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THE ROAD TO BOOKER AND BEYOND: CONSTITUTIONAL LIMITS ON SENTENCE ENHANCEMENTS

John Gleeson[*]

On November 1, 1987, federal sentencing underwent a metamorphosis. A regime of indeterminate sentencing, where judges exercised unexplained, unreviewed and virtually unbounded discretion, was transformed by the United States Sentencing Guidelines into a carefully controlled regime of structured sentencing. The reform movement that resulted in the Guidelines also produced various forms of determinate sentencing in the states. In the past decade, this new sentencing era has produced an explosion in Supreme Court litigation over the limits placed by the Constitution of the United States on legislatures' power to direct sentencing outcomes.[1]

I focus here principally on one case from the October 2004 Term—*United States v. Booker*,[2] which held that the mandatory

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[*] United States District Judge, Eastern District of New York. This article is adapted from oral remarks at Touro Law Center's annual Supreme Court Review program. I am grateful to the members of the Touro Law Review for their help in preparing it for publication.

[1] *See* Shepard v. United States, 544 U.S. 13 (2005); United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Harris v. United States, 536 U.S. 545 (2002); Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000); Jones v. United States, 526 U.S. 227 (1999); Almendarez-Torres v. United States, 523 U.S. 224 (1998); Edwards v. United States, 523 U.S. 511 (1998); United States v. Watts, 519 U.S. 148 (1997) (per curiam); Witte v. United States, 515 U.S. 389 (1995).

[2] 543 U.S. 220 (2005).

Federal Guidelines were unconstitutional.[3] It may seem odd, in a Symposium devoted to the review of an entire Supreme Court Term, to discuss only a single case from that Term, but *Booker* bears the weight. It is the latest and most significant installment in this fast-growing body of Supreme Court doctrine. As dramatic as it is standing alone—it effected a change in federal sentencing nearly as momentous as the Guidelines themselves—it holds the promise for further significant developments as its principles are applied to other sentencing statutes, both federal and state. In short, it is the latest installment, but certainly not the last.

Besides, *Booker* cannot really be discussed alone. Some context is necessary for a full appreciation of the case and its potential consequences. All of the sentencing devices created in the interest of determinate sentencing are not the same. It is useful to distinguish among three broad categories of them: (1) mandatory minimum sentences, which are prevalent and quite controversial; (2) statutes that lengthen a defendant's maximum sentence based on his prior convictions; and (3) statutes and other mechanisms, including structured sentencing regimes like the Federal Guidelines, that lengthen a defendant's sentence based on facts other than prior convictions. The sentencing device at issue in *Booker* falls into the last category, but I start with brief sketches of the unstable lay of the land with regard to the first two.

[3] *Id.* at 245-46.

I. MANDATORY MINIMUM SENTENCES

The Supreme Court first addressed the constitutionality of mandatory minimum sentences in *McMillan v. Pennsylvania*.[4] *McMillan* involved a Pennsylvania statute that mandated a five-year minimum sentence if the defendant visibly possessed a firearm during the commission of certain felonies.[5] The fact that triggered the mandatory minimum—visibly possessing a firearm—was not an element of the offense, and thus was not submitted to the jury at trial.[6] Rather, it was determined by the judge in the sentencing phase, where the applicable standard of proof was preponderance of the evidence.[7] McMillan and others challenged the statute, alleging that it violated both due process and the jury trial guarantee of the Sixth Amendment.[8]

In rejecting this challenge, the Supreme Court found it significant that the statute did not affect the maximum penalty for the offense of conviction; it merely provided for a minimum sentence of five years.[9] The Court explained that the statute "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available."[10]

McMillan was decided in 1986. In 2000, in the famous *Apprendi*[11] case, the Court cast doubt on its viability. *Apprendi* is

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[4] 477 U.S. 79 (1986).
[5] *Id.* at 81; *see* 42 PA. CONS. STAT. § 9712(a) (1982).
[6] *McMillan*, 477 U.S. at 85-86.
[7] *Id.* at 81; *see* 42 PA. CONS. STAT. § 9712(a), (b) (1982).
[8] *McMillan*, 477 U.S. at 80.
[9] *Id.* at 87-89.
[10] *Id.* at 88.
[11] Apprendi v. New Jersey, 530 U.S. 466 (2000).

described below—it addressed a different type of sentence enhancement—but one of the things the *Apprendi* majority and dissent argued about was whether the Court had, in effect, overruled *McMillan*.[12] Two years later, the Court addressed that question in *Harris v. United States*.[13] Harris, a federal defendant, was convicted of carrying a firearm in relation to his marijuana trafficking, in violation of 18 U.S.C. § 924(c). This statute requires a mandatory minimum (and consecutive) sentence of five years, but the sentence is elevated to seven years if the sentencing judge determines that the firearm was "brandished."[14] As in *McMillan*, the sentence-enhancing device at issue in *Harris* did not alter the *maximum* penalty the defendant faced. In a plurality decision, the Court reaffirmed *McMillan*, reasoning that there is a "fundamental distinction" between factors that may extend a defendant's sentence beyond the maximum authorized by a jury's verdict (or a defendant's plea of guilty) and factors that merely limit the discretion of the sentencing court within a defined range.[15]

While the Supreme Court may have intended to erase doubts about the constitutionality of mandatory minimums in *Harris*, it has not done so. Justice Breyer, who provided the fifth vote in support of the outcome, found the Court's holding contrary to the "logic" of *Apprendi*.[16] In addition, after *Harris* was decided, *Apprendi* was

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[12] *See id.* at 487 n.13 ("The principal dissent accuses us of today 'overruling *McMillan*.' . . . We do not overrule *McMillan*.").

[13] 536 U.S. 545 (2002).

[14] *Id.* at 550-51; *see* 18 U.S.C. § 924(C)(1)(A) (2001).

[15] *Harris*, 536 U.S. at 557.

[16] *Id.* at 569 (Breyer, J., concurring in part and concurring in the judgment) (joining in Court's opinion only because "I cannot yet accept [*Apprendi's*] rule").

extended by *Booker* to invalidate the mandatory Federal Guidelines system.[17] Specifically, as discussed further below, *Booker* held that the Guidelines were unconstitutional because their sentencing ranges were determined based upon facts found by judges, not by juries.[18] It is not a big leap from that holding to the proposition that mandatory minimum sentences also violate the Sixth Amendment if they are based on facts found by judges, not by juries. In sum, the continuing validity of mandatory minimum sentences is far from certain.

II. RECIDIVISM-BASED ENHANCEMENTS

The Supreme Court first addressed sentence enhancements based on recidivism in *Almendarez-Torres v. United States*.[19] The case involved the federal illegal reentry statute, 8 U.S.C. § 1326, under which a defendant who illegally re-entered the United States after deportation faced a two-year maximum sentence.[20] However, the statute's sentencing provision raised the maximum sentence from two to twenty years if the defendant had previously been deported subsequent to the commission of an "aggravated" felony.[21] The triggering fact—the prior conviction—had been found by the judge, not the jury,[22] and unlike the triggering fact in *McMillan*, which merely established a mandatory minimum, it elevated the authorized maximum sentence.[23] Nonetheless, the Court rejected a challenge to

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[17] *Booker*, 543 U.S. at 244-46.
[18] *Id.* at 237-38.
[19] 523 U.S. 224 (1998).
[20] *Id.* at 226; *see* 8 U.S.C. § 1326(a) (2001).
[21] *Almendarez-Torres*, 523 U.S. at 226; *see* § 1326(b).
[22] *Almendarez-Torres*, 523 U.S. at 227.
[23] *Id.* at 244 ("[T]he major difference between this case and *McMillan* consists of the

the defendant's eighty-five month sentence, finding it significant that the triggering fact was recidivism, "as typical a sentencing factor as one might imagine."[24]

Almendarez-Torres demonstrates better than any other case the volatility of this area of Supreme Court doctrine. It was a five-to-four decision, and it took just two years for one of the five Justices to repudiate his vote. In his concurrence in *Apprendi*, Justice Thomas wrote that his vote in *Almendarez-Torres* was wrong.[25] *Almendarez-Torres* appears to have been further weakened by *Shepard v. United States*.[26] *Shepard* involved the determination of facts *about* a prior conviction. Specifically, the question was whether, in characterizing predicate state court convictions for enhancement purposes under the Armed Career Criminal Act, 18 U.S.C. § 924(e), a sentencing court may look beyond the defendant's guilty plea to police reports or complaint applications.[27] The Court answered that question in the negative, and Justice Thomas' concurring opinion called once again for the overruling of *Almendarez-Torres*.[28] Thus, the path the Supreme Court has taken since 2000 suggests that the safe harbor for prior conviction-based enhancements created by *Almendarez-Torres* may be short-lived.

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circumstance that the sentencing factor at issue here (the prior conviction) triggers an increase in the maximum permissive sentence, while the sentencing factor at issue in *McMillan* triggered a mandatory minimum sentence.").

[24] *See id.* at 230.

[25] *Apprendi*, 530 U.S. at 520-21.

[26] 544 U.S. 13, 125 S. Ct. 1254 (2005).

[27] *Id.* at 1257.

[28] *Id.* at 1264 (Thomas, J., concurring).

III. STRUCTURED SENTENCING REGIMES: BOOKER'S INVALIDATION OF THE FEDERAL GUIDELINES

The demise of the mandatory Federal Guidelines had its origins in a case involving a New Jersey hate crime statute. The defendant in *Apprendi v. New Jersey* was charged with firing bullets into the home of a new family in the neighborhood.[29] He faced up to ten years for doing so.[30] But the family was African-American, and the sentencing judge found that the crime was motivated by racial bias and a desire to intimidate, so the hate crime provision resulted in an addition two years added to the defendant's sentence.[31] The Supreme Court found that the enhancement above the ten years violated the Sixth Amendment right to a jury trial. Specifically, the Court held 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."[32] Thus, other than the narrow safe harbor for recidivism-based enhancements, *Apprendi* precluded sentences above the applicable statutory maximum when the enhancements are based on facts found by judges.[33]

The Court in *Apprendi* recognized that judges have historically exercised broad discretion in sentencing defendants

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[29] *Apprendi,* 530 U.S. at 469.

[30] *Id.* at 470 (citing N.J. STAT. ANN. § 2C:43-6 (West 2005), *invalidated in part by* State v. Franklin, 878 A.2d 757 (N.J. 2005)).

[31] *Id.* at 471 ("Having found 'by a preponderance of the evidence' that Apprendi's actions were taken 'with a purpose to intimidate' as provided by the statute . . . the trial judge held that the hate crime enhancement applied.") (citations omitted).

[32] *Id.* at 490.

[33] *Id.*

"*within the range* prescribed by statute,"[34] but held that a sentencing statute cannot expose a criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone. "[T]he relevant inquiry," the Court said, "is not one of form but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's verdict?"[35] Because the judge's finding of invidious discriminatory intent caused the defendant in *Apprendi* to receive a greater sentence than he faced when he pled guilty, the sentence was unconstitutional.

Apprendi cast some doubt on the constitutionality of the Federal Guidelines. The Guidelines contain an offense guideline for virtually every federal crime.[36] The offense guideline sets a base offense level, and then identifies a number of offense characteristics, which, if present, require an upward adjustment of the offense level.[37] The presence of a gun in a drug case, for example, elevates the offense level by two;[38] a loss table in the fraud guideline elevates the base offense level by different degrees based on the amount of loss involved.[39] Other guidelines allow further adjustments to the defendant's score for factors such as an aggravating or mitigating role in the offense.[40] Thus, various facts that are typically neither alleged

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[34] *Apprendi*, 530 U.S. at 481.
[35] *Id.* at 494.
[36] U.S.S.G., App. A.
[37] *See* U.S.S.G. § 1B1.1.
[38] *See* U.S.S.G. § 2D1.1(b)(1).
[39] *See* U.S.S.G. § 2B1.1.
[40] *See* U.S.S.G. § 3B1.1.

in the indictment nor found by a jury operate to increase the defendant's sentencing range. And except in relatively infrequent cases where a "departure" is warranted,[41] the sentencing judge was required by statute to sentence within the applicable range.

Did this system violate the rule of *Apprendi*? For four years after *Apprendi*, every federal court that addressed the constitutionality of the Guidelines found that they did not, as long as the sentence imposed fell within the statutory maximum sentence.[42] It turned out, however, that the phrase "statutory maximum" meant one thing to the federal judges in the lower courts, and quite another to the Supreme Court.

The last of this line of cases to reach the Supreme Court before *Booker* was *Blakely v. Washington*.[43] Blakely kidnapped his wife and forced her into a box in the back of his pickup truck.[44] Under Washington law, which was similar in structure to the Federal Guidelines, Blakely faced a statutory maximum sentence of ten years[45] and a sentencing range of forty-nine to fifty-three months.[46] However, Washington law contained a provision (analogous to the Guidelines' upward departure provision[47]) that permitted a sentence above the range upon a finding of substantial and compelling reasons

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[41] *See* U.S.S.G. § 5K2.0.

[42] *See, e.g.*, United States v. Garcia, 240 F.3d 180, 184 (2d Cir. 2001), *cert. denied*, 533 U.S. 960 (2001) (citing nine other courts of appeals that had reached the same result).

[43] 542 U.S. 296 (2004).

[44] *Id.* at 298.

[45] *Id.* at 299.

[46] *Id.*

[47] *See* U.S.S.G. § 2K2.0.

to justify an additional sentence.[48] The judge imposed a sentence of ninety months based on a finding of "deliberate cruelty," one of the grounds enumerated in the statute.[49] Thus, Blakely's sentence was thirty-seven months above the upper end of the applicable range, but still well below the ten-year statutory maximum.

The Supreme Court held that the sentence violated the Sixth Amendment right to trial by jury. It rejected the state's reliance on the fact that the sentence fell within the ten-year maximum established by the offense of conviction.[50] The "relevant" maximum sentence, it held, was the upper end of the *sentencing* range. The Court reasoned as follows:

> [T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority.[51]

Thus, any fact "legally essential to the punishment" must be proven to a jury beyond a reasonable doubt or admitted by the defendant.[52]

From the perspective of the lower federal courts, *Blakely*

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[48] *Blakely*, 542 U.S. at 299 ("A judge may impose a sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence.' ") (citing § 9.94A.120(2)); *see also* State v. Jacobson, 965 P.2d 1140, 1145 (Wash. 1998) ("RCW 9.94A.120(2) authorizes a sentencing court to 'impose a sentence outside the standard sentence range . . . if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.' ").

[49] *Blakely*, 542 U.S. at 296.

[50] *See id.* at 303-04.

[51] *Id.* (citation omitted).

[52] *Id.* at 313.

might as well have said, "We hold that the statutory maximum sentence is not the statutory maximum sentence." The lower federal courts were taken by surprise, to put it mildly, and the chaos was immediate. Within twenty-one days—less time than it usually takes to get a briefing schedule from a court of appeals, a three-way circuit split developed on the validity of the Federal Guidelines.[53]

Less than seven months after *Blakely*, the Supreme Court decided *Booker*.[54] *Booker* involved two separate cases, both of which involved defendants who had been convicted of narcotics charges after trial. Based upon the quantity of drugs involved, as determined by the jury, the first of the two defendants faced a sentence of 210 to 262 months under the Guidelines.[55] However, based on post-trial findings of additional quantities of drugs and of the defendant's obstruction of justice, a higher range was applicable and that defendant was sentenced to 360 months.[56] The second defendant faced a range of sixty-three to seventy-eight months based on the quantity of drugs as determined by the jury. Again, the applicable Guidelines range was elevated significantly by factfindings made by the sentencing judge. In light of *Blakely*, however, the judge disregarded all upward adjustments to the range that were based upon

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[53] The Seventh Circuit, in *Booker*, found that the Guidelines structure had not survived *Blakely*'s analysis. United States v. Booker, 375 F.3d 508, 511 (7th Cir. 2004). The Fifth Circuit disagreed, holding that the Guidelines were still valid. United States v. Pineiro, 377 F.3d 464, 473 (5th Cir. 2004), *vacated*, 543 U.S. 1101 (2005). The Second Circuit opted for a rarely-used procedure: certifying questions to the Supreme Court with respect to the validity of the Guidelines. United States v. Penaranda, 375 F.3d 238, 247-48 (2d Cir. 2004). *See* Kathleen A. Hirce, *A Swift and Temporary Instruction: The Effectiveness of the Circuit Courts Between* Blakely *and* Booker, 2 SETON HALL CIRCUIT REV. 271 (2005).

[54] 543 U.S. 220 (2005).

[55] *Id.* at 227.

[56] *Id.*

facts not found by the jury.[57]

The questions before the Court were "whether [the] *Apprendi* line of cases applied to the Sentencing Guidelines, and if so, what portion of the Guidelines remained in effect."[58] Each question received a separate five-to-four opinion, with only Justice Ginsburg in the majority of both. The Court's answers were (a) yes, the Sixth Amendment principles animating *Apprendi* and *Blakely* apply to the Federal Guidelines, rendering that system unconstitutional;[59] and (b) the Guidelines remain in effect, with the dramatic caveat that they are now only advisory, not mandatory.[60] Specifically, after *Booker*, sentencing judges are bound only to "consider" the applicable sentencing range, and their authority to sentence outside that range is no longer circumscribed by the narrow limits of the departure authority vested by the Guidelines themselves.[61]

In the first of *Booker's* two opinions, the Court observed that when a trial judge exercises discretion to select a sentence within a range defined by statute, the defendant has "no right to a jury determination of the facts that the judge deems relevant."[62] But the federal system had eliminated that discretion by *mandating* sentences within the prescribed range, subject only to the limited ability of the court to depart from the range. Because "departures are not available

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[57] *Id.* at 228-29
[58] *Id.* at 229.
[59] *Booker*, 543 U.S. at 243-45.
[60] *Id.* at 245.
[61] *Id.* at 245-46.
[62] *Id.* at 233.

in every case, and in fact are unavailable in most,"[63] as a practical matter, under the Guidelines system "it became the judge, not the jury, that determined the upper limits of sentencing."[64] As defined by *Blakely*, "the statutory maximum" sentence under the Guidelines was not the maximum sentence authorized by the offense of conviction, but rather the upper end of the guideline range computed by reference only to the facts found by the jury or admitted by the defendant. Enhancements to that range based on judicial findings of fact "increase[d] the judge's power and diminish[ed] that of the jury."[65] By authorizing enhanced punishments only upon such findings of fact, the Guidelines stripped the defendant of the guarantee that the jury would stand between the defendant and the power of the government to impose punishment.[66]

Having decided in its first *Booker* opinion that the Guidelines system violated the Sixth Amendment, the Court filed a second opinion prescribing the remedy. It "severe[d] and excise[d]" two provisions of the Sentencing Reform Act of 1984: (a) 18 U.S.C. § 3553(b)(1), which mandated sentences within the Guidelines range (unless a departure was warranted); and (b) 18 U.S.C. § 3742(e), which established standards of review on appeal.[67] The first excision converted the mandatory Guidelines into an advisory system, in which the Guidelines range is but one of the various factors enumerated in 18 U.S.C. § 3553(a) to be considered in imposing

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[63] *Id.* at 234.
[64] *Booker*, 543 U.S. at 236.
[65] *Id.*
[66] *Id.* at 237.
[67] *Id.* at 259.

sentence. The second excision resulted in a new, court-made, "reasonableness" standard of review for federal sentences.[68] The remainder of the Sentencing Reform Act remains intact.

IV. THE SENTENCING LANDSCAPE POST-BOOKER

Booker has created many more questions than it answered. These include questions about the appropriate weight to accord to the now-advisory Guidelines range, and how stringent the new reasonableness standard of review will be. The lower courts have split on these questions, as they have on the questions of plain and harmless error.[69] While the state courts have begun to test their own states' laws against *Booker* and its predecessors, they are reaching such different and seemingly irreconcilable results that help from the Supreme Court is inevitable. Take, for example, the recent decisions

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[68] *Id.* at 260-61.

[69] As for the weight to be accorded the advisory Guidelines range, compare United States v. Wilson, 350 F. Supp. 2d 910, 925 (D. Utah 2005) (Guidelines range merits "heavy weight" and may properly be "deviate[d] from" only in "unusual cases"), with United States v. Ranum, 353 F. Supp. 2d 984, 986-87 (E.D. Wis. 2005) (finding that courts are free to disagree with the range so long as the ultimate sentence is reasonable). On the stringency of appellate courts' "reasonableness review" of sentences imposed after *Booker*, compare, for example, United States v. Mykytiuk, 415 F.3d 606, 607-08 (7th Cir. 2005) (finding that all sentences within the applicable range are entitled to a rebuttable presumption of reasonableness), with United States v. Cooper, 437 F.3d 324, 331 (3d Cir. 2006) (declining to adopt such a rebuttable presumption). With respect to plain error, some courts of appeals have adopted a stringent standard, requiring defendants to make a specific showing that their sentences would have been lower if the sentencing court had considered the Guidelines to be only advisory. *E.g.*, United States v. Rodriguez, 398 F.3d 1291, 1302-03 (11th Cir. 2005). Others find plain error to exist and remand for resentencing, in essence, whenever the sentence imposed exceeds the upper end of a range calculated solely based on facts found by the jury or admitted by the defendant. *E.g.*, United States v. Hughes, 401 F.3d 540, 547-48 (4th Cir. 2005). Still others have chosen a middle ground, remanding cases to the sentencing court to complete the plain error analysis by determining whether the sentence would have been different. *E.g.*, United States v. Crosby, 397 F.3d 103, 117 (2d Cir. 2005). The Supreme Court will soon address the question of whether *Blakely/Booker* error is procedural, and thus subject to harmless error review, or structural error requiring reversal. Washington v. Recuenco, 110 P.3d 188 (Wash. 2005), *cert. granted*, 126 S. Ct. 478 (2005) (oral

in California and Maine.

California's determinate sentencing scheme specifies three levels of punishment for each defendant and directs the imposition of the middle term "unless there are circumstances in aggravation or mitigation of the crime."[70] The sentencing court may rely on aggravating facts that have not been found by the jury, but it must state on the record "the ultimate facts" that justify the upper term sentence.[71] In *People v. Black*, the upper term sentence was imposed based on the "nature, seriousness, and circumstances of the crime;"[72] multiple acts of sexual abuse committed against the defendant's stepdaughter and the emotional and physical injuries caused by the acts were deemed aggravating factors.[73] The California Supreme Court analyzed *Blakely* and *Booker* and concluded that they established

> a constitutionally significant distinction between a sentencing scheme that permits judges to engage in the type of judicial factfinding typically and traditionally involved in the exercise of judicial discretion employed in selecting a sentence from within the range prescribed for an offense, and a sentencing scheme that assigns to judges the type of factfinding role traditionally exercised by juries in determining the existence or nonexistence of elements of an offense.[74]

The court concluded that the former type of judicial factfinding is

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argument heard Apr. 17, 2006).

[70] People v. Black, 113 P.3d 534, 538 (Cal. 2005) (citing CA. PENAL CODE § 1170 (2005)).

[71] *Id.* at 539.

[72] *Id.* at 537.

[73] *Id.* at 536-37.

[74] *Id.* at 542.

permissible, but the latter is not. In determining which type was involved in the case before it, the court acknowledged that the statutory mandate that the sentencing court impose the middle term sentence absent a finding of aggravating (or mitigating) circumstances made the California scheme analogous to those struck down in *Blakely* and *Booker*, and supported the defendant's argument that the middle term was the applicable "statutory maximum" for purposes of the Sixth Amendment.[75] However, it reasoned that factfindings necessary to an upper term sentence did not produce specific sentence enhancements; rather, they merely made the exercise of traditional sentencing discretion reasonable. Thus, the court concluded, "the upper term is the 'statutory maximum,' " and the scheme does not violate the Sixth Amendment.[76]

The Supreme Judicial Court of Maine seemed to reach the opposite result a few days later in *State v. Schofield*.[77] Schofield was convicted of manslaughter after binding a five year-old foster child in her care with duct tape, resulting in her asphyxiation. At the time of her sentencing, Maine law provided as follows:

> [T]he court shall set a definite period not to exceed 40 years. The court may consider a serious criminal history of the defendant and impose a maximum period of incarceration in excess of 20 years based on either the nature or seriousness of the crime alone or the nature and seriousness of the crime coupled with

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[75] *Black*, 113 P.3d at 543.

[76] *Id.*

[77] 2005 ME 82, *available at* http://www.courts.state.me.us/opinions/2005%20documents/05me82sc.htm.

the serious criminal history of the defendant.[78]

Schofield received a twenty-eight year sentence, and the sentencing court based its decision to exceed twenty years on the ground that the offense was among the most heinous and violent offenses committed against a person.[79]

In sustaining the Sixth Amendment challenge to the enhanced sentence, the court stated:

> The Supreme Court reiterated [in *Booker*] the essential inquiry for Sixth Amendment purposes: whether the sentencing statute requires a factual finding before an enhanced sentence may be imposed. . . . In other words, may the court impose the sentence *without* first making a specified finding of fact? If the answer is yes, then the sentencing scheme is discretionary and does not violate the Sixth Amendment. If the answer is no, then the defendant's right to a jury determination is infringed.
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> With respect to Schofield's sentencing, the answer to this critical question is no.[80]

The court specifically rejected the argument that had been accepted by the California Supreme Court in *Black*, i.e., that facts such as heinousness are not among the sort of discrete factual determinations that the Sixth Amendment requires juries to decide.[81]

As mentioned, the Supreme Court will likely resolve differences like those between *Black* and *Schofield*.[82] Just as the true

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[78] *Id.* at ¶ 12 (citing ME. REV. STAT. ANN. tit. 17-A, § 1252 (2)(A) (Supp. 2001)).

[79] *Id.* at ¶ 16.

[80] *Id.* at ¶¶ 20-21.

[81] *Id.* at ¶ 22.

[82] The California scheme upheld in *Black* will soon be examined by the Supreme Court, which recently granted certiorari to hear People v. Cunningham, No. 010396-0, 2005 WL 880983 (Cal. App. Apr. 18, 2005), *cert. granted*, 126 S. Ct. 1329 (2006). The sentencing judge in that case imposed the upper term on the defendant based on his finding of

scope of *Apprendi* was grossly underestimated by the lower federal courts, we may learn that the true scope of *Blakely* and *Booker* is now being underestimated by the states (like California) that try to exempt judicial factfindings on the ground that they fall into a protected category traditionally reserved for judges. And of course the safe harbor exception for enhancements based on prior convictions, as well as mandatory minimum sentences, will be reexamined in light of *Booker*. Finally, if Congress believes that the powers bestowed on federal sentencing judges by *Booker's* new advisory Guidelines regime are being misused, new legislation may also come our way.

The only sure thing is that more change seems inevitable, and that it will be interesting to watch it happen. But from the parochial perspective of a federal sentencing judge, there is a sweet irony to where we are right now. Pre-Guidelines, it was thought that judges had far too much authority, so the Guidelines were created to take it away. They succeeded, at least in that limited respect, and judges have been persistent critics of their loss of authority under the Guidelines. Yet, from a Sixth Amendment perspective, this regime gave judges too *much* authority, at least as compared to juries. *Booker's* remedy for that fatal defect: give the judges more authority over sentences. That is an odd path, but we like where it has led.

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aggravating factors. As in *Black*, the *Cunningham* court upheld the California scheme, reasoning, "the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment." *Id.*, at *9.