

## Casenote

### ***Blakely v. Washington: Criminal Sentencing and the Sixth Amendment Limitation on Judicial Factfinding***

In *Blakely v. Washington*,<sup>1</sup> the United States Supreme Court held that Washington's state criminal sentencing procedure did not comply with the defendant's Sixth Amendment jury trial guarantee.<sup>2</sup> A criminal defendant has the right to have a jury decide all facts legally essential to punishment.<sup>3</sup> This decision is important for its impact on criminal sentencing procedures, especially regarding its implications for the federal sentencing guidelines.

#### I. FACTUAL BACKGROUND

In 1998 Ralph Howard Blakely, Jr. kidnapped his estranged wife Yolanda from their home in Grant County, Washington. He used duct tape to restrain her and forced her, at knifepoint, into a wooden box in the bed of his pickup truck. During the abduction, Blakely pleaded with Yolanda to dismiss her divorce suit and related trust proceedings against him. The couple's thirteen-year-old son, Ralphy, returned home from

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1. 124 S. Ct. 2531 (2004).

2. *Id.* at 2530.

3. *Id.* at 2543.

school, and Blakely ordered him to drive behind the truck in another car. Blakely threatened that he would use a shotgun to harm Yolanda if Ralph did not comply. Ralph followed the truck to a gas station. While both vehicles were stopped, Ralph escaped and sought help. Blakely drove on with Yolanda, still imprisoned in the wooden box, to a friend's house in Montana. The friend called the police who then arrested Blakely.<sup>4</sup>

Blakely was charged with first-degree kidnapping. In a plea agreement, the State of Washington reduced the charge to second-degree kidnapping involving domestic violence and use of a firearm. Blakely later agreed to an additional charge of second-degree assault, involving domestic violence.<sup>5</sup> He pleaded guilty to the charge of second-degree kidnapping, which is a class B felony, admitting the elements of the charge and the allegations of domestic violence and use of a firearm. Blakely did not admit any other relevant facts.<sup>6</sup>

Washington state sentencing law provided that “[n]o person convicted of a [class B] felony shall be punished by confinement. . . exceeding. . . a term of ten years.”<sup>7</sup> Other provisions of Washington’s Sentencing Reform Act<sup>8</sup> further limited the sentence. Second-degree kidnapping with a firearm bears a standard sentence range of forty-nine to fifty-three months, which is less than ten years.<sup>9</sup>

A judge may, however, impose a sentence that exceeds the standard range if the judge discovers “‘substantial and compelling reasons justifying an exceptional sentence.’” When a judge sentences a defendant to a sentence that exceeds the standard range, the judge must support the sentence with findings of fact and conclusions of law.<sup>11</sup>

The State recommended a sentence within the standard range which was forty-nine to fifty-three months. The facts in Blakely’s plea corresponded to the state’s guided maximum sentence.<sup>12</sup> The court, however, sentenced him to an additional thirty-seven months after hearing Yolanda’s testimony describing the kidnapping and after making a judicial determination that the petitioner acted with “deliberate

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4. *Id.* at 2534.

5. *Id.* at 2535 n.2 (noting “The 14-month sentence on that count ran concurrently and is not relevant here.”).

6. *Id.* at 2534-35.

7. WASH. REV. CODE ANN. § 9A.20.021(1)(b).

8. WASH. REV. CODE ANN. § 9.94A.320.

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

10. *Id.* (quoting WASH. REV. CODE ANN. § 9.94A.120(2)).

11. *Id.*

12. *Id.*

cruelty.”<sup>13</sup> This determinant gave the court grounds, under state law relating to domestic violence cases, for a departure from the standard sentence.<sup>14</sup>

Blakely objected, and the judge held a three-day bench hearing, which included testimony from Blakely, Yolanda, Ralph, a police officer, and medical experts. Subsequent to the hearing, the judge issued thirty-two findings of fact and concluded that the initial sentence of ninety months should stand.<sup>15</sup>

Blakely appealed and contended that the trial judge’s sentencing procedure deprived him of his Sixth Amendment constitutional right to have a jury determine, beyond a reasonable doubt, all the facts that were legally applicable to his sentence. The Washington State Court of Appeals affirmed, and when Blakely appealed again, the Washington Supreme Court denied discretionary review.<sup>16</sup>

The Supreme Court granted certiorari.<sup>17</sup> In its majority opinion, the Court reversed the lower court’s ruling, holding that the petitioner’s Sixth Amendment right was violated by the imposition of an exceptional sentence based on facts not found by a jury.”

## 11. LEGAL BACKGROUND

The Sixth Amendment provides that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . and to be informed of the nature and cause of the accusation.”<sup>19</sup> Generally, the Sixth Amendment provides criminal defendants the right to trial by jury. Juries decide the verdict on the charged offenses, and judges impose sentences as punishment.

### A. *Background: The Sixth Amendment and Criminal Sentencing*

In *Williams v. New York*,<sup>20</sup> defendant was convicted of first-degree murder. The trial judge imposed the death sentence despite the jury’s recommendation of life imprisonment. The judge explained the sentence enhancement was justified by additional information and was authorized by statute. Specifically, the judge described the shocking details of the crime and spoke about his own belief in defendant’s guilt. The judge

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13. *Id.*

14. *Id.*

15. *Id.* at 2535-36.

16. *Id.* at 2536.

17. *Id.*

18. *Id.* at 2538.

19. U.S. CONST. amend. VI.

20. 337 U.S. 241 (1949).

reasoned that the investigation had uncovered many material details about defendant's background and prior convictions. These facts, although relevant to punishment, could not have been brought before the jury for consideration."

The Supreme Court discussed how there were both historical and practical reasons for the distinction between the rules governing trial and sentencing procedure." Additionally, a sentencing judge has the task of determining the extent of punishment and having the most information possible is essential for setting an appropriate sentence.<sup>23</sup> The Court held that even though the potential for abuse arises when a judge is choosing the appropriate sentence, especially when the choice is between life imprisonment and death, judicial discretion is nevertheless constitutional.<sup>24</sup> A judge does not violate the Due Process Clause, which incorporates the Sixth Amendment, merely by considering information that was not put before a jury.<sup>25</sup>

In *In re Winship*,<sup>26</sup> appellant was a twelve-year-old boy who had stolen money from a woman's purse. The trial judge reasoned that while the evidence might not establish guilt beyond a reasonable doubt, such proof was not required by the Fourteenth Amendment. The judge ordered the boy to be placed in a training school for an initial period of eighteen months.<sup>27</sup>

The Supreme Court discussed the historical precedence of requiring that a guilty conviction be based on proof beyond a reasonable doubt.<sup>28</sup> This "safeguard" reduces the risk of guilty convictions based on errors of fact.<sup>29</sup> The Court reversed and expressly held that the Due Process Clause, which incorporates the Sixth Amendment, requires proof beyond a reasonable doubt of every fact essential to constitute a crime.<sup>30</sup> This rule of law applies to children as well as to adults being charged with crimes.<sup>31</sup>

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21. *Id.* at 242-44.

22. *Id.* at 246.

23. *Id.* at 247.

24. *Id.* at 252.

25. *Id.*

26. 397 U.S. 358 (1970).

27. *Id.* at 360.

28. *Id.* at 361.

29. *Id.* at 362-63.

30. *Id.* at 364.

31. *Id.* at 365.

In *United States v. Gaudin*,<sup>32</sup> Gaudin was convicted of making material false statements on federal loan documents.<sup>33</sup> The trial court instructed the jury that a guilty verdict required the government to prove the materiality of the alleged false statements, but that this decision was a matter for the court rather than the jury. The judge ruled that the statements were material.<sup>34</sup>

Justice Scalia delivered the opinion of the Court in which he reiterated the pedigree of Sixth Amendment precedent.<sup>35</sup> The Court reasoned that the jury is not a “mere factfinder” but rather a body that “appl[ies] the law to those facts and draw[s] the ultimate conclusion of guilt or innocence.”<sup>36</sup> As such, the Court held that the trial judge’s act of refusing to let the jury determine the materiality of the false statements infringed on respondent’s right to have a jury determine his guilt beyond a reasonable doubt.<sup>37</sup>

In *Jones v. United States*,<sup>38</sup> Nathaniel Jones, along with two other people, robbed and assaulted two men. A grand jury indicted Jones and his accomplices on counts relating to carjacking and using a firearm in a crime of violence. The trial judge’s jury instructions referred only to the first paragraph of one of the statutes allegedly violated. The judge did not instruct the jury to consider “serious bodily injury,”<sup>39</sup> an element listed in the statute’s subsection. The jury returned a guilty verdict on both counts for Jones. The presentence report recommended a sentence of twenty-five years because one of the victims had serious bodily injury. Jones objected to the recommended sentence because “serious bodily injury” had not been considered by the jury. The trial court imposed the twenty-five year sentence, reasoning that a preponderance of evidence supported the allegation of serious bodily injury.<sup>40</sup>

The Supreme Court disagreed with the lower court’s rationale.<sup>41</sup> The element of serious bodily injury was a fact that required consideration by the jury. A finding of serious bodily injury could result in a much higher sentence, thus making the element more than just a sentencing factor.<sup>42</sup> The Court reversed and held that while it was not always

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32. 515 U.S. 506 (1995).

33. *Id.* at 507.

34. *Id.* at 508.

35. *Id.* at 510-11.

36. *Id.* at 514.

37. *Id.* at 522-23.

38. 526 U.S. 227 (1999).

39. *Id.* at 231.

40. *Id.* at 229-31.

41. *Id.* at 232.

42. *Id.* at 232-33.

necessary for every fact having a bearing on sentencing to be put before a jury, in this case, the statute's elements must be proven beyond a reasonable doubt and submitted to the jury.<sup>43</sup>

### ***B. The Modern Apprendi Rule***

The United States modeled its criminal law sentencing system after a historical tradition that required jury trials for accusation and sentencing hearings for criminal defendants. The Court acknowledged this rich history of sentencing tradition in *Apprendi v. New Jersey*.<sup>44</sup> In *Apprendi* petitioner Apprendi fired shots into the home of an African-American family, which had recently moved to a neighborhood that had previously been all white. A grand jury indictment charged Apprendi with several offenses, including shooting and unlawful possession of weapons. None of the charges referred to the state's hate crime statute.<sup>45</sup>

Apprendi pled guilty to three counts for which there were statutory sentencing ranges. The State reserved the right to request an enhanced sentence based on one of the offenses being committed for racially biased reasons. Apprendi likewise reserved the right to challenge the enhancement as a constitutional infringement. The trial judge accepted the guilty pleas and held a hearing to determine Apprendi's purpose in committing the crimes. The judge held that the hate crime enhancement applied because there was evidence supporting a finding of racial bias.<sup>46</sup>

The Supreme Court considered the question of whether the sentence enhancement on one of the counts was constitutionally permissible since the enhanced sentence exceeded the statutory maximum.<sup>47</sup> The Court discussed the importance of the Sixth Amendment jury guarantee and the Fourteenth Amendment Due Process Clause relating to proof beyond a reasonable doubt.<sup>48</sup> A sentencing factor is a fact that is not put before a jury but that could affect the judge's decision in imposing a sentence.<sup>49</sup> A sentencing factor describes a circumstance that is either aggravating or mitigating that relates to a specific sentence within a

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43. *Id.* at 248, 252.

44. 530 U.S. 466 (2000).

45. *Id.* at 469.

46. *Apprendi*, 530 U.S. at 469-71.

47. *Id.* at 474.

48. *Id.* at 476-77.

49. *Id.* at 485 (citing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (holding that an enhanced sentence based on facts not found by the jury raises serious constitutional concerns)).

range allowed by the jury's finding.<sup>50</sup> A sentence enhancement, on the other hand, increases a sentence beyond the authorized statutory maximum sentence.<sup>51</sup> Because a sentence enhancement is virtually the same as an element of a greater offense, it falls within the category of things a jury is required to find.<sup>52</sup>

Without specially ruling on the federal sentencing guidelines,<sup>53</sup> the Court held that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be considered by a jury and proved beyond a reasonable doubt.<sup>54</sup> The sentencing judge had transformed *Apprendi*'s sentence from one related to a second-degree offense into one related to a first-degree offense. This enhancement had more than just a nominal effect and was, therefore, unconstitutional.<sup>55</sup> In her dissent, Justice O'Connor warned that the *Apprendi* decision established a "bright-line rule" that effectively limited the power of elected representatives to define criminal offenses and related sentences.<sup>56</sup>

The *Apprendi* rule was applied in *Ring v. Arizona*.<sup>57</sup> There, Ring participated in the armed robbery of a courier van during which the driver was killed. The jury was instructed on premeditated murder and felony murder. The jury convicted Ring of felony murder occurring during the course of armed robbery. No evidence placed Ring at the scene of the crime; thus, unless further findings were made, Ring could not be sentenced to death, the statutory maximum for first-degree murder under the statute.<sup>58</sup>

At Ring's sentencing hearing, his accomplice testified that Ring had been at the scene of the crime and shot the driver. Based on this testimony, the judge found there were aggravating factors that affected Ring's sentence and imposed the death penalty.<sup>59</sup> Ring appealed his sentence, and ultimately the Supreme Court granted certiorari in order to clarify the reasoning and rule of *Apprendi*.<sup>60</sup>

The Court considered the question of whether a judge may find aggravating factors or whether the Sixth Amendment jury trial

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50. *Id.* at 494 n.19.

51. *Id.*

52. *Id.*

53. U.S. SENTENCING GUIDELINES MANUAL (1998).

54. *Apprendi*, 530 U.S. at 490.

55. *Id.* at 494-95.

56. *Id.* at 525.

57. 536 U.S. 584 (2002).

58. *Id.* at 589, 591-92.

59. *Id.* at 593-95.

60. *Id.* at 596.

guarantee requires aggravating factors to be determined by a jury.<sup>61</sup> Because these factors effectively created elements of a greater offense, the Court held that they must be found by a jury in order to be consistent with the Sixth Amendment.<sup>62</sup>

### III. COURT'S RATIONALE

In *Blakely v. Washington*,<sup>63</sup> the Supreme Court granted certiorari to consider whether the judge's imposition of an additional thirty-seven months to petitioner's sentence violated petitioner's Sixth Amendment right to trial by jury.<sup>64</sup> Justice Scalia wrote the majority opinion comprised of both liberal and conservative justices, an unusual five to four split.<sup>65</sup>

In its analysis the Court revisited *Apprendi* as a foundation for the rule regarding the constitutionality standards for criminal sentencing.<sup>66</sup> The maximum sentence a judge may impose on a criminal defendant is that which is based on the facts "reflected in the jury verdict or admitted by the defendant."<sup>67</sup> The majority stated that the maximum is not the maximum sentence that may be imposed after finding additional facts, but instead, the maximum sentence that may be imposed without finding any additional facts.<sup>68</sup>

The Court held that a judge who imposes a sentence based on facts not found by the jury has exceeded the proper authority of sentencing.<sup>69</sup> There is no distinction among a judge's authority in enhancing a sentence based on finding a specific fact, one of many specific facts, or any fact that could be aggravating. In any case, the judge is finding a fact that the jury's verdict does not authorize.<sup>70</sup> Justice Scalia's interpretation of the *Apprendi* rule requires a jury to hear every legally essential fact.<sup>71</sup> In this way, the right to trial by jury ensures the people's ultimate control of the judicial branch.<sup>72</sup> The decision in

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61. *Id.* at 597.

62. *Id.* at 609.

63. 124 S. Ct. 2531 (2004).

64. *Id.* at 2540.

65. *Id.* at 2534.

66. *Id.* at 2536.

67. *Id.* at 2537. See *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that the Sixth Amendment jury trial guarantee applied to Arizona's sentencing factors).

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

69. *Id.*

70. *Id.* at 2538.

71. *Id.*

72. *Id.* at 2539.

*Apprendi* reinforces the notion that the “judge’s authority to sentence derives wholly from the jury’s verdict.”<sup>73</sup>

Justice Scalia repeated that the main issue splitting the *Blakely* majority and the dissents was where to draw the constitutional line.<sup>74</sup> Justice Scalia noted that the Court was not split over the issue of whether the Constitution limited the authority of the states to categorize certain elements as sentencing factors.<sup>75</sup> Furthermore, the Court’s decision in *Blakely* did not express an opinion on the federal sentencing guidelines.<sup>76</sup>

Justice Scalia reasoned that two alternatives exist for critics of *Apprendi*.<sup>77</sup> First, if a jury is not required to make every finding of fact, then a jury would only need to find the facts chosen by a legislature as elements of the crime. This scheme would allow judges to find any facts a legislature labels as sentencing factors, no matter how much these facts may enhance the sentence.<sup>78</sup> The second alternative is that legislatures may set “legally essential sentencing factors *within limits*” without allowing the law to go too far into the realm of sentencing authority possessed by the judge.<sup>79</sup> Justice Scalia argued that this second standard was too subjective.” For example, petitioner in *Blakely* pled to a lesser offense in order to avoid the charge of first-degree kidnapping, but his enhanced sentence was essentially the same as the first-degree kidnapping.<sup>81</sup> Petitioner’s enhanced sentence exceeded the maximum by almost seventy percent, and the majority argued the judge went “*toofar*” in imposing that sentence.<sup>82</sup>

The Court held that *Blakely*’s sentencing procedure violated the Sixth Amendment; therefore, his sentence was invalid.<sup>83</sup> Justice Scalia cautioned that the Court’s decision did not invalidate determinate sentencing schemes, which **fix** sentences for a certain length of time.<sup>84</sup> The decision in *Blakely* illustrated how to implement constitutionally sound, determinate sentencing schemes.<sup>85</sup>

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73. *Id.*

74. *Id.* at 2537 n.6.

75. *Id.*

76. *Id.* at 2538 n.9.

77. *Id.* at 2539.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 2540.

83. *Id.* at 2543.

84. *Id.* at 2540.

85. *Id.*

While there were no concurring opinions, four Justices voiced dissents.<sup>86</sup> Justice O'Connor, joined by Chief Justice Rehnquist in her dissent, argued that the majority's decision imposed significant costs and could result in every nuance of a case being tried before a jury.<sup>87</sup> Abiding by *Blakely* could mean separate trials, first for the guilt phase and then for character evidence presented at sentencing.<sup>88</sup> Moreover, O'Connor contended that, under *Blakely*, trial or post-trial behavior cannot be considered by a judge without a separate trial even if the legislature desired for such behavior to be taken into consideration by the sentencing judge.<sup>89</sup> Ultimately, O'Connor argued that without allowing a judge to find facts, there was no check on the jury's verdict.<sup>90</sup>

Justice Kennedy argued for an additional reason not mentioned by O'Connor in his dissent.<sup>91</sup> The Constitution establishes a system of three branches that work interdependently. According to Kennedy, the majority's decision does not uphold this interdependency because it restrains experienced judges."

Justice Breyer's dissent argued that the majority's holding works a detriment to criminal defendants who plead guilty because those defendants can no longer argue sentencing factors to a judge.<sup>93</sup> Breyer contended that he does not believe the Sixth Amendment guarantees that a jury is to find facts about sentencing factors in the same way a jury is constitutionally required to find facts about elements of an offense.<sup>94</sup> Breyer reasoned that judges should have this ability to use their own judgment and find sentencing factors because "that is what judges are there for."<sup>95</sup>

In the majority opinion, Scalia addressed the dissenting arguments.<sup>96</sup> He argued that defendants are not deprived of the opportunity to put sentencing factors before a judge because defendants can still waive the *Apprendi* right of submitting facts to a jury and either stipulate facts or consent to judicial factfinding.<sup>97</sup> Additionally, the majority reasoned,

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86. *Id.* at 2534 (O'Connor and Rehnquist, JJ., dissenting).

87. *Id.* at 2546 (O'Connor and Rehnquist, JJ., dissenting).

88. *Id.*

89. *Id.*

90. *Id.* at 2548.

91. *Id.* at 2550 (Kennedy, J., dissenting).

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

93. *Id.* at 2553 (Breyer, J., dissenting).

94. *Id.* at 2552 (Breyer, J., dissenting).

95. *Id.* at 2560 (Breyer, J., dissenting).

96. *Id.* at 2540.

97. *Id.* at 2541.

a defendant has the option of plea bargaining.” Regarding the existence of political checks in the form of sentencing judges, as discussed by O’Connor, Scalia responded that the Sixth Amendment is evidence of the constitutional framers’ reluctance to trust the government in the area of sentencing.” Finally, Scalia contended that while O’Connor strongly argued against the majority’s decision, she did not offer an understandable alternative meaning of the jury trial guarantee.<sup>100</sup>

#### IV. IMPLICATIONS

The Supreme Court’s decision in *Blakely v. Washington*<sup>101</sup> invalidated petitioner’s sentence because his sentencing did not comply with the Sixth Amendment right to trial by jury.<sup>102</sup>

This decision is important for several reasons. The Court expressed the “need to give intelligible content to the right of jury trial”<sup>103</sup> and cautioned that its decision did not hold determinate sentencing schemes unconstitutional.<sup>104</sup> Rather, the majority showed support for the policy objectives of determinate schemes such as parity among defendants and proportionality between the sentence and the offense.<sup>105</sup> In addition, Justice Scalia specifically noted that this decision did not express an opinion on the federal sentencing guidelines.<sup>106</sup>

Justice O’Connor’s dissent pointed to three consequences of the majority’s decision: first, the majority casts “constitutional doubt” over sentencing guidelines of many states; second, the decision calls into question criminal judgments since *Apprendi*; and third, the decision does not resolve several practical questions, such as whether courts could apply the guidelines to mitigating factors.<sup>107</sup>

Justice Breyer’s dissent also outlined ramifications of the majority’s holding. Because defendants cannot argue for lower sentences in front of a judge as a result of *Blakely*, Breyer predicted prosecutors will have increased power as defendants rely more on plea bargaining.<sup>108</sup> Furthermore, Breyer fears the potential for legislatures to rewrite codes

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98. *Id.*

99. *Id.* at 2539 n.10.

100. *Zd.* at 2537 n.6.

101. 124 S.Ct. 2531 (2004).

102. *Id.* at 2538.

103. *Zd.*

104. *Zd.* at 2540.

105. *Id.*

106. *Id.* at 2538 n.9.

107. *Id.* at 2549 (O’Connor, J., dissenting).

108. *Zd.* at 2553 (Breyer, J., dissenting).

and impose higher statutory sentences since judges may no longer upwardly adjust sentences based on aggravating facts.<sup>109</sup>

Prior to *Apprendi*, a defendant faced the possibility of having a sentencing judge, without warning, increase the maximum sentence from "as little as five years to as much as life imprisonment" based on nothing more than a post-trial probation report, the facts of which were not found by a jury.<sup>110</sup> The *Apprendi* rule sought to alleviate sentencing injustices that occurred as a result of this judicial sentencing discretion. Following *Blakely*, which applied the inherited rule of *Apprendi*, it appears that judges have lost even more of their pre-*Apprendi* power and cannot find sentencing factors, with the exception of prior convictions, unless the defendant consents to judicial factfinding. This rule has produced many questions of procedure and compliance resulting in confused courts and prosecutors.<sup>111</sup>

A cry for help was made and heard, and the Court responded on the opening day of its October Term, 2004, by hearing oral arguments in a combined case that addressed the applicability of *Blakely* to the federal sentencing guidelines.<sup>112</sup> The Court appeared to be on the brink of either eliminating the guidelines altogether or taking a less extreme alternative of "*Blakely*-izing" the guidelines, meaning criminal indictments would have to include all sentencing factors before being presented to juries.<sup>113</sup> Either alternative seemed to impose a significant burden on juries by requiring them to wade through even more complex facts and indictments.

The Court's January 12, 2005 ruling in *United States v. Booker*, the combined case, only partially solved the *Blakely* dilemmas of application.<sup>114</sup> The five to four decision held that the federal sentencing guidelines, previously mandatory, are now only advisory in order to comply with the Sixth Amendment.<sup>115</sup> This decision, however, left other *Blakely* questions unanswered, such as how to avoid sentencing inconsistencies that may result from *Booker*'s apparent partial grant of judicial discretion; judges, arguably, and ironically, seem to have more sentencing power now that they are not bound by the federal guidelines'

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109. *Id.* at 2558 (Breyer, J., dissenting).

110. *Id.* at 2542.

111. *See, e.g.*, *United States v. Pineiro*, 377 F.3d 464 (2004) (holding that *Blakely* does not apply to the Federal Sentencing Guidelines); *United States v. Penaranda*, 375 F.3d 238 (2004) (certifying questions of *Blakely* compliance).

112. *United States v. Booker*, 125 S. Ct. 738 (2005).

113. Tony Mauro, *Court May Scrap Federal Sentencing System*, *LEGAL TIMES*, Oct. 11, 2004, at 1-2.

114. *Booker*, 125 S. Ct. at 746, 749-50.

115. *Id.* at 756-57.

maximum and minimum limits.<sup>116</sup> Courts will carry on sentencing as they wait on Congress to redraft the federal sentencing guidelines in a way that upholds the Sixth Amendment.<sup>117</sup>

The *Blakely* majority favored a stricter interpretation of the Sixth Amendment in order to preserve the jury trial right, but the application of this decision could create judicial inefficiency. The court system divides the labor of sentencing between experienced judges and less experienced juries. Judges rather than juries impose sentences because they know more about the law and appropriate punishments. Juries find facts. Prior to *Blakely*, a judge was authorized to find some facts relevant to sentencing as long as there was only a nominal effect on the sentence as a result of that factfinding. *Blakely* removed nearly all of the factfinding tools a judge has, which are few, and put those tools in the hands of the inexperienced jury. Judges are left to build sentences without the appropriate tools. *Apprendi* seemed to strike a meaningful balance between Sixth Amendment preservation and judicial economy, but *Blakely* upset that balance by taking away reasonable sentencing power from judges. *Booker* apparently returns that power but, at the same time, takes away the mandatory sentencing tools of the federal sentencing guidelines.

*Blakely* has other implications. Criminal defendants and their attorneys may be less likely to shop for favorable judges because a post-*Blakely* era could give judges less power in the sentencing phase. Instead, juries may wield more power, which makes jury selection and attorney case presentation even more significant. The importance of having carefully-selected juries could increase the time and cost of voir dire processes, thus affecting both defendants and society. Furthermore, attorneys may feel more pressure to zealously advocate for their clients since persuasion and presentation may influence a sentencing jury in a way that would have been less persuasive to a sentencing judge. This influence may evolve attorneys' courtroom style and method as attorneys' sentencing message is essentially crafted for one primary audience—the jury.

Because of their typical experience in sentencing procedures, sentencing judges probably did not require much, or any, explanation of sentencing factors. A jury, however, requires thorough explanation, a process that must be repeated for each new jury in each new case. The time and cost of this lengthy explanation, which for some complex cases could take several days, will place a higher burden on attorneys, who

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116. Tony Mauro, *U.S. Sentencing Guidelines Held Advisory, Not Mandatory*, 179N.J. L.J. 158 (2005).

117. *Id.* at 2.

must provide the explanation, and jurors, who have less incentive to serve on jury duty as the time commitment increases. With all of these implications in mind, the debate, aside from the Booker decision, focuses on the values of the Sixth Amendment right to jury trial versus efficiency.

Justice O'Connor predicted that *Blakely* would create "havoc" in trial courts across the country.<sup>118</sup> Indeed, judicial interpretation of *Blakely* indicated a split of opinion on how the decision should be applied, especially to the federal sentencing guidelines. Congress even issued a resolution urging the Supreme Court to "resolve the . . . confusion and inconsistency" caused by *Blakely*.<sup>119</sup> The Court has partially responded to the confusion with its decision in *Booker*, which makes the federal sentencing guidelines advisory, but many questions remain unanswered. Until the Supreme Court rules more specifically on how *Blakely* and *Booker* should be applied, it is up to the courts to establish their own guidelines in compliance with interpreted understandings of these cases.

REBECCA K. MCKELVEY

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118. *Blakely*, 124 S. Ct. at 2549.

119. S. Con. Res. 130, 108th Cong. (2004).