson v. New York, 432 U.S. 197 (1977) (finding most sentencing factors do not have to be treated as elements of the crime and therefore do not have to be charged in an indictment); McMillan v. Pennsylvania, 477 U.S. 79 (1986) (concluding that the linking of a fact to the severity of punishment does not necessarily make a fact an element of the crime)).
84. *Almendarez-Torres*, 523 U.S. at 240.

crease a sentence if the factor is not set forth in an indictment and proved beyond a reasonable doubt.[85] However, the Court emphasized the *Patterson* decision found the opposite: Most sentencing factors do not have to be treated as elements of the crime and therefore do not have to be charged in an indictment.[86] Additionally, the Court pointed out that *McMillan* held the Constitution does *not* require a sentencing factor to be treated as an element, concluding the linking of a fact to the severity of punishment does not necessarily make that fact an element of the crime.[87] Lastly, the Court reiterated that judges have typically had discretion within broad statutory ranges and that sentencing guidelines have channeled that discretion by using sentencing factors, which "no one here claims that the Constitution thereby makes 'elements' of a crime."[88]

Constitutionality of State Sentencing Guidelines

After *Almendarez-Torres* was decided, the United States Supreme Court took a surprising turn in *Jones v. United States* when it found a traditional sentencing factor to be an element of the crime, therefore requiring that it be charged in an indictment.[89] The defendant in *Jones* was charged with carjacking and using or aiding and abetting the use of a firearm in relation to a crime of violence.[90] The jury found the defendant guilty on both counts; however, the pre-sentence report recommended an enhanced sentence because of serious bodily injury to one of the victims.[91] The defendant argued that serious bodily injury was an element of the offense, which had not been charged in the indictment or proven to a jury.[92] The Court noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[93] Finding that "much turns" on the difference between an element and a sentencing consideration, the Court found it questionable that a fact that significantly increases a penalty range does not have the same constitutional safeguards as an element of the offense.[94] This lack of constitutional safeguards would "correspondingly shrink" the jury's role to the "relative importance of low-level gatekeeping."[95] The Court then raised the question of whether unlimited legislative power to authorize sentencing determina-

85. *Id.*
86. *Id.* at 241.
87. *Id.* at 242.
88. *Id.* at 245-46.
89. Jones v. United States, 526 U.S. 227 (1999).
90. *Id.* at 230.
91. *Id.* at 231.
92. *Id.*
93. *Id.* at 243 n.6.
94. *Id.* at 232-33.
95. *Id.* at 243-44.

tions (i.e., the sentencing guidelines) would erode the jury's function "to a point against which a line must necessarily be drawn."[96] The Court recognized that not every sentencing fact must be found by a jury but noted this diminution of the jury's power would merit Sixth Amendment concern.[97] The Court concluded by disagreeing with the dissent's prediction that the majority's decision would negatively impact sentencing policies, emphasizing that "if such policies conflict with safeguards enshrined in the Constitution for the protection of the accused, those policies have to yield to the constitutional guarantees."[98]

Ultimately, *Jones* paved the way for similar decisions in *Apprendi v. New Jersey* and *Ring v. United States*, both of which have scathing dissents that focus on the chaotic effects the majority's decisions could have on not only the state sentencing guidelines but also the federal sentencing guidelines.[99] The defendant in *Apprendi* fired several shots into the home of an African-American family who lived in an otherwise all-white neighborhood in New Jersey.[100] A New Jersey hate crime law provided for an enhanced imprisonment if the trial judge found, by a preponderance of the evidence, that the defendant purposely intimidated an individual because of "race, color, gender, handicap, religion, sexual orientation, or ethnicity."[101] The Court considered the constitutional question of whether the twelve-year sentence imposed was permissible, given that it was above the ten-year maximum for the offense charged.[102] The Court recognized history does *not* suggest it is impermissible for judges to exercise discretion *within the range* prescribed by statute.[103] However, after reexamining prior cases, the Court reaffirmed the opinion in *Jones* that any fact, other than a prior conviction, that increases the penalty beyond the prescribed statutory maximum must be

96. *Id.* at 244.
97. *Id.* at 248.
98. *Id.* at 252 n.11. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) ("The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.").
99. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (reaffirming the holding in *Jones* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); Ring v. United States, 536 U.S. 584, 609 (2002) (holding the Sixth Amendment right to trial by jury applies to the factfinding necessary to increase a defendant's sentence as well as to the death penalty).
100. *Apprendi*, 530 U.S. at 469.
101. N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000).
102. *Apprendi*, 530 U.S. at 474. The defendant entered into a plea agreement, pleading guilty to second-degree possession of a firearm for an unlawful purpose and unlawful possession of an antipersonnel bomb. *Id.* at 469-70. The State reserved the right to request an enhanced sentence on the ground that the offense was committed with a biased purpose, and Apprendi reserved the right to challenge the enhancement on the ground that it violated the Constitution. *Id.* at 470.
103. *Id.* at 481.

submitted to a jury and proved beyond a reasonable doubt.[104] The Court declared that it does not matter if a finding is characterized as an element of the crime or a sentencing factor—the relevant inquiry is "one not of form, but of effect" and the question to be asked is whether the defendant is being exposed to a greater punishment than that authorized by the jury's guilty verdict.[105] Additionally, the Court found the potential doubling of one's sentence is "unquestionably of constitutional significance," both in terms of years behind bars and the severe stigma attached.[106] The State of New Jersey relied on *Almendarez-Torres*, arguing that the reasons supporting the prior conviction exception apply to the New Jersey statute.[107] However, the Court reiterated that recidivism, which was the primary issue in *Almendarez-Torres*, is an exception because it "'does not relate to the commission of the offense'" and New Jersey's biased purpose inquiry is not an exception because it goes towards the "commission of the offense."[108] Therefore, the Court concluded the New Jersey procedure was "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system."[109]

Finally, in *Ring*, the Court dealt with the Sixth Amendment right to trial by jury in capital prosecutions.[110] Defendant Ring was found guilty of felony murder and therefore, under Arizona law, could not be sentenced to death.[111] However, the Superior Court of Maricopa County in Arizona found two aggravating factors and entered a "Special Verdict," sentencing Ring to death.[112] The Court reiterated the rule in *Apprendi* that if a state makes an increase in the defendant's authorized punishment based on the finding of a fact, that fact must be found by a jury beyond a reasonable doubt, whether the state has labeled it a sentencing factor or an element of the crime.[113] Furthermore, the Court held that the Sixth Amendment applies to both an increase in sentence and the death penalty, the ultimate increase in sentence,

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104. *Id.* at 490 (citing Jones v. United States, 526 U.S. 227, 243 n.6 (1999)).

105. *Id.* at 494. The Court then discussed the difference between a sentencing factor and a sentence enhancement. *Id.* at 494 n.19. The Court described a sentencing factor as "a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense" and a sentence enhancement as "an increase beyond the maximum authorized statutory sentence, [which] is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.*

106. *Id.* at 495.

107. *Id.* at 496.

108. *Id.* (quoting Almendarez-Torres v. United States, 523 U.S. 224, 230, 244 (1998)).

109. *Id.* at 497.

110. Ring v. United States, 536 U.S. 584 (2002).

111. *Id.* at 592.

112. *Id.* at 594. The judge found that (1) "Ring committed the offense in expectation of receiving something of 'pecuniary value'" and (2) the offense was committed "'in an especially heinous, cruel or depraved manner.'" *Id.* at 594-95 (quoting ARIZ. REV. STAT. ANN. § 13-703 (West 2001)).

113. *Id.* at 602 (citing *Apprendi*, 530 U.S. at 482-83).

concluding that "[c]apital defendants, no less than non-capital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[114]

Following the decisions in *Jones*, *Ring*, and *Apprendi*, the applicable rule of law for sentence enhancement cases was the rule formulated in *Apprendi*: "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."[115]

PRINCIPAL CASE

In *Blakely v. Washington*, the Court considered whether the exceptional sentence imposed by the sentencing judge violated the defendant's Sixth Amendment right to trial by jury.[116] Justice Scalia, writing for the majority, first addressed longstanding precedent, focusing on the rule expressed in *Apprendi v. New Jersey*: "'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.'"[117] The Court reiterated that the rule in *Apprendi* reflects the principle that the "'truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'"[118] Even though the state contended there was no *Apprendi* violation because the relevant "statutory maximum" was the ten-year maximum for class B felonies under Washington law, and not the fifty-three months defined by Washington's Sentencing Reform Act, the Court defined "statutory maximum" for *Apprendi* purposes as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[119] In other words, the relevant "statutory maximum" is the maximum a judge may impose without any additional findings.[120] According to the Washington Supreme Court, the exceptional sentence provision cannot be imposed unless it "takes into account factors other than those which are used in computing the standard range sentence for the offense."[121] Therefore, the sentencing judge based his sentence on additional findings that were not

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114. *Id.* at 589, 609.
115. *Apprendi*, 530 U.S. at 490.
116. Blakely v. Washington, 124 S. Ct. 2531, 2534 (2004).
117. *Id.* at 2536 (quoting *Apprendi*, 530 U.S. at 490).
118. *Id.* at 2536 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).
119. *Id.* at 2535, 2537 (citing WASH. REV. CODE ANN. § 9A.20.021(1)(b) (West 2000) (stating there is a ten-year maximum for class B felonies); *Apprendi*, 530 U.S. at 483 ("the maximum he would receive if punished according to the facts reflected in the jury verdict alone")).
120. *Blakely*, 124 S. Ct. at 2537.
121. State v. Gore, 21 P.3d 262, 277 (Wash. 2001).

admitted by the defendant and were not proven to a jury.[122] The United States Supreme Court concluded that this sentencing procedure did not comply with the Sixth Amendment and Blakely's sentence was invalid.[123]

In determining the *Apprendi* decision applied to Blakely's exceptional sentence, the Court emphasized the right to trial by jury.[124] The Court cited various works by John Adams and Thomas Jefferson, among others, in confirming that a jury trial ensures the people's control in the judiciary and is a "fundamental reservation of power in our constitutional structure."[125] The Court stressed the rule in *Apprendi* ensures that the judge's authority arises entirely from the jury's verdict.[126] The Court then suggested if the rule in *Apprendi* were not applied to Blakely's exceptional sentence, states might adopt one of two alternatives: (1) only elements of the crime, not sentencing factors, need to be proven to a jury, no matter how much they increase the punishment, and (2) legislatures may establish legally essential sentencing factors, as long as they do not go "*too far*."[127] The Court pointed out that in the former, a judge could sentence a defendant to a crime entirely different from that in the jury's verdict, and in the latter, the standard of "too far" would be highly subjective.[128] The Court determined that neither alternative was "plausible."[129]

Even though the Court found that Washington's sentencing scheme violated Blakely's Sixth Amendment right, the Court contended the case was "not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment."[130] The

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122. *Blakely*, 124 S. Ct. at 2537.
123. *Id.* at 2538.
124. *Id.*
125. *Id.* at 2538-39. John Adams wrote in a February 12, 1771, diary entry that "the common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature. 2 JOHN ADAMS, WORKS OF JOHN ADAMS 252-53 (C. Adams ed. 1850). Thomas Jefferson wrote in a July 19, 1789 letter to Abbe Arnoux that "[w]ere I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative." 15 THOMAS JEFFERSON, PAPERS OF THOMAS JEFFERSON 282-83 (J. Boyd ed. 1958).
126. *Blakely*, 124 S. Ct. at 2539.
127. *Id.*
128. *Id.*
129. *Id.* at 2539-40. The Court used the example that a judge could sentence a man for murder even if the jury convicted him only of illegally possessing a firearm or of making an illegal lane change while fleeing the death scene, which would be an absurd result. *Id.* at 2539. The Court also pointed out Blakely's ninety-month sentence exceeded the standard maximum by almost seventy percent and the Washington Supreme Court has upheld other exceptional sentences fifteen times the standard maximum, demonstrating the subjectivity of the "too far" standard. *Id.* at 2539-40. The Court stated the Framers would not have left the scope of jury power up to the "judges' intuitive sense of how far is *too far*" (i.e., a manipulable standard rather than *Apprendi's* bright-line rule) because the Framers were "unwilling to trust government to mark out the role of the jury." *Id.* at 2540.
130. *Id.*

Court pointed out the Sixth Amendment is not a "limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury."[131] The Court discussed the differences between indeterminate and determinate sentencing schemes, specifically differentiating between determinate judicial-factfinding schemes and determinate jury-factfinding schemes.[132] An indeterminate sentencing system allows "judges to impose a sentence range (such as, three-to-six years) rather than a specific period of time to be served."[133] A determinate sentencing system is where "an offender may be released from prison only after expiration of the sentence imposed."[134] A judicial-factfinding scheme allows "a judge to make factual findings and then impose a penalty beyond a recommended standard range of sentences."[135] In jury-factfinding schemes, the jury decides if a factor has been proven beyond a reasonable doubt, but the judge "nonetheless retains the discretion to sentence within or beyond the guidelines range."[136] The Court agreed with Justice O'Connor's argument that determinate judicial-factfinding schemes do entail less discretion than indeterminate schemes; however, it *also* found that judicial-factfinding schemes involve more judicial power than jury-factfinding schemes.[137] Ultimately, the Court did not concede that the restraint of judicial power is a Sixth Amendment objective, but it concluded that *Apprendi* does not disserve that goal.[138] Additionally,

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131. *Id.*

132. *Id.* at 2540-41. Washington had an indeterminate sentencing scheme before the enactment of its sentencing guidelines scheme. *Id.* at 2544 (O'Connor, J., dissenting). Its criminal code separated felonies into broad sentences: twenty years to life, zero to ten years, and zero to five years. WASH. REV. CODE ANN. § 9A.20.020 (West 2000). Sentencing judges had unfettered discretion to sentence defendants to prison terms anywhere within the statutory range. *Id.* §§ 9.95.010-.011. This system of unguided discretion ultimately resulted in disparities in sentences for defendants who committed the same offense. David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 126-27 (2001). In contrast, determinate sentencing schemes impose identical punishments on defendants who committed crimes in different ways, resulting in "excessive uniformity." *Blakely*, 124 S. Ct. at 2553 (Breyer, J., dissenting) (quoting Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity Not Disparity*, 29 AM. CRIM. L. REV. 833, 847 (1992)).

133. Jon Wool & Don Stemen, *Aggravated Sentencing:* Blakely v. Washington, *Practical Implications for State Sentencing Systems*, POL. & PRAC. REV., August 2004, at 2 (*available at* http://www.ussguide.com/members/BulletinBoard/Blakely/Articles/VeraInstitute-Aug2004.pdf (last visited Dec. 1, 2004)).

134. *Id.*

135. *Id.* at 1.

136. *Id.* at 7.

137. *Blakely*, 124 S. Ct. at 2540-41. The Court cited as evidence the Kansas Supreme Court's decision in *State v. Gould*, 23 P.3d 801, 809-14 (Kan. 2001). In *Gould*, the Kansas Supreme Court found constitutional issues with Kansas's determinate-sentencing system. *Id.* The Kansas legislature responded by applying *Apprendi's* requirements to its system and *not* by reestablishing indeterminate sentencing. KAN. STAT. ANN. § 21-4718 (Supp. 2003). The *Blakely* Court stated that the end result was less, not more, judicial power. *Blakely*, 124 S. Ct. at 2541.

138. *Blakely*, 124 S. Ct. at 2541.

the Court stipulated that a defendant can waive his *Apprendi* rights and consent to judicial factfinding; therefore, judicial factfinding could still be offered by states.[139]

The Court also maintained that the Constitution does not state that facts are better determined by a judge than a jury and asserted that the Framers' intentions for criminal justice were a strict division of authority between judge and jury.[140] The Court concluded by reiterating the longstanding tenet of common-law criminal jurisprudence: "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours.'"[141]

Justice O'Connor's Dissent

Justice O'Connor filed a dissenting opinion in which Justice Breyer joined and in which Chief Justice Rehnquist and Justice Kennedy joined in part.[142] Justice O'Connor's dissent focused on the practical implications of *Blakely*, beginning with two emotional statements: "The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries .... [T]he practical consequences of today's decision may be *disastrous*."[143] Justice O'Connor stated that *Blakely* could effectively eliminate legislative sentencing guidelines schemes along with twenty years of sentencing reform.[144] She began her opinion by retracing the history leading up to Washington's guidelines scheme and determined that the guidelines scheme is "by no means unique."[145] Prior to the Sentencing Reform Act of 1981, Washington had an indeterminate sentencing scheme under which sentencing judges had unfettered discretion to sentence defendants within the statutory range.[146] This unfettered discretion ultimately resulted in disparities in sentences for defendants who committed the same offense.[147] Justice O'Connor emphasized that sentencing in this kind of system could turn on the "idiosyncrasies" of the judge and not on the specific crime or background of the defendant.[148] The Washington legisla-

139. *Id.*
140. *Id.* at 2543.
141. *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).
142. *Blakely*, 124 S. Ct. at 2543 (O'Connor, J., dissenting).
143. *Id.* at 2543-44 (O'Connor, J., dissenting) (emphasis added).
144. *Id.* at 2543 (O'Connor, J., dissenting).
145. *Id.* at 2544-45, 2548 (O'Connor, J., dissenting).
146. WASH. REV. CODE ANN. §§ 9.95.010-.011 (West 2000).
147. Boerner & Lieb, *supra* note 132, at 126-27. "Judges were authorized to choose between prison and probation with few exceptions, subject only to review for abuse of discretion." *Id.* at 73.
148. *Blakely*, 124 S. Ct. at 2545 (O'Connor, J., dissenting).

ture then passed the Sentencing Reform Act of 1981 to ensure that punishment was proportionate to the seriousness of the crime.[149] The Act was also passed to bring some much-needed "uniformity, transparency, and accountability" to a "sentencing and corrections system that 'lack[ed] any principle except unguided discretion.'"[150] Justice O'Connor stressed that determinate sentencing schemes serve important constitutional values, such as the balance of powers, and even though the majority's decision does not prohibit guidelines schemes, it "exacts a substantial constitutional tax."[151]

Justice O'Connor then listed several "substantial and real" costs of *Blakely's* decision, including separate, full-blown jury trials, additional expenses, and double jeopardy issues.[152] Focusing on the initial indictment, Justice O'Connor concluded the majority's decision inevitably means that all facts, including facts used by sentencing judges to determine a sentence, will have to be charged in an indictment and submitted to a jury.[153] She then pointed out the scarcity of evidence regarding the extension of this rule to guidelines schemes, emphasizing that only one court has applied *Apprendi* to invalidate a guidelines scheme; therefore, "there is no map of the uncharted territory blazed by today's unprecedented holding."[154]

Justice O'Connor then changed directions and discussed deference to the legislature.[155] She defined the majority's opinion as "adopting a rigid rule that destroys everything in its path," explaining that deference to legislative labels is more consistent with pre-*Apprendi* decisions and would be easier to administer than the majority's rule.[156] In other words, Justice

149. WASH. REV. CODE ANN. § 9.94A.010 (West 2000).

150. *Blakely*, 124 S. Ct. at 2545 (quoting Boerner & Lieb, *supra* note 132, at 73).

151. *Blakely*, 124 S. Ct. at 2545-46 (O'Connor, J., dissenting). In Justice O'Connor's view, the majority's decision will "impose significant costs on a legislature's determination that a particular fact, not historically an element, warrants a higher sentence." *Id.* (O'Connor, J., dissenting).

152. *Id.* at 2546-47 (O'Connor, J., dissenting). For example, if a legislature does not want factors bearing on sentencing to impact a jury's initial determination of guilt, the State would have to require a separate, full-blown jury trial during the penalty phase proceeding, which would result in additional expenses. *Id.* at 2546 (O'Connor, J., dissenting). Also, because of the majority's decision, certain facts will be known prior to the trial (i.e., a defendant might reveal that he sold primarily to children while engaging in drug distribution). *Id.* (O'Connor, J., dissenting). Therefore, a judge may have to bring a separate criminal prosecution to account for this revelation, which would most likely be barred altogether by the Double Jeopardy Clause. *Id.* at 2546-47 (O'Connor, J., dissenting) (citing Blockburger v. United States, 284 U.S. 299 (1932) (holding that one cannot be prosecuted for separate offenses unless the two offenses both have at least one element that the other does not)).

153. *Id.* at 2546 (O'Connor, J., dissenting) (citing *In re* Winship, 397 U.S. 358 (1970)).

154. *Id.* at 2547 n.1 (O'Connor, J., dissenting) (citing State v. Gould, 23 P.3d 801 (Kan. 2001) (modifying its determinate sentencing scheme to comply with *Apprendi* though legislation)). *See infra* notes 233-35 and accompanying text.

155. *Blakely*, 124 S. Ct. at 2547-48 (O'Connor, J., dissenting).

156. *Id.* (O'Connor, J., dissenting) (citing Apprendi v. New Jersey, 530 U.S. 466, 552-54 (2000) (O'Connor, J., dissenting) ("Because I do not believe that the Court's 'increase in the

O'Connor claimed the rule of deference to the legislature has a "built-in political check" and "would vest primary authority for defining crimes in the political branches, where it belongs."[157] She criticized the majority's evidence of the Framers' intent, arguing that judicial sentencing discretion was foreign to the Framers, and, therefore, the Court should not look to original intent to determine if broad discretionary authority was or is constitutional.[158]

At the end of her dissent, Justice O'Connor once again made an emotional plea that the "consequences of today's decision will be as far reaching as they are disturbing," claiming the decision will have effects not only on Washington's sentencing guidelines scheme, but also on other states' sentencing schemes as well.[159] She criticized the Court for ignoring the "havoc" the decision will inflict on trial courts and discussed the potential effects on the Federal Sentencing Guidelines, voicing her concern that if the Washington scheme does not comport with the Constitution, then no guidelines schemes will.[160] Justice O'Connor also stated the decision will threaten an untold number of criminal judgments, noting that approximately 8,000 federal criminal appeals in which the defendant's sentence was at issue were pending as of March 31, 2004.[161]

Justice Kennedy's Dissent

Justice Kennedy's dissent, joined by Justice Breyer, essentially agreed with Justice O'Connor, adding that the Court disregarded the fundamental principle that the different branches of government should have recurring dialogue in order to satisfy the evolution of the law and constitutional theory.[162] Justice Kennedy contended the sentencing guidelines are an

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maximum penalty rule' is required by the Constitution, I would evaluate New Jersey's sentence-enhancement statute by analyzing the factors we have examined in past cases.")). *See also* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (concluding that a prior conviction is not an element of an recidivist offense); Witte v. United States, 515 U.S. 389 (1995) (finding there is no double jeopardy bar against uncharged conduct in imposing a guidelines enhancement); Walton v. Arizona, 497 U.S. 639 (1990) (holding that in capital cases aggravating factors do not have to be found by a jury); Mistretta v. United States, 488 U.S. 361 (1989) (stating the Federal Sentencing Guidelines do not violate separation of powers); McMillan v. Pennsylvania, 477 U.S. 79 (1986) (concluding facts that increase a mandatory minimum sentence are not necessarily elements).

157. *Blakely*, 124 S. Ct. at 2548 (O'Connor, J., dissenting).

158. *Id.* (O'Connor, J., dissenting).

159. *Id.* (O'Connor, J., dissenting).

160. *Id.* at 2549-50 (O'Connor, J., dissenting).

161. *Id.* at 2549, 2549 n.2 (O'Connor, J., dissenting) (citing Memorandum from Carl Schlesinger, Administrative Office of the United States Courts, to Supreme Court Library (June 1, 2004) (on file with the Clerk of the Court) (stating that on March 31, 2004, there were 8,320 federal criminal appeals pending in which the defendant's sentence was at issue and between June 27, 2000, when *Apprendi* was decided, and March 31, 2004, there were 272,191 defendants sentenced in federal court)).

162. *Id.* at 2550-51 (Kennedy, J., dissenting).

example of this "collaborative process" and claimed the majority's opinion shuts down nonjudicial sources of ideas and experience and destroys a sentencing scheme developed by legislators, which will result in states having to "scrap everything and start over" in regard to sentencing guidelines.[163]

Justice Breyer's Dissent

Justice Breyer, with whom Justice O'Connor joined, also filed a dissent.[164] Justice Breyer's eleven-page dissent began by discussing the effects of *Apprendi* and *Blakely* and then focused on the "adverse consequences inherent in [*Blakely's*] conclusion."[165] He reiterated that, under the *Apprendi* rule, the jury must find the facts that make up the crime *and* all the punishment-increasing facts.[166] Justice Breyer agreed with the majority that the difference between a sentencing factor and an element of the crime is just a legislative label, but he disagreed that the Sixth Amendment requires identical treatment of both (i.e., that both elements and sentencing factors must be proved to the jury beyond a reasonable doubt), asserting that identical treatment misrepresents historical sentencing practices and destroys law that legislatures relied on to design punishment systems.[167] He then emphasized the majority's interpretation of the Sixth Amendment in *Blakely* "cannot be right," setting forth alternative options for states and subsequent consequences in light of the majority's decision.[168] Such alternatives included a pure "charge offense" or determinate sentencing system, an indeterminate sentencing system, an *Apprendi*-compliant determinate sentencing system, and a rewrite of the criminal codes.[169]

A pure "charge offense" or determinate sentencing system, explained Justice Breyer, treats like cases alike but fails to treat different cases differently, resulting in identical punishments on people who committed crimes in very different ways.[170] Furthermore, determinate sentencing can result in prosecutors manipulating sentences through charges, effectively giving prosecutors "tremendous" power.[171] In contrast, under an indetermi-

163. *Id.* at 2551 (Kennedy, J., dissenting).
164. *Id.* at 2551-62 (Breyer, J., dissenting).
165. *Id.* at 2551-52 (Breyer, J., dissenting).
166. *Id.* at 2551 (Breyer, J., dissenting).
167. *Id.* at 2552 (Breyer, J., dissenting).
168. *Id.* at 2552-58 (Breyer, J., dissenting).
169. *Id.* (Breyer, J., dissenting). *See infra* notes 170-81 and accompanying text.
170. *Blakely*, 124 S. Ct. at 2552-53 (Breyer, J., dissenting).
171. *Id.* at 2553 (Breyer, J., dissenting). Justice Breyer argued that in a determinate sentencing system, prosecutors can simply charge defendants with crimes bearing higher sentences. *Id.* (Breyer, J., dissenting). Knowing they will not have a chance to argue a lower sentence in front of a judge, defendants may then plead to charges they otherwise might have contested. *Id.* (Breyer, J., dissenting). For example, defendants could be forced to surrender a sentencing issue like drug quantity when they agree to the plea, thereby transferring power to prosecutors. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1100 (2001).

nate sentencing scheme, the judge has wide discretion over the length of the sentence, which could ultimately turn on the mood of the judge or on findings that may have been made by a preponderance of the evidence rather than beyond a reasonable doubt.[172] Justice Breyer emphasized that under this type of sentencing, the jury would have very little control over the sentence, which is in sharp contrast with the majority's decision to defend jury power.[173]

Justice Breyer then described an *Apprendi*-compliant determinate sentencing system, which would "punish similar conduct similarly and different conduct differently."[174] A judge could depart *downward* from sentences but not *upward* unless the aggravating factor was charged to a jury and proved beyond reasonable doubt.[175] Justice Breyer hypothesized there would be two ways to carry out this system: (1) subdividing each crime into a list of complex crimes, including sentencing factors, and (2) requiring at least two juries for each defendant—one jury to determine guilt and an additional jury to try sentencing factors.[176] Justice Breyer pointed out the inherent difficulties in each of these examples.[177] He suggested that, by subdividing each crime into a list of complex crimes, prosecutors would have to charge all relevant facts before an investigation even took place or before many of the facts relevant to punishment were known.[178] This type of system would result in "rough uniformity of punishment for those who engage in roughly the same *real* criminal conduct," which would be "artificial (and

172. *Blakely*, 124 S. Ct. at 2553-54 (Breyer, J., dissenting) (citing McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986)).

173. *Id.* at 2554 (Breyer, J., dissenting).

174. *Id.* (Breyer, J., dissenting).

175. *Id.* (Breyer, J., dissenting). Justice Breyer claimed this *Apprendi*-compliant determinate sentencing scheme would be the most likely path legislatures would take in light of the *Blakely* decision, which was based on the Kansas decision in *State v. Gould*, 23 P.2d 801 (Kan. 2001). *Blakely*, 124 S. Ct. at 2554 (Breyer, J., dissenting). However, Justice Breyer pointed out that *Gould* is the *only* example of this type of system. *Id.* (Breyer, J., dissenting).

176. *Blakely*, 124 S. Ct. at 2554-56 (Breyer, J., dissenting).

177. *Id.* at 2554-58 (Breyer, J., dissenting).

178. *Id.* at 2555 (Breyer, J., dissenting). For example, a robbery statute could increase a punishment depending upon:

> (1) the nature of the institution robbed, (2) the (a) presence of, (b) brandishing of, (c) other use of, a firearm, (3) making of a death threat, (4) presence of (a) ordinary, (b) serious, (c) permanent or life threatening, bodily injury, (5) abduction, (6) physical restraint, (7) taking of a firearm, (8) taking of drugs, (9) value of property loss, etc.

Id. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1 (2003). A prosecutor would then have to charge all relevant facts before a presentence investigation, before the trial itself, or before many of the facts relevant to the punishment are known. *Blakely*, 124 S. Ct. at 2555 (Breyer, J., dissenting). This type of system would also prejudice defendants because they would have to contest "material aggravating facts in the guilt phases of their trials" (i.e., a defendant charged with murder using a machete would have to argue that he did not kill the person, or if he did, he did not use a machete). *Id.* (Breyer, J., dissenting).

consequently unfair)."[179] Additionally, the second *Apprendi*-compliant method, a two-jury system, would result in prosecutors' having more power and would "undercut, if not nullify," legislative guidelines that ensure the punishment reflects real criminal conduct, not the conduct a prosecutor decides to charge and prove.[180] Ultimately, Justice Breyer summarized the options he discussed as weakening the connection between real conduct and real punishment, decreasing uniformity, and adding expense and complexity involved in a two-jury system.[181]

Justice Breyer then discussed the history of sentencing, criticizing the majority for basing its rule on "'longstanding tenets of common-law criminal jurisprudence.'"[182] He stressed that no historical treatise writer disputes judges traditionally have had discretion in sentencing based on facts not proved at trial; rather, modern history indicates judges have had broad discretion to set sentences within a statutory range.[183] For example, Justice Breyer pointed out that, in the nineteenth century, power shifted to the judge to increase or decrease a sentence within the statutory maximum and that modern, pre-*Apprendi* cases make clear that legislatures can distinguish between "sentencing facts" and "elements of crimes."[184] He claimed this legislative structuring of sentences has a dual effect: It enhances the Sixth Amendment's jury trial right and provides additional due process to defendants by allowing sentencing hearings before judges.[185]

Justice Breyer concluded his dissent by discussing why the Sixth Amendment permits a jury trial right to depend upon a legislative decision to label a fact as a sentencing factor, rather than an element of the crime.[186] He argued the sentencing system, which relates to the fairness and effectiveness of the criminal justice system, depends on the legislature's having constitutional authority to make these labels and the majority's opinion results in a "virtually unchangeable constitutional decision," which affects tens of thousands of criminal prosecutions.[187]

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179. *Blakely*, 124 S. Ct. at 2555 (Breyer, J., dissenting).
180. *Id.* at 2557 (Breyer, J., dissenting). Justice Breyer argued that efforts to tie the punishment to the conduct have occurred for more than a century, and the Court's holding "undermines efforts to reform these processes, for it means the legislature cannot *both* permit judges to base sentencing upon real conduct *and* seek, through guidelines, to make the results more uniform." *Id.* (Breyer, J., dissenting). He further stated a two-jury system would "work a radical change in pre-existing criminal law" and the Constitution has never required bifurcated jury-based sentencing other than in the context of the death penalty. *Id.* (Breyer, J., dissenting).
181. *Id.* at 2558 (Breyer, J., dissenting).
182. *Id.* at 2558-60 (Breyer, J., dissenting) (quoting *Blakely*, 124 S.Ct. at 2536).
183. *Id.* at 2559 (Breyer, J., dissenting) (internal citations omitted).
184. *Id.* at 2559-60 (Breyer, J., dissenting).
185. *Id.* at 2560 (Breyer, J., dissenting).
186. *Id.* at 2561 (Breyer, J., dissenting).
187. *Id.* at 2561-62 (Breyer, J., dissenting).

ANALYSIS

The Supreme Court's opinion in *Blakely* represents a bright-line constitutional rule: Any fact that increases a defendant's punishment based on a determinate sentencing guideline should be charged in an indictment and proven to a jury beyond a reasonable doubt.[188] The majority's rule allows a criminal defendant to have the full safeguards of the law in regard to an enhanced sentence.[189] Even though the *Blakely* decision was a hard, inconvenient one, it enforces the constitutional right to trial by jury.[190] Ultimately, inconvenience does not justify letting the Constitution slide.[191] This result embodies a constitutional guarantee, which is more significant than apprehension about the demise of twenty years of, at best, controversial sentencing reform.[192]

The majority's decision in *Blakely* is important because "it extends the *Apprendi* rationale from facts that increase a *statutory maximum* to all facts that increase a *determined sentencing guideline*."[193] The decision can be considered a Sixth Amendment victory in the form of a bright-line cate-

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188. *Id.* at 2536, 2543.

189. *See In re* Winship, 397 U.S. 358, 363 (1970) (stating that the basic procedural protections of a jury trial and proof beyond reasonable doubt exist to "provide concrete substance for the presumption of innocence" and to reduce erroneous deprivations).

190. *Blakely*, 124 S. Ct. at 2538. *See id.* at 2543-50 (O'Connor, J., dissenting).

191. *See* Jones v. United States, 526 U.S. 227, 252 n.11 (1999) ("[I]t should go without saying that, if such policies conflict with safeguards enshrined in the Constitution for the protection of the accused, those policies have to yield to the constitutional guarantees.").

192. *See generally* AMERICAN COLLEGE OF TRIAL LAWYERS, UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED 1 (2004), http://www.ussguide.com/-members/BulletinBoard/Blakely/Articles/ ACTL-Report.pdf (last visited Dec. 2, 2004) (determining federal sentencing policies "have resulted in an incursion on the independence of the federal judiciary, a transfer of power from the judiciary to prosecutors and a proliferation of unjustifiably harsh individual sentences"); News Release, National Association of Criminal Defense Lawyers, Statement of Barry C. Scheck President-Elect: National Association of Criminal Defense Lawyers On *Blakely v. Washington* (June 24, 2004) (on file with National Association of Criminal Defense Lawyers) [hereinafter Scheck], *at* http://www.nacdl.org/public.nsf/newsreleases/2004mn014?opendocument (last visited Dec. 2, 2004) ("The [*Blakely*] decision does not represent a step backward from the goal of sentencing reform, but a great leap forward, because it stands for the proposition that no defendant in a U.S. court will be punished for an unproven crime."); Kate Stith & William Stuntz, *Sense and Sentencing*, N.Y. TIMES, June 29, 2004, http://www.ussguide.com/ members/BulletinBoard/Blakely/NYT-06-29-04.html (last visited Dec. 2, 2004) (stating that under the Federal Sentencing Guidelines "virtually all the power is in the hands of the prosecutors"); John Gibeaut, *Compound Sentencing Problems*, ABA JOURNAL EREPORT, August 6, 2004, *at* http://www.abanet.org/journal/ereport/ au6blakely.html (last visited Dec. 2, 2004) (discussing the effects *Blakely* may have on the Federal Sentencing Guidelines).

193. Steven G. Kalar et al., *A Blakely Primer: An End to the Federal Sentencing Guidelines?* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS: THE CHAMPION, August 2004, at 10, http://nacdl.org/public.nsf/championarticles/ a0408p10?opendocument (last visited Dec. 2, 2004).

gorical rule.[194] Bright-line rules are a way to achieve certainty and clarity: "Certain rights can be preserved only through strict enforcement of categorical guarantees, and when the Framers drafted certain rights in absolute terms, they had good reason to do so."[195] *Blakely* focused on whether a determinate sentencing system could be "implemented in a way that respects the Sixth Amendment" and not on whether the sentencing system itself was unconstitutional.[196] This focus was the best way to argue the Constitution prohibits judicial discretion on a matter, and for good reason: "[A] bright-line rule is essential to give intelligible content to a provision in the Bill of Rights."[197] Because of the *Blakely* decision, a defendant can only be punished for a crime that has been proven to a jury beyond a reasonable doubt.[198] Ultimately, *Blakely* stands for the proposition that "no defendant in a U.S. court will be punished for an unproven crime."[199]

In addition to establishing a bright-line rule, the majority's decision serves to reduce the abuse of power by prosecutors.[200] Under sentencing systems, "virtually all the power is in the hands of prosecutors."[201] Through the combination of criminal code statutes and sentencing guidelines, prosecutors have a long list of charging options.[202] The items that the prosecutors select from this list determine if and how long a defendant goes to prison.[203] This list can be considered "harsh" because a prosecutor can choose a severe charge, resulting in a long recommended sentence.[204] Furthermore, if the defendant pleads guilty by a plea bargain, the prosecutor inevitably dictates

194. Jeffrey L. Fisher, *A Blakely Primer: Drawing the Line in Crawford and Blakely*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS: THE CHAMPION, August 2004, at 18, *at* http://nacdl.org/public.nsf/championarticles/a0408p18?opendocument (last visited Dec. 2, 2004).

195. *Id.*

196. Blakely v. Washington, 124 S. Ct. 2531, 2540 (2004).

197. Fisher, *supra* note 194, at 18. *See Blakely*, 124 S. Ct. at 2540, where the majority explained:

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

Id.

198. Scheck, *supra* note 192.

199. *Id.*

200. Stith & Stuntz, *supra* note 192.

201. *Id.*

202. *Id. See also Blakely*, 124 S. Ct. at 2542 ("[G]iven the sprawling scope of most criminal codes, and the power to affect sentences by making (even nonbinding) sentencing recommendations, there is already no shortage of *in terrorem* tools at prosecutors' disposal.").

203. Stith & Stuntz, *supra* note 192.

204. *Id.*

the terms of the defendant's sentence: "The information judges see at sentencing is, for the most part, the information prosecutors want them to have."[205] *Blakely* may "[rule] this system out of bounds" because any fact that increases a defendant's sentence has to be charged in an indictment and proven to a jury beyond a reasonable doubt.[206] The necessity of the rule from *Blakely* was evidenced by the facts of the case itself. In *Blakely*, the defendant was induced to plead guilty by the dropping of a more serious charge but was "blindsided by an unanticipated sentence."[207] This kind of "legal maneuver" will no longer be permitted because of the *Blakely* decision—a decision that "redresses one of the blackest marks in the history of American criminal justice and restores to civilian defendants a precious constitutional right."[208]

The majority's decision also reduces the potential abuse of power by judges.[209] The basic procedural protections of a jury trial and proof beyond a reasonable doubt exist to "provide concrete substance for the presumption of innocence" and to reduce imposition of erroneous deprivations.[210] Because of the loss of liberty and stigma involved when a defendant faces an enhanced punishment, "it necessarily follows that the defendant should not . . . be deprived of [these procedural] protections."[211] Nonetheless, before *Blakely*, the judge—not a jury—would hold the sentencing hearing, consider a range of sentencing factors, and base the defendant's enhanced sentence on these considerations.[212] Once again, *Blakely* may "[rule] this system out of bounds" because any fact that increases a defendant's sentence has to be proven to a jury beyond a reasonable doubt.[213]

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205. *Id.*

206. *Id.*

207. Robert Hardaway, *Protecting the Right to a Jury Trial: A Recent Supreme Court Decision is a Victory for Defendants' Rights*, THE DENVER POST, August 1, 2004, at 1E. *See also Blakely*, 124 S. Ct. at 2534-35 ("Pursuant to the plea agreement, the State recommended a sentence within the standard range of 49 to 53 months. After hearing [the defendant's wife's] description of the kidnapping, however, the judge rejected the State's recommendation and imposed an exceptional sentence of 90 months—37 months beyond the standard maximum.").

208. Hardaway, *supra* note 207, at 4E.

209. Stith & Stuntz, *supra* note 192.

210. *In re* Winship, 397 U.S. 358, 363 (1970).

211. Apprendi v. New Jersey, 530 U.S. 466, 484 (2000).

212. Stith & Stuntz, *supra* note 192. In *Blakely*, the sentencing judge imposed a ninety-month sentence, which exceeded the fifty-three-month standard maximum by almost seventy percent. *Blakely*, 124 S. Ct. at 2539-40. In other cases, the Washington Supreme Court has upheld sentences fifteen times the standard maximum. *Id.* at 2540. *See* State v. Branch, 919 P.2d 1228, 1235 (Wash. 1996) (prescribing a four-year exceptional sentence from a three-month standard maximum sentence); State v. Oxborrow, 723 P.2d 1123, 1125, 1128 (Wash. 1986) (prescribing a fifteen-year exceptional sentence from a one-year standard maximum sentence).

213. Stith & Stuntz, *supra* note 192.

Given the grave importance of enforcing a constitutional guarantee, the dissenters focused on significant, but not insurmountable, issues.[214] Because *Blakely* found that implementing a state sentencing guidelines scheme violated a defendant's Sixth Amendment right to trial by jury, ambiguity arises surrounding the effect of *Blakely* on the Federal Sentencing Guidelines.[215] The United States Supreme Court has decided to rule on the roles of judges and juries in federal criminal sentencing, specifically addressing the question of whether judges can conduct fact-finding at sentencing without violating a defendant's Sixth Amendment rights.[216] Ultimately, the Court will have to decide whether the Federal Sentencing Guidelines are still viable.[217]

The majority's decision may cause a reformulation of sentencing practices in the United States, but the supposed consequences are far from "disastrous."[218] Unlike the federal system, "judicial fact-finding [in state courts] is used in only a small fraction of cases and thus is easier to avoid while states are constructing responses."[219] *Blakely* does not require states to abandon their guidelines systems.[220] In fact, states that use presumptive or voluntary systems still have an option that retains their current system *and* complies with the *Blakely* ruling.[221] For example, when enhanced sentences

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214. *See Blakely*, 124 S. Ct. at 2543-50 (O'Connor, J., dissenting); *id.* at 2550-51 (Kennedy, J., dissenting); *id.* at 2551-62 (Breyer, J., dissenting).

215. Gibeaut, *supra* note 192.

216. *Id.* The Court agreed to hear two appeals: *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105, argued on October 4, 2004. United States v. Booker, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 125 S. Ct. 11 (2004); United States v. Fanfan, 2004 U.S. Dist. LEXIS 18593 (D. Me. June 28, 2004), *cert. granted*, 125 S. Ct. 12 (2004). In *Booker*, a federal jury convicted Freddie J. Booker of possessing and distributing crack cocaine. *Booker*, 375 F.3d at 509. Using the Federal Guidelines' intricate mathematical formula, Booker's sentence would have been under twenty-two years because of the drug quantity (only 92.5 grams of crack cocaine) and Booker's prior convictions. *Id.* at 509-10. However, the sentencing judge increased Booker's sentence to thirty years because of another 566 grams of cocaine that Booker had sold before his arrest and because the judge determined that Booker had obstructed justice. *Id.* at 509. The United States Court of Appeals for the Seventh Circuit threw out the enhanced sentence. *Id.* at 515. In *Fanfan*, a jury convicted Fanfan of conspiring to distribute at least 500 grams of powdered cocaine. *Fanfan*, 2004 U.S. Dist. LEXIS 18593, at *5. The judge concluded that the additional evidence warranted a fifteen to sixteen-year sentence under the guidelines but gave Fanfan only six and a half years because of *Blakely*. *Id.* at *6-7.

217. Gibeaut, *supra* note 192.

218. *See Blakely*, 124 S. Ct. at 2544 (O'Connor, J., dissenting).

219. Wool & Stemen, *supra* note 133, at 2.

220. *Id.* at 6.

221. *Id.* at 7. Under a presumptive sentencing guidelines system, the guidelines "require a judge to impose the recommended (presumptive) sentence or one within a recommended range, or provide justification for imposing a different sentence." *Id.* at 2. Six states employ presumptive guidelines systems: Kansas, Minnesota, North Carolina, Oregon, Tennessee, and Washington. *Id.* at 3. Under a voluntary sentencing guidelines system, the guidelines "do not require a judge to impose a recommended sentence, but may require the judge to provide justification for imposing a different sentence." *Id.* at 2. Six jurisdictions employ voluntary

are sought, states with a presumptive or voluntary system can retain their core system and allocate fact-finding to juries.[222] Moreover, states that do have to reform their sentencing guidelines systems can move from a presumptive system to a voluntary system, or vice versa, depending on the goals the state had in enacting the guidelines system in the first place.[223] Therefore, solutions exist that "largely preserve the goals that drove states to enact structured sentencing systems."[224] Also, many state officials have shown "a discernable lack of appetite to abolish guidelines systems"; therefore, states will probably keep their sentencing systems, modifying them to be *Blakely*-compliant.[225]

Since the state court's use of Washington's sentencing guidelines scheme was found unconstitutional, the Federal Guidelines may be "vulnerable to attack."[226] The provision in the Washington code that was implemented provided for an increase in the upper bound of the presumptive sentencing range if there are "substantial and compelling reasons."[227] The Court in *Blakely* found that these "soft" constraints did not survive *Apprendi*, suggesting that the "hard" restraints found in the Federal Sentencing Guidelines will also be rejected.[228] On the other hand, even if enhanced sentencing facts must be treated as elements under the Washington statute, facts that must be established for upward adjustments or departures under the Guidelines may *not* have to be treated as elements.[229] Washington's maximum sentences were codified in statutes, whereas the Federal Guidelines are "a unique product of a special delegation of authority" and are *not* legislatively en-

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guidelines systems: Arkansas, Delaware, Maryland, Rhode Island, Utah, and Virginia. *Id.* at 3.

222. *Id.* at 7.

223. *Id.*

224. *Id.* at 2-3.

225. *Id.* at 9. For a comprehensive overview of the effects of *Blakely* on various state sentencing guidelines, *see* Wool & Stemen, *supra* note 133, at 1-11.

226. Blakely v. Washington, 124 S. Ct. 2531, 2549 (2004) (O'Connor, J., dissenting).

227. *Id.* at 2535 (citing WASH. REV. CODE ANN. § 9.94A.120 (West 2000)).

228. *Id.* at 2550 (O'Connor, J., dissenting). The provision struck down under Washington's sentencing scheme provides for an increase in the upper bound of the presumptive sentencing range if "there are substantial and compelling reasons justifying an exceptional sentence." WASH. REV. CODE ANN. § 9.94A.120 (West 2000). The Act also provides a nonexhaustive list of aggravating factors. *Id.* § 9.94A.390. These "soft" restraints allow judges to exercise a substantial amount of discretion. *Blakely*, 124 S. Ct. at 2550 (O'Connor, J., dissenting). The Federal Sentencing Guidelines contain "hard" constraints, which require an increase in the sentencing range upon specified factual findings. *Id.* (O'Connor, J., dissenting). *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (1998) (stating that increases in the offense level for firearms offenses are based on the number of firearms involved); *id.* § 2B1.1 (stating that an increase in the offense level for financial crimes is based on amount of money involved, number of victims, etc.); *id.* § 3C1.1 (stating a general increase in the offense level for obstruction of justice).

229. Nancy J. King & Susan R. Klein, *Beyond* Blakely 2 (unpublished manuscript, on file with author), *at* http://sentencing.typepad.com/sentencing_law_and_policy/files/kingklein_beyond_blakely.pdf (last visited Dec. 2, 2004).

acted.[230] The Federal Guidelines "were never intended to operate on the same footing as the statutory maximums" and may therefore be constitutional.[231]

Even if part of the Federal Sentencing Guidelines were found unconstitutional, much of the Guidelines would be untouched by *Blakely*.[232] For example, the state of Kansas chose to modify its determinate sentencing scheme to comply with *Apprendi* through legislation.[233] The Kansas Sentencing Committee created a subcommittee, including legislators, prosecutors, defense attorneys, and judges, which created a "substantively workable and fair but politically acceptable" legislative response to *Blakley*.[234] The system, which incorporates jury fact-finding as the basis of an enhanced sentence, was quickly embraced and has proven effective in practice.[235] Therefore, the "apocalyptic predictions regarding *Apprendi's* application to a determinate sentencing scheme have not come to pass" and there seems to be no barrier to federal judges' or Congress' accomplishing this same modification.[236] Admittedly, severing judicial factfinding for enhanced sentences from the Guidelines "will render the [Sentencing Reform Act of 1984] less effective in securing the uniformity in sentencing that Congress originally intended."[237] But the Sentencing Reform Act, which promulgated the Federal Sentencing Guidelines, would still be able to advance its overall goal of ending sentencing disparities, while preserving constitutional rights.[238]

Even if *Blakely's* decision may negatively affect the Federal Guidelines, the Guidelines are considered by some to be "too complex and

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230. *Id.* (internal citations omitted).
231. *Id.* (internal citations omitted).
232. *Id.* at 3.
233. Wool & Stemen, *supra* note 133, at 7. *See* State v. Gould, 23 P.3d 801 (Kansas 2001). In Kansas, sentence-enhancing facts now have to go to the jury. KAN. STAT. ANN. § 21-4718(b)(2) (Supp. 2002).
234. Wool & Stemen, *supra* note 133, at 7.
235. *Id.*
236. Randall L. Hodgkinson, *A* Blakely *Primer: The Kansas Sentencing Guidelines*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS: THE CHAMPION, August 2004, at 20, http://www.nacdl.org/public.nsf/championarticles/a0408p20?opendocument (last visited Dec. 2, 2004) (discussing Kansas's statutory reform after *Apprendi*). *See also* King & Klein, *supra* note 229, at 6 ("As in Kansas, a federal jury could hear evidence of guilt and evidence supporting aggravating facts, either in a unitary proceeding, or, in the judge's discretion, in a bifurcated proceeding. There seems to be no constitutional or federal statutory barrier to this solution.").
237. King & Klein, *supra* note 229, at 8.
238. *Id.* at 5, 8. The Sentencing Act of 1984 attempted to remedy indeterminate sentencing by (1) rejecting rehabilitation and parole, (2) consolidating power that had been exercised by the sentencing judge and the parole commission instead into the United States Sentencing Commission, (3) making all sentences determinate, (4) making the Sentencing Commission's guidelines binding on the courts, and (5) authorizing limited appellate review of sentencing decisions. Mistretta v. United States, 488 U.S. 361, 367 (1989).

clumsy" in the first place.[239] Congress set up the Guidelines system in 1984, along with the Sentencing Commission, in an effort to decrease sentencing disparity.[240] This Commission set presumptive ranges based on historical sentencing patterns; however, the Guidelines are complicated, and the Commission's effort "boiled down to a mathematical calculation where the end product bore no relationship to the crime and could yield bizarre results."[241] This calculation has little credibility with judges—they are reluctant to show deference to a system "where they can't explain the sentence to the defendant."[242] Judges have little discretion within the range set forth by the Guidelines, and the Guidelines are excessively long and complicated because they attempt to cover every possible factor.[243] The Guidelines are considered so complex that "they micromanage the judges' work."[244]

In addition to being complex, the current Federal Guidelines system has resulted in a district court judge's imposing a *severe* increase in a defendant's sentence by relying on facts not charged in an indictment and not proven to a jury beyond a reasonable doubt.[245] In *United States v. Hammoud,* the district court imposed a sentence of 155 years based on the Federal Sentencing Guidelines.[246] The United States Court of Appeals for the Fourth Circuit affirmed the district court's holding, finding that *Blakely* did not apply to the Federal Sentencing Guidelines.[247] Ultimately, the *Blakely*

239. Gibeaut, *supra* note 192 (quoting University of Pennsylvania law professor Paul H. Robinson, a member of the U.S. Sentencing Commission, who voted against the original federal guidelines in 1987).

240. *Id.*

241. *Id.* (quoting Robinson, *supra* note 239). For example, a bizarre result would be equivalent sentences for drug trafficking and a violation of the Wild Free-roaming Horses and Burros Act. *Id.*

242. *Id.* (quoting Robinson, *supra* note 239).

243. AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 192, at 12. The Guidelines manual is 500 pages long, which causes time-consuming sentence determinations. *Id.* Because of the Guidelines, sentencing has changed from "reaching a just result to properly interpreting the numerous potentially relevant provisions in the Guidelines." *Id.* This complexity has introduced more sentencing disparity, which is in direct contrast with the policy behind the Sentencing Reform Act of 1984, because courts struggle to interpret and apply the Guidelines. *Id.*

244. Gibeaut, *supra* note 192 (quoting Freddie J. Booker's lawyer, T. Christopher Kelly). Kelly stated that he would rather see the court "trash" the guidelines and opt for fact-finding by the jury. *Id.*

245. United States v. Hammoud, 381 F.3d 316, 327 (4th Cir. 2004).

246. *Id.*

247. *Id.* at 357. In *Hammoud*, the defendant was charged with various immigration violations, sale of contraband cigarettes, money laundering, mail fraud, credit card fraud, and racketeering. *Id.* at 326. The jury convicted the defendant of fourteen offenses, only a couple of which were relevant to the calculation of the sentence under the Federal Sentencing Guidelines. *Id. See* 18 U.S.C. §§ 1956(a)(1), 1956(h) (West 2000 & Supp. 2004) (money laundering and conspiracy to commit money laundering); 18 U.S.C. § 2342 (West 2000) (transportation of contraband cigarettes). The presentencing report recommended several upward adjustments to the base offense level, ultimately resulting in a required sentence of life imprisonment. *Hammoud*, 381 F.3d at 326-27. At the sentencing hearing, the court concluded that

decision and the upcoming Federal Guidelines cases "'may be a sort of trigger for rethinking the entire federal system.'"[248]

A solution to the apparent turmoil that *Blakely* has caused would be to declare the Federal Guidelines as advisory.[249] Federal district judges would legally be able to determine sentences within the fixed statutory range.[250] They would still have to take notice of the Guidelines, but the Guidelines would not be a "straitjacket."[251] In other words, under an advisory Guidelines system, Congress could let "guidelines guide—and judges judge."[252] In the meantime, the Sentencing Commission would be able to look at its approach to relevant conduct, standards of proof, and cross-references.[253] The *Blakely* decision will allow more humane sentencing procedures to be developed that incorporate the past two decades of sentencing reform (both at the state and federal level) and will present an opportunity to revisit priorities surrounding criminal sentencing procedures.[254]

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the Guidelines provided for a sentence of life imprisonment. *Id.* at 327. None of the offenses carried a statutory maximum; therefore, the court imposed the maximum sentence on each count, resulting in a sentence of 155 years. *Id.*

248. Gibeaut, *supra* note 192 (quoting appellate lawyer Thomas C. Goldstein). Because the justices cannot legislate, the question is whether the Court will put in a "stopgap" measure and hope that Congress acts. *Id.*

249. Letter from Dennis W. Archer, ABA President, to The Honorable Orrin G. Hatch, Chairman, Committee on the Judiciary, United States Senate, and The Honorable Patrick Leahy, Ranking Democrat, Committee on the Judiciary, United States Senate 2 (July 12, 2004) (one file with the American Bar Association) (regarding *Blakely v. Washington* and the future of the Federal Sentencing Guidelines). *See also* Kalar et al., *supra* note 193, at 10 (considering making sentencing guidelines advisory).

250. Stith & Stuntz, *supra* note 192.

251. *Id.*

252. *Id.*

253. Kalar et al., *supra* note 193, at 10.

254. Archer, *supra* note 249, at 2. Because of *Blakely*, the judiciary, the Department of Justice, the defense bar, and countless organizations and academics are assessing *Blakely's* ramifications for the federal system and are devoting resources to determining what reforms may be appropriate. *Id.* at 1-2. For example, *Justice at Stake*, a national campaign working to "keep our courts fair, impartial and independent" has issued a brief that explains why courts are best qualified to pick punishments that fit the crime and shows how the power to punish criminals is being taken away from the courts. BERT BRANDENBURG & AMY KAY, JUSTICE AT STAKE, COURTS . . . OR CALCULATORS?, THE ROLE OF COURTS IN CRIMINAL SENTENCING 8 (2004), http://justiceatstake.org/files/SentencingBrief.Final.pdf (last visited Dec. 2, 2004). Hearings by the Committee on the Judiciary and the ABA's Justice Kennedy Commission are addressing the issues raised by the *Blakely* decision. Archer, *supra* note 249, at 1-2. The Justice Kennedy Commission "has issued sweeping recommendations regarding state and federal sentencing policies, including the repeal of mandatory sentencing laws and steps to eliminate racial and ethnic bias in the criminal justice system." WATCHING JUSTICE, WATCHING JUSTICE EVENT: BLAKELY, THE KENNEDY COMMISSION, AND BEYOND (2004), *at* http://www.watchingjustice.org/whatsnew/whatsnew.php?docId=435 (last visited Dec. 2, 2004). Additionally, the Constitution Project, a bipartisan nonprofit organization that discusses controversial legal and constitutional issues, created a sentencing initiative in response

Blakely's decision extended *Apprendi's* bright-line rule to determinate sentencing guidelines, but this rule will hardly wreak havoc on our nation's trial courts.[255] The Department of Justice has issued legal positions and policies in light of *Blakely*, stating that "[d]espite the current uncertainty about the implications of Blakely . . . federal prosecutors . . . can continue to play their vital role in bringing justice to their communities and effectively vindicat[e] federal criminal law."[256] If *Blakely* applies to the Federal Sentencing Guidelines, the Department of Justice has proposed an interim solution that will allow sentencing courts to consider the same factors the Guidelines make relevant to sentencing, while not contravening *Blakely*.[257] This solution emphasizes that the court "should impose a sentence, in its discretion, within the maximum and minimum terms established by statute for the offense of conviction."[258] Following these protective procedures and the *Blakely* decision, prosecutors can safeguard against the "possibility of a changed legal landscape as a result of future court decisions."[259] These pro-

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to *Blakely*. THE CONSTITUTION PROJECT, SENTENCING INITIATIVE, *at* http://www.constitutionproject.org/si/index.html (last visited Dec. 2, 2004).

255. *See* Blakely v. Washington, 124 S. Ct. 2531, 2549 (2004) (O'Connor, J., dissenting). Justice O'Connor raised various questions in her dissent: "How are courts to mete out guidelines sentences? Do courts apply the guidelines as to mitigating factors, but not as to aggravating factors? Do they jettison the guidelines altogether?" *Id.* (O'Connor, J., dissenting).

256. Memorandum from James Comey, Deputy Attorney General, to the US Attorneys' Office 5 (July 2, 2004) (on file with author), http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.pdf (last visited Dec. 2, 2004) (regarding departmental legal positions and polices in light of *Blakely v. Washington*).

257. *Id.* at 3.

258. *Id.* at 2. There are three components of this solution. *Id.* First, if the sentence can be calculated without the resolution of facts beyond the jury verdict, then the Guidelines remain constitutional and applicable. *Id.* In other words, if the court finds there are no applicable upward adjustments under the Guidelines "beyond the admitted facts or the jury verdict on the elements of the offense," the Guidelines should be applied. *Id.* Second, the Guidelines should be applied if the defendant agrees to waive his or her *Blakely* rights. *Id.* However, the ABA explained that a compulsory waiver of *Blakely* rights would burden the constitutional right to a jury trial and could be seen as an attempt to evade *Blakely's* holding, concluding that "any law or policy that relies upon the ability to force defendants to waive their constitutional rights for its effect must be regarded as extremely problematic in a just society." Archer, *supra* note 249, at 2. Third, if there are upward adjustments under the Guidelines, thereby making *Blakely* applicable, the Guidelines system as a whole cannot be applied and the court should impose a sentence within the statutory sentencing range. Comey, *supra* note 256, at 2.

259. Comey, *supra* note 256, at 3. Specific procedures that should be used by prosecutors include the following: "including in indictments all readily provable Guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from the *Blakely* and *Apprendi* rules)," obtaining "superseding indictments that allege all readily provable Guidelines upward adjustment or upward departure factors," seeking "to obtain plea agreements that contain waivers of all rights under *Blakely*," urging "courts to continue to direct probation officers to prepare presentence reports that contain Guidelines sentencing calculations based on all available factual information normally considered at sentencing before the advent of *Blakely*," and asking "district courts to state alternative sentences to enable efficient and prompt resentencing." *Id.* at 3-4.

cedures set out quite clearly how defendants can have the full safeguards of the law while prosecutors can bring "justice to their communities."[260]

Not only are there ways to ensure that *Blakely* will *not* wreak havoc on our nation's trial courts, perceived "added costs" flowing from the majority's decision may be unfounded.[261] Costs could be reduced by including sentences in plea bargains.[262] Moreover, the need for a jury trial during sentencing could be eliminated if the defendant waived his jury trial right as part of a plea bargain.[263] Therefore, predicted "added costs" may not materialize, and even if they do, the risk of increased expenses must yield to constitutional guarantees.[264]

Another issue stemming from the *Blakely* decision is whether *Blakely* will be applied retroactively.[265] Defendants seeking retroactive application of *Blakely* (back to the date *Apprendi* was decided) will confront the recent United States Supreme Court decision in *Schriro v. Summerlin*, which discussed whether *Ring* was to be applied retroactively.[266] Relying on *Ring*, the Ninth Circuit invalidated the defendant's death sentence, concluding *Ring* did not apply because the defendant's sentence had become final before *Ring* was decided.[267] The United States Supreme Court discussed when a decision results in a "new rule," emphasizing that a "new rule" applies to all criminal cases pending on direct review.[268] The Court determined

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260. *Id.* at 5.

261. Hardaway, *supra* note 207, at 4E. *See supra* notes 152-54, 181 and accompanying text.

262. Hardaway, *supra* note 207, at 4E.

263. King & Klein, *supra* note 229, at 9. In the wake of *Blakley*, the Department of Justice stated that prosecutors should now include in a plea agreement that:

> [T]he defendant agrees to have his sentence determined under the Sentencing Guidelines; waives any right to have facts that determine his offense level under the Guidelines . . . alleged in an indictment and found by a jury beyond a reasonable doubt; agrees that facts that determine the offense level will be found by the court at sentencing by a preponderance of the evidence and that the court may consider any reliable evidence, including hearsay; and agrees to waive all constitutional challenges.

Comey, *supra* note 256, at 4.

264. *See* Jones v. United States, 526 U.S. 227, 252 n.11 (1999) ("[I]f such policies conflict with safeguards enshrined in the Constitution for the protection of the accused, those policies have to yield to the constitutional guarantees.").

265. *See* Blakely v. Washington, 124 S. Ct. 2531, 2549 (2004) (O'Connor, J., dissenting).

266. Schriro v. Summerlin, 124 S. Ct. 2519, 2521 (2004). In *Summerlin*, the defendant was convicted of first-degree murder and sexual assault. *Id.* The judge found two aggravating factors and imposed the death sentence. *Id.* The two aggravating factors found by the judge were (1) a prior felony conviction involving use or threatened use of violence and (2) commission of the offense in an especially heinous, cruel, or depraved manner. *Id.* (citing ARIZ. REV. STAT. ANN. §§ 13-703(F)(2), 13-703(F)(6) (West 1978)).

267. *Id.* at 2522. *See* Ring v. United States, 536 U.S. 584 (2002).

268. *Id.*

a "new rule" only applies in limited circumstances to convictions that are already final.[269] These limited circumstances include "new" substantive rules, but do *not* include "new" procedural rules.[270] The Court concluded that *Ring's* rule was procedural and therefore does not apply retroactively to cases already final on direct review.[271]

To apply *Blakely* retroactively, defendants will have to argue the rule in *Blakely* is not "new" or, alternatively, the rule is a "new substantive" rule as defined in *Summerlin*.[272] Additionally, most defendants will be raising *Blakely* on appeal under 28 U.S.C. section 2255.[273] According to the United States Supreme Court, federal courts may not grant relief under section 2255 if the "new" rule was announced after the prisoner's conviction became final.[274] Therefore, if *Blakely* is considered a "new" rule, any conviction that became final before *Blakely* was handed down on June 24, 2004, cannot rely on *Blakely* for relief.[275] Conversely, if the *Blakely* rule was dictated by *Apprendi*, then prisoners whose appeals were pending when *Apprendi* was announced can raise their *Blakely* claims.[276] Even if *Blakely* can be applied retroactively, which seems unlikely in light of the Supreme Court's restrictive view of retroactivity, the threat of thousands of criminal cases in jeopardy must, once again, yield to constitutional guarantees.[277]

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269. *Id.*

270. *Id.* at 2522-23. Substantive rules include "decisions that narrow the scope of a criminal statute by interpreting its terms . . . as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 2522. Substantive rules apply retroactively because of the risk that a defendant could face a punishment the law cannot impose upon him. *Id.* at 2522-23. Procedural rules do not apply retroactively because they "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 2523.

271. *Id.* at 2526-27.

272. *See supra* notes 268-70 and accompanying text.

273. King & Klein, *supra* note 229, at 10. 28 U.S.C. section 2255 states the following:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255 (2004).

274. Teague v. Lane, 489 U.S. 288 (1989) (O'Connor, J., plurality).

275. King & Klein, *supra* note 229, at 14.

276. *Id.* In other words, prisoners whose direct appeals where pending when *Apprendi* was announced will not be barred by *Teague*. *Id.*

277. *See* Jones v. United States, 526 U.S. 227, 252 n.11 (1999) ("[I]f such policies conflict with safeguards enshrined in the Constitution for the protection of the accused, those policies have to yield to the constitutional guarantees.").

CONCLUSION

Blakely enforced a constitutional guarantee—a guarantee that strongly outweighs any potential ramifications of the majority's decision. Additionally, solutions exist to diminish the effects of these potential ramifications, while still upholding the defendant's constitutional right to a trial by jury. If guidelines systems are in danger and *Blakely* is determined to apply retroactively, the criminal justice system will still be intact, and attorneys, judges, and lawmakers will have to work to improve a controversial sentencing system. Justice Scalia, writing for the majority, confirmed *Apprendi's* bright-line rule that all facts that increase a defendant's punishment beyond the statutory maximum, including facts within determinate sentencing guidelines, should be charged in an indictment and proven to a jury beyond a reasonable doubt. This rule established a constitutional line that clearly demonstrates what facts must go to the jury. Ultimately, the majority's rule allows criminal defendants the full safeguards of the law, not only when facing the death penalty, but also when facing an increase in punishment, a rule that will give "intelligible content" to the Sixth Amendment right to a trial by jury.

TERESA R. NELSON