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Beyond *Blakely*: Implications of the *Booker* Decision for State Sentencing Systems

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The Supreme Court's recent decision in *United States v. Booker* has transformed sentencing for federal judges, prosecutors, and defense attorneys.¹ But what guidance does it offer state policymakers and practitioners? The short answer: not much.

The *Booker* decision addresses only a few of the many questions raised by the Court's earlier ruling in *Blakely v. Washington*, which directly and dramatically affected the sentencing systems in a number of states.² For those in the states who are struggling with these questions, *Booker's* 118 pages and six opinions offer little clarity.³ Nonetheless, the *Booker* decision sheds some light on the *Blakely* rule and sharpens its implications for certain states' structured sentencing systems.⁴

Preliminarily, it is important to stress one thing the *Booker* rulings do not do. They do not call into question the practice of proving to a jury beyond a reasonable doubt the facts that can justify an enhanced sentence. This practice, known as jury fact-finding, has emerged as the most commonly considered response to *Blakely* in the states. Even though *Booker* rejected jury fact-finding for the federal system, it made clear that the method satisfies *Blakely's* constitutional requirements.⁵ Consequently, states that are considering this option need not change course.

Here is what we know after *Booker*. First, the legal source of a sentencing rule (that is, whether it was created by a

Once again the Supreme Court has thrown a sizeable wrench into the national sentencing machinery. As with its decision in *Blakely v. Washington*, however, the Court's latest pronouncements in *United States v. Booker* may cause less lasting trauma than the sweeping ruling might suggest. For the states, *Booker's* implications—as well as its illuminating power—are modest. For the federal system, there is reason to believe that the decision might prove a workable result.

Blakely provoked an initial wave of worry across states as many jurisdictions scrambled to determine if they were implicated by the Court's extension of Sixth Amendment jury-trial protections. After some anxiety, most decided (correctly, it seems) that the ruling did not affect their sentencing systems. The jurisdictions unable to make that claim have, for the most part, been calmly constructing policy alternatives designed to satisfy the Court's rule while not unraveling the entirety of their sentencing regimes. Many such alternatives will undoubtedly be considered and passed in the legislative sessions underway in statehouses across the country.

This is not so for federal sentencing. The immediate chaos of *Blakely* was amplified on the federal level because of that system's reliance on judicial fact-finding in the vast majority of sentences imposed. The lower federal courts divided as to whether *Blakely* even applied in the federal context and, if it did, what would be the proper response. *Booker* has brought some clarity to this fog but at the cost of the federal system as we knew it. The Court made a system that was binding on judges into one that they need not follow. But voluntary guidelines create a vacuum that Congress may abhor and the temptation for legislative action will be great.

A look at the state experience, however, suggests that hasty congressional action may not be required. A number of states have embraced voluntary sentencing guidelines and appear to be satisfied with their ability to promote public safety while balancing other concerns of judicial discretion, fairness, and cost. The collection and use of objective data to inform thoughtful bipartisan deliberation has been a hallmark of sentencing policymaking in many of these states. While there are big differences between federal and state models, there is little reason to think that the federal system would not also benefit from adherence to such principles. Time is needed for such study and, with state examples counseling that rigor and safety need not be sacrificed when judges are given more latitude in sentencing, it may be appropriate to take the time.

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legislature, by an administrative body, or, likely, even by judicial decision) is irrelevant to the analysis of whether it might violate *Blakely's* Sixth Amendment rule. Second, the discretion afforded judges in voluntary sentencing guidelines systems means such structures are immune from the *Blakely* requirements that can plague presumptive sentencing systems, which generally require courts to impose penalties within a predetermined range. Third, presumptive systems that require judges to make traditional, broad findings to enhance a sentence (for example, determining that a presumptive sentence is insufficient to protect public safety)

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.

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

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.

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may trigger *Blakely* concerns. Fourth, we are no closer to knowing the extent to which *Blakely* applies retroactively. Still, when the rule applies retroactively in a given case, it is now clear that courts may employ a harmless error analysis to determine whether re-sentencing is necessary. No one knows how much this court-friendly standard will reduce the number of re-sentencings, although it may do so significantly.

This report begins with a brief discussion of the Court's two holdings in *Booker* and how they influence our understanding of the *Blakely* decision. It then offers a more detailed analysis of the ways *Booker* illuminates the four issues outlined in the preceding paragraph, with the goal of providing practical guidance to state policymakers and practitioners.

Unpacking the *Booker* Holdings: Substance and Solution

One reason that *Booker*—despite its length and tremendous impact on the federal system—has little effect on states is that it largely focuses on an analysis of what Congress wanted the federal sentencing system to achieve. The only part of the decision that applies directly to state systems is a straightforward restatement of the rule the Court first articulated in *Blakely*. This rule is contained in one of two separate, five-person majority opinions issued by the Court. The opinion it appears in is referred to as the “substantive” opinion because it addresses the sole issue of constitutional substance: Does *Blakely's* Sixth Amendment rule apply to the federal sentencing guidelines? The Court says it does. The federal guidelines are unconstitutional when judges rather than juries determine facts that are used to increase a defendant's punishment (or increase the range of available punishments) beyond what is authorized by a jury verdict or the defendant's own admissions.⁶

The other majority's opinion, which is known as the “remedial” opinion, resolved the second question presented to the Court: If *Blakely* applies, what remains of the statutes and guidelines that structure federal sentencing and how will they function?⁷ The remedial opinion sets out a solution to the constitutional violation. It strikes down the statute that required judges to apply the federal guidelines, and converts a strongly presumptive system into an advisory guidelines

system. As a result, federal judges are now required to consider the sentencing ranges provided by the guidelines, as well as other statutorily listed sentencing goals, but they are not required to follow them. Because the rulings in the remedial opinion are not based in the Constitution but in the Court's interpretation of the relevant federal statutes, they have no binding effect on state systems. The states are free to choose a different course, as is Congress.

Reading *Booker* in Light of *Blakely*

Despite its slimmest-possible majorities, *Booker* strengthens the *Blakely* rule, if only by reaffirming it. It does, however, address one aspect of the rule more explicitly than in prior cases—namely, that the Sixth Amendment requirement of jury fact-finding hinges on whether a system places limits on the sentence a judge can impose without finding additional facts. Conversely stated, if a judge is given discretion to impose any sentence up to the maximum provided by statute, the judge is free to make any fact-findings upon which the ultimate sentence may be based. It is only when the system imposes a threshold limiting a judge's ability to impose a sentence that a jury must determine the facts necessary to authorize a sentence beyond that threshold. This is why, in the federal system, the Court's decision to make the guidelines non-mandatory heals their constitutional ills; voluntary guidelines impose no binding internal thresholds.

The Court restated the *Blakely* rule as follows:

Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.⁸

Problems of language: statutory maximum, determinate and indeterminate systems

In this restatement, and elsewhere, the Court seems to have intentionally avoided its earlier use of the term "statutory maximum" and in its place it spells out the term's definition ("the maximum authorized by the facts established by a plea of guilty or a jury verdict"). The term had caused confusion in the past when the Court used it to refer to something other than the actual maximum sentence authorized by statute, which is what many people assumed it meant. Before *Blakely* expanded the definition, many thought that state guideline and presumptive sentencing systems were beyond the reach of the Sixth Amendment concerns that the Court first began

to establish in its earlier decision in *Apprendi v. New Jersey*. By restating the rule—and avoiding the troubling term—the *Booker* court appears to be striving for greater clarity.

There is another significant problem of language in *Blakely*, however, that *Booker* does not rectify. The *Blakely* court used the term "determinate sentencing" to refer to sentencing systems in which a judge's discretion is constrained by some internal sentencing threshold; Washington State's guidelines system, at issue in that case, is a classic determinate system in that it generally requires a judge to impose a sentence within a presumptive range. In contrast, the term "indeterminate sentencing," as it was used by the Court, refers to systems with no such internal constraints, where judges are free to sentence anywhere

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within the statutory limits. Unfortunately, these terms have entirely different meanings for many scholars and practitioners, particularly in certain states.⁹

Determinate sentencing in its other, perhaps more widely understood meaning, refers to the absence of a discretionary release mechanism, such as parole.¹⁰ Within this understanding, the notion of "determinacy" describes the extent to which a judge's sentence *determines* the length of time a defendant will actually serve in prison—typically all or most of the sentence handed down. An indeterminate sentencing system, then, is one in which a releasing authority, such as a parole board, has discretion to release a defendant prior to expiration of the full sentence imposed.

It is critical to distinguish between these definitions because indeterminate systems under the Court's definition—that is, systems that impose no constraint on a judge's sentencing discretion—are not affected by the *Blakely* rule, whereas indeterminate systems under the second definition may well be. At the very least, the Court has not stated that indeterminate systems in the second sense—where release authority is vested in non-judicial hands—are immune from *Blakely*.¹¹ This problem of language has led at least two state supreme courts to rule that *Blakely* does not apply to their sentencing systems at least in part because they are "indeterminate," although those states' systems are, in fact, determinate in the sense used by the *Blakely* court.¹²

The Source of the Legal Rule: A Distinction Rejected

The Court clearly resolved one lingering question raised by *Blakely* when it determined that the source of the legal rule that constrains a judge's sentencing discretion is not a factor in deciding whether the jury fact-finding requirement applies.

In *Blakely*, as in prior cases, the sentencing provision at issue was created by statute. The decision did not directly address whether a different source of the legal rule might provide a refuge from the Sixth Amendment requirement. Indeed, the Court's reference to "statutory maximum" sentences led some to believe that only rules created by statute triggered *Blakely*.

In *Booker*, the government argued that federal sentencing guidelines were not implicated by *Apprendi* because, unlike in *Blakely*, the guidelines at issue were promulgated by an administrative body (the United States Sentencing Commission) rather than by the legislature. The Court squarely rejected this argument. Noting that the guidelines have "the force and effect of laws," it held that the distinction between administrative or statutory origins "lacks constitutional significance."¹³

In a handful of states, sentencing guidelines are promulgated by sentencing commissions or through judicial rulemaking. There may be arguments in any given state that this distinction is more relevant than it is in the federal structure. It now appears more clearly than before, however, that the source of the rule creating a sentencing threshold is irrelevant so long as the rule has the force and effect of law.

Appellate review

It is possible that a sentencing threshold set out by an appellate court, rather than by the legislature or an administrative body, also may trigger application of the *Blakely* rule. In addition to deleting the statute that mandated application of the federal guidelines, *Booker* removed a statute that established the different standards of appellate review for federal sentencing determinations. In its place the Court put a single standard: whether the sentence is "reasonable." Although the creation of a new appellate standard for federal cases is of little concern to the states, in his dissent critiquing this new approach, Justice Scalia suggests that a sufficiently robust appellate standard may transform a voluntary system into a presumptive one, thus triggering the *Blakely* rule. "[A]ny system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the [now voluntary] Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional."¹⁴

State judges and policymakers may want to be mindful of this concern. Some state appellate courts have imposed rules that create presumptive sentences where statutes and guidelines otherwise do not.¹⁵ It seems all the more likely after *Booker* that a Sixth Amendment jury right may be created by appellate court rulings that require judges to remain below a sentencing threshold. In such instances, fact-finders necessary to sentence above the threshold must be made by a jury.

Voluntary Sentencing Guidelines: Approved and Clarified

If there was any doubt that a voluntary (or, as the Court terms it, "advisory") structured sentencing system complies with the Sixth Amendment, *Booker* resolves it. The Court creates for the federal system a regime of voluntary sentencing guidelines by removing the requirement that judges apply the guidelines' analyses and ranges. The Court is clear that this does not nullify the guidelines structure but rather transforms it into one in which judges must "consult," "take account of," or "consider" the guidelines factors and sentence

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ranges, although they are not obliged to follow them.¹⁶ Unfortunately for policymakers in states with voluntary guidelines, *Booker* is not very forthcoming in explaining where the line between presumptive and voluntary systems lies, although it is ever more clear that there is such a line and it determines whether the Sixth Amendment jury fact-finding rule applies.

The Court does not mention, for example, the significance of requiring a judge to state his or her reasons for exceeding a guidelines-determined sentence or for applying a sentence within a guidelines range that would have been available only upon finding a fact not proved to the jury or admitted by the defendant.¹⁷ Justice Scalia, in his separate dissenting opinion on the remedy, calls the majority's failure to delete the statutory requirement that a judge state reasons for every sentence "odd."¹⁸ Moreover, given the non-binding nature of the guidelines, he assumes that a sentencing judge would be

free to justify a sentence by saying that “this court does not believe that the punishment set forth in the Guidelines is appropriate for this sort of offense.”¹⁹

Justice Scalia is writing in dissent, but his observations may help those trying to determine on which side of the line their “voluntary” systems fall. If, on one hand, the law requires a court to offer reasons that look and sound like the additional facts necessary to exceed the otherwise available maximum sentence, such a system may require jury determination of those additional facts. On the other hand, as Justice Scalia suggests for the federal system, if the law allows general reasons to suffice, there may be no Sixth Amendment implications to requiring such reasons. In any event, it seems clear that the requirement that reasons be given—as in the regime resulting from the *Booker* decision—does not alone transform a voluntary system into a presumptive one.

Traditional Sentencing Findings: A Cautionary Tale

The dissenting justices in *Blakely*, and subsequent commentators, focused on the difficulty judges and prosecutors would face in submitting certain sentencing factors for jury determination. In particular, many wondered whether the rule was meant to encompass general sentencing determinations such as whether an enhanced sentence was necessary for the protection of the public or was appropriate given the nature of the offense or character of the defendant. For those in presumptive structured sentencing states that rely on jury fact-finding for enhanced sentences, the *Booker* decision provides both some possible clarification on this issue and a note of caution.

The remedial opinion discusses the federal statute that requires judges to consider the “nature and circumstances of the offense and the history and characteristics of the defendant” in deciding an appropriate sentence. The Court strongly implies that this provision would be unconstitutional in a presumptive guidelines regime, unless jury fact-finding was used.²⁰ The broader implication is that even such broad sentencing factors must be proved to a jury if they are to be the basis of an otherwise unavailable enhanced sentence. If so, this may have implications for a number of structured state systems. A federal court ruling in a case involving a Hawaii statute, for example, held that *Apprendi* and *Blakely* require juries rather than judges to decide matters such as whether an enhanced sentence is “necessary for protection of the public.”²¹ Similarly, statutes in Ohio—and probably other states—grant judges the authority to enhance sentences based on such general sentencing factors.²² These and other distinctions between types of facts and their Sixth

Amendment implications may need to be closely scrutinized after *Booker*.

No Comment on Retroactivity; No Doubt on Harmless Error Analysis

An important issue left unresolved after *Blakely*—and *Schiro v. Summerlin*, announced the same day—is the retroactive application of the rule established by *Apprendi* and *Blakely*.²³ Because retroactivity was not at issue in the *Booker* case, the Court’s rulings appear careful not to weigh in on the issue. The remedial opinion makes clear that all federal defendants whose direct appeals are not final may seek re-sentencing to take advantage of either the substantive or remedial rules announced in the case, but it does not address defendants whose direct appeals had been concluded, the key group for retroactivity purposes.²⁴

Even if the rule is determined not to be fully retroactive, the Court failed to clarify the relevant date for determining whether the rule applies to individual cases. Would *Blakely* apply to state defendants whose appeals were not final as of the date of *Blakely* (June 24, 2004) or the date of its predecessor *Apprendi* (June 26, 2000)? It appears that if the *Booker* and *Blakely* decisions spring inexorably from the rule announced in *Apprendi*, the *Apprendi* date would be the relevant one for

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both *Blakely*-controlled state cases and *Booker*-controlled federal cases. The *Booker* court does not address this issue, either for state or federal defendants. The substantive opinion strongly reiterates that both *Blakely* and *Booker* flow from *Apprendi* and do not themselves state any new rule, implying that the earlier *Apprendi* date is the one that will matter. Thus, even if the *Apprendi/Blakely* rule is ultimately held not to be fully retroactive, the earlier date would provide for a far greater number of possible re-sentencings.

The Court makes clear, however, that even for those who are eligible for re-sentencing, many will not overcome the strictures of what it calls “ordinary prudential doctrines.”²⁵ The most significant such doctrine for most states is harmless error analysis. It is now clear that there is no constitutional obstacle to a state’s denying re-sentencing to

a defendant whose sentence violated the *Blakely* rule where it has been determined that the violation was harmless. Although state law may control the scope and applicability of such a doctrine, it generally requires a showing, beyond a reasonable doubt, that the defendant would have received the same sentence had the rule requiring jury fact-finding been followed. Of course, it is difficult to know how often such a determination can or will be made in practice.

Issues not Addressed in *Booker*: The Ball Is in the State Courts

The *Booker* court had good reasons not to address retroactivity and many other issues left unresolved in *Blakely*. As a result, however, we have no further sign of the longevity of two of the Court's important prior holdings, *Almendarez-Torres v. United States* and *Harris v. United States*, both of which may stand on shaky ground. The former created an exception to the jury fact-finding requirement when the facts involve a defendant's prior convictions. The latter created an exception for fact-findings used to increase the minimum punishment available to a defendant. In both cases, the Court ruled that the Sixth Amendment does not apply, but at least five justices of the present Court have stated their disagreement with each of these rulings. Nor do we have any further guidance as to whether, and in what circumstances, consecutive sentences that individually do not exceed a presumptive threshold might run afoul of the *Blakely* rule, or any clearer indication of *Blakely*'s impact on indeterminate sentencing systems.

We are also left with an unfortunate effect of the Court's remedial opinion. The federal circuit courts of appeals, which often provide additional clarity and nuance to the Supreme Court's broader edicts, will not have the direct opportunity to resolve the issues that arise in presumptive structured sentencing systems. This is because the federal system, at least for the time being, is itself no longer such a system.²⁶

Consequently, unless the Supreme Court chooses to weigh in on a case arising from a state prosecution, state courts will be left to resolve a host of state statutory and federal constitutional issues on their own. Issues likely to be litigated in the states include whether sentence-enhancing factors function as elements of a crime, whether and when they must be charged by the prosecution, and what standard of proof a judge must apply if a defendant waives the jury fact-finding right.²⁷ As for the *Almendarez-Torres* and *Harris* exceptions, the states are bound by those decisions until the Supreme Court has an opportunity—now ever more unlikely—to revisit them.²⁸ This reliance on the state courts will increase the possibility of inconsistent interpretations of the federal constitutional rule and delay the final resolution of many

issues facing a sizeable number of states. The important and difficult work of interpreting, applying, and responding to *Blakely* will continue for state judges, practitioners, and policymakers.

Notes

1. *United States v. Booker*, ___ U.S. ___, 125 S. Ct. 738; No. 04-104 (Jan. 12, 2005).
2. *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004).
3. These questions include: How broad is the prior conviction exception?; How does the *Blakely* rule apply to indeterminate sentencing systems?; How does it affect consecutive sentences?; and How must prosecutors allege and prove sentence-enhancing facts? It is worth noting that the limited utility of the ruling is not surprising given the Court's focus on questions distinct to the federal system. Federal courts, even the Supreme Court, are generally restricted by Article III of the Constitution to consideration of issues presented in actual controversies between the parties in litigation. The parties in *Booker*, and the companion case *United States v. Fanfan*, had in dispute only a very limited set of federal constitutional and statutory questions.
4. For a discussion of many of the implications of the *Blakely* rule for the different forms of state sentencing systems and for a glossary of terms, see Jon Wool and Don Stemen, "Aggravated Sentencing: *Blakely v. Washington*—Practical Implications for State Sentencing Systems" (Vera Institute of Justice, August 2004), <www.vera.org/publication_pdf/242_456.pdf>; and Jon Wool, "Aggravated Sentencing: *Blakely v. Washington*—Legal Implications for State Sentencing Systems" (Vera Institute of Justice, September 2004), <www.vera.org/publication_pdf/250_477.pdf>.
5. One federal district judge has issued an order post-*Booker* reasoning that an advisory system authorizes judges to utilize any *Blakely*-consistent approach to sentencing, and a presumptive system with jury fact-finding is, in his view, the best such approach. The judge explained that he will apply the guidelines as if they were presumptive and require judicial fact-finding of all sentence-related facts necessary to an enhanced sentence. *United States v. Barkley*, No. 04-CR-119-H (N.D. OK, Jan. 24, 2005).
6. The same five justices (Justice Stevens—here writing for the Court—along with Justices Ginsburg, Scalia, Souter, and Thomas) that brought us *Apprendi* and *Blakely* once again make up the majority on this question, hewing closely to the rule and rationale set out in the prior decisions. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was the first opinion of the Court to state the rule followed in *Blakely*, and now *Booker*.
7. Justice Ginsburg joined the four dissenters on the substantive question to form a majority on the remedial question.
8. *Booker*, substantive opinion of the Court, 125 S. Ct. at 756.
9. Contrast, for example, California's statutes—which use these terms in the same sense as the Court—with New York's—which use them in the other sense. See Cal. Code §1170; N.Y. Penal Law Art. 70.

10. See, for example, Bureau of Justice Assistance Monograph, “1996 National Survey of State Sentencing Structures,” (Bureau of Justice Assistance, 1996) at 1-2. Those who employ this second use of the terms often refer to what the Court calls determinacy as a type of “structured sentencing.” See, for example, National Center for State Courts, “Sentencing Digest: Examining Current Sentencing Issues and Policies,” (National Center for State Courts, 1998).

11. The key issue here is whether a limitation on the minimum term of an indeterminate sentence—the term that controls eligibility for parole release—creates a sentencing threshold for *Blakely* purposes. Is jury fact-finding required to justify a sentence that delays a defendant’s eligibility for release beyond the time he or she would have been required to serve under the highest presumptive minimum term? The Court has not had the opportunity to address the question through the application of the *Apprendi* line of cases to an indeterminate system.

12. *People v. Claypool*, 684 N.W.2d 278 at 286, n.14 (Mich. 2004) (the *Blakely* “majority made clear that the decision did not affect indeterminate sentencing systems”); *State v. Rivera*, 102 P.3d 1044 at 1055 (Haw. 2004) (*Blakely* “effectively excises indeterminate sentencing schemes such as Hawaii’s from the decision’s Sixth Amendment analysis”); both quoting *Blakely v. Washington*, 124 S.Ct. 2531 at 2540. Additionally, several intermediate appellate court decisions in states that are determinate in the sense the Court employs, such as Ohio and Pennsylvania, have ruled that *Blakely* does not apply because their systems are indeterminate (in the other sense).

It should be noted that many states moved to determinate sentencing (no discretionary release authority) at the same time that they adopted structured sentencing (determinacy in the sense used by the Court) but there is no necessary correlation between the two. A number of states—Alaska, Colorado, Michigan, Pennsylvania, and Tennessee—are determinate in the sense the Court uses and indeterminate in the other sense.

13. *Booker*, substantive opinion of the Court, 125 S. Ct. at 750 and 752.

14. *Id.*, separate dissent of Justice Scalia, at 794.

15. See, for example, the rule set out in *Austin v. State*, 627 P.2d 657 (Alaska Ct. App. 1981).

16. *Booker*, remedial opinion of the Court, 125 S. Ct. at 764 and 767.

17. See 18 U.S.C. §3553(c) (requiring statement of reason for every sentence and “specific reason” for sentences inconsistent with guidelines).

18. *Booker*, separate dissent of Justice Scalia, 125 S. Ct. at 790. It is not clear whether Justice Scalia believes it “odd” because such a requirement, if meaningful and enforced, would render the guidelines presumptive or whether he believes it odd because given the advisory

nature of the guidelines and the Court’s institution of appellate review for reasonableness, such a requirement would provide no useful information to appellate judges.

19. *Id.*

20. 18 U.S.C. § 3553(a)(1); remedial opinion of the Court at 759. It should be noted that this discussion, although appearing in a majority opinion of the Court, is in response to Justice Stevens’s dissenting opinion on the remedial question and is not necessary to the Court’s holding and thus not strictly a part of it.

21. *Kaua v. Frank*, 2004 WL 2980265, No. 03-00432 (D. HI., Dec. 9, 2004). See Haw. Rev. Stat. §712-1243. The Hawaii Supreme Court subsequently came to the opposite conclusion, *State v. Rivera*, 102 P.3d 1044 (Haw. 2004). See Haw. Rev. Stat. §712-1243.

22. The length of an Ohio sentence, for example, may turn on whether the judge finds that the presumptive sentence “will demean the seriousness of the offender’s conduct.” Ohio Rev. Code §2929.14(B)(2).

23. *Schriro v. Summerlin*, 542 U.S. ____; 124 S. Ct. 2519 (2004), held that the rule announced in a case related to *Blakely*, *Ring v. Arizona*, 536 U.S. 584 (2002), is not to be retroactively applied. But because there are additional reasons that the *Apprendi/Blakely* rule may require retroactive application, this did not resolve the question.

24. Every new procedural constitutional rule—as the *Blakely* rule will likely be deemed—must be applied retroactively to all persons whose direct appeals are not final on the day the new rule is announced; only a very narrow group of watershed procedural rules must be retroactively applied to those whose direct appeals are concluded. It is this latter group that remains in question. See *Teague v. Lane*, 489 U.S. 288 (1989) at 311.

25. *Booker*, remedial opinion of the Court, 125 S. Ct. at 745.

26. Another way in which the federal courts will continue to play a role in deciding issues that now only arise in state cases is through federal *habeas corpus* review. But, this is not an efficient way to resolve systemic questions of federal constitutional law arising in the state courts.

27. After *Booker*, one federal district court judge has decided that he will apply a beyond-a-reasonable-doubt standard to all fact-findings, even those made by the judge, that serve to increase a defendant’s sentence, based on Fifth Amendment due process requirements. *United States v. Huerta-Rodriguez*, No. 8:04CR365 (D. NE, Feb. 1, 2005).

28. The Court is scheduled to hear a case this term in which it could shed light on the prior conviction exception. *Shepard v. United States*, No. 03-9168, concerns the scope of judicial fact-finding to determine the nature of a prior conviction, which might be used to enhance a sentence.



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