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Constitutional Law: Predictability as Fairness and the Possible Return to Federal Indeterminate Sentencing

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CONSTITUTIONAL LAW: PREDICTABILITY AS FAIRNESS AND THE POSSIBLE RETURN TO FEDERAL INDETERMINATE SENTENCING

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

Daniel Ryan Koslosky[*]

Respondent[1] was convicted by a jury of possession with intent to distribute at least fifty grams of crack cocaine.[2] During postconviction sentencing, the district court judge found, by a preponderance of evidence, that Respondent possessed an additional 566 grams of crack cocaine[3] and obstructed justice.[4] Pursuant to the applicable United States Sentencing Guidelines (Federal Guidelines), the judge increased Respondent's sentence to a minimum of thirty years imprisonment.[5] Respondent challenged the district court's application of the Federal Guidelines on the grounds that it violated his Sixth Amendment right to a trial by jury.[6] The

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1. Respondent's name was Freddie J. Booker. United States v. Booker, 125 S. Ct. 738 (2005). Consolidated with the *Booker* case was *United States v. Fanfan*, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004), *cert. granted*, 125 S. Ct. 12 (2004). Respondent Fanfan was arrested and convicted of conspiracy to distribute and possession with intent to distribute at least 500 grams of cocaine. *Booker*, 125 S. Ct. at 747 (Stevens, J.). During postconviction sentencing, the judge found by a preponderance of the evidence that Fanfan possessed, *inter alia*, 2.5 kilograms of cocaine, but the judge did not impose the sentence enhancements provided for in the guidelines. *Id.* (Stevens, J.). The Supreme Court joined the claims of both respondents on the ground that the constitutional issues presented in each claim were identical. *Id.* (Stevens, J.). *But see id.* at 795 (Thomas, J., dissenting in part) (arguing that the application of the sentencing guidelines in Booker's case resulted in unconstitutional judicial factfinding but that Fanfan's sentence was constitutional).

2. *Booker*, 125 S. Ct. at 746 (Stevens, J.). The jury found beyond a reasonable doubt that Booker possessed 92.5 grams of crack cocaine in violation of 21 U.S.C. § 841(a)(1) (2000). *Id.* (Stevens, J.). The applicable sentencing range for such a violation was between ten years and life imprisonment. *Id.* (citing 21 U.S.C. § 841(b)(1)(A)(iii) (2000)). The district court judge had discretion to incarcerate Booker for a period of between 210 and 262 months based on the quantity and type of narcotic and on prior criminal history. *Id.* (Stevens, J.) (citing U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(c)(4), 4A1.1 (2003)).

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

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

5. *Id.* (Stevens, J.). The district court judge's finding of the additional drugs increased Booker's base offense level from thirty-two to thirty-six, thereby giving the judge discretion to impose a sentence between 360 months and life imprisonment. United States v. Booker, 375 F.3d 508, 509 (7th Cir. 2004) (citing U.S. SENTENCING GUIDELINES MANUAL §§ 2D1(c)(2), (4), 3C1.1 (2003)).

6. *See Booker*, 125 S. Ct. at 747 (Stevens, J.). The Sixth Amendment provides in part that

Court of Appeals for the Seventh Circuit reversed the sentence, holding that the district court's application of the Federal Guidelines violated the Sixth Amendment.[7] The Supreme Court granted certiorari,[8] and in affirming the court of appeals in a dual opinion, HELD that the Sixth Amendment requires that all facts necessary to support a sentence greater than the relevant statutory maximum of the Federal Guidelines be found by a jury,[9] and that the Federal Guidelines are to become advisory because their mandatory nature is incompatible with the constitution's jury trial guarantee.[10]

The Federal Guidelines were enacted to remedy the sentencing disparities of the federal indeterminate sentencing system.[11] Congress adopted the Federal Guidelines, which established determinate sentencing ranges for various categories of criminal offenses.[12] The Sixth Amendment provides that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[13] However, beginning with *McMillan v. Pennsylvania*,[14] state and federal courts have traditionally confined the

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"[i]n 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 . . . ." U.S. CONST. amend. VI.

7. *Booker*, 375 F.3d at 515. The Court of Appeals for the Seventh Circuit did not address the question of severability. *Id.*

8. United States v. Booker, 125 S. Ct. 11 (2004).

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

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

11. Mistretta v. United States, 488 U.S. 361, 366-67 (1989). The *Mistretta* Court observed that "Congress delegated almost unfettered discretion" to sentencing judges under the indeterminate sentencing system. *Id.* at 364. Under the federal indeterminate sentencing regime, a sentencing judge would impose a sentence within a congressionally defined range and a parole official would subsequently determine the actual time of incarceration. *Id.* at 365-66. The Court noted that the system led to "widespread dissatisfaction with the uncertainties" regarding federal sentencing. *Id.* at 366; *see also* Apprendi v. New Jersey, 530 U.S. 466, 557-58 (2000) (Breyer, J., dissenting) (describing discretion judges enjoyed prior to Federal Guidelines); Koon v. United States, 518 U.S. 81, 113 (1996) (stating that pre-Guidelines system of indeterminate sentencing lacked uniformity, predictability, and detachment); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 226-30 (1993) (noting that judicial power was unchecked under indeterminate sentencing and disparity was a result); *infra* note 86 and accompanying text (noting that judges will have great discretion in the absence of guidelines).

12. Williams v. United States, 503 U.S. 193, 195 (1992). The Sentencing Reform Act of 1984 authorized the creation of the United States Sentencing Commission, which promulgated the Federal Guidelines. *Id.*; *see* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883-88 (1990) (discussing the historical context behind the development of the Federal Sentencing Guidelines); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1352-62 (1997) (describing Congress's goal in creating the Guidelines).

13. U.S. CONST. amend. VI.

14. 477 U.S. 79, 85-86 (1986); *see Booker*, 125 S. Ct. at 751 (Stevens, J.).

federal constitution's jury trial guarantee to only the finding of facts constituting elements of the crime[15] and not to sentencing factors.[16]

In *McMillan*, the Supreme Court considered whether a Pennsylvania sentencing guideline requiring the trial judge to find sentencing factors, by a preponderance of the evidence,[17] violated petitioners' Sixth Amendment right to a trial by jury.[18] The guideline in question prescribed that any person convicted of an enumerated felony was subject to a minimum term of incarceration if the sentencing judge found that the felon used a firearm while committing the crime.[19]

The Supreme Court held that the Sixth Amendment required that only elements included in the legislative definition of the offense be proven beyond a reasonable doubt.[20] Moreover, as a matter of federalism,[21] the Court stated that postconviction factors used to ascertain the appropriate term of incarceration are beyond the scope of the Sixth Amendment.[22] Accordingly, the *McMillan* Court held that due process is not offended when a sentencing judge utilized a fact not found by a jury beyond a

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15. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986). The Court noted that "'the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Id.* at 84 (quoting *In re* Winship, 397 U.S. 358, 364 (1970)).

16. *McMillan*, 477 U.S. at 86; *see also Booker*, 125 S. Ct. at 803 (Breyer, J., dissenting in part) (noting that history does not support a right to have all sentencing facts found by a jury); United States v. Gaudin, 515 U.S. 506, 511-13 (1995) (noting that, historically, juries did not have to make a finding of fact for each sentencing fact).

17. *McMillan*, 477 U.S. at 80-81 (citing 42 PA. CONS. STAT. § 9712 (1982)).

18. *Id.* at 80. Each of the four petitioners was convicted by a jury of an enumerated felony to which the guideline was applicable, but none was sentenced under the guideline because of the sentencing courts' reservations as to its constitutionality. *Id.* at 82. The Commonwealth appealed, and the Pennsylvania Supreme Court consolidated the claims. *Id.* at 83.

19. *Id.* at 81-82.

20. *Id.* at 85. The *McMillan* Court does, however, note that there were certain circumstances in which the "reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged." *Id.* at 86. The Court, however, refrained from defining the "extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases." *Id.*

21. *Id.* at 85. The Supreme Court noted that it had traditionally been "'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.'" *Id.* (quoting Patterson v. New York, 432 U.S. 197, 201-02 (1977)). The Court also reaffirmed earlier holdings that judicial review of state judicial policies under the Due Process Clause of the Fourteenth Amendment were to be deferential "unless 'it offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (quoting *Patterson*, 432 U.S. at 201-02); *see* Dorszynski v. United States, 418 U.S. 424, 440-41 (1989) (stating that sentencing authority is vested in the trial judge and not subject to appellate review); *infra* note 86 and accompanying text.

22. *See McMillan*, 477 U.S. at 91-92. The Court explained that "[o]nce the reasonable-doubt standard has been applied to obtain a valid conviction, 'the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him.'" *Id.* at 92 n.8 (quoting Meachum v. Fano, 427 U.S. 215, 224 (1976)).

reasonable doubt to sentence a defendant.[23]

The Supreme Court in *Almendarez-Torres v. United States*[24] affirmed the Sixth Amendment framework articulated in *McMillan*, holding that a criminal indictment does not need to include facts pertaining only to sentencing.[25] Petitioner had entered a guilty plea for illegally re-entering the United States after a previous deportation.[26] Without advance notice,[27] petitioner's sentence was increased beyond what the facts contained in the indictment authorized.[28] The *Almendarez-Torres* Court held that a criminal indictment is required to contain only those facts relevant to the legislatively defined offense, and therefore the increased sentence was appropriate.[29]

In a dissenting opinion, Justice Scalia asserted that the majority's holding was inconsistent with common-law tradition.[30] Justice Scalia further noted that it would be unfair to deny a criminal defendant a jury determination on a fact which stood to enhance his sentence.[31]

The differing Sixth Amendment implications corresponding to offense elements and to sentencing factors was significantly eroded by the Court

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23. *Id.* at 91. The Court noted that "'[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged.'" *Id.* at 85 (quoting Patterson, 432 U.S. at 210) (alteration in original) (emphasis added by *McMillan*). Postconviction judicial factfinding, by a preponderance of the evidence, under the Federal Guidelines was also found not to violate due process in a subsequent case. United States v. Watts, 519 U.S. 148, 156 (1997).

24. 523 U.S. 224 (1998).

25. *Id.* at 228.

26. *Id.* at 227. Petitioner entered a guilty plea for violating 8 U.S.C. § 1326 (1988), which makes it a crime for any alien who, subsequent to being deported, "'enters . . . , or is at any time found in, the United States.'" *Id.* at 229 (quoting 8 U.S.C. § 1326(a)(2) (1988)) (alteration in original).

27. *Id.* at 227 (noting that petitioner's indictment contained no reference to prior convictions).

28. *Id.* Under the facts set forth in the indictment the petitioner was subject to a sentence of no more than two years imprisonment. *Id.* The petitioner, as part of the plea agreement, stipulated to being deported subsequent to the three prior aggravated felonies. *Id.* Pursuant to 18 U.S.C. § 1326(b)(2) (1988) and the U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (1995), the sentencing judge found the applicable sentencing range to be between seventy-seven and ninety-six months in prison. *Almendarez-Torres*, 523 U.S. at 227.

29. *Almendarez-Torres*, 523 U.S. at 228 (citing Hamling v. United States, 418 U.S. 87, 117 (1974)). The Court echoed the *McMillan* rationale by stating that a fact did not automatically constitute an offense element merely because its presence was connected with the punishment's severity. *Id.* at 242. The Court further reiterated the *McMillan* observation that the legislative definition of the offense was dispositive as to the Sixth Amendment's applicability. *Id.*

30. *Id.* at 261 (Scalia, J., dissenting). Justice Scalia observed that "the fact of prior convictions *had* to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime." *Id.* (Scalia, J., dissenting) (emphasis in original).

31. *Id.* at 267 (Scalia, J., dissenting).

in *Apprendi v. New Jersey*.[32] At issue in *Apprendi* was a New Jersey statute that authorized an enhanced sentence for possession of a firearm if it was found that the defendant intended to intimidate a particular minority.[33] In invalidating the statute, the Court concluded that a jury must find, beyond a reasonable doubt, any fact that would enhance a sentence beyond the relevant statutory maximum.[34]

The *Apprendi* Court stated that the nature of the jury and evidentiary standards under the common law is such as to require that the Sixth Amendment apply to contemporary postconviction sentencing proceedings.[35] The Court held that as a matter of fairness, a common law indictment contains all pertinent circumstances relating to the crime, thereby allowing a defendant to better calculate the punishment sought.[36] The *Apprendi* Court preserved *McMillan* only to the extent that a sentence does not exceed the statutory maximum authorized by the jury verdict.[37] The Court, as a matter of precedence,[38] retained the distinction between a

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32. *See Apprendi*, 530 U.S. 466, 478 (2000). The Court noted that the "distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Id.* (footnote call number omitted).

33. *Id.* at 468-69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000)). The New Jersey statute allowed the sentencing judge to determine the defendant's motivation by a preponderance of the evidence. *Id.*

34. *Id.* at 483-84, 490. The relevant "statutory maximum" for *Apprendi* purposes was the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004) (emphasis in original).

35. *Apprendi*, 530 U.S. at 477-85. The Court noted that "trial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by [a jury].'" *Id.* at 477 (emphasis omitted) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS ENGLAND 373 (1769)). The Court also noted that jury determination of circumstances surrounding the underlying felony was necessitated when a statute provided for an elevated degree of punishment if those circumstances were present. *Id.* at 480.

36. *Id.* at 478-81. The Court noted that the indictment contained "'all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly.'" *Id.* at 478 (quoting J. ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 44 (15th ed. 1862)); *see also* Almendarez-Torres v. United States, 523 U.S. 224, 261 (1998) (Scalia, J., dissenting) (noting that, at common law, fact of prior convictions had to be charged and submitted to the jury); *supra* note 31 and accompanying text.

37. *See id.* at 487 n.13. The *Apprendi* Court conceded that it was "arguable" that *Almendarez-Torres* was incorrectly decided. *Id.* at 489. The Court, however, opted to treat *Almendarez-Torres* "as a narrow exception to the general rule." *Id.* at 490; *see also* United States v. Reese, 92 U.S. 214, 232 (1876) (Clifford, J., dissenting) (stating that the general rule is that an indictment can describe the offense in the words of the statute but many exceptions exist where every fact essential to punishment must be alleged in the indictment).

38. *See Apprendi*, 530 U.S. at 494-95.

sentencing factor and an offense element.[39]

In a separate concurring opinion, Justice Thomas adhered to the common law requirement that a criminal indictment must contain all facts necessary to impose the sentence sought by the state.[40] Justice Thomas asserted that *McMillan* was actually a break from the law's traditional understanding of the nature of the jury.[41] Thus, according to Justice Thomas, *Apprendi* could be seen as a return to the original meaning of the jury trial guarantee.[42] Justice Thomas's concurring opinion also noted that the distinction between a sentencing factor and an offense element is irrelevant; the dispositive question is how the fact enters into the sentence.[43]

In a dissenting opinion, Justice O'Connor adhered to traditional Sixth Amendment jurisprudence as articulated in *McMillan*.[44] Justice Breyer, in a separate dissenting opinion, agreed and found the majority's common law analysis unconvincing,[45] further asserting that the jury trial guarantee is not applicable to judicial postconviction factfinding.[46] Justice Breyer contended that, as a matter of pragmatism, the plethora of potential sentencing factors may overwhelm a jury, thus leaving judicial postconviction factfinding as the best alternative.[47]

The instant Court adopted the *Apprendi* rationale by holding that the

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39. *Id.* at 487 n.13, 494 n.19. The Court held that the term "sentencing factor" would still be denoted as a "circumstance, which may be either aggravating or mitigating . . . that supports a specific sentence *within the range* authorized by the jury's finding." *Id.* at 494 n.19. The Court distinguished a "sentencing enhancement" as a term used to describe "an increase beyond the maximum authorized statutory sentence" and noted that it was "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.*; *see supra* note 16 and accompanying text.

40. *Id.* at 510-11 (Thomas, J., concurring).

41. *Id.* at 518 (Thomas, J., concurring).

42. *Id.* (Thomas, J., concurring).

43. *Id.* at 520-21 (Thomas, J., concurring). Justice Thomas stated that he was "aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment." *See id.* at 521 (Thomas, J., concurring); *see also supra* note 32 and accompanying text. *But see* Almendarez-Torres v. United States, 523 U.S. 224, 242 (1998) (stating that sometimes the state need not treat a sentencing factor as an element); *supra* note 29 and accompanying text.

44. *Apprendi*, 530 U.S. at 524-25 (O'Connor, J., dissenting).

45. *Id.* at 564-66 (Breyer, J., dissenting). Justice O'Connor contended that the common-law authority on which the majority relied was not inconsistent with the *McMillan* holding that the right to a jury trial applied to only those elements defined in the offense. *Id.* at 526 (O'Connor, J., dissenting). Specifically, Justice O'Connor asserted that the precedent utilized by the Court "pertain[ed] to circumstances in which a common-law felony had also been made a separate statutory offense carrying a greater penalty." *Id.* (O'Connor, J., dissenting). *But see* Blakely v. Washington, 124 S. Ct. 2531, 2536 n.5 (2004) (discussing common-law offenses and when an indictment must charge aggravating factors).

46. *See Apprendi*, 530 U.S. at 564-66 (Breyer, J., dissenting).

47. *Id.* at 557 (Breyer, J., dissenting).

Sixth Amendment requires that any fact which increases the maximum authorized sentence under the Federal Guidelines must be found by a jury.[48] In the first part of the dual opinion, Justice Stevens espoused *Apprendi's* common-law analysis by reiterating that a trial by jury is an enshrined tenet of American jurisprudence.[49] Accordingly, the instant Court concluded that the jury trial guarantee applies to sentencing made pursuant to the Federal Guidelines because of their mandatory nature.[50]

In the latter part of the dual opinion, the instant Court per Justice Breyer held that the mandatory nature of the Federal Guidelines, and the applicability of the Sixth Amendment to the same, are incompatible.[51] There, the Court determined that severing the provision that mandates application of the Federal Guidelines[52] would be the least disruptive alternative in light of the instant Court's new Sixth Amendment jurisprudence.[53]

Additionally, the instant Court excised the provision of the Federal Guidelines that provided for appellate review.[54] The instant Court stated that this provision is incompatible with the instant Court's aforesaid holdings because of its dependence on the Federal Guidelines mandatory framework.[55] Thus, the instant Court determined that a standard of

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48. United States v. Booker, 125 S. Ct. 738, 756 (2005) (Stevens, J.).

49. *Id.* at 752 (Stevens, J.). Justice Stevens noted that the application of the jury trial guarantee of the Sixth Amendment is "not the product of recent innovations in our jurisprudence, but rather [has its] genesis in the ideals our constitutional tradition assimilated from the common law." *Id.* at 753 (Stevens, J.).

50. *Id.* at 750 (Stevens, J.). The instant Court recognized that if the Federal Guidelines "could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Id.* (Stevens, J.). Justice Stevens acknowledged that 18 U.S.C. § 3553(b)(1) (Supp. 2004) was the provision that made application of the Federal Guidelines mandatory. *Id.* (Stevens, J.).

51. *Id.* at 756 (Breyer, J.).

52. The section in question was 18 U.S.C. § 3553(b)(1) (2000). *Booker*, 125 S. Ct. at 764 (Breyer, J.). Section 3553(b)(1) stated that "*the court shall* impose a sentence" and is cited by Justice Breyer as the provision making the Federal Guidelines mandatory. 18 U.S.C. § 3553(b)(1) (2000) (emphasis added); *Booker*, 125 S. Ct. at 764 (Breyer, J.). This determination, however, was reached after Justice Breyer determined that the provision "'the court'" read as "'the judge without the jury.'" *Id.* at 759 (Breyer, J.). Justice Stevens, in a dissenting opinion, suggested that the "'court'" may be interpreted as "includ[ing] a judge's selection of a sentence as supported by a jury verdict." *Id.* at 779 (Stevens, J., dissenting in part).

53. *Id.* at 760, 764-65 (Breyer, J.).

54. *Id.* at 756-57 (Breyer, J.). The excised provision provided that "[u]pon review of the record, the court of appeals *shall* determine whether the sentence (1) was imposed in violation of law." 18 U.S.C. § 3742(e) (2000) (emphasis added).

55. *Booker*, 125 S. Ct. at 756-57 (Breyer, J.).

"unreasonableness"[56] would instead apply to appellate review of federal sentences henceforth.[57]

Paramount to the instant Court's conclusions was that the goal of the Federal Guidelines was to provide more uniformity to federal sentencing.[58] The instant Court stated that the Federal Guidelines were enacted to better correlate punishment with a defendant's actual conduct.[59] The instant Court concluded that application of the jury trial guarantee would create rigidity in federal sentencing and thereby undermine congressional intent.[60]

The instant Court noted that sentencing judges would effectively be deprived of considering information regarding the defendant's actual conduct that is obtained postconviction.[61] The instant Court warned that greater prosecutorial power would result,[62] and that plea bargaining would be relegated to a situation analogous to the indeterminate sentencing regime.[63]

In a dissenting opinion, Justice Stevens stated that extension of the jury trial guarantee, under the *Apprendi* framework, to the Federal Guidelines was not inconsistent with the intent of Congress.[64] Justice Stevens also asserted that the instant Court increased uncertainty in the plea process by making the Federal Guidelines advisory.[65] Moreover, the dissent argued

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56. *Id.* at 765 (Breyer, J.).

57. *See id.* at 765-66 (Breyer, J.). The instant Court noted that the standard of "unreasonableness" could be inferred from the language of the statute based on "related statutory language, the structure of the statute, and the 'sound administration of justice.'" *Id.* (Breyer, J.) (quoting Pierce v. Underwood, 487 U.S. 552, 559-60 (1988)); *see also Underwood*, 487 U.S. at 560 (discussing problems related to the standard of appellate review).

58. *See Booker*, 125 S. Ct. at 759 (Breyer, J.); *supra* note 11 and accompanying text.

59. *Booker*, 125 S. Ct. at 761 (Breyer, J.).

60. *See id.* at 759 (Breyer, J.).

61. *Id.* at 762 (Breyer, J.). The Court acknowledged, however, that a conviction could only be based on conduct contained in the indictment. *Id.* (Breyer, J.).

62. *Id.* at 763 (Breyer, J.). The Court noted that "any factor that a prosecutor chose not to charge at the plea negotiation would be placed beyond the reach of the judge entirely." *Id.* (Breyer, J.). *But see* Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1414-17 (1997) (arguing that a charge-offense system is unlikely to alter the rate of prosecutorial subversion of the Federal Guidelines' uniformity goals).

63. *See Booker*, 125 S. Ct. at 762-63 (Breyer, J.). Justice Breyer asserted that "plea bargaining would likely lead to sentences that gave greater weight, not to real conduct, but rather to the skill of counsel, the policies of the prosecutor, the caseload, and other factors that vary from place to place." *Id.* at 763 (Breyer, J.); *see also* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1082-87 (1976) (describing the role of the judge in plea bargaining and analyzing sentencing disparities dependent on whether the defendant negotiated a plea or was tried with or without a jury).

64. *Booker*, 125 S. Ct. at 785-86 (Stevens, J., dissenting in part) (noting that disparities in federal sentencing were a result of judicially-vested discretion).

65. *Id.* at 781 (Stevens, J., dissenting in part). Justice Stevens asserts that the instant Court

that sentencing judges would still have been able to impose a sentence within the range to reflect real conduct and reject any factually false plea agreement.[66]

Ultimately, the instant Court is unable to reconcile the competing interests of providing defendants fairness based on the ability to predict punishment with judicial discretion to impose a sentence based on actual conduct.[67] By making the Federal Guidelines only advisory, the instant Court risks increasing federal defendants' uncertainty regarding the sentence to which they are subject.[68]

The fairness inherent in a defendant's ability to predict, with a degree of certainty, the sentence to which he is subject has long been acknowledged by the common-law and state courts.[69] However, in its contemporary Sixth Amendment jurisprudence, the Supreme Court has primarily focused on the common law nature of the jury instead.[70] The instant Court embraces the role of the jury at common law by making the Sixth Amendment applicable so as to replicate the protections traditionally offered to defendants under common-law criminal proceedings.[71]

The corollary of this development in Sixth Amendment jurisprudence is that defendants are better able to predict the term of incarceration that they face at the commencement of the criminal proceeding.[72] Since all facts necessary to increase a sentence beyond the statutory maximum must be submitted to a jury, they also must be included in the indictment.[73] Consequently, a criminal defendant[74] has forewarning as to the punishment

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"eliminated the certainty of expectations in the plea process." *Id.* (Stevens, J., dissenting in part).

66. *Id.* at 781-82 (Stevens, J., dissenting in part).

67. *See id.* at 756 (Breyer, J.) (holding that the mandatory nature of the Federal Guidelines is incompatible with the instant Court's constitutional holding).

68. *See id.* at 781 (Stevens, J., dissenting in part); Almendarez-Torres v. United States, 523 U.S. 224, 256-57 (1998) (Scalia, J., dissenting); *supra* note 64.

69. *See Booker*, 125 S. Ct. at 753 (Stevens, J.); *supra* notes 30-31, 35-37, 40 and accompanying text.

70. *See* Blakely v. Washington, 124 S. Ct. 2531, 2534, 2539-40 (2004); Apprendi v. New Jersey, 530 U.S. 466, 477 (2000); Jones v. United States, 526 U.S. 227, 240 (1999); McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986).

71. *See Booker*, 125 S. Ct. at 753 (Stevens, J.). Justice Thomas asserted earlier that the Fifth and Sixth Amendments "codified a few particular common-law procedural rights." *Apprendi*, 530 U.S. at 500 n.1 (Thomas, J., concurring).

72. *See* Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines After Blakely: A Former Commissioner's Perspective*, 2004 BYU L. REV. 935, 980-81 (2004) (arguing that the Federal Guidelines reduced sentencing disparity); Geraldine Scott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 941-42 (stating that under the Federal Guidelines punishment for white collar offenses was more certain and uniform); *supra* notes 35-36 and accompanying text.

73. *See Apprendi*, 530 U.S. at 518 (Thomas, J., concurring); Jones v. United States, 526 U.S. 227, 243 n.6 (1999); *supra* note 29 and accompanying text.

74. *See Booker*, 125 S. Ct. at 749 (Stevens, J.) (noting that there is no constitutionally

to which he is subject at the commencement of the prosecution.[75] This result is consistent with the Court's observation in *Apprendi* that a criminal defendant is entitled to adequately prepare a defense.[76]

The instant Court, in what has been coined a case of "judicial jujitsu,"[77] undercuts this contemporary development of Sixth Amendment jurisprudence by making the Federal Guidelines advisory so as not to implicate the Sixth Amendment.[78] The instant Court increases judicial discretion in postconviction sentencing to better allow judges to allocate sentences based on a defendant's actual conduct.[79] The instant Court justifies this increase in judicial discretion by reasoning that Congress intended to better link similar conduct by defendants with their corresponding sentences.[80]

By requiring judges only to consult the Federal Guidelines rather than be bound by them,[81] the *Booker* Court relegates federal sentencing to the *McMillan* framework.[82] Under a *McMillan* construction of federal sentencing, only those factors included in the definition of the offense would be required to be charged in an indictment.[83] By foreclosing Sixth Amendment applicability to any fact other than those necessary to constitute an element of the offense, the instant Court reinstates judicial discretion at sentencing.

However, judges following a strict *McMillan* construction would be required to impose a sentence within the applicable range unless they found information which sanctioned an upward or downward departure.[84] Under an exclusively advisory system, however, judges would be required only to consult the Federal Guidelines, thereby allowing the imposition of any sentence, with the only caveat being that it cannot be unreasonable

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significant difference between the Federal Guidelines and the state sentencing guidelines at issue in *Blakely*); *Blakely*, 124 S. Ct. at 2548-50 (O'Connor, J., dissenting) (implying that there is no constitutional distinction between the Federal guidelines and the Washington sentencing statute).

75. *See supra* notes 31-32 and accompanying text. The increased notice provided to criminal defendants by Justice Steven's approach is evident in the Supreme Court's recent opinion of *Shepard v. United States*, 125 S. Ct. 1254, 1263 (2005) (holding that a necessarily admitted guilty plea to a burglary charge defined by a nongeneric statute is limited to the terms of the plea or charging document and thereby excludes the police report or complaint).

76. *See Apprendi*, 530 U.S. at 478; *supra* notes 31-32 and accompanying text.

77. Charles Lane, *Sentencing Standards No Longer Mandatory; Federal Judges May Deviate, Court Rules*, WASH. POST, Jan. 13, 2005, at A01.

78. *See Booker*, 125 S. Ct. at 750 (Stevens, J.); *supra* note 50 and accompanying text.

79. *See supra* notes 11, 59-61, 66 and accompanying text.

80. *See supra* notes 11, 59-61 and accompanying text.

81. *Booker*, 125 S. Ct. at 757 (Breyer, J.).

82. *See supra* notes 16, 20-23 and accompanying text.

83. *See supra* notes 25, 28-29 and accompanying text.

84. *See* McMillan v. Pennsylvania, 477 U.S. 79, 81 n.1 (1986) (noting the mandatory nature of the Pennsylvania sentencing guideline in question); *supra* note 17 and accompanying text.

upon review.[85] The instant Court thus effectively restores an indeterminate-like federal sentencing regime by giving great deference to the choices of judges in postconviction proceedings[86] and by delegating supervisory power outside the arena of the trial court.[87]

Common-law criminal jurisprudence was concerned with providing defendants with fairness based on their ability to predict the sentence to which they were subject.[88] Beginning with *Apprendi*, the Supreme Court began gradually to broaden the reach of the jury trial guarantee of the Sixth Amendment so as to replicate the notice that defendants were afforded under common-law sentencing.[89] The instant Court, however, undercut this trend in criminal jurisprudence by construing the Federal Guidelines in a manner such as not to implicate the Sixth Amendment.[90] Consequently, criminal defendants may be subject to similar, if not the

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85. *See supra* notes 56-57 and accompanying text.

86. *See* Dorszynski v. United States, 418 U.S. 424, 443 (1974) (stating that well-established doctrine prevented review of sentencing discretion). *Dorszynski* was decided under the indeterminate sentencing system and further stated that "limited review [wa]s available when sentencing discretion [wa]s not exercised at all." *Id.* Also consider *Mistretta v. United States*, 488 U.S. 361, 364 (1989). The *Mistretta* majority noted that "[a trial] court's determination as to what sentence was appropriate met with virtually unconditional deference on appeal." *Id.*; *see also* United States v. Grayson, 438 U.S. 41, 46 (1978) (stating that a "fundamental proposal" of the sentencing reform movement was a "flexible sentencing system permitting judges and correctional personnel, particularly the latter, to set the release date of prisoners according to informed judgments concerning their potential for, or actual, rehabilitation and their likely recidivism"); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 7 (1972) (stating that sentences under the indeterminate sentencing system were "not appealable except on rare and extraordinary grounds"); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892-93 (1990) (discussing indeterminate sentencing and the rehabilitative theory of prison and punishment).

87. Recall that under the indeterminate sentencing system the sentencing judge would impose a term of incarceration within a congressionally defined range and a parole official would determine the actual time of incarceration. *Mistretta*, 488 U.S. at 365-66. The *Mistretta* Court noted that sentencing judges were delegated "almost unfettered discretion" that resulted in "widespread dissatisfaction" with regard to the uncertainties of federal sentencing. *Id.* at 364-66. Recall *Apprendi v. New Jersey*, 530 U.S. 466, 558 (2000) (Breyer, J., dissenting), in which Justice Breyer adhered to judicial sentencing discretion and noted that "federal law left the individual sentencing judge free to determine which factors were relevant. That freedom meant that each judge, in an effort to tailor punishment to the individual offense and offender, was guided primarily by experience, relevance and a sense of proportional fairness." *Id.* (Breyer, J., dissenting). The term of incarceration made pursuant to the advisory Federal Guidelines would be determined with greater judicial discretion and subject to appellate review. The two systems are by no means exact but instead parallel in their effect on the predictability defendants are afforded. *See* Frankel, *supra* note 86, at 29 (discussing the rationale behind indeterminate sentencing).

88. *See supra* notes 29-32, 35-56 and accompanying text.

89. *See supra* notes 72-76 and accompanying text.

90. *See supra* notes 50, 52 and accompanying text.

same, sentencing uncertainties they encountered under the *McMillan* and indeterminate sentencing regimes.[91]

91. *See supra* notes 27-28 and accompanying text.