No. 04-104

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

FREDDIE J. BOOKER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

1. This Court's recent precedent consistently requires any fact (other than prior conviction) necessary for the imposition of a sentence to be found by a jury beyond a reasonable doubt or admitted in the defendant's plea. The Court attaches no significance to how the fact is labeled, but looks instead to the relationship of the fact to the proposed sentence. If the fact is necessary to a sentence – whether or not labeled as an element – a defendant has the right to have the government prove the fact to a jury.

By asking whether a fact has the effect of increasing the potential sentence to which a defendant is exposed, the rule secures the constitutional rights to jury trial and proof beyond a reasonable doubt. This "bright-line" rule honors the role a jury plays as the democratic institution that authorizes the punishment a court imposes.

This rule applies to facts that increase sentencing ranges under the Federal Sentencing Guidelines. It does not matter that most of the sentence-enhancing facts under the Guidelines were designated by the Sentencing Commission rather than Congress, because Congress cannot delegate the authority to create rules that it cannot constitutionally create itself. Neither the Commission's status as an independent agency nor its location in the Judicial Branch render the rule inapplicable to federal sentencing. Congress retains direct control of the Guidelines and of the Commission, and has assured that judges will not comprise a majority of the Commissioners.

Moreover, petitioner's characterization of the binding sentencing rules that the Commission creates as mere guidance for the exercise of sentencing discretion is inaccurate. For the purpose of constitutional analysis, no principled distinction can be drawn between sentencing rules enacted by Congress and those enacted by the

Commission. None of this Court's precedents render inapplicable the defendant's entitlement to jury findings of all facts that authorize the sentence imposed.

Eight years were added to respondent's punishment for crimes that were never considered by his jury. By making findings of facts that were necessary to the increased sentence, the sentencing judge violated rights secured to respondent by the Fifth and Sixth Amendments.

2. Depriving a defendant of the right to have a jury find facts necessary to a sentence is unconstitutional, but this does not invalidate the entire Sentencing Reform Act or the Sentencing Guidelines promulgated pursuant to it. The federal Guidelines remain operative so long as the fact-finder is a jury rather than a judge.

The Sentencing Commission's preference for judicial fact-finding in the operation of the Guidelines does not assist petitioner, because severability analysis must focus on legislative intent, not on the agency's intent. Like other agencies, the Commission is well positioned to modify its rules to give effect to congressional intent and to respond to changing circumstances, including court holdings that invalidate portions of a regulatory scheme.

Congress enacted sentencing reform to assure that sentences were imposed uniformly and to promote certainty and proportionality in sentencing. A change in the identity of the fact-finder from judge to jury does not disturb these goals. Congress still would have preferred determinate sentencing under guidelines to discretionary sentencing, even had it understood that defendants may insist on jury findings of facts required for an increase in a sentencing range.

Petitioner's argument that the Court should declare the federal sentencing scheme not "severable" is deeply flawed. Petitioner actually urges severability in two ways.

First, it wants the Guideline scheme to apply when no fact-finding is required, but not otherwise. This position effectively severs 18 U.S.C. § 3553(b), which directs courts to apply the Guidelines in every case, from the balance of the federal sentencing scheme. The result is a dual sentencing scheme, one discretionary and the other controlled by guidelines. That result does not further the desire of Congress to promote sentencing uniformity.

Second, petitioner argues that the Guidelines should be advisory – a position that severs the statutory subsection making the Guidelines mandatory from the subsection that permits judges to consider the Guidelines along with other factors in imposing a sentence. Since mandatory Guidelines do not violate the Constitution, petitioner would nullify a constitutional statute in order to create an advisory system that Congress did not want.

Petitioner has not overcome the presumption that favors the retention of legislation. The Guidelines can continue to operate if juries substitute for judges as fact-finders in those cases that are not resolved with a guilty plea. However, the lower court's suggestion that a sentencing jury may be empanelled on remand should be rejected. While a sentencing scheme that permits juries to find Guideline facts can be implemented with or without the assistance of Congress, the Court should not allow that after the trial jury has rendered a verdict and been discharged. To interpret existing sentencing legislation to permit a second jury to find facts after a prosecution has been tried to a verdict would raise grave double jeopardy concerns that are best avoided.

ARGUMENT

I. THE DISTRICT JUDGE VIOLATED THE FIFTH AND SIXTH AMENDMENTS BY FINDING FACTS BY A PREPONDERANCE OF THE EVIDENCE, BY NOT SUBMITTING THOSE FACTS TO A JURY, AND BY IMPOSING A LONGER SENTENCE THAN THE FEDERAL SENTENCING GUIDELINES AUTHORIZED WITHOUT THOSE FINDINGS

Respondent was charged with two drug crimes, both occurring on February 26, 2003. The government proved the first crime – distribution of an unspecified quantity of cocaine base – through the testimony of a witness who said he had purchased an eighth ounce of the drug from respondent minutes before both men were arrested. The government proved the second crime – possession with the intent to distribute more than 50 grams of cocaine base – by presenting evidence that about 92 grams of cocaine base were found in respondent's satchel. (PSR ¶¶ 4-12) Respondent was not charged with other crimes, and the jury was not asked to decide whether respondent distributed drugs at any time prior to February 26, 2003.

Following the guilty verdict on each count, the district judge used the United States Sentencing Guidelines Manual to determine the respondent's sentence. *See* 18 U.S.C. § 3553(b). The Manual first instructs a judge to determine the base offense level applicable to the crime or crimes of conviction. U.S. Sentencing Guidelines Manual § 1B1.1(a), (b); § 1B1.2 (hereinafter Guidelines). The base offense level for the crime of possession with intent to sell 50 to 150 grams of cocaine base is 32. Guidelines § 2D1.1(c)(4). However, the Manual states that the base offense level should include all acts "that were part of the same course of conduct or common scheme or plan as the offense of conviction." *Id.* § 1B1.3(a)(2). The district judge found that

respondent distributed an additional 567 grams of cocaine base during the weeks prior to his arrest. That judicial finding increased respondent's base offense level to 36. *Id.* § 2D1.1(c)(2).

The judge next consulted chapter three of the Manual to decide whether other facts existed that required the offense level to be adjusted up or down. *See id.* § 1B1.1(c), (e). The judge found that respondent obstructed justice by giving false testimony during his trial. Based on that finding, the judge added two points to respondent's offense level, raising it to 38. *See id.* § 3C1.1. After using chapter four to calculate a criminal history category of VI, *see id.* §§ 1B1.1(f), 4A1.1, the judge examined the grid in chapter five to locate the intersection of the adjusted offense level and respondent's criminal history category. *Id.* § 1B1.1(g). The designated sentencing range for an adjusted offense level of 38 and a criminal history category of VI is 360 months to life.[1] *Id.* § 5A.

Had the judge not included an extra 567 grams of cocaine base in the offense level, and had this level not been adjusted upward for an obstruction of justice, the designated sentencing range would have been 240 to 262 months.[2] *Id.* § 5A. Respondent was sentenced to 360 months in prison – more than eight years longer than the

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[1] The sentencing range ordinarily defines the judge's sentencing authority. *See* 18 U.S.C. § 3553(b). Judges must follow the guidelines "in typical cases (those that lie in the 'heartland' of the crime as the statute defines it)," *Apprendi v. New Jersey*, 530 U.S. 466, 560 (2000) (Breyer, J., dissenting), while downward departures, which are meant to be rarely granted, U.S. Sentencing Guidelines Manual § 5K2.0, p.s., comment. (n.3), are subject to *de novo* appellate review. 18 U.S.C. § 3742(e).

[2] The minimum sentence authorized by the guideline range increased from 210 months to 240 months because respondent's prior felony drug conviction subjected him to a 20 year mandatory minimum sentence. *See* 21 U.S.C. § 841(b)(1)(A); Guidelines § 5G1.1(c)(2).

maximum sentence that the Guidelines authorized on the basis of the facts found by the jury alone.

The court imposed extra punishment upon respondent for crimes and acts that were never charged, never submitted to a jury, and never proven beyond a reasonable doubt. "As a matter of simple justice," procedural safeguards designed to protect the accused should apply equally to each of his acts that the law "has singled out for punishment." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Although the government charged respondent only with selling a small quantity of cocaine base and with possessing another 92 grams on the same day, it wanted him to suffer added punishment for other drug crimes committed at other times and in other places. The court imposed still more punishment because it believed respondent committed perjury during his trial. The court imposed this punishment without affording respondent the procedural protections our Constitution provides against the wrongful infliction of punishment: indictment, proof beyond a reasonable doubt, and trial by jury. The sentencing procedure used in this case violated respondent's constitutional rights because the judge inflicted "punishment that the jury's verdict alone does not allow." *Blakely v. Washington,* 124 S.Ct. 2531, 2537 (2004).

A. When The Maximum Sentence Authorized By Law Depends Upon The Existence Of A Fact, The Fifth And Sixth Amendments Require The Fact To Be Proven To A Jury Beyond A Reasonable Doubt Or Admitted By The Defendant

In *Jones v. United States,* 526 U.S. 227, 243 n.6 (1999), the Court stated with clarity the rule of constitutional law that resolves the first question presented: "[U]nder the Due Process Clause of the Fifth Amendment

and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones* construed a federal carjacking statute to avoid the grave constitutional questions that would have arisen if the statute had allowed judges to find facts that authorize a longer sentence. *Jones,* 526 U.S. at 239. Reviewing "a series of cases over the past quarter century," *id.* at 240, the Court identified a question identical in principle to the one in this case: "[M]ay judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime?" *Id.* at 242. The constitutional rule articulated above permits only one answer: Judges may not find facts by a preponderance of the evidence if those facts increase the severity of the punishment to which a defendant is exposed.

Jones asked whether "an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn." *Id.* at 244. The Court drew that line in *Apprendi,* 530 U.S. at 491-92, when it held that the Due Process Clause prohibited a state court judge from deciding a fact that increased a maximum sentence. The legislature's designation of the fact as a "sentence aggravator" rather than an "offense element" provided no principled basis for diluting constitutional safeguards. *Id*. at 476. The constitutional focus must be on "effect," not "form." *Id.* at 494. The Court reinforced that focus in *Ring v. Arizona,* 536 U.S. 584, 602 (2002): "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."

These rules give effect to the central function the Framers intended a jury to perform in deciding the facts that trigger a judge's authority to impose a sentence.[3] *See Apprendi,* 530 U.S. at 476-83 (examining history); *id.* at 502-18 (Thomas, J., concurring) (same); *Jones,* 526 U.S. at 244-48 (same). No distinction between an "element" and a legislatively prescribed "sentencing factor" was imagined at the time our nation was founded. *Apprendi,* 530 U.S. at 478. The Framers had no reason to depart from the common law understanding that an indictment must allege "every fact essential to the punishment sought to be inflicted," 1 J. Bishop, *Commentaries on Criminal Law* § 961, at 564-65 (5th ed. 1872), and the correlative understanding that "[t]he idea of a jury trial" includes proof of "any particular fact which the law makes essential to the punishment." 1 J. Bishop, *Law of Criminal Procedure* § 87, at 55 (2d ed. 1872).

Petitioner suggests that *Apprendi* requires facts to be decided by a jury only if they increase a sentence "beyond the otherwise-applicable statutory maximum, such that it was the functional equivalent of a different, aggravated offense." Pet. Br. at 15. While petitioner seizes upon the Court's reference to facts that increase the penalty for a crime "beyond the prescribed statutory maximum," 530 U.S. at 490, the *Apprendi* Court's analysis did not turn on whether a sentence-enhancing fact was defined by statute

[3] Alexander Hamilton observed that both the Federalists and the Anti-Federalists "if they agree on nothing else, concur at least in the value they set upon the trial by jury." *The Federalist* No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Rachel Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing,* 152 U. Pa. L. Rev. 33, 55-59 (2003) (describing the Framers' belief that the jury was more than a fact-finding body; it was a critical check on the government and its laws mandating punishment).

or on whether it created the equivalent of an aggravated offense. Rather, the Court focused on the role a jury must play in finding any fact required for the imposition of a chosen punishment. The *Apprendi* decision endorsed the *Jones* rule as it had been expressed in a concurring opinion: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." 526 U.S. at 252-53 (Stevens, J., concurring), *quoted and adopted in Apprendi,* 530 U.S. at 490. Accordingly, a defendant may not be exposed "to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi,* 530 U.S. at 483 (emphasis in original).

The applicability of *Apprendi* to the finding of facts that determine sentencing ranges below a formal statutory maximum was established last Term in *Blakely v. Washington,* 124 S.Ct. 2531 (2004). Although a Washington statute set a formal maximum sentence of ten years for second-degree kidnapping (the crime Blakely admitted in his guilty plea), Washington's Sentencing Reform Act confined the sentencing court's discretion by setting a "standard range" of 49 to 53 months. The court could not exceed this range without finding facts beyond those Blakely admitted in his plea. 124 S.Ct. at 2535. The judge exceeded his authority by finding that Blakely acted with "deliberate cruelty," a fact that was necessary to the 90 month sentence that the judge imposed. *Id.* at 2537.

While ten years was defined by statute as the outer boundary of any sentence for second-degree kidnapping, the Sixth Amendment gave the defendant a right to a jury trial on all facts necessary to the imposition of a sentence in excess of the "standard range." *See Blakely*, 124 S.Ct. at 2538 ("The 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or

death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)"). The maximum sentence to which the *Apprendi* rule refers is the maximum a judge "may impose without any additional findings." *Blakely,* 124 S.Ct. at 2537. It is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* (emphasis in original). The maximum sentence that could be imposed on Blakely was 53 months, not 10 years, because this was the maximum sentence permitted by the facts Blakely admitted in his guilty plea.

Petitioner recharacterizes *Blakely* by relying, not on the language quoted above, but on the analysis of the Fifth Circuit in *United States v. Pineiro,* 377 F.3d 464 (5th Cir. 2004), and on the dissent in the court below. In petitioner's view, Washington law creates an offense of kidnapping and two aggravated versions of that offense: one requiring proof that a weapon was involved, the other requiring proof of deliberate cruelty. Pet. Br. at 18-19. This, petitioner says, is similar to the sentencing statutes at issue in *Apprendi* but unlike the federal Guidelines.[4]

There is in fact no distinction. Washington's sentencing scheme, like the federal Guidelines, permits the judge to find a variety of facts that increase the "standard range"

[4] Commentators appear to be in unanimous agreement that no principled distinction can be drawn between the judicial fact-finding that violated the Constitution in Washington's sentencing scheme and judicial fact-finding that triggers enhanced sentences under the federal Guidelines. *See* Albert W. Alschuler, *To Sever or Not to Sever: Why Blakely Requires Action By Congress,* 17 Fed. Sent. Rep. ___, *4 (forthcoming October 2004), *available for download at* http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/professor_alsch.html ("No academic commentator appears to have given any credence to any asserted distinction"); Stephanos Bibas, Blakely's *Federal Aftermath,* 16 Fed. Sent. Rep. 333, 334 (2004) ("No commentator who has considered this issue agrees with the Department of Justice's position").

sentence to which the defendant is otherwise subject. *See, e.g.,* Wash. Rev. Code § 9.94A.535(2) (listing fourteen aggravating circumstances that permit an increase in the standard range sentence). The Washington scheme differs meaningfully from the federal Guidelines only by affording Washington judges discretion not to exceed the standard range after finding that aggravating facts exist. *Compare* Wash. Rev. Code § 9.94A.535 ("court may impose a sentence outside the standard sentence range") *with* 18 U.S.C. § 3553(b) ("court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4)" unless circumstances exist that were not adequately considered by the Sentencing Commission). Thus, the Guidelines pose an even greater threat to the jury trial guaranty because they *require* judges to impose longer sentences on the basis of judicial fact-finding.

Petitioner's argument that the jury trial right should extend only to facts designated by statute as essential to punishment is inconsistent not only with the Court's analysis in *Blakely*, but with the broad language used in the opinion. *Blakely* does not hinge upon "whether or not the 'statutory maximum' for '*Apprendi* purposes' is actually embodied in a statute." *United States v. Hammoud,* 2004 WL 2005622, *39 (4th Cir. Sept. 8, 2004) (Motz, J., dissenting); *see, e.g., Blakely,* 124 S.Ct. at 2538 ("[b]ecause the State's *sentencing procedure* did not comply with the Sixth Amendment, petitioner's sentence is invalid") (emphasis added); *id.* at 2540 (describing how a sentencing "system" runs afoul of the Sixth Amendment).

With studied understatement, petitioner acknowledges that *Blakely "*could be read to suggest a broader rule." Pet. Br. at 19. So it could. *Blakely*'s definition of the term "statutory maximum" is flatly inconsistent with the one that drives petitioner's analysis.

Petitioner argues, however, that the Court's focus upon the maximum sentence a judge may impose without finding additional facts was unnecessary to its holding. Pet. Br. at 19. The Court's recognition that judges obtain their sentencing authority from the facts found by a jury or admitted in a plea was in fact central to its analysis. Petitioner's vision of *Blakely* gives no effect to the primacy of the jury as the entity that must authorize the punishment to be imposed. Its interpretation of *Blakely* would allow legislatures to structure sentencing laws to deprive a defendant of the right to require proof to a jury of the factual basis for punishment.[5] Its interpretation also fails to give "intelligible content to the right of jury trial," *Blakely,* 124 S.Ct. at 2538, by protecting an accused's entitlement to a jury finding of every fact legally necessary to the punishment imposed. *Id.* at 2537.

The unifying theme of *Jones*, *Apprendi*, *Ring*, and *Blakely* is respect for the Framers' belief that the core protections of notice, jury trial, and proof beyond a reasonable doubt ensure that the facts upon which a punishment is based are determined accurately and consistently with the norms of the community. The Framers scarcely could have envisioned a sentencing scheme that allows a judge (assisted by a probation officer) to find that a defendant committed additional crimes and to impose additional punishment that would not have been authorized in the

[5] It cannot be that the State of Washington could circumvent the Sixth Amendment by creating its own sentencing commission and directing the commission to promulgate the exact sentencing scheme that the Court found unconstitutional in *Blakely*. That would be the roadmap for states to follow, however, if the Court decides that *Blakely* applies to guidelines promulgated by statute but not to guidelines that are promulgated by commissions that are promulgated by statute, and then approved (if only passively) by the legislature. *See* 28 U.S.C. § 994(p).

absence of that finding. The Framers would not have tolerated "exclusively judicial factfinding to peg penalty limits." *Jones,* 526 U.S. at 244.

Respondent's federal Guideline range of 240 to 262 months applicable to his offenses of conviction, like the range of 47 to 53 months in *Blakely,* defined the limits of the court's sentencing authority. No jury decided that respondent committed drug crimes prior to February 26, 2003. No jury decided that respondent obstructed justice during his trial. Because "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury," *Apprendi,* 530 U.S. at 482 n. 10, the district court violated respondent's right to a jury trial and to proof beyond a reasonable doubt by finding the facts necessary to the imposition of an additional eight years in prison.

B. There Is No Principled Distinction Between The Unconstitutional Judicial Fact-Finding In *Blakely* And The Judicial Fact-Finding That Increased Respondent's Sentence

Petitioner claims that because the Sentencing Guidelines were authored by a commission instead of a legislature, the rationale of *Blakely* does not apply.[6] But it is the effect that facts have upon a judge's sentencing authority that determines whether a fact must be found by a jury.

[6] Petitioner seemed less certain of that position when it spoke to the Court in *Blakely.* In its amicus brief, petitioner questioned whether the differences between Washington's sentencing scheme and the federal Guidelines were "of constitutional magnitude" given the Commission's accountability to Congress, its delegated authority, the nature of the Guidelines as "binding legislative rules," and the direct enactment of guidelines by Congress. Brief for the United States as Amicus Curiae Supporting Respondent at 29-30, *Blakely v. Washington,* 124 S.Ct. 2531 (2004).

Apprendi, 530 U.S. at 494. The source of the law that links punishment to the existence of a fact makes no difference to the operation of the Sixth Amendment.

Petitioner builds its argument that the Guidelines differ significantly from statutes on a flawed premise: that the Sentencing Commission is a unique, independent, quasi-judicial body that promulgates rules to guide the discretion of judges but does not legislate statutory maxima. Neither the location of the Sentencing Commission in the Judicial Branch nor the nature of its rulemaking excuse federal sentencing from the tenet that facts essential to the punishment imposed must be determined by a jury. As importantly, petitioner all but overlooks Congress's role in directly amending the guidelines, in passively ratifying all guideline amendments, and in structuring the Sentencing Commission to assure that judges remain a minority (and to allow their removal from the Commission altogether).

1. Writing for the court below, Judge Posner offered a forceful refutation of petitioner's argument that judges have the authority to find facts essential to the determination of the maximum sentences established by the Sentencing Commission:

> Provisions of the guidelines establish a "standard range" for possessing with intent to distribute at least 50 grams of cocaine base, and other provisions of the guidelines establish aggravating factors that if found by the judge jack up the range. The pattern is the same as that in the Washington statute, and it is hard to believe that the fact that the guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature can make a difference. The Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution

> by a multistage sentencing scheme neither, it seems plain, can a regulatory agency.

United States v. Booker, 375 F.3d 508, 510-11 (7th Cir. 2004). It should be obvious that Congress may not assign to the Sentencing Commission the power to do something it could not constitutionally do itself.[7] *See United States v. Koch,* 2004 WL 1899930, *9 (6th Cir. Aug. 26, 2004) (Martin, J., dissenting) (criticizing majority for undermining *Blakely* "by allowing Congress to accomplish indirectly – by delegating authority to the Commission – precisely what we now know the Sixth Amendment prohibits it from doing directly."). As one commentator observed, "to allow Congress to delegate to an agency the power to create a sentencing system that would violate the right to jury trial if Congress enacted this system itself would be bizarre." Albert W. Alschuler, *To Sever or Not to Sever: Why Blakely Requires Action By Congress,* 17 Fed. Sent. Rptr. ___, *4 (forthcoming October 2004), *available for download at* http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/professor_alsch.html. The simple, pointed logic underlying these analyses compels the conclusion that *Blakely* applies to federal sentencing.

2. There is no doubt that the Sentencing Commission is unique, *see Mistretta v. United States,* 488 U.S. 361, 384 (1989) ("the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches"); *id.* ("The

[7] Justice Breyer asked the obverse question in *Apprendi*, 530 U.S. at 561-62 (Breyer, J., dissenting): "That is, if the Constitution permits a delegate (the commission) to exercise sentencing-related rulemaking power, how can it deny the delegator (the legislature) what is, in effect, the same rulemaking power?" It is precisely because the Sentencing Commission exercises "the same rulemaking power" as Congress when it links maximum sentences to the existence of certain facts that the Sixth Amendment requires those facts to be proved to a jury.

Sentencing Commission unquestionably is a peculiar institution within the framework of our Government."), but its unusual nature does not change its identity as a delegate of congressional authority. While Congress empowered the Commission with "substantial discretion in formulating guidelines," *id.* at 377, the Sentencing Reform Act "'explains what the Commission should do and how it should do it,'" *id.* at 379, *quoting United States v. Chambless,* 680 F. Supp. 793, 796 (E.D. La. 1988), by legislating the general principles that the Commission must follow when deciding how particular "offense and offender characteristics" should bear upon "a full hierarchy of punishment" that ranges "from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives." *Id.* at 377. The Commission is not a separate and independent branch of government; it is a child of Congress created to do the bidding of Congress. Until recently, the Justice Department seemed to share that understanding of the Commission's role. *See* Dep. Att'y Gen. Larry Thompson, Testimony Before U.S. Sentencing Commission (March 19, 2002), *available at* http://www.ussc.gov/hearings/031902.htm ("In our constitutional system, we believe the Sentencing Commission exists to effectuate the express will of Congress").

Congress delegated to the Commission the authority to make rules that govern federal sentencing, but the Commission remains "fully accountable to Congress." *Mistretta*, 488 U.S. at 393. Congress retained the power to accept, reject, or modify the Guidelines. *See id.* at 383-94; *Blakely,* 124 S.Ct. at 2549 (O'Connor, J., dissenting) ("Congress has unfettered control to reject or accept any particular guideline"); 28 U.S.C. § 994(p). If the Commission desires to amend the Guidelines or to modify amendments that have not taken effect, it must explain its reasoning to Congress, and Congress has at least 180 days to alter or veto the proposed change, 28 U.S.C. § 994(p), although it may do so "at any time." *Mistretta,* 488 U.S. at 394.

Congress has repeatedly exercised its power to shape the Guidelines and dictate their content. It has directed the Sentencing Commission to amend the Guidelines more than fifty times since 1987. *See* U.S. Sentencing Guidelines Manual, Appx. C (2003 ed.) (amendments 134, 135, 141, 156, 203, 317, 363, 364, 370, 435-37, 511, 513-15, 521, 526, 527, 531, 537, 538, 541-44, 551, 554-56, 558, 562, 571, 576, 587, 590, 592, 593, 596, 605, 608-12, 615-17, 637, 647, 648, 650, 651, 653, 654, 659). It disapproved proposed guidelines that would have reduced the disparity between sentences for powdered cocaine and crack cocaine. Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334. It also disapproved proposed guidelines that would have reduced sentences for money laundering. *Id.*

In addition, Congress has itself legislated Guideline provisions. Section 401(m)(2) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 649 (the "PROTECT Act"), directed the Sentencing Commission to promulgate "amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced." In section 401(b), moreover, Congress directly amended the Guidelines by adding a new section to a policy statement (Guidelines § 5K2.0(b)) that limits a court's authority to depart downward when imposing a sentence for certain crimes against children. In subsection 401(i), Congress amended various guidelines and application notes pertaining to crimes against children. Finally, section 401(g) amended the guideline governing acceptance of responsibility (Guidelines § 3E1.1) to permit an additional downward departure of one level (albeit only at the government's request) to reward the prompt entry of a guilty plea. Contrary to petitioner's conception of the process of promulgating guidelines, none of these amendments fairly reflect the collective judgment of the judiciary.

In light of the control that Congress exercises over guideline development, it is of no constitutional consequence that *most* of the guideline provisions are of administrative rather than legislative origin. If a maximum sentence determined by a guideline range that Congress enacted directly is subject to the procedural protections of the Fifth and Sixth Amendments (which it must be, for it is indistinguishable from the standard range in *Blakely*), a maximum sentence enacted administratively, but tacitly approved by Congress, must be subject to the same protection.

3. The dissenters in *Jones* acknowledged that the federal Sentencing Guidelines were only "a more detailed version" of statutes like the one at issue in that case. *Jones,* 526 U.S. at 267-68 (Kennedy, J., dissenting). The PROTECT Act exemplifies the degree to which Congress' control of the Guidelines renders them indistinguishable in principle and effect from Acts of Congress. Like sentencing statutes, the guidelines are binding on courts. *See Stinson v. United States*, 508 U.S. 36, 42-43 (1993) (Guidelines Manual, including policy statements and commentary, binds federal courts); *Mistretta,* 488 U.S. at 391 (the Commission uses its administrative power to create "court rules" that "bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases"). Judges are directed by statute to follow them. 18 U.S.C. § 3553(b). The term "Guidelines" is therefore a misnomer. Judges are not merely guided; their discretion is fettered by the force of law. A judge who cannot justify a departure from the Guidelines to the satisfaction of an appellate court will be reversed.[8] 18 U.S.C. § 3742(e)(3).

[8] The amicus brief filed by the Ad Hoc Group of Former Federal Judges disregards the actual operation of the Guidelines and instead describes them as it would like them to be. While the brief cites *Koon v. United States,* 518 U.S. 81 (1996), for its understanding that it "was not the congressional purpose to withdraw all sentencing discretion from

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This Court recognized in *United States v. R.L.C.,* 503 U.S. 291 (1992), that the federal Sentencing Guidelines create a binding maximum sentence that has the same force as a maximum created by statute. In deciding that the Juvenile Delinquency Act, which limits detention to "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult," 18 U.S.C. § 5037(c)(1)(B), referred to the maximum term of imprisonment established by the Guidelines rather than the formal statutory maximum, the Court rejected "any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines" because, the Court understood, "the mandate to apply the Guidelines is itself statutory." 503 U.S. at 297. The Court's understanding in *R.L.C.* that a maximum sentence authorized by the Guidelines has the same limiting force as a maximum sentence enacted by statute undermines the distinction between guidelines and statutes upon which petitioner rests its argument.

If there were any doubt about the legal force and effect of the Guidelines, it has been settled many times by decisions applying the *Ex Post Facto* Clause to the Guidelines amendments. *See, e.g., United States v. Bell,* 991 F.2d 1445, 1447 & n.4 (8th Cir. 1993), and cases cited; *see also Miller v. Florida*, 482 U.S. 423 (1987) (retroactive application of Florida's sentencing guidelines violated *Ex Post Facto* Clause). As petitioner concedes, Pet. Br. at 25, the *Ex Post Facto* Clause limits legislative power, not judicial decisionmaking. *Rogers v. Tennessee,* 532 U.S. 451, 456 (2001). The *Ex Post Facto* Clause applies to the Guidelines

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the United States District Judge," 518 U.S. at 113, the PROTECT Act undermined that understanding by requiring the Commission to effect a substantial reduction in downward departures, by reducing the grounds for departure, and by substituting *de novo* appellate review for the abuse of discretion standard adopted in *Koon*.

because, just as a legislature does, the Commission creates legally enforceable rights.

Thus, the administrative origin of maximum sentences established by the Guidelines does not distinguish them from maximum sentences established legislatively. As Justice O'Connor noted, the Guidelines "have the force of law," and their promulgation by an administrative agency "is irrelevant to the majority's reasoning" in *Blakely.* 124 S.Ct. at 2549 (O'Connor, J., dissenting).

4. Neither is the Commission's "nominal" placement in the Judicial Branch relevant to *Blakely*'s reasoning. *See id.*, 124 S.Ct. at 2549 (O'Connor, J., dissenting). "Although placed by the [Sentencing Reform] Act in the Judicial Branch, it is not a court and does not exercise judicial power." *Mistretta,* 488 U.S. at 384-85. Nor is the Commission "controlled by or accountable to members of the Judicial Branch." *Id.* at 393. Judges may be appointed to the Commission, but Congress recently amended the law to assure that judges would comprise a minority ("no more than three") of the Commission members. The appointment of judges to the Commission is no longer required.[9] PROTECT Act, *supra*, § 401n. It is fanciful to characterize the work of the Commission as "judges guiding judges" when judges necessarily are a minority and need not sit on the Commission at all.

The Commission exercises political, not adjudicative, power. The authority that Commissioners wield "is not judicial power; it is administrative power derived from the enabling legislation." *Mistretta,* 488 U.S. at 404. When the Commissioners do their work, they do not work as judges. *Id.*. The Commission's work is of a "significantly political nature," *id*. at 393, and the Commission exercises "political judgment" to carry out its responsibilities. *Id.* at 395. It

[9] At the time *Mistretta* was decided, at least three of the seven voting members were required to be judges. 488 U.S. at 368.

is precisely because the Commission was not granted adjudicatory functions that its authority to craft sentencing rules does not violate the constitutional principle of separation of powers. *Id.* at 388-90. Because the Commission's work is functionally legislative rather than adjudicative, its location in the Judicial Branch cannot insulate the rules it creates from the demands of the Fifth and Sixth Amendments.

5. Juries are the embodiment of democracy in the courts. *See Blakely,* 124 S.Ct. at 2539; John Adams, Diary Notes on the Right of Juries (Feb. 12, 1771) *in* 1 Legal Papers of John Adams 228, 229 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (the Constitution requires the "Common People" to act as "an absolute Check" upon the legislature); Thomas Jefferson, Letter to Abbé Arnoux, July 19, 1789, in 15 The Papers of Thomas Jefferson 282, 283 (Julian P. Boyd ed., 1958) ("Were I called upon to decide whether the people had best be omitted in the legislative or judiciary department, I should say it is better to leave them out of the Legislative."). Juries provide a counterweight to executive and judicial abuse and bestow democratic approval (or disapproval) upon the government's action by finding (or declining to find) the facts that authorize punishment. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing,* 152 U. Pa. L. Rev. 33, 54-59 (2003) (reviewing evidence that Framers expected jury to represent the community's sense of justice when government seeks to condemn or punish behavior as blameworthy). The need to preserve that role animated the decisions in *Apprendi, Ring,* and *Blakely*. Neither the source of the authorizing law (Congress or its delegate), the label attached to it (statute or administrative rule), nor the branch of government in which it was promulgated can make a principled difference in the operation of the constitutional imperative that all facts legally necessary to the punishment imposed must be found by a jury.

The Framers could not have envisioned a Sentencing Commission,[10] but if the idea had been proposed, it is impossible to believe that they would have given Congress the power to deprive a defendant of the right to have a jury find the facts that are necessary for punishment simply by delegating the authority to link facts and punishment to a commission that it establishes and controls. It would not have mattered to the Framers whether maxima were created by Congress or its delegate. What would have mattered is ensuring that the facts triggering the judge's authority to impose a particular sentence are found by a jury. That "bright-line rule," *Blakely*, 124 S.Ct. at 2540, secures the role of the jury envisioned by the Framers.

6. Just as the decision in *Ring* was compelled by a need to implement the holding of *Apprendi* "in a principled way," *Ring,* 536 U.S. at 613 (Kennedy, J., concurring), the decision in *Blakely* requires sentences authorized by the federal Guidelines to be grounded in facts found by a jury or admitted in a plea. Petitioner concedes as much by acknowledging that if *Blakely* means what it says, the

[10] It is thus disingenuous for petitioner to fault the Court for pointing to "no historical authorities" that considered sentencing schemes similar to the federal Sentencing Guidelines. Pet. Br. at 39-40. As the Court observed in *Apprendi,* 530 U.S. at 479, sentencing schemes with which the Framers were familiar did not include narrowly defined sentencing ranges that were triggered by the judicial finding of one or more facts in addition to those that defined some underlying crime. The Court has considered at length the role that juries have historically played as the finders of those facts that are necessary to the punishment sought and imposed. *Blakely,* 124 S.Ct. at 2539; *Apprendi,* 530 U.S. at 476-83; *id.* at 502-18 (Thomas, J., concurring); *Jones,* 526 U.S. at 244-48. Petitioner offers no historical analysis of its own, and the Court's view of history is entirely consistent with that of recent commentators. *See, e.g.,* Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C.L. Rev. 621, 629-41 (2004); Barkow, *supra,* at 48-65.

Guidelines set maximum sentences that depend upon facts admitted in a plea or found by a jury. Pet. Br. at 39.

The Court should reject petitioner's invitation to overrule *Blakely* just months after its announcement. *Stare decisis* "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827 (1991). Petitioner's dissatisfaction with *Blakely* provides no cause to reconsider a decision so recently written.

C. No Contrary Result Is Compelled By Any Of This Court's Precedents

1. No case decided by this Court prior to *Apprendi* is "fundamentally at odds" with the view that *Blakely* applies to federal sentencing, as petitioner contends. Pet. Br. at 33. Relying on a pre-Guidelines holding that a judge may consider a defendant's trial perjury when selecting a discretionary sentence, *United States v. Grayson,* 438 U.S. 41 (1978), the Court in *United States v. Dunnigan,* 507 U.S. 87 (1993), rejected an argument that enhancing a defendant's sentence pursuant to Guidelines § 3C1.1 for committing perjury at trial undermined the defendant's right to testify.[11] In *Witte v. United States,* 515 U.S. 389 (1995), the Court rejected a claim that an indictment violated the Double Jeopardy Clause when the facts underlying the charged offense had produced an increase in the defendant's Guideline sentence. *See* Guidelines

[11] *Dunnigan* viewed "the risk of incorrect findings of perjury by district courts" as "inherent in a system which insists on the value of testimony under oath." 507 U.S. at 97. When the law links a fact to increased punishment, however, the risk of error in finding that fact should be minimized by constitutional protections against the erroneous infliction of punishment.

§ 1B1.3 (relevant conduct). Neither *Dunnigan* nor *Witte* addressed the Sixth Amendment. Enforcing the Sixth Amendment's mandate for jury fact-finding does not contravene the logic or the holding of either case.

United States v. Watts, 519 U.S. 148 (1997) (*per curiam*), and *Edwards v. United States,* 523 U.S. 511 (1998), presented questions of Guidelines interpretation. *Watts* construed relevant conduct under § 1B1.3 to include acquitted conduct.[12] *Edwards* held that it did not matter whether the jury found the defendant guilty of conspiring to possess cocaine or cocaine base because all of the defendant's relevant conduct would be considered at sentencing. Neither case decided whether the relevant conduct fact-finder should be a judge or a jury.

Petitioner attempts to elevate *Edwards* to the status of a Sixth Amendment holding by arguing that Edwards relied upon the Sixth Amendment's jury-trial guarantee to bolster his contention that the sentencing court should have assumed the jury found him guilty only of conspiring to possess cocaine. Pet. Br. at 36. But "Edwards did not argue that the Guidelines sentencing scheme violated his Sixth Amendment right to a jury trial; indeed, Edwards presumed that had the jury identified whether cocaine or cocaine base was the object of the conspiracy, the district court could have properly determined the quantity of the identified drug at sentencing consistent with the Sixth Amendment." *United States v. Ameline,* 376 F.3d 967, 978 (9th Cir. 2004). *Accord Booker,* 375 F.3d at 514 ("The Court . . . did not rebuff a Sixth Amendment challenge to the guidelines because there was no Sixth Amendment challenge to the guidelines."). In any event, the Court flatly

[12] The Court suggested that the Court of Appeals' holding to the contrary might have been based on the view of double jeopardy that the Court rejected in *Witte. Watts,* 519 U.S. at 154.

stated "we need not, and we do not, consider the merits of petitioners' statutory and constitutional claims." 523 U.S. at 516. The Court should be taken at its word.

Edwards did not become a constitutional holding by virtue of a footnote in *Apprendi,* as petitioner suggests. Pet. Br. at 37-38. Responding to a dissenting observation that the logic of *Apprendi* applied to the federal Guidelines, the footnote "express[ed] no view on the subject beyond what this Court has already held." 530 U.S. at 497 n.21. By way of example, the Court cited *Edwards*' reference to a constitutional claim that might have arisen if Edwards had been sentenced to more than the statutory maximum for a cocaine-only conspiracy. *Id.* The *Apprendi* footnote did not mutate a decision that expressly declined to consider a constitutional claim and that never mentioned the Sixth Amendment into a decision of controlling constitutional precedent.

2. Petitioner relies heavily on *Williams v. New York*, 337 U.S. 241 (1949), a case that decided whether a New York court violated the defendant's right to due process by considering information at sentencing that it learned of after the trial. Although it viewed the question as "serious and difficult," *id.* at 244, the Court decided that the "prevalent modern philosophy" of individualized punishment made it necessary for a sentencing judge to consider a full range of information. *Id.* at 247. The Court noted that indeterminate sentences had "to a large extent taken the place of the old rigidly fixed punishments" and that rehabilitation had replaced retribution as the dominant goal of criminal justice. *Id.* at 248. In the context of these "progressive efforts to improve the administration of criminal justice," the Court was careful not to hinder the judge's ability to exercise discretion wisely. *Id.* at 251.

Changing philosophies of punishment have rendered the reasoning of *Williams* "almost wholly inapplicable to

guidelines sentencing in federal court."[13] Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process,* 66 S. Cal. L. Rev. 289, 318 (1992). *Blakely* underscored that point by rejecting the argument that the constitutionality of judicial fact-finding in a discretionary sentencing scheme implies the constitutionality of judicial fact-finding in a scheme that ties facts to specified sentencing ranges. 124 S.Ct. at 2540. A judge's authority to consider facts that shape a discretionary sentence has no bearing on the defendant's right to a particular sentence – "and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Id.*

D. The District Court Exceeded Its Constitutional Authority By Imposing Additional Punishment Upon The Respondent On The Basis Of Facts It Found By A Preponderance Of The Evidence At Sentencing

1. Relevant conduct

Sentencing in federal court is designed to punish the "real offense" the defendant committed. U.S. Sentencing Guidelines Manual § 1A1.1, comment., ed. note (reprinting ch. 1, pt. A4(a) in effect Nov. 1, 1987) (2003 ed.). The Guidelines accomplish that objective in large part by basing punishment on "relevant conduct" pursuant to Guidelines § 1B1.3. That provision requires punishment to reflect "the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained." § 1B1.3 comment, backg'd.

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[13] Federal sentencing eschews rehabilitation as a legitimate goal of imprisonment. 28 U.S.C. § 994(k).

In *Watts*, this Court explained that "sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed his crime." *Id.* at 154. Respondent was convicted of two discrete crimes that occurred on February 26, 2003. His relevant conduct (as found by the judge at sentencing) included acts of drug distribution that occurred on earlier days in different places. His relevant conduct did not reflect "the manner in which he committed his crime"; it reflected other crimes. By imposing extra punishment for additional crimes that were never submitted to a jury – punishment that was only authorized under the Guidelines by a finding that the crimes occurred – the district judge violated respondent's Sixth Amendment right to have a jury decide the facts that were essential to his punishment.

2. Obstructing justice

The sentencing judge increased respondent's offense level (and thus the maximum available sentence) after finding that respondent obstructed justice by lying during his trial testimony. Guidelines § 3C1.1. The threat of punishment for false testimony has historically invoked the right to a jury trial. *Blakely* expressly addressed that point: "Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries, see 4 William Blackstone, Commentaries 136-138 (1769)), is unclear." 124 S.Ct. at 2539-40 n.11.

Seeking punishment at sentencing for perjury that was never charged or proved beyond a reasonable doubt to the satisfaction of a jury may have been more convenient

for the government than commencing a second criminal prosecution, but it was an affront to the Constitution. Because the verdict did not authorize the additional punishment imposed upon respondent, the Seventh Circuit's decision to vacate respondent's sentence must be affirmed.

II. THE SENTENCING GUIDELINES SURVIVE AND APPLY, BUT THE JURY'S FACTUAL FINDINGS LIMIT RESPONDENT'S GUIDELINE RANGE

A. *Blakely* Does Not Invalidate The Sentencing Reform Act Or The United States Sentencing Guidelines As A Whole

The Sixth Amendment principles that this Court has explicated since *Jones* and *Apprendi*, and that it applied in *Blakely* to a guideline sentencing scheme, apply first in federal cases. But *Blakely* and the jury trial guaranty neither require nor preclude any particular theory of penology or system of sentencing. The Court's words in *Blakely* serve here as well. "This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Blakely*, 124 S. Ct. at 2540. Both determinate sentencing and systems in which guidelines channel sentencing discretion are compatible with *Blakely*.

1. Because the Sixth Amendment operates before sentencing to determine a sentence's limits, not at sentencing or in its imposition, *Blakely* and the Seventh Circuit's decision below leave intact the primary purposes of the Sentencing Reform Act of 1984, Pub. L. 98-473, Tit. II, ch. II, 98 Stat. 1987 (Oct. 12, 1984). Those purposes include certainty, uniformity, proportionality and fairness. *See id.*, § 217(a), 98 Stat. 1987, 2018 (in part enacting 28 U.S.C. § 991(b)(1)(B)); U.S. Sentencing Guidelines Manual § 1A1.1 Commentary.

Blakely and the decision below address the scope of the Sixth Amendment's jury trial guaranty, not the merits of Congress' sentencing goals. A court's power to sentence rests on a finding of guilt, which ordinarily is the jury's province if the defendant elects a trial. *Callan v. Wilson*, 127 U.S. 540, 556-57 (1888); *Duncan v. Louisiana*, 391 U.S. 145, 151-57 (1968). The jury's finding determines the maximum sentence that the defendant may receive. *Blakely*, 124 S. Ct. at 2537; *Ring*, 536 U.S. at 602.

In federal court specifically, the Sentencing Guidelines may continue to govern sentencing. *See United States v. Johns*, 2004 WL 2053275, *6 (M.D. Pa. 2004) ("Once this maximum is established [by the jury], the court may employ the Guidelines as they were intended . . . ") *Blakely* and the Sixth Amendment govern the predicates of sentencing, but not the scheme for imposing sentence once the predicates are determined. If an increased sentence hinges on facts that have not been admitted in a plea, the jury must find them on proof beyond a reasonable doubt. Sentencing then goes forward.

Within that limit, *Blakely* and the Sixth Amendment do not speak to whether the judge decides a term of imprisonment absolutely (determinate sentencing); decides that term provisionally, subject to later reduction by the executive (indeterminate sentencing); or merely imposes a sentence selected by the legislature (mandatory sentencing).[14] Likewise, the Sixth Amendment and *Blakely*

[14] Some judges have described the result of declaring the Sentencing Guidelines non-severable as "indeterminate sentencing". That is a misnomer. Indeterminate sentencing refers to schemes in which a judge imposes a term of imprisonment with an upper limit, subject to discretionary release at an earlier time by an executive authority (usually a parole board). Black's Law Dictionary 911 (rev. 4th ed. 1968).

Sentencing without the guidelines, as some district judges are practicing it after *Blakely*, is not indeterminate sentencing. It is

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do not dictate how legislatures and courts should assure proportionality, uniformity, certainty, fairness, or other sentencing goals. Legislators have room to select a penological theory they favor within the limits of the Sixth Amendment.

2. Judges no longer may decide what facts are probable and increase the guideline range on the basis of those decisions. Some defendants who (prior to *Blakely*) waived jury trial without admitting facts that support upward adjustments under the Sentencing Guidelines, or who had jury trials that failed to determine those facts, will receive lower sentences than they would have received before *Blakely.* Cases straddling *Blakely* are short-term phenomena. Prosecutors and courts adapted rapidly to the *Blakely* decision. *See* Dep. Att'y Gen. James Comey, Memorandum to all Federal Prosecutors (July 2, 2004), *reprinted in* 16 Fed. Sent. Rep. 357 (2004). And in some cases the unfairness that the petitioner perceives in shorter sentences is mitigated by the government's ability to charge defendants with the additional crimes that cannot be considered as relevant conduct at sentencing.

Still, some defendants – those whose convictions were not final at the time *Blakely* was decided – may, as petitioner fears, escape significant Guideline enhancements as a result of *Blakely*'s application to federal sentencing. This result is unavoidable because the holding of *Blakely* applies to cases pending in trial courts and on direct review. *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987); *Teague v. Lane,* 489 U.S. 288 (1989). The price is worth paying when compared to the alternative of sacrificing these defendants' constitutional rights. Petitioner's concern that a limited number of straddle defendants may

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discretionary but determinate sentencing unless the perceived invalidity of the Sentencing Reform Act resurrects parole.

receive a windfall[15] is of little relevance to the Court's constitutional or severability analysis.

To the extent that this guideline system will have asymmetrical burdens of proof on aggravating and mitigating factors, *see* Pet. Br. at 50, that is not novel either in legislative schemes, *cf*. 18 U.S.C. § 3593(c) (in capital cases, government must prove aggravating factors beyond reasonable doubt; defendant must prove mitigating factors by a preponderance of the information), or in judicial schemes. *See*, *e.g.*, *Lopez v. United States*, 373 U.S. 427, 433 n.4, 434-35 (1963) (defendant must make "some showing" of government inducement to raise entrapment defense; quoting approvingly trial court's instruction calling that burden a preponderance).

3. Because the Sixth Amendment affects only amenability to sentencing and the outer limits of punishment, *Blakely* calls into doubt on their face very few provisions of the Sentencing Guidelines and the Sentencing Reform Act.

a. Applied to the Guidelines, *Blakely* seems to invalidate outright only one procedural policy statement,[16] Guidelines § 6A1.3, and perhaps parts of one rule of criminal procedure. All else it affects only indirectly, by application.[17]

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[15] In cases like respondent's, there is no "windfall." Pet. Br. at 68. If a sentence of almost 22 years for a man in his 50's, rather than a 30 year sentence, conforms to petitioner's concept of a windfall, that concept is not likely to be widely shared.

[16] This Court has distinguished between "guidelines" and "policy statements," *Williams v. United States*, 503 U.S. 193, 200 (1992), just as the Sentencing Reform Act does. *See* 28 U.S.C. §§ 994(a)(1), (a)(2). Federal courts must follow both. *Williams*, 503 U.S. at 200-01, discussing 18 U.S.C. § 3742(f)(1).

[17] The only guideline petitioner identifies as lost after *Blakely* is § 3C1.1, applicable to an obstruction of justice. It is true that an enhancement could not be imposed for an obstruction (like perjury) occurring during or after trial, but an enhancement for pre-indictment obstruction remains available, provided it is proved to a jury.

Guidelines § 6A1.3(a) directs "the court" to resolve any dispute over factors important to the sentencing determination, using information reliable enough to support its "probable accuracy." Subsection (b) provides that "[t]he court" shall resolve those disputed sentencing factors at a sentencing hearing under Fed. R. Crim. P. 32. For that reason, *Blakely* and the lower court's decision in *Booker* may invalidate Fed. R. Crim. P. 32(i)(3)(B) (requiring "the court" to resolve disputed portions of the presentence report at sentencing if the dispute will affect the sentence).[18]

b. *Blakely's* direct effect on the Sentencing Reform Act itself extends only to parts of two subsections of the Act: § 212(a)(2), which created 18 U.S.C. § 3553 and other provisions; and § 213(a), which created 18 U.S.C. § 3742. Section 3553(b)(1) requires the imposition of a sentence within the applicable guideline range unless "the court" finds aggravating or mitigating circumstances not adequately considered by the Sentencing Commission. Section 3742(e) provides for appellate review of the district court's findings of fact. Severing the term "court" as fact-finder in these statutes does not assault Congress's basic intentions. *Accord United States v. Ameline*, 376 F.3d 967, 980-83 (9th Cir. 2004).

Indeed, the specific identity of the fact-finder does not appear prominently anywhere in the Sentencing Reform Act. Had Congress been concerned centrally with the difference between judge and jury as fact-finder, § 3742(e) – addressing appellate review of "the findings of fact of the district court" after sentencing – would have been an

[18] Because a jury trial invokes the Federal Rules of Evidence, *Blakely* and *Booker* also may affect the word "sentencing" in Fed. R. Evid. 1101(d)(3), which provides that the rules are inapplicable at sentencing. They do not abrogate it, however, as *Blakely* does not affect a judge's ability to find facts at sentencing that do not determine the guideline range.

unlikely place to express that concern, as if an afterthought. Taken in whole, the Act suggests that Congress was less concerned with the identity of the predicate factfinder than with certainty, uniformity and proportionality.

Petitioner suggests that *Blakely* also directly impairs § 217(a) of the Sentencing Reform Act, which created 28 U.S.C. §§ 991-998, and therefore § 994(a)(1). Pet. Br. at 47. But *Blakely* does not affect the statute's assignment of guidelines for "use of a sentencing court."[19] 28 U.S.C. § 994(a)(1). Sentencing courts may continue to apply the Guidelines. When and how the sentencing court applies which guidelines will depend on predicate jury findings, just as a jury verdict traditionally has set the limits of the sentence that a judge may impose. The use of Guidelines by a "sentencing court" leaves room to accommodate the jury's constitutional role.

4. If Congress intended judges and not juries to decide facts that increase a guideline range beyond that

[19] Petitioner's contention that 28 U.S.C. § 994(a)(1) is invalid if *Blakely* applies to federal sentencing turns on the premise that "court" means "judge" and thus excludes a jury. *See* Pet. Br. at 47-48. It does not. Federal courts long have distinguished between courts, as inanimate institutions, and judges, as human officers who work in those institutions. *See, e.g., In re Metzger,* 46 U.S. (5 How.) 176, 191 (1847). As Justice Story explained while riding circuit, "A court is not a judge, nor a judge a court. A judge is a public officer who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered." *United States v. Clark,* 25 F. Cas. 441, 442 (C.C.D. Mass. 1813) (No. 14,804) (Story, Circuit Justice).

Sometimes the distinction between judge and court is important, *Todd v. United States,* 158 U.S. 278, 282-84 (1895) (witness intimidation indictment dismissed, where testimony was at a preliminary examination before a commissioner who was not a "court of the United States"); *Clark,* 25 F. Cas. at 442-43 (perjury indictment dismissed on same grounds), and sometimes not. *In re United States,* 194 U.S. 194, 196-97 (1904). But the term "court" at least allows a construction that makes room for a jury's role as well as a judge's.

authorized by the verdict, the Court must decide whether the balance of the Sentencing Reform Act, or the Guidelines promulgated pursuant to it, can stand. Petitioner correctly notes that some lower courts have held that the Guidelines do not apply at all after *Blakely*. Those courts have envisioned a purely discretionary, yet still determinate, sentencing scheme. That vision declares the Guidelines not severable, while apparently leaving in place as severable much of the Act itself – its elimination of parole, its statutory good time formula, supervised release, and its limitation of motions to modify a sentence to the prosecution's use. Fed. R. Crim. P. 35(b).

Petitioner endorses that reasoning. As it urges non-severability, petitioner relies tacitly on severability at crucial points. The United States apparently would sever a statutory provision that *Blakely* does not invalidate, 18 U.S.C. § 3553(b),[20] to leave a discretionary but determinate scheme that exacerbates the worst qualities of the indeterminate sentencing system that the Sentencing Reform Act replaced: judges on the free range, now without the post-sentencing tool of parole, which prior to the Sentencing Reform Act corralled sentences toward uniformity and proportionality. Petitioner turns severability on its head. It would excise the valid, resurrect the invalid, and so create a new system antithetical to the purposes of the Act.

Worse yet, petitioner proposes that this Court sever federal sentencing into two distinct, and quite different, schemes functioning side by side. For defendants who can

[20] Section 3553(b) directs the court to impose a sentence within the applicable guideline range unless unusual circumstances exist. *Blakely* does not invalidate that directive because *Blakely* is concerned only with how facts necessary to a sentence are found. Once a jury determines the necessary facts, a statutory directive that courts sentence within designated Guideline ranges does not violate the Sixth Amendment.

be sentenced without judicial fact-finding, the Guidelines would continue to apply untouched. If fact-finding is necessary at sentencing, the Guidelines would not apply other than as advisory shadow laws, Pet. Br. at 67, although the Sentencing Reform Act's determinate features would apply. Petitioner nowhere explains why Congress would have intended determinate sentencing without the channeling effect of mandatory guidelines in some cases but not in others.[21]

Neither does petitioner explain how retaining the Guidelines as advisory laws that shape discretion, presumably by preserving 18 U.S.C. § 3553(a) while striking § 3553(b), is consistent with its argument that the Guidelines are not severable. Petitioner's argument is that none of the guidelines survive to bind, but all of them survive to guide.[22] The argument necessarily urges severability as a

[21] The dual scheme that petitioner proposes would be subject to manipulation by both parties. If a party did not want the Guidelines to apply, a mere claim that a sentence-enhancing fact must be found seemingly would assure that the Guidelines are not binding at sentencing. A party who wanted the Guidelines to apply would argue that no additional facts need be found at sentencing. Petitioner's "schizophrenic" application of the Guidelines in some cases but not in others, *United States v. King,* 2004 WL 1769148, *3 (M.D. Fla. 2004), is unworkable for that reason.

[22] Whether that guidance would be enforceable or reviewable on appeal, petitioner does not say. The law provides for "plainly unreasonable" review when "there is no sentencing guideline," 18 U.S.C. § 3742(a)(4), but petitioner does not explain whether that standard, or any other, would apply if a judge did not follow advisory guidelines. *Any* appellate review of a court's application of an "advisory" guideline would seem to imply that the guideline has binding force. Petitioner's proposed remedy either nullifies appellate review of sentences, which Congress plainly did not intend, or uses appellate review as a back door restoration of binding guidelines, complete with judicial fact-finding, in violation of the Sixth Amendment.

court's only authority to consider the Guidelines comes from § 3553(a).

Strikingly, petitioner does not explain how its dual sentencing schemes would advance, rather than impede, uniformity and proportionality in federal sentencing. Duality cannot advance uniformity. Congress thought in 1984 that federal judges were not singing from the same sheet of music. Petitioner would not only restore, but increase the cacophony.

With its dual sentencing schemes, petitioner tacitly proposes that this Court "rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Ret. Bd. v. Alton R.R.*, 295 U.S. 330, 362 (1935). That is precisely what petitioner elsewhere agrees a court may not do. Pet. Br. at 45.

For these reasons, the Court should reject petitioner's purely discretionary, yet determinate, proposal for one side of a dual system of federal sentencing. Congress did not intend the Guidelines to be used in some cases but not in others. Congress did not intend judges to impose wholly discretionary sentences in any case. The remedy proposed by petitioner does not advance uniformity, and without the national perspective and leveling influence of the Parole Commission, it does not advance proportionality. Petitioner's proposed remedy less resembles what Congress intended than a surviving guideline system (admittedly dependent on jury findings) that continues to cabin discretion.

5. Because the root question is whether the statute will continue to function in a manner consistent with legislative intent, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 679, 685 (1987), severability presupposes legislation as its object. Legislators express their intentions in legislation, and in the process that produces legislation.

The legislature does not typically write regulations. It leaves that task to the executive branch. Congress therefore does not ordinarily express its intent through regulations.[23] It expresses its intent only by the manner in which it authorizes regulations.

Petitioner's focus on the manner in which the Sentencing Commission intended the Guidelines to work therefore is misplaced. The Guidelines do not reflect legislative intent directly. They reflect the Sentencing Commission's mediate intent in implementing congressional directives. While the Commission's work must be consistent with Congress's, the Commission's intent is one step removed from legislative intent. The Commission's intent also is of little relevance to severability analysis. What is relevant is fidelity to congressional intent, as expressed in the statute.

It therefore makes no difference whether the Sentencing Commission would have promulgated the existing Guidelines if it could not have included Guideline § 6A1.3. As petitioner suggests, the Guidelines are lengthy and detailed. They account for a variety of facts that might be more conveniently determined by a judge than a jury. But Congress did not tell the Sentencing Commission to write lengthy and detailed guidelines that are better suited to judicial fact-finding than to jury fact-finding. It told the

[23] Although Congress has written sentencing guidelines, *see* discussion of PROTECT Act, *supra* at 17, they reveal little about the intent of the Congress that enacted the Sentencing Reform Act. *See United States v. Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). Neither do they reveal whether Congress would have enacted the Guidelines knowing that juries rather than judges could not find the facts that determine sentences. *See Buckley v. Valeo*, 424 U.S. 1, 128 (1976) (intent is determined by whether Congress would have enacted the law without the offending provision).

Commission to devise a guideline scheme that would accomplish the goals of uniformity and proportionality.

The question is not whether the Sentencing Commission would have written identical Guidelines if it had known it could not assign the finding of every guideline fact to a judge. The question is whether Congress would have directed the Commission to create a determinate guideline sentencing scheme if it had known that the Constitution requires juries to find facts necessary to increase guideline ranges. That question is easily answered: Congress wanted to end sentencing disparities by reducing judicial discretion, and it likely would have believed the Commission capable of creating such guidelines within the framework of the Constitution.

6. There are other good reasons to bring severability analysis to bear only on the intent of the legislature, rather than on the intent of the body that promulgates regulations or guidelines. In our constitutional system, the legislature is the principal author of broad policy. The legislative branch is the most responsive to public preferences. But the Framers feared that the legislature would breed tyranny (and addressed the legislative branch first as a matter of priority, not accident; *see generally The Federalist* No. 48 (James Madison) (Clinton Rossiter ed., 1961)). They accordingly established a rigid and counterbalanced process of enacting legislation. Both houses of Congress must approve a bill. The president must sign or veto it. U.S. Const. art. I, § 7, cl. 2. Only an enhanced majority in Congress overrides a presidential veto. U.S. Const. art. I, § 7, cl. 2.

Executive branch regulations and judicial branch guidelines under an authorizing statute, by contrast, require a less rigid process. While the Administrative Procedures Act usually requires public notice and opportunity for comment, 5 U.S.C. § 553, and those requirements bind the Sentencing Commission, 28 U.S.C. § 994(x), the regulatory process,

including the Commission's work, remains more fluid than the legislative process.

It must be that way. Congress acts at a moment in time; agencies and the Sentencing Commission implement that legislation over time. Given that task, agencies amend, modify or repeal regulations as shifting demographic, political, economic, technological, or other trends warrant. They repromulgate regulations easily, in most instances.

When a court strikes down a particular regulation, then, it usually has no reason to doubt that the agency can amend or reconsider the troublesome provision and continue apace. With this fluidity of response, only rarely should there be reason to suppose that the loss of a single fruit might imperil the tree, let alone despoil the entire regulatory orchard.

In this regard, the Sentencing Commission and its Guidelines are no different than executive branch agencies and their regulations. The Commission in fact has amended the Guidelines almost annually, sometimes more often, since their inception. In the first 16 years, the amendments added up to hundreds. The Sentencing Commission adopted 662 through November 5, 2003, many with several parts. *See* U.S. Sentencing Guidelines Manual, Appx. C (2003 ed.). The Commission has tinkered as it has seen fit, both in response to congressional directives and on its own. Possessed of that demonstrated capacity to amend and adapt, the Sentencing Commission gives little reason to fear that the loss of any particular guideline or guidelines should threaten the whole.

7. Almost all of this Court's severability precedent addresses legislation. However, this Court on rare occasion has applied severability analysis to regulations or an executive order. Those cases provide few rules for a coherent application of severability doctrine to administrative enactments.

In *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), this Court struck down a subsection of a Customs Service regulation permitting importation of certain "gray-market" goods, but held that the subsection was "severable."[24] *K Mart*, 486 U.S. at 294. The Court's entire explanation of this ruling was:

> The severance and invalidation of this subsection will not impair the function of the statute as a whole, and there is no indication that the regulation would not have been passed but for its inclusion.

Id. at 294. In its brevity, the *K Mart* Court did not explain why invalidation of one regulation ever would "impair the function" of a statute. Impairment seems unlikely, for an agency faces no bar to promulgating a new regulation that serves the legislative intent and satisfies a court's objection.

The Court also did not explain its inquiry into the likelihood that the agency would have promulgated the rest of the regulation without the offending portion. This is an inquiry into agency intent, while severability turns on legislative intent. A more telling question would be whether Congress would have wanted a regulatory scheme to exist even if the regulation at issue could not be promulgated.

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[24] In the only case that *K Mart* cited in applying severability analysis to a regulation, *Federal Reserve System Board of Governors v. Dimension Financial Corp*., 474 U.S. 361 (1986), the Court struck down the Federal Reserve Board's definition of a "bank" as contrary to the Bank Holding Company Act of 1956. Without addressing severability, the Court apparently left intact other Federal Reserve Board regulations (at least the Court did not say otherwise). *Dimension Financial*, 474 U.S. at 374-75. The Court well may have proceeded on the assumption that a stricken regulation simply becomes inoperative, and that the agency is free to write a replacement consistent with legislative intent.

In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the Court tentatively applied severability doctrine to an 1850 executive order of President Zachary Taylor. *Mille Lacs Band*, 526 U.S. at 190-95. The Court declared the executive order not severable. *Id*. at 191. However, *Mille Lacs Band* noted at the outset that, "Although this Court has often considered the severability of *statutes*, we have never addressed whether *Executive Orders* can be severed into valid and invalid parts, and if so, what standard should govern the inquiry." *Id*. (italics in original). The Court also observed that no party challenged the court of appeals' assumption that executive orders are severable and that the standards applicable to statutes also apply to those orders. *Id*. With no challenge to those assumptions, the Court wrote cautiously that, "for purposes of this case we shall assume, *arguendo*, that the severability standard for statutes also applies to Executive Orders." *Id*. The decision offers scant support for the proposition that the Sentencing Commission's intent in crafting the Guidelines has any bearing on whether judicial fact-finding was so essential to congressional intent that Congress would not have enacted sentencing reform without it.

To the extent that these cases offer any help at all, they suggest that federal courts usually will view regulatory schemes as severable. Respondent has discovered no case in which this Court held a regulatory scheme (as distinct from President Taylor's 150-year old executive order) non-severable. But the cases offer little support for petitioner's contention that the Commission's intent in creating a detailed set of interrelated Guidelines has any bearing on what Congress intended in enacting sentencing reform.

Petitioner also cites *Addison v. Holly Hill Fruit Products, Inc*., 322 U.S. 607, 618-19 (1944), in support of its argument that the Sentencing Commission's policy

judgments are important to a severability analysis. Pet. Br. at 47. That decision undercuts petitioner's point. *Holly Hill Fruit* invalidated one part of one section within a group of regulations under the Fair Labor Standards Act of 1938. Rather than try to save that single section by rewriting it to patch the invalid portion, the Court remanded that job to the Administrator and directed the district court to stay the case pending that regulatory rewrite. *Holly Hill Fruit*, 322 U.S. at 619. The Court nowhere cast doubt on the rest of the sections within that regulatory scheme under the FLSA.

Holly Hill Fruit therefore supports respondent's view that agencies, not courts, write and rewrite regulations; that agencies quickly can correct their mistakes; and that the failure of one regulatory section provides no occasion to apply severability analysis to the whole, or even to consider the possibility that the loss of one provision might invalidate the entire scheme. By analogy here, this Court may refrain from rewriting Guidelines § 6A1.3 to correct the word "court," if that word does not bear a construction that accommodates the jury's role. The Sentencing Commission is capable of responding to this Court's application of *Blakely* to federal sentencing by rewriting Guidelines § 6A1.3 and by amending other guidelines if doing so will better advance the goals of uniformity and proportionality in sentencing. But the loss of Guidelines § 6A1.3 gives no reason to consider discarding all other guidelines.

8. If the focus is on legislative rather than agency intent, the question is not whether the Sentencing Commission would have written the current Guidelines if it had known that facts requiring longer sentences must be found by a jury. The question is whether Congress would have enacted the Sentencing Reform Act with the benefit

of that knowledge. The answer is that *Blakely* does not threaten the demise of the entire Act.[25]

This Court starts with a presumption of severability. *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). The presumption serves democracy by avoiding the unnecessary invalidation of legislation. *Id.* at 652-53. Here, the presumption underscores the need to save those portions of the law that serve the broad purposes Congress identified.

Changing the fact-finder from judge to jury to comply with *Blakely* does not impede the purposes of the Act. The Sentencing Commission remains. Sentences will be fixed and predictable. Discretionary parole will not reappear. Sentencing will continue generally to operate in the manner Congress intended. *See Alaska Airlines*, 480 U.S. at 685.

Although *Blakely* prevents judges from finding probable facts that require an increased sentence, federal courts retain a determinate sentencing scheme that will preserve the key congressional objectives of certainty, uniformity and proportionality. Fact-finding as a predicate to sentencing may not operate after *Blakely* as Congress intended, but legislative intent always yields to constitutional imperatives. That in itself is not sufficient reason to discard the entire law.

9. Changing the identity of the fact-finder will not cause the Sentencing Reform Act to lose its ability to function independently. In any event, no statute functions "independently" in the sense that petitioner argues. *See*

[25] Severability analysis leads to the same result whether it focuses on the Act or on the Guidelines. The loss of one policy statement, Guidelines § 6A1.3, and the constitutionally required insertion of a different predicate (a jury finding on a higher standard of proof) for upward adjustments does not undermine the basic sentencing scheme that both Congress and the Commission designed.

Pet. Br. at 59-63. No statute can. Federal law is complex and connected, in the sense that constitutional rights, rules of procedure, and statutes always inform the operation of court proceedings, other statutes, and regulations. No statutory scheme ever functions with complete independence, devoid of impact upon other rules, statutes, and rights. Neither can it avoid their impact.

Like all federal statutes, the Sentencing Reform Act works within a complex matrix of rights, rules, and statutes that makes absolutes few, and requires courts frequently to reconcile competing interests. That truism makes the function of the Sentencing Reform Act no less independent. Where a constitutional requirement, like the right to jury trial, collides with a statute, to some degree the statute yields. But the legislature's enactments are not so inconsequential that they must collapse in the collision.

B. While Courts And Congress May Adopt Jury Trial Procedures For Sentencing Facts In Future Cases, No Jury May Be Convened To Try Sentencing Facts In Respondent's Case

If this Court applies *Blakely* to federal sentencing but leaves in place the Sentencing Reform Act, as respondent urges, the Court will face the question whether federal courts may submit facts to juries that support guideline range increases. They may, in cases not already tried.

This Court and lower courts are capable of fashioning procedures to assure a fair determination of Guideline facts. This Court also might elect to wait for Congress to fashion the best procedures for submitting Guideline facts to juries. Both courses constitutionally are open.

As petitioner notes, choices need to be made when applying *Blakely* to federal sentencing. Congress may wish to make some of those choices. Congress may desire to

address the charging of additional facts in an indictment. Congress may wish to provide statutory authority to empanel a jury to decide sentencing factors after a guilty plea is entered to an underlying charge, or to designate standards for the bifurcated trial of Guideline facts. But the absence of legislation serves as no barrier to compliance with the Constitution. Even without the assistance of Congress, this Court and the lower courts have ample authority to bring federal sentencing practice into compliance with the Sixth Amendment right to jury trial.

1. The forerunner of the modern jury existed before writings of kings or parliaments authorized it. The jury was developing in regions of Europe and Scandinavia, including England, by the twelfth century. R.C. Van Caenegem, The Birth of the English Common Law 71-79 (Cambridge Univ. Press, 2d ed. 1988). The year 1215 marked both the Fourth Lateran Council (which forbade clerical participation in trials by ordeal, and so sped reliance on other forms of trial), Roger D. Groot, *The Early-Thirteenth-Century Criminal Jury*, *in* Twelve Good Men and True: The Criminal Jury Trial in England, 1200-1800, 10 (J.S. Cockburn & Thomas A. Green eds., Princeton 1988), and John's reluctant accession to Magna Carta. But "[t]here was little in Magna Carta that directly affected the development of the jury." Groot, *supra*, at 10. Magna Carta acknowledged the right to a jury, rather than created or defined that fact-finding body. 1 William Blackstone, Commentaries *123-24 (1765) (describing Magna Carta and English liberties: "Which charter contained very few new grants; but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the

fundamental laws of England"). The jury has non-statutory, or common law, roots many centuries old.[26]

2. This Court and the lower federal courts are capable of adapting jury trials to the Sixth Amendment predicates of federal sentencing. Petitioner's pragmatic concerns cannot trump a constitutional right, but those concerns are overstated. Federal courts long have conducted bifurcated trials in criminal cases (on insanity defenses or forfeiture provisions, for example) and in civil cases (on liability and damages). Instructing jurors on the law is what courts always have done, even when the law is complex, as in a patent or securities fraud trial. Federal courts are familiar with special verdicts; they have been employed in criminal cases routinely since *Apprendi*.

The facts that are often most critical to sentencing (and those that result in the most severe offense level increases) include drug quantities (Guidelines § 2D1.1) and financial loss (Guidelines § 2B1.1). Those facts are readily susceptible to jury determination in special verdicts. And proving relevant conduct is little different from proving a separately charged crime.[27] While the Sentencing Guidelines include dozens or hundreds of potential enhancements, in any given case but a few are implicated.

Giving notice of potential sentence enhancements already has proven feasible. The Department of Justice began seeking superseding indictments that include

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[26] This Court acknowledged 36 years ago that historians now regard as mistaken the view that the jury trial traces back only to Magna Carta. *Duncan v. Louisiana*, 391 U.S. at 151 n.16 (citing 1 Frederick Pollock & Frederic W. Maitland, *The History of the English Law Before the Time of Edward I* 173 (2d ed. 1909)).

[27] A few guideline enhancements, such as obstruction of justice by perjury at trial, are not capable of charging in advance or submission to the jury. Those are rare exceptions causing little or no harm. Often, the government will have a remedy: it may charge a new offense.

sentencing allegations within days or weeks after this Court's decision in *Blakely*. *See* Comey memorandum, *supra*. They can continue to do so.

Petitioner's fears about complexity ultimately are fears of juries and judges. As to juries, the Framers understood that governments would not always appreciate the jury's role; in part, that was the point of securing the right to jury trial in the Constitution. As to judges, there is no reason to fear an inability to manage complex trials and to instruct upon complex legal rules. They do so regularly.

3. As petitioner correctly notes, this Court has refused to fashion a sentencing jury where the legislature has not provided one. *United States v. Jackson*, 390 U.S. 570 (1968); Pet. Br. 60-61. The *Jackson* Court declined "to extend the capital punishment provision of the Federal Kidnaping Act in a new and uncharted direction, without the compulsion of a legislative mandate and without the benefit of legislative guidance." 390 U.S. at 581.

The Kidnapping Act applied the death penalty only to defendants who lost a trial; the lives of those who pled guilty were automatically spared. The Court deemed this too great a burden on the right to a jury trial. *Id.* at 572. To avoid that consequence, the government asked the Court to instruct lower courts to convene juries after guilty pleas were entered to decide upon death. The Court declined to do so. *Id.* at 580-81.

Jackson applies here to this extent: for those defendants who have entered a guilty plea or against whom a verdict has been rendered, no new and separate sentencing jury can be convened. Empanelling a sentencing jury in a noncapital case after the trial jury has been discharged would be an innovation unknown in federal criminal law; the Court would have to create it "from whole cloth." *Id.* at 580. *Jackson* restrains courts from going that far.

For defendants who have not entered a plea or had a trial, however, no wholly new trial procedure need be invented. Trying Guideline facts with the underlying charges in a single proceeding before a single jury, in whatever fashion best promotes fairness, would require no extraordinary change in procedure, and is not barred by *Jackson*'s logic or language.

4. There is another reason to reject the lower court's suggestion that a sentencing jury might be empanelled for respondent. Interpreting existing sentencing legislation to permit the use of a sentencing jury after trial, and indeed after appeal, would raise a serious constitutional doubt under the Double Jeopardy Clause of the Fifth Amendment.[28] This Court avoids those doubts when it can. *See, e.g., Jones*, 526 U.S. at 239-40.

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). Respondent understands that his case concluded before the government appreciated what *Blakely* requires to gain guideline offense level increases. "Nonetheless, where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks*, 437 U.S. at 11 n.6.

At least where a defendant does not obtain a new trial on appeal, the Fifth Amendment's Double Jeopardy Clause applies as much to bar a second, higher punishment on additional evidence as to bar a second determination of

[28] The lower court recognized the possibility that the Double Jeopardy Clause might preclude a sentencing jury. *Booker,* 375 F.3d at 514.

guilt or innocence on additional evidence. *See North Carolina v. Pearce*, 395 U.S. 711, 719-21 (1969), *overruled in part on other grounds*, *Alabama v. Smith*, 490 U.S. 794 (1989); *United States v. Noble*, 367 F.3d 681, 682-83 (7th Cir. 2004) (government may not offer additional evidence of drug quantity on remand, where it failed to carry burden at first sentencing).

Pearce allowed a longer sentence after retrial, rejecting a double jeopardy challenge. That rule "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *Pearce*, 395 U.S. at 721. The essential premise is missing here. Respondent stands convicted of the offenses with which he was charged.

This Court's decision in *United States v. DiFrancesco*, 449 U.S. 117 (1980), does not countenance additional evidence in a new jury trial to increase respondent's maximum possible sentence on remand. *DiFrancesco* held that the Double Jeopardy Clause permits a higher sentence on remand, where a statute expressly authorizes the government to appeal a sentence. *DiFrancesco*, 449 U.S. at 132-39. But that case arose during the era of indeterminate sentencing. The distinctions between that era and guideline sentencing after *Blakely* make a crucial difference. As *DiFrancesco* noted, the government appeal there did "not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence." *DiFrancesco*, 449 U.S. at 136. "Furthermore," *DiFrancesco* continued, "a sentence is characteristically determined in large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature." *Id*. at 136-37. None of those justifications for a higher sentence on remand obtain today.

To the contrary, a sentence on remand here that relied on upward adjustments under the Guidelines would require a full-blown jury trial, as adversarial and likely to cause "embarrassment, expense, anxiety, and insecurity" as the first. *Id*. at 136. The cornerstone of *DiFrancesco* – a streamlined resentencing on judicial determinations unaffected by the Sixth Amendment right to jury trial – is not present here. For respondent, the Double Jeopardy Clause would block a sentencing jury trial on remand, or at least raise serious constitutional doubts. The Court should reject the lower court's suggestion that a sentencing jury may be convened after remand.

CONCLUSION

For the reasons stated, this case should be remanded for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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