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Constitutional Law: Fact of Factor: The Supreme Court Eliminates Sentencing Factors and the Federal Sentencing Guidelines

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CONSTITUTIONAL LAW: FACT OR FACTOR: THE SUPREME COURT ELIMINATES SENTENCING FACTORS AND THE FEDERAL SENTENCING GUIDELINES

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

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A jury convicted Respondent Booker of possession with intent to distribute at least fifty grams of cocaine,[1] an offense carrying a sentence of 210 to 262 months in prison according to the Federal Sentencing Guidelines (the "Guidelines").[2] At a later sentencing hearing, the judge found by a preponderance of the evidence that Respondent Booker possessed an additional 566 grams of cocaine and was guilty of obstructing justice, warranting a sentence of 360 months to life according to the Guidelines.[3] Booker appealed the thirty year sentence imposed by the judge.[4] Relying on *Blakely v. Washington*,[5] the Court of Appeals for the Seventh Circuit reversed and remanded, holding that the sentence violated the Sixth Amendment.[6]

Respondent Fanfan was convicted by a jury of possession with intent to distribute 500 or more grams of cocaine,[7] an offense carrying a sentence

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* I would like to thank my parents for supporting me in my education and my life. I would also like to thank my husband for centering my world. My world is a better place and I am a better person because of you.

1. United States v. Booker, 125 S. Ct. 738, 746 (2005) (Stevens, J.). The evidence reflected that Respondent Booker possessed 92.5 grams of cocaine base (crack). *Id.* (Stevens, J.).

2. *Id.* (Stevens, J.). Congress delegated authority to the United States Sentencing Commission, pursuant to the Federal Sentencing Reform Act of 1984, to create the Guidelines in an effort to reduce sentencing disparities. Mistretta v. United States, 488 U.S. 361, 362, 374 (1989). The Supreme Court approved the delegation of authority in its decision in *Mistretta*, and has consistently held that the Guidelines have the force and effect of laws. *Booker*, 125 S. Ct. at 750 (Stevens, J.). For a discussion of the history, purpose, and development of the Guidelines, see *Mistretta*, 488 U.S. at 361.

3. *Booker*, 125 S. Ct. at 746 (Stevens, J.).

4. *Id.* (Stevens, J.).

5. 124 S. Ct. 2531 (2004). The Court in *Blakely* held a sentence imposed under the State of Washington's determinate sentencing scheme to be unconstitutional. *Id.* at 2538. The Court stated that it was not holding all determinate sentencing schemes unconstitutional, *id.* at 2540, and was expressing no opinion on the Federal Sentencing Guidelines. *Id.* at 2538 n.9. In her dissent, Justice O'Connor suggested the *Blakely* decision would impact the Federal Sentencing Guidelines and drew a comparison between the Federal Guidelines and the Washington State Guidelines. *Id.* at 2549–50 (O'Connor, J., dissenting).

6. *Booker*, 125 S. Ct. at 746-47 (Stevens, J.).

7. *Id.* at 747 (Stevens, J.).

of up to seventy-eight months in prison.[8] At the sentencing hearing, the judge found additional facts that mandated a sentence of 188 to 235 months according to the Guidelines.[9] However, relying on *Blakely*, the judge refused to impose the longer sentence and sentenced Respondent Fanfan solely according to the jury verdict.[10]

Petitioner filed a notice of appeal in the First Circuit in Respondent Fanfan's case and petitioned for writ of certiorari in both cases.[11] The Supreme Court granted both petitions and, in a two-part decision affirming its holding in *Apprendi v. New Jersey*,[12] HELD, 1) Any fact (other than a prior conviction) that is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt;[13] and 2) The provisions of the Sentencing Reform Act making the Guidelines mandatory are incompatible with the above holding and must be severed and excised.[14]

The Sixth Amendment[15] affords every "'criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.'"[16] While such elements indisputably warrant proof beyond a reasonable doubt,[17] other aspects of the offense—characterized as sentencing factors—may, and sometimes must, be determined by a judge based upon a preponderance of the evidence.[18] Over many cases and

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8. *Id.* (Stevens, J.).

9. *Id.* (Stevens, J.).

10. *Id.* (Stevens, J.).

11. *Id.* (Stevens, J.).

12. 530 U.S. 466 (2000). The Court in *Apprendi* held that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 490.

13. *Id.* at 756. (Stevens, J.).

14. *Id.* at 756-57 (Breyer, J.). The Court specifically excised 18 U.S.C. § 3553(b)(1) (Supp. 2004), which makes the Guidelines mandatory, and 18 U.S.C. § 3742(e) (main ed. & Supp. 2004), which depends on the mandatory nature of the Guidelines. *Id.* (Breyer, J.).

15. The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation; [and] to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

16. *Booker*, 125 S. Ct. at 748 (Stevens, J.) (quoting United States v. Gaudin, 515 U.S. 506, 511 (1995)).

17. *Id.* at 748 (Stevens, J.) (quoting In re Winship, 397 U.S. 358 (1970)).

18. *Id.* at 749-50 (Stevens, J.) (noting that the Guidelines raise constitutional concerns because they are binding on district judges); *see also* McMillan v. Pennsylvania, 477 U.S. 79, 81-82 (1986) (discussing the constitutionality of the state's Mandatory Minimum Sentencing Act requiring a judge to impose a minimum five year sentence upon his finding that the defendant "'visibly possessed a firearm'").

several decades, the Supreme Court has wrestled with the constitutional distinction between a sentencing factor and an element of a crime.[19]

The Court confronted this issue in *McMillan v. Pennsylvania*, where a judge's finding that the defendant had visibly possessed a firearm, based on a preponderance of the evidence, raised the minimum sentence to five years in prison.[20] The case implicated Pennsylvania's Mandatory Minimum Sentencing Act.[21] Although the sentencing judge found the Act unconstitutional and refused to apply it, the Pennsylvania Supreme Court disagreed and remanded.[22] The United States Supreme Court, in a five to four decision,[23] affirmed the Pennsylvania Supreme Court.[24] Relying on *Patterson v. New York*,[25] the Court reasoned that the State need not prove every fact influencing the severity of punishment beyond a reasonable doubt.[26] Instead, the Court emphasized the Legislature's intent that visible possession be a sentencing factor and not an element of the crime.[27] While recognizing there would be constitutional limits to the State's power to define the elements of a crime, the Court did not attempt to define those

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19. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 474 (2000) (describing "analytical tensions" in the relevant jurisprudence).

20. *McMillan*, 477 U.S. at 81. The statute provided that, for certain enumerated felonies, if the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm during the commission of the offense, the defendant would be subject to a minimum prison sentence of five years. *Id.* Pursuant to the Act, the judge had no discretion to impose a lower sentence. *Id.* at 81-82.

21. *Id.* at 80. The sentencing portion of the Pennsylvania Act, § 9712(b) provided:

> "Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction . . . . The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable."

Id. at 81 n.1 (quoting 42 PA. CONS. STAT. § 9712 (1982)).

22. *Id.* at 82-83.

23. *Id.* at 80. Justice Stevens, who wrote the portion of the instant Court's opinion holding *Apprendi* applicable to the Guidelines, *Booker*, 125 S. Ct. at 756 (Stevens, J.), dissented in *McMillan* based on reasoning similar to that in the instant decision, arguing that "when the State threatens to stigmatize or incarcerate an individual . . . it may do so only if it proves the elements of the prohibited transaction beyond a reasonable doubt." *McMillan*, 477 U.S. at 98 (Stevens, J., dissenting) (citing *In re* Winship, 397 U.S. 358 (1970)).

24. *McMillan*, 477 U.S. at 84.

25. 432 U.S. 197 (1977).

26. *McMillan*, 477 U.S. at 84. The *McMillan* Court said *Patterson* had rejected the idea that all facts linked to punishment need to be proved beyond a reasonable doubt, *id.* at 84, and later said, "the present case is controlled by *Patterson*." *Id.* at 85.

27. *Id.* at 85-86.

limits.[28] With its decision, the Court established only that any impact on punishment, especially by a factor that had always been considered to bear on punishment, would not make that factor an element.[29]

The Court faced this issue again in *Almendarez-Torres v. United States*.[30] In *Almendarez-Torres*, the defendant, a deported alien, was convicted of returning to the United States without permission, warranting a maximum prison sentence of two years.[31] At a later sentencing hearing, the judge found, based on the defendant's admission, that his initial deportation was pursuant to three prior aggravated felony convictions.[32] This finding increased the maximum sentence from two to twenty years.[33] The defendant appealed, arguing that his prior convictions were elements of the crime and should have been charged in the indictment.[34] Again in a split decision, the Supreme Court disagreed with the defendant and affirmed his conviction.[35] The Court concluded that its precedents stood only for the "proposition that *sometimes* the Constitution does require (though sometimes it does not require) the State to treat a sentencing factor as an element."[36] In this case, the Court reasoned that recidivism was a typical sentencing factor[37] and that Congress intended it as such in the statute at issue.[38] Thus, although the finding of recidivism raised the defendant's maximum sentence, the Court concluded that the Constitution did not require recidivism be deemed an element of the offense.[39]

Finally, in *Apprendi v. New Jersey*, the Court established a specific test to distinguish an element of a crime from a sentencing factor.[40] The state

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28. *Id.* at 86.

29. *Id.* at 89-90.

30. 523 U.S. 224 (1998).

31. *Id.* at 226-27. The defendant was charged with, and pleaded guilty to, a violation of 8 U.S.C. § 1326 (1988). *Id.*

32. *Id.* at 227.

33. *Id.* at 226. The District Court found a sentencing range of seventy-seven to ninety-six months applicable under the Guidelines and sentenced Almendarez-Torres to eighty-five months in prison. *Id.* at 227.

34. *Id.*

35. *Id.* at 247-48.

36. *Id.* at 242 (emphasis in original). The Court relied on *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977), to reach this conclusion. *See Almendarez-Torres*, 523 U.S. at 240-42.

37. *Id.* at 230.

38. *Id.* at 235.

39. *Id.* at 247.

40. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The Court applied the rule it had first expressed in a footnote in an earlier case, Jones v. United States, 526 U.S. 227, 243 n.6 (1999). *Apprendi*, 530 U.S. at 490. The *Jones* court stated the principle that "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6.

"hate crime" statute at issue authorized an increase in the defendant's maximum punishment based on a finding of "biased purpose" by the judge at sentencing.[41] The Court held the statute unconstitutional and firmly declared that any fact, other than that of a prior conviction, that "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[42] The Court's holding departed from its holdings in *McMillan*[43] and *Almendarez-Torres*[44] and made clear that the determination of a sentencing factor or element of a crime would be based on the impact on punishment, regardless of legislative intent or the factor's traditional application.[45] The Court described the relevant inquiry as "one not of form, but of effect," particularly, the effect on punishment.[46]

In the instant case, the Respondents' sentences were increased following findings of fact made by a judge at a sentencing hearing, but were not raised above the statutory maximum.[47] The sentences remained within the statutory range, but were increased above the maximum that the Guidelines would have imposed on the basis of the jury verdict.[48] Because of additional findings made by the judge at the sentencing hearing, the Guidelines mandated a longer sentence.[49]

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41. *Id.* at 470. Specifically, the state hate crime statute provided for an additional ten to twenty year prison term if the trial judge found by a preponderance of the evidence that the defendant committed the crime "'with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Id.* at 468-69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000)).

42. *Id.* at 490.

43. *McMillan* deferred to the legislature's definition of a crime and reasoned that the statute at issue merely assigned a precise weight to a traditional sentencing factor. McMillan v. Pennsylvania, 477 U.S. 79, 86, 89-90 (1986).

44. *Almendarez-Torres* held that recidivism, a traditional sentencing factor, need not be treated as an element of the offense. 523 U.S. at 247.

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

46. *Id.* at 494.

47. United States v. Booker, 125 S. Ct. 738, 746 (2005) (Stevens, J.). The Court noted that the statutory range for Respondent Booker's conviction was ten years to life in prison. *Id.* (Stevens, J.). The Court did not mention the statutory range authorized by Respondent Fanfan's conviction. *See id.* (Stevens, J.).

48. *Id.* (Stevens, J.). The Guidelines provided for a sentence of 210 to 262 months based on Respondent Booker's conviction and criminal history. *Id.* (Stevens, J.). In Respondent Fanfan's case, the Guidelines authorized a seventy-eight month sentence based on the jury verdict. *Id.* at 747 (Stevens, J.).

49. *Id.* at 746-47 (Stevens, J.). The findings of the judge at sentencing increased Respondent Booker's range to 360 months to life. *Id.* at 746 (Stevens, J.). The judge's additional findings at sentencing increased Respondent Fanfan's sentence range to 188 to 235 months. *Id.* at 747 (Stevens, J.).

The instant Court held that *Apprendi* applied to the Guidelines.[50] The Court reasoned that the Guidelines were mandatory and binding on judges and thus had the practical force and effect of laws.[51] The instant Court focused on the role of the jury as a protection against arbitrary and unreasonable punishments.[52] The Court expressed concern that sentence enhancements had become more serious and had begun to diminish the role of the jury.[53] In an effort to preserve the jury's role, the Court clarified that the "statutory maximum" referred to in the *Apprendi* rule was the maximum sentence that could be imposed "'solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'"[54] Lastly, the instant Court concluded that the provisions making the Guidelines mandatory must be severed and excised; hence the Guidelines would become merely advisory in nature.[55]

The instant Court's decision effectively eliminates sentencing factors, and at least temporarily resolves the lengthy debate over when a factor becomes an element of the crime.[56] The decision suggests a philosophical departure from *McMillan*[57] and a retreat from *Apprendi*, as well as a movement towards a more constitutionally rigorous doctrine.[58]

In *Apprendi*, the Court clung to its precedents and established a "bright-line" rule[59] to define an element of a crime.[60] *Apprendi* held that any factor, except a prior conviction, that increased punishment above the statutory maximum must be an element of the crime.[61] This rule accommodated *McMillan*, which addressed a factor that increased minimum punishment

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50. *Id.* at 753 (Stevens, J.).

51. *Id.* at 750 (Stevens, J.).

52. *Id.* at 753 (Stevens, J.). The Court said, "The Framers of the Constitution understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases." *Id.* (Stevens, J.) (quoting THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). The Court also characterized the jury as a protection against the power of the government. *Id.* at 752 (Stevens, J.).

53. *Id.* at 751 (Stevens, J.).

54. *Id.* at 746-47 (Stevens, J.) (quoting Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004)) (emphasis omitted).

55. *See supra* note 14.

56. *See* Apprendi v. New Jersey, 530 U.S. 466, 474 (2000) (referring to the "'analytical tensions' in this Court's post-*Winship* jurisprudence"). See generally *McMillan v. Pennsylvania*, 477 U.S. 79, 84-88 (1986), and *Jones v. United States*, 526 U.S. 227, 239-44 (1999), for analysis and discussion of relevant historical cases and decisions pertaining to the sentencing factor-element debate.

57. *See infra* notes 64-70 and accompanying text.

58. *See infra* notes 78-82 and accompanying text.

59. *Apprendi*, 530 U.S. at 525 (O'Connor, J., dissenting). Justice O'Connor criticized the Court for establishing such a test, arguing that the Court's precedents reflect a decision to consider each case individually. *Id.* at 524-25 (O'Connor, J., dissenting).

60. *See id.* at 490.

61. *Id.*

but did not impact maximum punishment.[62] In addition, by allowing an exception for past convictions, the rule accounted for the *Almendarez-Torres* decision and recidivism generally.[63]

The instant Court's holding retains the past-conviction exception, but departs significantly from *McMillan*,[64] at least theoretically. In *McMillan*, the Court refused to endorse the idea that every factor tied to punishment must be proved to a jury.[65] Yet, the instant Court expressed this exact sentiment.[66] Emphasizing the importance of the jury and the significance of meeting the higher burden of proof before depriving a person of liberty,[67] the instant Court specifically stated that a defendant has the right to have every fact essential to his punishment proved to a jury.[68] Ultimately, the instant Court retreated from this stance in its holding, merely saying that the punishment cannot be greater than that authorized by the facts found by the jury.[69] However, the instant Court's reasoning clearly diverged from *McMillan*.[70]

Given the instant Court's willingness to depart from *McMillan*, it is unclear why the Court retains the past-conviction exception that accommodates *Almendarez-Torres* and other decisions that have characterized recidivism as a traditional sentencing factor.[71] The exception is not necessary to avoid a conflict with *Almendarez-Torres*.[72] The instant

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62. *Id.* at 487 n.13 (distinguishing the statute in *McMillan* for its lack of effect on the maximum punishment).

63. *Id.* at 488-90. The Court distinguished *Almendarez-Torres* because it pertained to recidivism, but also suggested that *Almendarez-Torres* may have been incorrectly decided and, hence, that the Court's reasoning might also apply to recidivism. *Id.*

64. In *Apprendi*, Justice O'Connor argued that the Court actually overruled *McMillan*. *Id.* at 533-34 (O'Connor, J., dissenting).

65. *See supra* note 26 and accompanying text.

66. United States v. Booker, 125 S. Ct. 738, 749 (2005) (Stevens, J.).

67. *Id.* at 752 (Stevens, J.) (quoting Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004)). The Court stated in *Blakely*:

> [t]he Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," rather than a lone employee of the State.

Blakely, 124 S. Ct. 2531, 2543 (2004) (quoting 4 BLACKSTONE, COMMENTARIES, 343 (1769)).

68. *Booker*, 125 S. Ct. at 752 (Stevens, J.).

69. *Id.* at 756 (Stevens, J.).

70. *See supra* note 64 and accompanying text.

71. Even in *Apprendi*, another opinion by Justice Stevens, the Court suggested that *Almendarez-Torres* was incorrectly decided. *See* Apprendi v. New Jersey, 530 U.S. 466, 489-90 (2000).

72. *See id.* at 488. The Court suggests that, because Almendarez-Torres had admitted his prior convictions, the constitutional burden-of-proof issue was not even before the Court in that

Court's rule allows facts admitted by the defendant to be used in determining the sentence and, since the petitioner in *Almendarez-Torres* admitted his prior convictions,[73] the rule without the past-conviction exception does not conflict with *Almendarez-Torres*.[74] Furthermore, there have been compelling arguments against allowing the past-conviction exception, suggesting that the exception runs contrary to common law.[75] Finally, the reasoning in the instant case and other recent relevant cases, such as *Apprendi* and *Blakely*, focuses on the impact of a finding on punishment, to the exclusion of legislative intent, textual interpretations, or historical application as a sentencing factor.[76] The instant Court never explained why it retains the past-conviction exception, although the exception seems inconsistent with the instant Court's underlying philosophy.[77]

Prior to the instant decision, the Court appeared to be developing a rule to identify an element of the crime that was devoid of constitutional significance.[78] Previously, the Court's reasoning and its holdings primarily

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decision. *Id.*

73. Almendarez-Torres v. United States, 523 U.S. 224, 227 (1998).

74. *See Booker*, 125 S. Ct. at 756 (Stevens, J.).

75. *See, e.g., Almendarez-Torres*, 523 U.S. at 261 (Scalia, J., dissenting). According to Justice Scalia, at common law, prior convictions had to be charged in the indictment and submitted to the jury for determination. *Id.* (Scalia, J., dissenting). Scalia further claims that, at least through 1965, it was "near-uniform practice among the States" to treat prior convictions as an element of the offense. *Id.* (Scalia, J., dissenting). Scalia cites cases through 1967 to support his position. *Id.* (Scalia, J., dissenting). Furthermore, Scalia questions the majority's reliance on *Graham v. West Virginia*, 224 U.S. 616 (1912), arguing that *Graham* dealt with a statute that explicitly preserved the right to a jury determination regarding recidivism. *Id.* at 258 (Scalia, J., dissenting). Scalia claims that *Graham's* holding provides no support for the majority's position, but concedes that *Graham's* reasoning could be viewed the other way. *Id.* at 258-60 (Scalia, J., dissenting). Scalia further notes that while *Graham* and other cases allowed recidivism to be charged and tried separately, they did not allow it to be determined by a judge "as more likely than not." *Id.* at 259-60 (Scalia, J., dissenting); *see also Apprendi*, 530 U.S. at 502 (Thomas, J., concurring).

76. *See Booker*, 125 S. Ct. at 756 (Stevens, J.); Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004); *Apprendi*, 530 U.S. at 490. The rule articulated in each case defines an element of a crime in terms of its impact on the range of punishment. *Cf.* McMillan v. Pennsylvania, 477 U.S. 79, 89-91 (1986) (deferring to the legislature's judgment and holding a statute constitutional where it assigned a punishment to a traditional sentencing factor but did not exceed the statutory maximum); *Almendarez-Torres*, 523 U.S. at 228 (deferring also to the legislature's judgment and holding that past convictions may be appropriately characterized as sentencing factors even when they increase the maximum punishment).

77. *See Booker*, 125 S. Ct. at 749 (Stevens, J.). In *Apprendi*, the Court also raised questions about the necessity of the past-conviction exception, but chose to leave the exception undisturbed, explaining the issue was not properly before the Court. *Apprendi*, 530 U.S. at 489-90. This may apply to the instant case as well, as neither Respondent challenges his sentence on the basis of past convictions. *See Booker*, 125 S. Ct. at 746 (Stevens, J.).

78. *See Apprendi*, 530 U.S. at 501-02 (Thomas, J., concurring) (arguing that the Constitution requires a broader rule than that adopted in *Apprendi* and, further, that the common law understood

took into account the amount of punishment, the historical application of a fact in determining punishment, and the intent of the legislature.[79] Even in *Apprendi*, the Court's rule turned on whether the factor increased punishment above the statutory maximum.[80] The instant Court shifts the focus back to the defendant's Sixth Amendment right to a jury trial.[81] In effect, the instant Court fashions a rule that retreats from *Apprendi's* focus on the amount of punishment and turns the issue towards the fact of punishment and the intermediary role of the jury.[82] While the Court does not go to the extreme of holding that all factors affecting punishment must be proved to a jury, including past convictions, the shift it does make foreshadows this possibility.[83]

The practical implications of the instant decision are far from clear.[84] In the short term, the decision has rendered the Guidelines merely advisory

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any fact—including recidivism—that was a basis for "imposing or increasing punishment" was also an element of an offense).

79. *Id.* at 490 (establishing a rule that held sentencing factors constitutional so long as they did not exceed the statutory maximum); *Almendarez-Torres*, 523 U.S. at 247 (deferring to the legislature's judgment and holding that past convictions may be appropriately characterized as sentencing factors even when they increase the maximum punishment); McMillan v. Pennsylvania, 477 U.S. 79, 89-90 (1986) (also deferring to the legislature's judgment and holding a statute constitutional which merely assigned a punishment to a traditional sentencing factor but did not exceed the statutory maximum).

80. *Apprendi*, 530 U.S. at 490. *Apprendi* characterized the relevant inquiry as "one not of form, but of effect." *Id.* at 494.

81. *Booker*, 125 S. Ct. at 749 (Stevens, J.). But see Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345 (2005), for an alternative perspective. Gardina argues that the instant Court's decision actually diminishes the role of the jury, stating that by making the Guidelines merely advisory, the instant Court moves them outside the reach of the Sixth Amendment. *Id.* at 351. While it is true that the instant Court opts not to engraft the right to a jury trial onto the existing system, the Court makes clear the importance of the right to have a jury determine facts pertinent to sentencing and, in so doing, takes a firmer stance on the issue than it has in the past. Ultimately, the Court does not move the Guidelines out of the reach of the Sixth Amendment, but instead leaves Congress to devise an appropriate sentencing scheme incorporating the Sixth Amendment rights. *Booker*, 125 S. Ct. at 768 (Breyer, J.).

82. *See supra* note 52 and accompanying text.

83. *Booker*, 125 S. Ct. at 803 (Breyer, J., dissenting in part) (questioning whether Justice Stevens's portion of the instant Court's two-part opinion is meant to encompass and disallow all sentencing facts, including recidivism).

84. *Id.* at 787 (Stevens, J., dissenting in part) (arguing that the portion of the two-part majority decision authored by Justice Breyer making the Guidelines advisory would cause a return to the sentencing disparities Congress sought to eliminate); *cf. id.* at 795 (Scalia, J., dissenting in part) (arguing that the portion of the two-part majority decision authored by Justice Breyer and making the Guidelines advisory would "wreak havoc" on the federal courts); Henry Weinstein & David Rosenzweig, *The Nation; How Judges Will Use Discretion Is the Big Question*, L.A. TIMES, Jan. 13, 2005, at A24 (noting that the Supreme Court's decision in *Booker* will give judges significantly greater discretion in imposing criminal sentences).

and, arguably, inconsequential.[85] Judges are presently left with broad discretion at sentencing, so long as the sentence remains within the range authorized by the jury verdict.[86] The Court purports to endorse this result.[87] However, the longterm implications of the Court's decision may ultimately reduce, if not eliminate, judicial discretion at sentencing.[88]

The potential difference between short term and long term implications of the instant Court's decision is due to a distinction between the instant Court's rule and its reasoning. The instant Court's rule allows for sentencing ranges and judicial discretion within such ranges as authorized by the jury verdict.[89] However, to exercise discretion within a sentencing range, a judge would need to make some findings, presumably findings of fact, at sentencing.[90] While the instant Court's rule allows for this result, its reasoning does not.[91] The Court instead reasons that the Constitution requires any fact essential to punishment—hence any fact increasing punishment—be proved to a jury.[92] Thus, the instant Court's reasoning leaves little if any room for such judicial fact-finding at sentencing.[93]

The instant Court's decision may intentionally leave lawmakers in a quandary. The Court recognizes that the constitutional rights of defendants compete with the efficiency of today's criminal justice system.[94] A simple rule affords the opportunity for efficiency considerations to eclipse constitutional rights.[95] Conversely, the complexity of the decision prompts

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85. *Booker*, 125 S. Ct. at 790 (Scalia, J., dissenting in part) (arguing that the instant Court's decision to excise portions of the Guidelines "[i]n order to rescue [the Guidelines] from nullification" was not successful as the excision left the judges with the discretion they had prior to the enactment of the Guidelines); *see also id.* at 787 (Stevens, J., dissenting in part) (arguing that after the instant Court's decision, judges will have discretion to disregard the guidelines, resulting in the same sentence disparities that the guidelines were designed to eliminate).

86. *Id.* at 756-57 (Breyer, J.).

87. *See id.* at 750 (Stevens, J.).

88. *See* Blakely v. Washington, 124 S. Ct. 2531, 2554-55 (2004) (Breyer, J., dissenting) (predicting how legislatures might respond to *Blakely*, suggesting a complex charge system that would require all previous sentencing factors be charged as elements of the crime); Charlie Savage, *High Court Overturns Sentencing Guidelines; But Ruling Will Allow 'Advisory' Use By Judges*, BOSTON GLOBE, Jan. 13, 2005, at A1 (reporting that legal analysts suspect Congress will move to narrow sentencing ranges and ultimately decrease judicial discretion in the long term).

89. *Booker*, 125 S. Ct. at 775 (Stevens, J., dissenting in part).

90. *Id.* (Stevens, J., dissenting in part). Justice Stevens argues that judicial fact-finding is constitutional and permissible under the instant Court's rule (as articulated in the portion of the two-part majority opinion he authored). *Id.* (Stevens, J., dissenting in part).

91. *Id.* at 802 (Breyer, J., dissenting in part). *But see id.* at 775 (Stevens, J., dissenting in part) (arguing that the portion of the two-part majority opinion he authored, holding *Blakely* applicable to the Guidelines, does not make judicial fact-finding impermissible).

92. *Id.* at 749 (Stevens, J.).

93. *See supra* note 83 and accompanying text.

94. *Booker*, 125 S. Ct. at 755-56 (Stevens, J.).

95. In his dissent in *Apprendi*, Justice Breyer argued that even the *Apprendi* rule is a

a more thorough evaluation of sentencing practices in order to balance the competing interests of State and defendant, while ensuring that constitutional principles remain paramount.[96]

Ultimately, the instant Court recognizes the significant and broad impact its decision will likely have on the federal and state criminal justice systems, but holds fast to its principles.[97] Championing the jury as a check on government power,[98] the instant Court's decision revitalizes the role of the jury as primary fact finder and vindicates the Sixth Amendment rights of criminal defendants.[99] This decision is not only an important statement of the rights of criminal defendants but also a powerful reminder that the liberties we are afforded under our Constitution should neither be taken lightly nor sacrificed for the sake of such lesser virtues as efficiency and expediency.

"procedural ideal" that cannot be met in the "real world of criminal justice." Apprendi v. New Jersey, 530 U.S. 466, 555 (2000) (Breyer, J., dissenting).

96. *See Booker*, 125 S. Ct. at 768 (Breyer, J.). The instant Court leaves the "ball . . . in Congress' court . . . to devise and install, long-term, the sentencing system, compatible with the Constitution." *Id.* (Breyer, J.).

97. *Id.* at 781 (Stevens, J., dissenting in part). In his dissent to the portion of the two-part majority opinion authored by Justice Breyer, Justice Stevens argued that the jury system may not be the most efficient, but "the Constitution does not permit efficiency to be our primary concern." *Id.* (Stevens, J., dissenting in part).

98. *Id.* at 752 (Stevens, J.). For a discussion of the evolution of the role of the jury at common law, leading up to the drafting of the Sixth Amendment, see Benjamin F. Diamond, THE SIXTH AMENDMENT: WHERE DID THE JURY GO? FLORIDA'S FLAWED SENTENCING IN DEATH PENALTY CASES, 55 FLA. L. REV. 905, 909-11 (2003).

99. *See* Carl Hulse & Adam Liptak, *New Fight Over Controlling Punishments Is Widely Seen*, N.Y. TIMES, Jan. 13, 2005, at A29 (reporting that many judges, concerned over unnecessarily harsh sentences, are happy with the instant Court's decision); Savage, *supra* note 88 (reporting that the instant decision upheld jury trial rights).