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Aggravated Sentencing: *Blakely v. Washington*

Legal Considerations for State Sentencing Systems

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Few decisions in recent memory have engendered as much uncertainty in the state and federal courts as *Blakely v. Washington*.[1] In the weeks since the Supreme Court ruled, prosecutors, defense attorneys, and judges have been struggling with *Blakely's* implications for cases at every stage of litigation. Federal and state trial and appellate courts have issued sometimes contradictory decisions about the holding's reach. Congress and some state legislatures are gathering opinions and organizing their responses. And the Court has agreed to decide, when it returns for its fall term, the foundational question of whether *Blakely* applies to the federal sentencing guidelines. It is uncertain whether the Court will at the same time resolve other *Blakely* issues facing the states.

There is no doubt that *Blakely*—the Court's recent decision extending the Constitution's jury trial right to fact-findings that increase criminal sentences beyond an established threshold—is disturbing the legal landscape for states with *structured sentencing systems*.[2] There is little to suggest, however, that this disturbance will derail the sentencing reform efforts that led to such structured systems. Indeed, it is possible that state policymakers will use the immediate challenge of complying with *Blakely* as impetus to advance yet unrealized or incomplete reforms. To achieve either the modest goal of minimizing *Blakely's* disruption or the more ambitious aim of broader policy improvement requires state

As *Blakely* continues to sow confusion and anxiety in many quarters of the criminal justice world, it is worth noting that much of the reported chaos has been confined to the federal system. Federal appeals courts have responded to the decision in contradictory ways that have left unsettled the fate of many criminal defendants. While the Supreme Court is all but certain to rule on the constitutionality of federal sentencing guidelines, the chance that its further decisions will add confusion rather than clarity persists. And the threat of intervention by a Congress whose recent relationship with the judiciary has been contentious looms large.

In contrast, after an initial wave of apprehension, most states appear to be intent on hewing to a more moderate course. In part, that is because they can. State sentencing systems, varied as they may be, simply are not as dependent on judge-found facts at sentencing—the heart of *Blakely*—as is the federal system. This means provisions that offend *Blakely* are easier to avoid for the time being, as state courts begin to sort out how the decision applies to their systems.

There is, however, another important distinction. Many states have better recent experience in gathering together politically accountable officials to think about and construct sentencing reforms that are not only workable and public-safety minded but that squarely observe other aims—related to fairness, proportionality, and resources—that led many to revisit their sentencing schemes in the first place. The existence of productive entities such as sentencing commissions, working groups, legislative judiciary committees, and others gives many states a leg up in tackling *Blakely*.

It also presents a potential opportunity, as this second in our series of *Blakely* papers suggests. Can the occasion of the Court's decision encourage states not only to fix problems in their systems created by *Blakely* but also to explore policy changes that further protect the public while advancing justice? It is admittedly a tall order. The coming months will tell whether states seize and exploit the challenge the Supreme Court has handed them.

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legislators and others involved in statutory reform to pay close attention to the rationale underlying the Court's decision.

The recent Vera companion publication *Practical Implications for State Sentencing Systems* discussed the impact of *Blakely* on different forms of structured sentencing in the states. It offered possible ways for states to amend affected systems to comply with the Court's decision while preserving the initial purposes of such systems.[3] This report discusses the legal considerations raised by *Blakely* and presents further implications of the ruling within and beyond state structured sentencing systems.[4] It is intended as a primer—identifying and discussing, without attempting to resolve, the range of legal issues raised—for those charged with responding to *Blakely* and the Court's related decisions.

After reviewing the Court's holding, this paper addresses the following themes:

- The Court's focus on the effects of sentencing rules, rather than their labels
- The nature of "facts" under *Blakely*
- The dwindling distinction between "sentencing factors" and "elements"
- The *Blakely* implications of delayed eligibility for release
- The impact on dispositional departures and sentences other than incarceration
- The limited effect on consecutive versus concurrent sentences
- Guilty pleas and the uncertainty of *Blakely* waivers
- The precarious prior conviction exception
- The problem of judicial fact-finding prior to sentencing, and
- Retroactive application of the *Blakely* rule.

The Holding

In *Blakely*, the Supreme Court found that Washington's sentencing guidelines scheme violates defendants' Sixth Amendment jury right by giving judges, rather than juries, the authority to make factual determinations necessary to enhance sentences. *Blakely* presented a defendant's challenge to the "exceptional sentence" provisions of Washington's Sentencing Reform Act, a classic *presumptive sentencing guidelines system*. The defendant, charged with kidnapping in the first degree, agreed to plead guilty to kidnapping in the second degree and admitted involvement in domestic violence and being armed with a deadly weapon, but no other relevant facts. The offense, under these circumstances, carries a statutory maximum penalty of 10 years but a guidelines sentence range of 48 to 53 months. The judge nonetheless sentenced the defendant to 90 months' imprisonment—a sentence above the guidelines range but below the statutory maximum—after a hearing in which the judge determined that the offense had been committed with "deliberate cruelty."

Washington law makes clear that an exceptional sentence—one beyond the guidelines range—is authorized only upon the finding by the judge of such an "aggravating factor." Aggravating factors are identified in a non-exhaustive statutory list. Other aggravating factors—except those used to determine the standard guideline range for the offense such as the defendant's criminal history or an element of the offense—may be identified by a judge, so long as they provide a "substantial and compelling reason" to impose an exceptional sentence.[5] When a Washington judge bases an exceptional sentence on an aggravating factor, whether enumerated in the statute or not, the judge must state on the record findings of fact to support that factor. The standard of proof a judge is to apply to make this factual determination is a preponderance-of-the-evidence standard.[6]

> The use of judicially-determined facts to increase a sentence beyond an effective maximum sentence violates defendants' right to trial by jury.

The Supreme Court found this system unconstitutional. It held that a judge may not increase a defendant's penalty beyond that which would be available "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[7] Any fact (other than the fact of a prior conviction) necessary to enhance a penalty beyond that which is authorized solely by the jury verdict or guilty plea must be proven to a jury beyond a reasonable doubt, if not formally admitted by the defendant. When a sentencing system imposes an upper sentencing threshold—creating an *effective maximum sentence*—any facts necessary to go above that threshold are subject to jury determination, as are the standard elements of the offense. Thus, the use of judicially-determined facts to increase a sentence beyond an effective maximum sentence violates defendants' right to trial by jury.[8]

The Court's Reasoning and the Legal Issues Raised

The ultimate impact of the holding on state sentencing systems will depend on a range of legal issues, some of which have been resolved and many others that have been left hanging or have not been raised as yet in the Court's decisions. *Blakely* did not arrive unannounced. It was a

logical, perhaps inevitable, next stage in a trail of decisions—the *Apprendi* line of cases, as it is known after the Court's decision in *Apprendi v. New Jersey*—that began in 1999 and has preoccupied the Court since. (We briefly summarize those decisions at the bottom of these pages.) To gauge the effect on particular structured sentencing systems and to understand how states may avoid *Blakely's* troubled waters, it is necessary first to examine the Court's apparent motivating principles and some of the legal issues presented in these cases.

The Court's focus on effect, rather than form

The principal dispute between the majority and dissenting opinions in *Blakely*, and in many of the previous cases in this line, is whether the Sixth Amendment jury right requires an unambiguous rule or whether states should be free to allow some degree of judicial determination of sentencing factors. The Court emphatically espouses a formalist approach by eliminating any distinction between sentencing factors and elements of an offense for jury right purposes. Legislatures are no longer free to empower judges to determine facts to elevate a sentence beyond the effective maximum; labeling a factor as germane only to sentencing rather than guilt will not obviate the need to prove it to a jury beyond a reasonable doubt.

But it is an odd sort of formalism: *Blakely* makes clear that the required analysis turns on the effect, rather than the form, of a fact-finding. This principle has been at the foundation of the entire line of cases: "[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[9] Put another way, the Court clarifies what was first suggested in *Blakely's* predecessors: it is the effective sentence, regardless of what it is called, that must not be surpassed on the basis of a judge's fact-finding. "[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts [the formal statutory maximum sentence], but the maximum he may impose *without* any additional findings [the effective maximum sentence]."[10] It is odd too because the chosen effect—the surpassing of a sentencing threshold—has no obvious Sixth Amendment significance.

There are numerous implications of this focus on effect, rather than form. Not far below the surface of the *Blakely* opinions—and on the surface in the briefs and at oral argument—is the question of what this legal conclusion means for the federal sentencing guidelines. In its friend of the court brief, the United States suggested that the federal system's grounding in administrative law distinguishes it from state guidelines systems such as Washington's that are based in statute. The government conceded, however, that this distinction may not be sufficient in that the federal guidelines, regardless of their administrative source, have been held to have the force of law.[11] The *Blakely* majority notes this position but does not explicitly address the federal guidelines. Justice O'Connor, in dissent, is more direct: "The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning."[12] Indeed, the emphasis on effect rather than form makes it likely that the source of the legal rule that creates a presumptive sentencing threshold is irrelevant. State guidelines systems derived from administrative sources that nonetheless have the force of law will likely be no less affected by the Court's holding than those derived from statute.[13]

A similar question arises when courts establish effective sentencing thresholds that may be surpassed only on some judicial factual determination. Just as with administratively promulgated guidelines or their functional equivalents, sentencing thresholds created by court decisions appear to fall within the *Blakely* rule. Some states have established upper sentencing thresholds through judicial decisions that have the same force as statutory law. The Court of Appeals of Alaska, for example, has long followed the rule it articulated in *Austin v. State*.[14] That judge-made rule requires that most

Blakely's Predecessors

Almendarez-Torres v. United States (1998) was decided before the Court had formed its *Blakely* jurisprudence.[i] The Court addressed a federal alien illegal reentry statute that, in one section, defines the offense and provides a sentence of up to two years, and in another section, increases the available sentence to 20 years if the alien had previously been deported upon conviction of an aggravated felony. The Court found the latter to be a sentencing factor, rather than an element of an aggravated offense, and held that it might be determined by a judge, rather than by the jury. The Court did not rule on the required standard of proof a judge must apply and left open the possibility that its ruling might be limited to facts involving recidivism, "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."[ii] *Almendarez-Torres* is

first felony offenders, for whom Alaska's statutory sentencing guidelines do not apply, may not receive a sentence greater than the maximum guidelines sentence for second felony offenders unless a judge finds an aggravating factor or extraordinary circumstance.[15] When courts create an effective maximum sentence in this way, as is done elsewhere through administrative guidelines or statute, it may trigger a right to jury determination of any factor that authorizes a sentence beyond the threshold.

The Court makes clear that other distinctions that turn on form, rather than effect, are irrelevant to its constitutional inquiry. The Court states, for example, that it does not matter whether a sentencing scheme mandates an *enhanced sentence* after a judge finds certain facts or merely authorizes one.[16] It is likewise irrelevant whether facts that lead to an enhanced sentence are found in an exhaustive statutory list or an illustrative, open-ended one.[17] And although it is not explicitly addressed in the Court's decision, it is evident that its holding is not limited to *structured sentencing systems*. Such systems, the focus of *Practical Implications for State Sentencing Systems*, are affected at the most basic and broadest level, yet any statutory provision that imposes a sentencing threshold that may be surpassed only by judicial fact-finding is suspect.

A number of states that do not have structured sentencing systems employ enhancement statutes that hinge on a judge finding some fact or circumstance relating to the commission of the offense or the status of the victim. New Jersey, for example, responded to the *Apprendi* decision—which struck down that state's bias crime enhancement provision—by deleting that provision and one other. However, a half-dozen enhancement provisions remain in New Jersey's statutes, including those governing gang crimes, crimes for hire, crimes committed with a firearm or while in possession of a stolen vehicle, and crimes against persons under the age of sixteen.[18] Rhode Island, on the other hand, has a statutory provision that directs the courts each year to adopt presumptive sentence ranges for those felony categories that constituted more than five percent of the caseload during the preceding year.[19] A companion statute directs judges to impose sentences within the presumptive ranges for those felonies unless a judge makes a finding justifying an alternative sentence based on, among other things, the nature and circumstances of the offense.[20] As statutes that allow otherwise unavailable additional punishment based on offense or victim characteristics are not covered by the sole exception to the *Blakely* rule—for the fact of prior conviction—they are clearly suspect.

The uneasy nature of "facts" under Blakely

The Court's insistence on establishing an unambiguous, "bright-line," rule that turns on effect suggests that any effort to distinguish between the "facts" referred to in the decision and some other or lesser form of information, will fail. A sentencing scheme, therefore, may run afoul of the Sixth Amendment if it relies on a judicial determination of "findings," "factors," "circumstances," or "reasons," rather than "facts," to increase a sentence, regardless of the chosen label. *Voluntary sentencing guidelines* systems that require a judge to apply the guidelines and state reasons for enhanced sentences also may be implicated by *Blakely*.[21] Stating reasons implies that one has made a factual determination underlying those reasons.

Not all facts are equally susceptible to jury determination. Courts have long struggled to draw lines between questions of fact—which are traditionally the province of the jury—and questions of law—which are left to the judge to determine. For example, aggravating factors that compare the defendant to other defendants or the circumstances of the offense to the circumstances in other offenses charged under the same statute would be extremely difficult for jurors to decide.[22] Are jurors to hear evidence of the typical kidnapping defendant or the typical kidnapping case? Are sentencing hearings to become a battle of expert witnesses in such matters?

thus the source of the prior conviction exception stated in the *Blakely* holding. Justice Scalia wrote in dissent, joined by three of the other four members of the *Blakely* majority.

Monge v. California (1998) offered Justice Scalia an opportunity to answer the "grave and doubtful question" he had raised in his *Almendarez-Torres* dissent: "whether the Constitution permits a fact that increases the maximum sentence to which a defendant is exposed to be treated as a sentencing factor rather than as an element of a criminal offense."[III] He concluded, again in dissent, that the Constitution does not permit it. This case was a double jeopardy challenge to a re-sentencing following an appellate court's finding that there had been insufficient evidence of an aggravating factor (involving recidivism) used to enhance the defendant's sentence. If the aggravating factor was deemed an element of an enhanced offense, the

How, for example, might a jury decide whether a "defendant is a hate crime offender whose imprisonment for an extended term is necessary for the protection of the public," as in one of Hawaii's statutory aggravated sentencing factors?[23] The Hawaii Supreme Court, anticipating many of the issues in the *Apprendi* line of cases, has identified two classes of facts to help answer this question. "[H]istorical facts are wholly *extrinsic* to the specific circumstances of the defendant's offense and therefore have no bearing on the issue of guilt *per se*."[24] The Hawaii court has ruled that such facts—which include the determination of whether a defendant for whom "imprisonment for an extended term is necessary for the protection of the public"—are to be determined by the judge. On the other hand, facts that "are enmeshed in, or, put differently, *intrinsic* to the commission of the crime charged," must be alleged in the indictment and proven to a jury beyond a reasonable doubt.[25] These include underlying facts that address whether a defendant is "a hate crime offender," who "intentionally selected a victim . . . because of hostility toward the actual or perceived race, religion," or other characteristic of the victim.[26]

There are many practical difficulties that appear to have been beyond the Court's vision in *Blakely*, and about which there will be much pressure to create workable subsidiary rules.

Blakely and its predecessors offer few clues as to whether the Supreme Court will draw distinctions among types of facts. On the one hand, to do so would weaken its decision to create a bright-line rule. Such a rule with too many distinctions would fail to achieve the Court's stated constitutional purpose. On the other hand, this is but one of many practical difficulties that appear to have been beyond the Court's vision in *Blakely*, and about which there will be much pressure to create workable subsidiary rules.

The dwindling distinction between sentencing factors and elements

Akin to the question of whether *Blakely* permits distinctions among types of facts is whether *Blakely* abides any remaining distinction between sentencing factors and elements of a substantive offense. The Court, in a confounding footnote, suggests it is eliminating the distinction once and for all, at least for purposes of the Sixth Amendment jury right. This is consistent with its determination to apply a bright-line rule that prohibits what is functionally an element of a crime from having lesser force by being labeled as a sentencing factor. Yet the implications of eviscerating such a distinction extend beyond the Sixth Amendment, and the Court's indirectness is frustrating. Justice O'Connor's dissent is less reserved. She states unequivocally that under the majority's approach, "any fact that increases the upper bound on a judge's sentencing discretion is an element of an offense. . . . all must now be charged in an indictment and submitted to a jury."[27]

Although Justice O'Connor refers to charging in an indictment, the Fifth Amendment right to indictment by grand jury does not apply to state prosecutions.[28] Nonetheless, as a general matter, all elements of an offense must be specified in the charging document, even if not in an indictment voted by a grand jury. In the states where there is a grand jury right in felony cases, prosecutors would have to present sufficient evidence of any aggravating factors they might seek at sentencing. And, to avoid prejudicing grand jurors, they might have to do so at grand jury proceedings that are bifurcated into separate phases for the underlying substantive offense and any aggravating factors.

An even more disturbing implication is that eliminating the distinction between sentencing factors and elements for all purposes also would eliminate any distinction between

Fifth Amendment's double jeopardy clause would bar re-sentencing. The Court, following *Almendarez-Torres*, held that a recidivism-based aggravating factor was not an element of an enhanced offense, but a traditional sentencing factor ancillary to the base offense.

Jones v. United States (1999) was the first case in which the views expressed in Justice Scalia's dissents in *Almendarez-Torres* and *Monge* coalesced in a majority opinion.[IV] Jones interpreted a federal carjacking statute so as to avoid what the Court determined would be an unconstitutional result: judicial determination of sentencing factors that increase punishment. Contrary to *Almendarez-Torres's* treatment of a recidivism-based aggravating factor, it held that the serious bodily injury aggravating factor in the carjacking statute created a separate enhanced offense, such that the factor had to be charged in

the charged offense and aggravating factors. That is, each offense plus an aggravating factor would become a new offense. A prosecutor might charge simple kidnapping, kidnapping with deliberate cruelty, kidnapping of a particularly vulnerable defendant with deliberate cruelty. It is not easy to see how a judge could protect a defendant's right to a fair trial by excluding prejudicial extrinsic evidence as that very evidence would become intrinsic to one or more of the other counts.[29] A jury cannot avoid being influenced if, for example, it hears facts underlying five prior convictions for selling drugs in the same proceeding at which it must decide the defendant's guilt in a sixth case.

The ability of judges to base enhanced sentences on aggravating factors not found in statute may also be restricted by the merging of sentencing factors into offense elements. Although not expressed as a constitutional mandate applicable to the states, a long-recognized principle prohibits creation of common law crimes, that is, criminal offenses defined by courts rather than legislatures.[30] The prohibition is based on due process concerns: a person is entitled to notification that conduct is deemed criminal at the time it occurs, not merely at the time of prosecution or sentencing. In this sense it is like the prohibition against *ex post facto* laws, laws created by any source that define an offense or increase punishment after the conduct at issue occurred.[31] If an aggravating factor is now constitutionally equivalent to an element of an aggravated offense, the finding of an aggravating factor not defined in statute—even if found by a jury beyond a reasonable doubt—may violate the prohibition against judicially-created offenses. Thus the non-exhaustive statutory lists of aggravating factors employed by most states with presumptive sentencing provisions may have to be trimmed back to fully enumerated statutory lists.

The breadth of these implications suggests that sentencing factors may have become elements of an offense only to the extent that proof to a jury beyond a reasonable doubt is required for their use in enhanced sentences.[32] Whether a factor must be presented in the charging document is not strictly a matter of the right to trial by jury but also of due process concerns related to providing a defendant with sufficient notice of the charges against him. And a discussion of the due process clause was conspicuously absent in the *Blakely* opinion. Indeed, the Court may have forecast this result in *Schriro v. Summerlin*, decided the same day as *Blakely*. There it noted that the rule in *Ring v. Arizona* requiring aggravating factors be proven to a jury—akin to the rule in *Blakely*—did not modify the elements of the underlying substantive offense because it did not expand the range of conduct the offense prescribes.[33]

Even if it is premature to conclude that sentencing factors, after many decades of contrary understanding, must now be considered elements of the underlying offense or of some aggravated offense, policymakers must be keen to the interplay of Sixth Amendment jury trial and Fourteenth Amendment due process requirements. Although the right to indictment by grand jury has not been found to be within the due process clause applicable to the states, most other protections relevant to criminal proceedings have. The *Blakely* Court does not directly address due process, but it imports a core due process concept—namely, proof beyond a reasonable doubt—into its Sixth Amendment analysis. This raises the question of whether the procedural rules required by due process in criminal trials are equally applicable to a sentencing proceeding that may result in an enhanced sentence. *Blakely* and its predecessors did not address these concerns, but the cases suggest that equal standards may apply. The Court previously has held that a defendant enjoys the right to remain silent at sentencing after relinquishing it for purposes of a plea allocution—a defendant's statement admitting the factual elements of the offense—and that a court may not use that silence against a defendant in sentencing.[34] Similarly, a defendant likely has the right to testify in his own behalf, to present favorable witnesses or other evidence, and to cross examine witnesses

the indictment and proven to the jury beyond a reasonable doubt. In what is arguably dicta, the Court stated as its animating principle that, in a federal prosecution, the Fifth Amendment due process clause and the Sixth Amendment notice and jury trial guarantees require that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt."[v] With Justice Thomas joining the four *Almendarez-Torres* and *Monge* dissenters, the *Blakely* majority was formed.

Apprendi v. New Jersey (2000) left no doubt that a new constitutional principle was being announced. In *Apprendi*, the New Jersey statute at issue allowed for a sentence beyond the statutory maximum for the offense upon a judicial finding that the offense had been carried out with a purpose to intimidate based on race or other group identity. The Court held that, in a

and otherwise challenge evidence adverse to his interests. And the government will bear the burden of proving an aggravating factor, preserving something similar to a presumption of innocence with regard to that factor. Further non-constitutional protections, such as prohibitions against hearsay and other evidentiary rules, may also apply equally.

Delayed eligibility for release may be an enhanced sentence

The decision raises another question: What is a "sentence" for *Blakely* purposes? This is no simple matter. Sentences are multi-faceted: they may encompass periods of incarceration and periods of community supervision. Sometimes the portions are pre-determined by the judge, and sometimes they are left to a parole board or corrections department to decide. They can include fines, restitution, community service, and rehabilitative programming. The question arises in two prominent respects, the first of which is whether the decision applies to determinations that affect a defendant's eligibility for release. The second, discussed in the subsequent section, is whether a sentence for *Blakely* purposes includes dispositional sentencing determinations—that is, those that alter the manner of service rather than the duration of the sentence—or just durational ones affecting the length of incarceration.

When the Court speaks of sentences beyond those authorized by a jury verdict, how is one to determine whether a sentence is enhanced when the presumptive sentence is itself somewhat undetermined? This question presents itself prominently in two states—Michigan and Pennsylvania—that base their presumptive sentences on the minimum term of an indeterminate sentence that is expressed as a range (a minimum term and a maximum term).[35] The minimum term portion of each sentence at issue in these states controls the period a defendant *must* serve before eligibility for release, and thus the likelihood of the duration the defendant *will* serve. It does not, however, absolutely control that duration; a parole board makes the subsequent release decision. The maximum term portion, for which there is no threshold short of the statutory maximum, determines the longest period a defendant may serve, regardless of the minimum term. For *Blakely* purposes, what is the maximum sentence authorized by the jury verdict in such systems? Is it simply the maximum term—because that determines the maximum period a defendant *may* serve? Or is it in fact the highest minimum term—because that determines the minimum period a defendant *must* serve? Only the latter interpretation would present a *Blakely* problem. It remains an open question; no case has applied the rule of *Harris v. United States* (allowing enhanced minimum sentences based on judicially-determined facts in a *determinate sentencing system*) to an *indeterminate sentencing system*.[36]

Whether a jury is required likely will turn on the degree to which delayed eligibility for release is an aspect of the "punishment" contemplated by *Blakely*.

Other states have provisions that raise a similar issue of whether delayed eligibility for release is encompassed by *Blakely*. In New Mexico, for example, the amount of sentence reduction credit available to an inmate is determined by whether the conviction is for a "serious violent offense." An inmate is entitled to a reduction of no more than 12 percent if it is, up to 50 percent if it is not.[37] Some offenses are statutorily defined as serious violent offenses, but a judge may find others to be so "when the nature of the offense and the resulting harm are such that the court judges the crime to be a serious violent offense."[38] *Blakely* may require that a jury, rather than the judge, make these factual determinations. As with the question of the applicability of *Blakely* to minimum

state prosecution, the Sixth Amendment right to jury trial requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[VI] *Apprendi* brought on a landslide of litigation and analysis; most courts and commentators concluded that it applied only to sentences enhanced beyond the statutory maximum sentence.

United States v. Cotton (2002) began the examination of whether sentences that resulted from *Apprendi* violations must be redone.[VII] In this federal prosecution, the Court applied statutory "plain error" analysis to the failure to present a drug quantity aggravating factor in the indictment and thus to prove it to the jury beyond a reasonable doubt. The unanimous Court held that, given the overwhelming evidence of drug quantity before the jury, this failure did not require reversal of the conviction or

terms in indeterminate systems, whether a jury is required likely will turn on the degree to which delayed eligibility for release is an aspect of the "punishment" contemplated by *Blakely*.[39] The indeterminacy involved in sentencing matters—even in determinate sentencing states such as New Mexico—raises a host of yet unanswered *Blakely* questions.[40]

Dispositional departures and non-incarceration sentences

There may be other circumstances in which it is not entirely clear whether a departure from a presumptive sentence falls within the *Blakely* rule. Durational enhancements, those that provide for longer terms of incarceration, are at issue in *Blakely* and other *Apprendi*-line cases. It is somewhat less certain that dispositional departures are controlled by *Apprendi* and *Blakely*. This is the second respect in which *Blakely* requires that courts inquire into the nature of a sentence.

To the extent that a sentence of incarceration rather than probation increases the "penalty" or "punishment," such dispositional departures would seem to fall within the scope of the Court's holdings.

The simplest example is a sentencing rule that allows judges to shift from a presumptive non-incarceration sentence to incarceration based on a judicial factual determination. California's Proposition 36, for example, mandates probation and drug treatment rather than incarceration for nonviolent drug offenders who possess or transport drugs for personal use, except for those with certain prior convictions or who "refuse" or are "unamenable" to treatment.[41] The determinations of personal use, treatment refusal, and amenability are made by the sentencing judge. And in Illinois, there is a general presumption of a probationary sentence for all offenses for which the statutes do not mandate incarceration unless the court determines that imprisonment is "necessary for the protection of the public" or probation "would demean the seriousness of the offender's conduct."[42]

Blakely and the other *Apprendi* cases cast doubt on whether a judge is authorized to rebut the presumption of probation and sentence a defendant to a term of incarceration based on a judicial factual determination. Prior to *Blakely*, at least one state high court has held that an upward dispositional departure—from probation to incarceration—is not a sentence enhancement within the meaning of *Apprendi*, but rather a departure that alters the mode of service of a sentence.[43] It is possible that this question may have different answers in states with different legal conceptions of the relationship between probation and incarceration, such as whether probation is a sentence in and of itself or an act of grace exempting a defendant from incarceration. Yet, to the extent that a sentence of incarceration rather than probation increases the "penalty" or "punishment," as *Apprendi* and *Ring* formulated it, such departures would seem to fall within the scope of the Court's holdings. Arguably, *Ring* provides explicit guidance. There, the Court held to be unlawful the sentence of death imposed beyond the presumptive sentence of incarceration—a dispositional departure albeit on a fundamentally different scale from that between probation and incarceration.[44]

The limited effect on consecutive versus concurrent sentences

In most states judges are free to order sentences for multiple convictions reached simultaneously to run consecutively or concurrently. In such contexts, no *Blakely* issue arises when a judge imposes consecutive sentences. Yet, some states have provisions that create a presumption of concurrent

re-sentencing because it did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings."[VIII]

Harris v. United States (2002) tested the application of the *Apprendi* rule to enhanced minimum sentences in a determinate sentencing system.[IX] The case involved a defendant convicted of the federal crime of carrying a firearm during a drug trafficking offense. After trial, the judge found that Harris had "brandished" the weapon, requiring an increase in the minimum sentence within the available range. Brandishing—treated as a sentencing factor—had not been charged in the indictment or proven beyond a reasonable doubt at the trial. A plurality—including Justice Scalia and three of the four *Apprendi* dissenters—ruled that the Fifth and Sixth Amendments do not prohibit a statutory structure that requires an enhanced *minimum* sentence based "upon judicial findings," so long as the sentence is within "the range authorized by the jury's verdict."[X]

sentencing, raising a *Blakely* question. Tennessee, for example, requires that when a defendant is convicted of more than one offense, sentences are to run concurrently unless the court finds one of seven statutory factors by a preponderance of the evidence.[45] These factors include the defendant's character and criminal history, the nature of the criminal conduct, the victim's condition, and the status of the defendant as a probationer. Oregon requires that sentences imposed for convictions "arising out of a continuous and uninterrupted course of conduct" run concurrently, unless the court finds certain facts relating to the defendant's intention to commit multiple offenses or the harm threatened or caused by the defendant's conduct.[46]

In the rare case of a presumption of concurrent sentences, a judge's decision to impose consecutive sentences based on a judicial factual finding other than prior conviction may violate the defendant's jury right.

If a defendant is convicted of two offenses, each of which carries a presumptive maximum of four years, two consecutive four-year sentences are no less a sentence beyond that authorized by the jury verdict than would be a single eight-year sentence. Under such circumstances, a judge's decision to impose consecutive sentences may violate the defendant's jury right.

But what of two consecutive four-year sentences where the presumptive maximum is 10 years for each offense? Arguably, the aggregate sentence imposed in such a case—eight years—is not beyond that authorized by the jury verdict—10 years—and therefore can be based on judicial fact-finding. Thus, although there appears to be no reason to distinguish an enhanced sentence that results from running two sentences consecutively from any other enhanced sentence, consecutive sentences may not form an enhanced sentence when together they do not exceed the effective maximum for concurrent sentences.

Guilty pleas and the uncertainty of Blakely *waivers*

Blakely was an appeal from a sentence in which the defendant admitted guilt rather than after a trial. It resolved any lingering question of the applicability of the *Apprendi*-line decisions to guilty plea cases. By pleading guilty and giving up the right to have guilt determined by a jury beyond a reasonable doubt, the Court made plain, a defendant does not give up all jury rights. Although the defendant in *Blakely* gave up his right to a jury determination of guilt, he was entitled to a jury determination of whether he acted with deliberate cruelty, or of any other aggravating factor, before he could be given a sentence beyond the presumptive sentence range established by the guidelines. The Court is equally clear, however, that defendants can be enticed through the plea bargaining process to stipulate to particular sentence-enhancing facts, or to waive their jury trial rights with regard to the determination of some or all of those facts.

The *Blakely* Court does not say what standard determines whether a defendant's stipulation is sufficient; it refers only to "appropriate waivers."[47] But because the stipulation to sentence-enhancing facts implicates a constitutional right, it is safe to assume that the stipulation will be sufficient only if it is accompanied by a knowing and voluntary waiver of the jury trial and due process rights at stake. A bare factual admission is not likely to suffice. On the other hand, a simple waiver of one's jury right with regard to enhancing facts will not serve to establish those facts; the defendant is still entitled to have them proven to a judge, unless he also foregoes that right with regard to any or all facts. As for "facts reflected in the jury verdict" upon which an enhanced sentence may be based, it seems clear that, at the very least, only those facts

Ring v. Arizona (2002) applied the *Apprendi* rule to an enhanced sentence that was not beyond the statutory maximum.[xi] The Court reversed a death sentence under Arizona's capital sentencing scheme, which authorized the death penalty only upon a judicial finding of an aggravating circumstance. Ring had been found guilty of an offense that carried a possible death sentence but, absent the judicial finding, the effective maximum sentence was life in prison. The Court, sweeping away doubts about the reach of *Apprendi*, held that the Sixth Amendment entitles defendants "to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[xii] If this appears not to differ from the rule as set out in *Blakely*, it is because there is little room between the two holdings, if any at all. That *Ring* seems not to have prepared state policymakers for *Blakely* may be attributable to its context, a capital prosecution, which may have obscured the implications of the holding, or at least given people reason to conclude that the Court did not mean what it was saying.

that a jury was instructed to determine, and affirmatively did determine beyond a reasonable doubt, may form the basis of an enhanced sentence.[48]

The uncertain scope and longevity of the prior conviction exception

In *Almendarez-Torres v. United States*, the Court held that a judge rather than a jury may determine the fact of a defendant's prior conviction even when that fact forms the basis of an otherwise unavailable enhanced sentence.[49] This remains the sole exception for facts subject to the rule enunciated in the *Apprendi* cases. Yet, for two reasons, the exception may be the next shoe to drop. First, the exception was carved out before the *Apprendi* rule was formed and has not explicitly been held to survive it, although the Court does re-state it in *Blakely*. Second, there now appear to be five members of the Court who believe *Almendarez-Torres* was wrongly decided; Justice Thomas, who joined the four *Apprendi*-line dissenters to form a majority in that case, has since stated that he was in error.[50]

Even if the exception is maintained, there remains the difficult question of how broadly it applies. It is unclear if it extends beyond the simple fact of a prior conviction to matters not objectively determined by that fact, such as classification of the defendant as a habitual offender. Such considerations are common both in states with structured sentencing and as stand-alone enhancement factors in other states' statutes. Hawaii, for example, allows for an enhanced sentence for any felony offense, known as an "extended term of imprisonment," based on a finding of one of six criteria relating to the defendant's history and character.[51] Among the six are some that relate closely to the fact of prior conviction—persistent offender, multiple offender—and others that are only distantly related—criminal activity as a major source of livelihood, vulnerable victims. Many states authorize an enhanced sentence if an offense is committed while the defendant is on release from custody—on bail, probation, or parole. If this factual determination is made by a judge rather than a jury, as it routinely is, it would violate the Sixth Amendment unless it is found to be within the prior conviction exception. A Connecticut appellate court has held that such an "antecedent encounter with the criminal justice system . . . of which a court may take judicial notice" falls within the exception.[52] An Arizona appellate court, on the other hand, has declined to extend the prior conviction exception to the determination of release status.[53]

Even if the prior conviction exception is maintained, there remains the difficult question of how broadly it applies.

Some statutes allow for enhanced sentences based on a difficult to disaggregate amalgam of recidivism and other factors. New York's persistent felony offender statute, for example, authorizes a judge to sentence a person who has two prior felony convictions to a prison term well beyond that otherwise authorized for the current offense alone. The enhanced sentence must be based on, and is only available after, a judicial weighing of "the history and character of the defendant and the nature and circumstances of his criminal conduct."[54] Although the New York Court of Appeals has ruled that the statute does not violate a defendant's Sixth Amendment jury right, at least one federal court has subsequently ruled that it does, and that decision preceded *Blakely*.[55] There is no dispute that the statute creates a presumption of a lesser sentence range and that an enhanced sentence can be imposed only upon a judicial factual determination. The two decisions differ, however, over whether any facts beyond prior conviction are at issue in subjecting a defendant to the enhanced sentence range in the first instance.

Schriro v. Summerlin (2004), decided the same day as *Blakely*, answered one of the questions surrounding the applicability of the *Apprendi*-line holdings to sentences imposed before the rules were announced.[XIII] Summerlin had been sentenced to death under circumstances legally indistinguishable from those at issue in *Ring*, but his appeals had become final before *Ring* was decided. The Court found that the right to jury determination of sentence-enhancing facts at issue in *Ring* is a procedural, rather than a substantive, right and that it does not implicate the fundamental fairness and accuracy of the proceeding. Therefore, the Court held that it was not to be retroactively applied; it is available only to those whose direct appeals were not yet final on the date the relevant rule was announced (although the Court does not provide the benchmark date).

A cautious approach would be to assume that all facts beyond the bare existence of prior convictions are subject to jury determination when they serve to enhance the otherwise available sentence. More cautious would be to consider even the fact of prior conviction to be a jury question, if not admitted by the defendant, in the event the Supreme Court overrules *Almendarez-Torres*.[56]

The problem of judicial fact-finding prior to sentencing

As mentioned, the decision most clearly affects enhanced sentences in structured sentencing systems, as with Washington's presumptive sentencing guidelines. But it will likely affect such systems at more than one level, applying not only to decisions about the appropriate sentence but also to some judicial fact-findings that place a defendant within a particular sentencing range in the first place. In most states' structured sentencing systems the determination of the appropriate sentence range is largely mechanical, based on the statutory level of the present offense and the defendant's prior convictions. The former requires no fact-finding and the latter falls within the earlier-noted exception stated by the Court in *Almendarez-Torres*. In some states, however, other factors, each based on judicially-found facts, determine the appropriate sentence range.

Blakely's rationale also appears to apply to judicially-determined facts that establish the appropriate sentencing range to be applied in the first instance.

The Maryland sentencing guidelines, for example, present a series of *Blakely* issues. First the judge must determine whether the defendant has been convicted of a "person offense," a subjective determination about the nature of the criminal conduct or the harm or threat of harm to the victim.[57] Next the judge must assess an offense score which is based on determination of three subjective elements—victim injury, victim special vulnerability, and weapon use—and one objective, statutorily-defined element—seriousness of the offense.[58] Only then may the judge decide the appropriate sentence within the range or, upon finding additional facts, beyond the range.

Applying the *Blakely* inquiry (Does the statutory scheme, or some part of it, create an effective maximum sentence that a judge may exceed only by finding additional facts?) prompts the conclusion that such a method for determining the guidelines range may violate defendants' jury right. An effective maximum sentence—that authorized by the jury verdict alone, absent the judicial findings that elevate the available range—has been exceeded at each increase of the offense score. To the extent that facts—other than prior conviction—enter into a court's determination to supersede each effective maximum sentence, *Blakely* would seem to require that those facts also be determined by a jury beyond a reasonable doubt, if not admitted by the defendant.[59]

Retroactive application of the Blakely *rule*

The discussion to this point has been limited to how the *Blakely* ruling will affect future cases at the trial level. In the short term, however, there is an enormous additional concern: How will *Blakely* affect past cases and the defendants now serving enhanced sentences? In general, a rule of constitutional criminal procedure—as *Blakely* will likely be deemed—will not apply retroactively unless it is shown to be a "watershed rule" that implicates the fundamental fairness and accuracy of a criminal proceeding.[60] *Summerlin*, which addressed the retroactive application of the Court's decision in *Ring*, provides relevant guidance. It held that the right to jury trial at issue in *Ring* is procedural rather than substantive and is not to be applied retroactively. This does not decide the matter with regard to the rule announced in *Blakely*, however. First of all, it is generally held that only the Supreme Court can decide whether a new procedural rule is to be retroactively applied and *Summerlin* did not decide that with regard to *Blakely*, to the extent it differs from the rule announced in *Ring*. There is at least one such relevant difference. *Summerlin* addressed the right to jury determination of certain facts but not the issue of proof beyond a reasonable doubt.[61] Arguably, the right to have facts proven beyond a reasonable doubt is a right upon which the accuracy of a criminal proceeding turns. That basic validity is at issue in *Blakely* because the Washington scheme allows judges to apply a lesser standard of proof.[62]

Moreover, even if *Blakely* is ultimately deemed not retroactive, there is still a question as to how far into the past it applies.[63] A new rule of constitutional criminal procedure that is not retroactive will nonetheless apply to defendants whose direct appeals in state courts have not been completed on the date the new rule is established. But given the closeness of the rule established in *Blakely* to the rule initially established in *Apprendi* (and arguably one year earlier in *Jones v. United States*), it is far from certain whether the *Apprendi* benchmark (June 26, 2000) or the *Blakely* benchmark (June 24, 2004) governs. The Supreme Court has in the past determined that when a rule so closely follows

a previous rule, the previous rule provides the benchmark date.[64] There is a strong argument, therefore, that defendants given an enhanced sentence based on judicial fact-finding whose direct appeals were not completed by June 26, 2000, are entitled to a new sentencing hearing. Justice O'Connor suggests as much in her *Blakely* dissent: "[A]ll criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack."[65]

There is a strong argument that defendants given an enhanced sentence based on judicial fact-finding whose direct appeals were not completed by June 26, 2000, are entitled to a new sentencing hearing.

Thus, regardless of the degree to which *Blakely* is deemed retroactively applicable, there will be a significant number of cases in which defendants can establish a *Blakely* violation. Courts will therefore have to grapple with an additional question, whether *Blakely* errors may be deemed harmless in individual cases, thus eliminating the need for re-sentencing. The Supreme Court has held that reversal of a conviction is not required where an appellate court finds that a constitutional error was harmless beyond a reasonable doubt (that is, it did not affect the outcome). Such has been the standard applied to *Apprendi* violations.[66] Similarly, upon finding that a *Blakely* violation occurred, it appears that appellate courts will apply a harmless error analysis to determine whether re-sentencing is required. But it may be that in most enhanced sentence cases on review, the *Blakely* error was not harmless beyond a reasonable doubt, and re-sentencing will be necessary. In such cases, additional due process and double jeopardy questions likely will arise, which might foreclose or curtail reconsideration of aggravating factors determined by a judge or not raised the first time around.[67]

Blakely and the Sixth Amendment

What does *Blakely* signal for future interpretations of the Sixth Amendment? First, one must appreciate some of the awkwardness of the decision. Although many commentators have stated that *Blakely* extended the *Apprendi* rule too far, perhaps the strongest legal argument against *Blakely* is that it appears not to go far enough. The Court's commitment to drawing a bright-line rule, rather than leaving it to courts to determine the particular circumstances in which judges may determine sentencing-related facts, has the seemingly perverse effect of placing most judicial fact-finding in sentencing beyond the reach of the Sixth Amendment. The Court chose a particular effect—whether an effective maximum sentence is created within a system and superseded by a judge—as its benchmark. Only when a system places a limit on the upper end of sentences is there a right to have a jury determine whether a defendant acted with deliberate cruelty or any other aggravating factor. In all other systems—that is, in a majority of states—there is no such Sixth Amendment right: a judge may make any number of factual determinations that lead to higher and higher sentences all the way to the statutory maximum.

Can this distinction stand? What other bright-line rule might the Court choose to assure that the Sixth Amendment does not turn on a state's decision to rein in the upper sentencing discretion of judges? Only one is evident. It might hold that a judge may never use a judicially-determined fact to support a sentence. This would indeed provide a more consistent and therefore more intelligible rule than *Blakely* offers—at least as we presently understand *Blakely*—but it would at the same time undo the judicial role in sentencing as we know it. Justice Scalia could certainly ground such a rule in the practices of the late 18th century to the same extent he grounds the *Blakely* rule there. But there is no chance he could maintain a majority of justices to overrule *Williams v. New York* and the 20th-century understanding of the constitutionally-permissible role of judges to judge individual sentencing facts to achieve the most just sentence.[68]

Blakely, likely, is the product of compromise and, as with all compromises, is subject to further iterations. But this compromise produced a bright-line rule and such rules are not readily amenable to modification. So, although the initial impact of *Blakely* appears extraordinary, the long-term implications are difficult to predict. Most likely the Court will begin to identify some distinctions in order to address practical concerns. In any event, the implications may not prove so significant for state systems. Practitioners and policymakers in the states, however, must respond to *Blakely* now, rather than wait for it to play itself out. They are gauging *Blakely's* effects and weighing appropriate short- and long-term responses. After the initial shock, many are beginning to accept the decision and its implications as one more challenge in their efforts to make sentencing law and practice more rational and fair. We offer these *Legal Considerations* in the hope that they will assist those efforts.

Notes

[1] *Blakely v. Washington*, 542 U.S. ____; 124 S. Ct. 2531; No. 02-1632 (June 24, 2004).

[2] Italicized terms are defined in a glossary appearing at the end of the text.

[3] Jon Wool and Don Stemen, "Aggravated Sentencing: B*lakely v. Washington*—Practical Implications for State Sentencing Systems" *Policy and Practice Review* (Vera Institute of Justice, August 2004), <http://www.vera.org/publication_pdf/242_456.pdf>.

[4] We continue to focus on *Blakely's* impact on state sentencing systems. We do not address the formidable impact on the federal system.

Glossary

The following definitions reflect their usage in this paper.

Structured sentencing system: a system providing some form of recommended sentences within statutory sentence ranges.

Sentencing guidelines system: procedures to guide sentencing decisions and a system of multiple, recommended sentences based generally on a calculation of the severity of the offense committed and the criminal history of the offender.

Presumptive sentencing guidelines: sentencing guidelines that require a judge to impose the recommended (presumptive) sentence or one within a recommended range, or provide justification for imposing a different sentence.

Voluntary sentencing guidelines: sentencing guidelines that do not require a judge to impose a recommended sentence, but may require the judge to provide justification for imposing a different sentence.

Effective maximum sentence: the maximum sentence authorized for an offense based solely on the facts reflected in the jury verdict or formally admitted by the defendant.

Enhanced sentence: a sentence greater than the effective maximum sentence.

Determinate sentencing system: a system in which there is no discretionary releasing authority and a defendant may be released from prison only after expiration of the sentence imposed (less available good time).

Indeterminate sentencing system: a system in which a discretionary releasing authority, such as a parole board, may release a defendant from prison prior to expiration of the sentence imposed. It may also, but need not, allow judges to impose a sentence range (such as, three-to-six years) rather than a specific period of time to be served.

[5] Wash. Rev. Code §9.94A. The elements of the offense are its constituent parts, each of which must be charged and proven to a jury beyond a reasonable doubt in order for a conviction to result. They generally consist of a certain mental state, such as the intent to cause injury; certain acts, such as the use of force; and certain results, such as serious physical injury; among other things.

[6] *State v. Sanchez*, 848 P.2d 735 (Wash. Ct. App. 1993) at 739. The preponderance standard, satisfied by a showing that something is more likely than not, is the lowest legal standard for the ultimate determination of facts. Proof beyond a reasonable doubt, on the other hand, is the highest standard.

[7] *Blakely*, 124 S. Ct. at 2537; slip op. at 7 (emphasis in original).

[8] Sentences below effective minimums based on judicially-determined mitigating facts are not implicated. This is because a defendant has no cause to complain—practically or constitutionally—of a diminished sentence. The prosecution, on the other hand, has no rights at issue; the Sixth Amendment protects defendants, not the prosecution, from government action.

[9] *Apprendi v. New Jersey*, 530 U.S. 466 (2000) at 494.

[10] *Blakely*, 124 S. Ct. at 2537; slip op. at 7 (emphasis in original).

[11] Brief for the United States as Amicus Curiae Supporting Respondent at 9.

[12] 124 S. Ct. at 2549; slip op. at 12 (O'Connor, J., dissenting). It may be noted that Chief Justice Rehnquist and Justice Kennedy expressly declined to join this section of Justice O'Connor's dissent.

[13] Some of the federal Courts of Appeal have held that *Blakely* does not apply to the federal guidelines because of their non-statutory source. See, for example, *United States v. Hammoud*, ___ F.3d ___; 2004 WL 2005622, No. 03-4253 (4th Circ. Sept. 8, 2004). Unlike many others that will play out in the lower courts, we can expect resolution of this question in short order. The Court has agreed to hear arguments in two cases this fall addressing the applicability of *Blakely* to the federal guidelines. *United States v. Booker*, No. 04-104; *United States v. Fanfan*, No. 04-105.

[14] *Austin v. State*, 627 P.2d 657 (Alaska Ct. App. 1981).

[15] Statutes set out the factors involved in finding an aggravating factor or extraordinary circumstance. Alaska Stat. §§12.55.155(c), 12.55.165.

[16] 124 S. Ct. at 2538; slip op. at 9, n. 8.

[17] "This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence." 124 S. Ct. at 2538; slip op. at 9 (parentheticals and emphasis in original).

[18] N.J. Stat. Ann. §2C:44-3.

[19] R.I. Gen. Laws §12-19.3-2.

[20] R.I. Gen. Laws §12-19.3-3.

[21] For a discussion of these six voluntary guidelines systems see *Practical Implications* at page 5.

[22] Jury findings of such facts would not only be difficult, they might

compromise a defendant's ability to have a fair trial. Facts which are legally irrelevant to the charged offense, such as a defendant's prior bad acts, must be excluded from the jury's consideration of guilt. Yet, such issues could safely be determined by the jury at a post-trial sentencing hearing.

[23] Haw. Rev. Stat. §706-662(6). Hawaii's statutes allow for an "extended term of imprisonment" upon the determination of one of six "criteria."

[24] *State v. Kaua*, 72 P.3d 473 (Hawaii 2003) at 482 (emphasis in original).

[25] *Id.* (emphasis in original, internal quotation marks omitted).

[26] Haw. Rev. Stat. §706-662(6)(b).

[27] *Blakely*, 124 S. Ct. at 2546; slip op. at 5 (O'Connor, J., dissenting).

[28] See *Hurtado v. California*, 110 U.S. 516 (1884), which, despite its age, remains the law.

[29] One example is evidence used to prove a defendant's propensity to commit similar crimes. Such evidence is never admissible to prove the commission of the current crime with which the defendant is charged. It is unrealistic to ask a jury to disregard evidence that "the present offense is a felony that was committed as part of a pattern of criminal conduct," as one of Minnesota's aggravated sentencing provisions requires. Minn. Stat. §609.1095. At least one Minnesota appellate court has ruled that such evidence need not be presented to the jury as it falls within the prior conviction exception. *State v. Henderson*, 2004 WL 192535; No. A03 1898 (Minn. Ct. App. August 31, 2004).

[30] There is a constitutional prohibition on the creation of federal common law crimes, but it is based in separation of powers concerns, rather than due process mandate, and thus may not be applicable to the states. See, for example, *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812). On the other hand, most states have a statutory—and perhaps constitutional—prohibition against creating common law crimes.

[31] U.S. Const. Art. 1, §9, cl. 3; Art. 1, §10, cl. 1.

[32] For an argument that application of *Blakely* to the federal guidelines would convert sentencing factors into offense elements in violation of separation of powers principles, see Judge Wilkinson's concurrence in *Hammoud*, cited at note 13.

[33] *Schriro v. Summerlin*, 542 U.S. ____; 124 S. Ct. 2519; No. 03-526, (June 24, 2004) at 2524; slip op. at 6. *Ring v. Arizona*, 536 U.S. 584 (2002). Similarly, in *Mistretta v. United States*, 488 U.S. 361 (1989) at 396, upholding the federal guidelines against separation of powers attack, the Court noted that the guidelines "do not bind or regulate the primary conduct of the public," as would a system that establishes elements of an offense.

[34] *Mitchell v. United States*, 526 U.S. 314 (1999).

[35] Whether *Blakely* affects the sentencing systems of these two states is discussed at greater length in *Practical Implications* at pages 5–6.

[36] Moreover, *Harris's* staying power is in question. A majority of the justices either dissented or stated in concurrence that, although they disagree with the entire *Apprendi* line, they see no distinction for Sixth Amendment purposes between enhancements of minimum sentences and maximum sentences. Justice Breyer, an *Apprendi* dissenter, stated that he could not logically distinguish enhancements of minimums from enhancements of maximums for Sixth Amendment purposes, but he declined to join the dissent—which would thus have become the majority—because of his opposition to *Apprendi*. *Harris v. United States*, 536 U.S. 545 (2002) at 569-70 (Breyer, J., concurring). Whether the additional weight of the *Blakely* decision will be sufficient to foster a majority to overrule *Harris* is an open question.

[37] N.M. Stat. Ann. §33-2-34(A)(1) and (2).

[38] N.M. Stat. Ann. §33-2-34(L)(4)(n).

[39] In a different context the Court has held that a provision which delays eligibility for release changes the "quantum of punishment." *Weaver v. Graham*, 450 U.S. 24 (1981) at 31-33 ("effective sentence is altered" by reduction in available good time).

[40] Some have concluded that *Blakely* simply does not apply to indeterminate sentencing systems. This may be based on Justice Scalia's different use of the terms "determinate" and "indeterminate." He refers to structured sentencing systems as determinate systems; he does not use the term, as it is often used by practitioners, to distinguish between systems that provide for discretionary release and those that do not. Thus, the decision's reference to determinate systems implies no exclusion of systems in which a defendant's length of stay in prison is indeterminate.

[41] Cal Code §§1210 and 1210.1.

[42] 730 Ill. Comp. Stat. 5/5-6-1.

[43] *State v. Carr*, 53 P.3d 843 (Kan. 2001). A number of unpublished California decisions have held that there is no *Apprendi* violation in the denial of probation upon a judicial determination of personal use. See, for example, *People v. Saenz*, No. D039214, 2003 WL 133020 (Cal. Ct. App. Jan. 17, 2003).

[44] A related issue is whether the "sentence" encompassed by *Blakely* and its predecessors includes such non-incarceration aspects as probation lengths and fine amounts. In Delaware, a judge may increase the presumptive maximum probation term up to the statutory maximum term of commitment available for the offense upon certain judicial findings, such as that "public safety will be enhanced by a longer period of probation." Del. Code Ann. tit. 11 §4333. It seems likely that the facts leading to an enhanced probation term or fine, one that exceeds that otherwise authorized solely by the jury verdict, would be subject to jury determination to the same extent as an enhanced prison term, even though, as with others discussed previously, they are not the sort of facts traditionally left to a jury and may not be readily susceptible to jury determination.

[45] Tenn. Code Ann. §40-35-115.

[46] Or. Rev. Stat. §137.123.

[47] *Blakely*, 124 S. Ct. at 2541; slip op. at 14.

[48] *Id.* at 2537, slip op. at 7.

[49] *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

[50] *Apprendi*, 530 U.S. at 520-21 (Thomas, J., concurring).

[51] Haw. Rev. Stat. §706-662.

[52] *State v. Sanko*, 771 A.2d 149 at 155 (Conn. App. Ct. 2001) (addressing Conn. Gen. Stat. §53a-40b).

[53] *State v. Gross*, 31 P.3d 815 (Ariz. Ct. App. 2001) (addressing Ariz. Rev. Stat. §13-604).

[54] N.Y. Penal Law §70.10(2).

[55] *People v. Rosen*, 752 N.E.2d 844 (N.Y. 2001); *Brown v. Greiner*, 253 F. Supp. 2d 413, amended by 258 F. Supp. 2d 68 (E.D.N.Y. 2003).

[56] Shortly before *Blakely* was decided, the Court agreed to hear a case that could present a vehicle for overruling *Almendarez-Torres*. *Shepard v. United States* (No. 03-9168), a federal guidelines case in which an upward departure was based on prior convictions, will be heard this coming term.

[57] Md. Regs. Code 14 §22.01.02(11).

[58] Md. Regs. Code 14 §§22.01.08 and 09.

[59] Indeed, this appears to be the infirmity at the core of the federal guidelines system, where a base offense level is enhanced by a multitude of defendant-specific and offense-specific judicial fact-findings to arrive at the ultimate sentencing range.

[60] See *Teague v. Lane*, 489 U.S. 288 (1989) at 311. Substantive constitutional rules, on the other hand, are given full retroactive application.

[61] The procedure at issue in *Ring*, addressed in *Summerlin*, applied the reasonable doubt standard to judicial factual determinations.

[62] In the *Blakely* state appeal, the Washington appellate court ruled that proof beyond a reasonable doubt was not required. *State v. Blakely*, 47 P.3d 149 (Wash. Ct. App. 2002) at 159.

[63] At least one federal appellate panel has indicated that the Supreme Court will likely conclude that *Blakely* need not be retroactively applied. *In re. Dean*, No. 04-13244 (11th Cir. July 9, 2004).

[64] See *Shea v. Louisiana*, 470 U.S. 51 (1985) at 55-59.

[65] *Blakely*, 124 S. Ct. at 2549; slip op. at 11 (O'Connor, J., dissenting).

[66] *Chapman v. California*, 386 U.S. 18 (1967). A lesser standard is required when a constitutional challenge is brought on collateral (post-appeal) attack of a conviction. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). For a discussion of the Court's application in *United States v. Cotton* of a related statutory rule—"plain error" analysis—to an *Apprendi* violation, see page 7, above.

[67] See, for example, *Miller v. Florida*, 482 U.S. 423 (1987), holding that increasing the guidelines range after the crime was committed violates the ex post facto clause.

[68] *Williams v. New York*, 337 U.S. 241 (1949), rejected the argument that the Constitution prohibits a judge from considering facts not determined by a jury in its sentencing decision.

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[I] *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

[II] *Id.* at 247-48, 243.

[III] *Monge v. California*, 524 U.S. 721 (1998) at 740-41 (Scalia, J., dissenting).

[IV] *Jones v. United States*, 526 U.S. 227 (1999).

[V] *Id.* at 243, n. 6. There is some doubt as to the force of this "rule" in that the Court also stated that "our decision today does not announce any new principle of constitutional law." *Id.* at 251, n. 11. Justice Souter's footnote 11, and Justice Kennedy's dissent to which it responds, foreshadow the majority and dissenting opinions in *Blakely*.

[VI] *Apprendi v. New Jersey*, 530 U.S. 466 (2000) at 490.

[VII] *United States v. Cotton*, 535 U.S. 625 (2002).

[VIII] *Id.* at 632-33.

[IX] *Harris v. United States*, 536 U.S. 545 (2002).

[X] *Id.* at 567.

[XI] *Ring v. Arizona*, 536 U.S. 584 (2002).

[XII] *Id.* at 589.

[XIII] *Schriro v. Summerlin*, 542 U.S. ____; 124 S. Ct. 2519; No. 03-526, (June 24, 2004).

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